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THE
LAW-DICTIONARY,
EXPLAINING THE
RISE, PROGRESS, AND PRESENT STATE
OF THE
British Law:

DEFINING AND INTERPRETING
THE TERMS OR WORDS OF ART,
AND COMPRISING ALSO
COPIOUS INFORMATION ON THE SUBJECTS
OF
TRADE AND GOVERNMENT.

BY
SIR THOMAS EDLYNE TOMLINS, KNT.
OF THE INNER TEMPLE, BARRISTER AT LAW.

The Fourth Edition,
WITH EXTENSIVE ADDITIONS, EMBODYING THE WHOLE OF THE RECENT ALTERATIONS IN THE LAW.

BY
THOMAS COLPITTS GRANGER, ESQ.
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THE LAW DICTIONARY.

KEE

KAIA. A key or wharf. *Spelm.*

KAIAGIUM. Keyage; which see.

KAIN, Poultry payable by a tenant to his landlord. *Scotch Dict.*

KALENDÆ. Rural chapters or conventions of the rural deans and parochial clergy; so called because formerly held on the Kalends, or first day of every month. *Paroch. Antiq.* 640.

KALENDAR and **KALENDS.** See *Calendar* and *Calends.*

KANTREF. See *Cantred.*

KARITE. See *Caritas.*

KARLE, *Sax.*] A man; and with any addition a servant or clown; as the *Saxons* called a domestic servant, a *huskarle*; from whence comes the modern word *churl*. *Domesday.*

KARRATA FENI. A cart-load of hay. *Mon. Ang.* tom. 1. p. 548. See *Carecta.*

KAY. See *Key.*

KEBBARS, or *Cullers.*] The refuse of sheep drawn out of a flock; *ovæ rejiculæ.* *Cooper's Thesaur.*

KEELAGE, *killagium.*] A privilege to demand money for the bottom of ships resting in a port or harbour. *Rot. Parl.* 21 *Edw.* 1.

KEELMEN. Are mentioned among mariners, seamen, &c. in various statutes. See title *Coals.*

KEELS. This word is applied to vessels used in the rivers of the north of England for the carriage of coals, &c. See *Keyles.*

KEEP. A strong tower or hold in the middle of any castle or fortification, wherein the besieged made their last efforts of defence, was formerly in England called a *Keep*; and the inner pile within the castle of Dover, erected by King Henry II. about the year 1153, was termed the *King's Keep*: so at Windsor, &c. It seems to be something in the nature of that which is called abroad a *Citadel.*

KEEPER OF THE FOREST, *Custos Forestæ.*] Or chief warden of the forest, hath the principal government over all officers within the forest: and formerly warned them to appear at the court of justice-seat, on a general summons from the lord chief justice in eyre. *Manwood, part 1. p. 156.* See title *Forest.*

KEEPER OF THE GREAT SEAL, *Custos magni sigilli.*] Is a lord by his office, styled Lord Keeper of the Great Seal of England, and is of the King's Privy Council: through his hands pass all charters, commissions, and grants of the king under the great seal; without which seal many of those grants and commissions are of no force in law; for the king is by interpretation of law a corporation, and passeth nothing but by the great seal, which is as the public faith of the kingdom, in the high esteem and reputation justly attributed thereto.

VOL. II.

KER

The great seal consists of two impressions, one being the very seal itself with the effigies of the king stamped on it; the other has an impression of the king's arms in the figure of a target, for matters of a smaller moment, as certificates, &c. that are usually pleaded *sub pede sigilli.* And anciently when the king travelled into France or other foreign kingdoms, there were two great seals; one went with the king, and another was left with the *Custos Regni*, or the Chancellor, &c.

If the great seal be altered, the same is notified in the Court of Chancery, and public proclamations made thereof by the sheriffs, &c. 1 *Hale's Hist. P. C.* 171, 4.

The Lord Keeper of the Great Seal, by statute 5 *Eliz.* c. 18, hath the same place, authority, pre-eminence, jurisdiction, and execution of laws, as the Lord Chancellor of England hath; and he is constituted by the delivery of the great seal, and by taking his oath. 4 *Inst.* 87. See *Lamb. Archæion.* 65; 1 *Rot. Abr.* 385, and this Dictionary, titles *Chancellor*; *Great Seal of England.*

KEEPER OF THE PRIVY SEAL, *Custos privati sigilli.*] That officer, through whose hands all charters, pardons, &c. pass, signed by the king, before they come to the great seal: and some things which do not pass the seal at all: he is also of the Privy Council; but was anciently called only Clerk of the Privy Seal; after which he was named Guardian *del* Privy Seal; and lastly, Lord Priy Seal, and made one of the great officers of the kingdom. See stat. 12 *R. 2.* c. 11; *Rot. Parl.* 11 *H. 4.*; and 34 *H. 8.* c. 4.

The Lord Privy Seal is to put the seal to no grant without good warrant; nor with warrant, if it be against law, or inconvenient, but that he first acquaint the King therewith. 4 *Inst.* 55. As to the fees of the clerks under the Lord Privy Seal, for warrants, &c. see stat. 27 *H. 8.* c. 11. See further this Dictionary, titles *Grants of the King*; *Privy Seal.*

KEEPER OF THE TOUCH, mentioned in the ancient statute 12 *H. 6.* c. 14, seems to be that officer in the King's mint at this day called the Master of the Assay. See *Mint.*

KEEPERS OF THE LIBERTIES OF ENGLAND. By authority of Parliament. See *Custodes Libertatis.*

KENDAL, *Concagium.* An ancient barony. *MS.*

KENNETS. A coarse Welsh cloth. See stat. 33 *H. 8.* c. 3.

KERHERE. A custom to have a cart-way; or a commutation for the customary duty for carriage of the lord's goods. *Cowell.*

KERNELLARE DOMUM, from Lat. *Crena*, a notch.] To build a house formerly with a wall or tower, kernelled with crannies or notches, for the better convenience of shooting arrows, and making other defence. *Du Fresnoe* derives this word from *quarnellus* or *quadrancellus*, a four-square hole or notch; *ubicunque patent quarnelli sive fenestree*; and this form of walls and battlements for military uses might pos-

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sibly have its name from *quadrillus*, a four-square dart. It was a common favour granted by our Kings in ancient times, after castles were demolished for prevention of rebellion, to give their chief subjects leave to fortify their mansion-houses with kernalled walls. *Paroch. Antiq.* 533.

KERNELATUS. Fortified or embattled according to the old fashion. *Plac.* 31 *Ed.* 3.

KERNES. Idle persons; vagabonds. *Ordin. Hibern.* 31 *Ed.* 3. m. 11, 12.

KEVERE. A cover or vessel used in a dairy-house for milk or whey. *Paroch. Antiq.* 386.

KEY, *Kaia* and *caya*, Sax. *Leg. Teut.* *Key*, now generally spelled *Quay*, from the French *quai*.] A wharf to land or ship goods or wares at. The verb *caiare*, in old writers, signifies (according to *Sealiſiger*) to keep in, or restrain: and so is the earth or ground, where keys are made, with planks and posts. *Cowell*.

The lawful keys and wharfs for lading or landing goods belonging to the port of London, were *Chester's Key*, *Brewer's Key*, *Galley Key*, *Wool Dock*, *Custom-house Key*, *Bear Key*, *Porter's Key*, *Sab's Key*, *Wiggin's Key*, *Young's Key*, *Ralph's Key*, *Dice's Key*, *Smart's Key*, *Somer's Key*, *Hammond's Key*, *Lyon's Key*, *Botolph Wharf*, *Grant's Key*, *Cock's Key*, and *Fresh Wharf*; besides *Billingsgate*, for landing of fish and fruit; and *Bridgehouse*, in Southwark, for corn and other provision, &c. but for no other goods or merchandise. Deal boards, masts, and timber, may be landed at any place between Limehouse and Westminster, the owner first paying or compounding for the customs, and declaring at what place he will land them. *Lex Mercat.* 132, 133; stat. 13 & 14 *Car.* 2. c. 11. § 14; *Rot. Scac.* 19 *Car.* 2. These quays were some years ago purchased out of money advanced by government, with a view to the improvement of the port of London. See the acts 43 *G.* 3. c. cxxiv; 46 *G.* 3. c. 118.

There is now a lawful wharf at Hungerford Market, for the landing of goods or merchandise, and passengers for steam-boats, &c. See 11 *G.* 4. c. 70.

By the 7 & 8 *G.* 4. c. 29. s. 17. persons stealing goods or merchandize from any dock, wharf, or quay adjacent to any port of entry or discharge, navigable river, or canal, or to any creek, &c. may, on conviction, be transported for life, or not less than seven years, or imprisoned for not exceeding four years, and if males, whipped.

KEYAGE, Kaiagium.] The money or toll paid for lading or unlading wares at a key or wharf. *Rot. Pat.* 1 *Edw.* 3. m. 10; 20 *Edw.* 3. m. 1.

KEYLES or **KEELS**, *Ciuli* or *Ciules*.] A kind of long-boats of great antiquity, mentioned in stat. 23 *H.* 8. c. 18. *Spelm.*

KEYING. Five fells, or pelts, or sheeps-skins with their wool on them. *Cowell*.

KEYUS, KEYS. A guardian, warden, or keeper. *Mon. Ang.* tom. 2. p. 71. In the Isle of Man, the twenty-four chief commoners, who are, as it were, conservators of the liberties of the people, are called keys of the island. See tit. *Man, Isle of*.

KICHELL. A cake: it was an old custom for godfathers and godmothers, every time their godchildren asked them blessing, to give them a cake, which was called a God's Kichell. *Cowell*.

KIDDER. Signified one that badges or carries corn, dead victual, or other merchandize, up and down to sell. 5 *Eliz.* c. 12. They are also called Kiddiers in 13 *Eliz.* c. 25.

KIDDLE, KIDLE, or KEDEL, Kidellus.] A dam or open wear in a river with a loop or narrow cut in it, accommodated for the laying of wheels or other engines to catch fish. 2 *Inst.* fol. 38. The word is ancient, for we meet with it in *Magna Charta*, c. 24, and in a charter made by King John to the city of London. By stat. 1 *H.* 4. c. 12. it was accorded, *inter alia*, that a survey should be made of the

wears, mills, stanks, stakes, and kidels, in the great rivers of England. They are now called Kettles, or Kettle-nets, and are much used on the sea-coasts of Kent and Wales. *Cowell*.

KIDNAPPING. The forcible abduction and conveying away of a man, woman, or child from their own country, and sending them to another; it is an offence at common law. *Raym.* 474.

This is unquestionably a very heinous crime, as it robs the King of his subjects, banishes a man from his country, and may, in its consequences, be productive of the most cruel and disagreeable hardships; and therefore the common law of England has punished it with fine, imprisonment, and pillory. 2 *Show.* 221; *Skin.* 47; *Comb.* 10; 4 *Comm.* 219.

The 11 & 12 *H.* 3. c. 7. though principally intended against pirates, had a clause to prevent the leaving abroad, by masters of vessels, of persons who had been kidnapped or spirited away: that clause was repealed by the 9 *G.* 4. c. 31. which by s. 30. enacts, that if any master of a merchant vessel shall (during his being abroad) force any man on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out, if they are in a condition to return, he shall be guilty of a misdemeanor, and shall, on conviction, be imprisoned for such time as the court shall award, and such offences may be prosecuted by indictment or by information at the suit of the attorney-general in K. B., and may be alleged to be committed at Westminster; and that court may issue commissions to examine witnesses abroad. As to the stealing of children, see tit. *Child*.

KILDERKIN. A vessel of ale, &c. containing eighteen gallons.

KILKETH. An ancient servile payment made by tenants in husbandry. *Cowell*.

KILLAGIUM. Keelage. *Cowell*.

KILLING CATTLE maliciously. 7 & 8 *G.* 4. c. 29. s. 25. 7 & 8 *G.* 4. c. 30. s. 16. See tit. *Cattle*.

KILLYTHSTALLION. A custom by which lords of manors were bound to provide a stallion for the use of their tenants' mares. *Spelm. Gloss.*

KILTH. *Ac omnes annuales redditus de quadam consuetudine in, &c. vocat. Kilth. Pat.* 7 *Eliz.*

KINDRED. Are a certain body of persons of kin or related to each other. There are three degrees of kindred in our law; one in the right line descending, another in the right line ascending, and the third in the collateral line.

The right line descending, wherein the kindred of the male line are called *Agnati*, and of the female line *Cognati*, is from the father to the son, and so on to his children in the male and female line; and if no son, then to the daughter, and to her children in the male and female line; if neither son nor daughter, or any of their children, to the nephew and his children, and if none of them, to the niece and her children; if neither nephew nor niece, nor any of their children, then to the grandson or grand-daughter of the nephew: and if neither of them, to the grandson or grand-daughter of the niece; and if none of them, then to the great grandson or great grand-daughter of the nephew and of the niece, &c. *et sic ad infinitum*.

The right line ascending is directly upwards; as from the son to the father or mother; and if neither father nor mother, to the grandfather or grandmother; if no grandfather or grandmother, to the great grandfather or great grandmother; if neither great grandfather or great grandmother, to the father of the great grandfather, or the mother of the great grandmother; and if neither of them, then to the great grandfather's grandfather, or to the great grandmother's grandmother; and if none of them, to the great grandfather's great grandfather, or great grandmother's great grandmother, *et sic ad infinitum*.

The collateral line is either descending by the brother and his children downwards, or by the uncle upwards: it is between brothers and sisters, and to uncles and aunts, and the

rest of the kindred, upwards and downwards, across and amongst themselves. 2 Nels. Abr. 1077, 1078.

There are several rules to know the degrees of kindred; in the ascending line, take the son and add the father, and it is one degree ascending, then add the grandfather, and it is a second degree, a person added to a person in the line of consanguinity making a degree; and if there are many persons, take away one, and you have the number of degrees; as if there are four persons, it is the third degree, if five, the fourth, &c. so that the father, son, and grandchild, in the descending line, though three persons, make but two degrees: To know in what degree of kindred the sons of two brothers stand, begin from the grandfather and descend to one brother, the father of one of the sons, which is one degree, then descend to his son the ancestor's grandson, which is a second degree; and then descend again from the grandfather to the other brother, father of the other of the sons, which is one degree, and descend to his son, &c. and it is a second degree; thus reckoning the person from whom the computation is made, it appears there are two degrees, and that the sons of two brothers are distant from each other two degrees: for in what degree either of them is distant from the common stock, the person from whom the computation is made, they are distant between themselves in the same degree; and in every line the person must be reckoned from whom the computation is made. If the kindred are not equally distant from the common stock; then in what degree the most remote is distant, in the same degree they are distant between themselves, and so the kin of the most remote maketh the degree; by which rule, I, and the grandchild of my uncle, are distant in the third degree, such grandchild being distant three degrees from my grandfather, the nearest common stock. The common law agrees in its computation with the civil and canon law, as to the right line; and only with the canon law as to the collateral line. Wood's Inst. 48, 49. See further at length, 2 Comm. c. 14: and this Dict. titles *Descent*; *Executor*, III.; V. 8.

KING.

REX; from Lat. *Rego* to rule: Sax. *Cyning* or *Coring*.] A monarch or potentate, who rules singly and sovereignly over a people: or he that has the highest power and rule in the land. The King is the head of the state. See *Bract. lib. 1. c. 8*.

THE SUPREME EXECUTIVE POWER of these kingdoms is vested by the English laws in a single person, the King or Queen; for it matters not to which sex the crown descends; but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power: as is declared by stat. 1 Mary, stat. 3. c. 1.

- I. Of the Title and Succession to the Throne.
- II. Of the Royal Family.—As to the Queen, see this Dict. under that title.
- III. Briefly and incidentally of the King's Councils,
- IV. Of the King's Duties; and his Coronation Oath.
- V. Of the King's Prerogative.
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 3. With respect to his Authority, Foreign and Domestic; in sending Ambassadors; making Treaties, War and Peace: As one of the Estates of the Realm; Commander of our Armies and Navies; the Fountain of Justice and of Honour; Arbitrer of Domestic Commerce; Supreme Head of the Church.
 4. As regards his Revenues, ordinary and extraordinary; and, in the latter, of his Civil List.

VI. Of the King's Prerogative in relation to his Debts; and see this Dict. titles *Execution*; *Extent*; *Judgment*, &c.

VII. The former and present state of the Prerogative in general.

I. The executive power of the English nation being vested in a single person, by the general consent of the people, the evidence of which general consent is long and immemorial usage, it became necessary to the freedom and peace of the state, that a rule should be laid down uniform, universal, and permanent, in order to mark out with precision who is that single person, to whom are committed (in subservience to the law of the land) the care and protection of the community; and to whom, in return, the duty and allegiance of every individual are due.

When the succession to the crown was formerly interrupted by the state of society and the constitution, which had not then arrived to the state of perfection it attained in later ages, and even more recently since the Revolution, distinctions have been frequently made between a King *de facto* and *de jure*. Though it is to be hoped that no contest of this nature is likely again to rise in these kingdoms, what is just shortly hinted on this subject will doubtless be agreeable to the student: see further on this subject, title *Treason*.

If there be a King regnant in possession of the crown, although he be but *Rex de facto*, and not *de jure*, yet he is *Seignior le Roy*: and another that bath right, if he be out of possession, he is not within the meaning of the stat. 11 H. 7. c. 1. for the subjects to serve and defend him in his wars, &c. And a pardon, &c. granted by a King *de jure*, that is not likewise *de facto*, is void. 3 Inst. 7. If a King that usurps the crown, grants licences of alienation or escheats, they will be good against the rightful King; so of pardons, and any thing that doth not concern the King's ancient patrimony, or the government of the people: judicial acts in the time of such a one, bind the right King and all who submitted to his judicature. The crown was tost between the two families of York and Lancaster many years; and yet the acts of royalty done in the reign of the several competitors were confirmed by the Parliament: and those resolutions were made because the common people cannot judge of the King's title, and to avoid anarchy and confusion. Jenk. Cent. 180, 1.

All judicial acts done by Henry VI. while he was King, and also all pardons of felony, and charters of denization granted by him, were deemed valid; but a pardon made by Edward IV. before he was actually King, was declared void even after he came to the crown. See 1 Hawk. P. C. c. 17: and stat. 1 Edw. 4. c. 1.

Hale says the right heir of the crown, during such time as the usurper is in plenary possession of it, and no possession thereof in the heir, is not a King within this act; as was the case of the House of York during the plenary possession of the crown in Henry IV., Henry V., Henry VI. But if the right heir had once the possession of the crown as King, though an usurper had got the possession thereof, yet the other continues his style, title, and claim thereto, and afterwards re-obtains the full possession thereof; a compassing the death of the rightful heir during that interval, is compassing of the King's death within this act, for he continued a King still, *quasi* in possession of his kingdom; which was the case of Edward IV. in that small interval wherein Henry VI. re-obtained the crown; and the case of Edward V. notwithstanding the usurpation of his uncle Richard III. 1 Hal. Hist. P. C. 104.

The grand fundamental maxim upon which the *Jus Coronæ*, or right of succession to the throne of these kingdoms depends, seems to be this: "That the crown is by common law and constitutional custom hereditary; and this in a manner peculiar to itself; but that the right of inheritance may from

time to time be *changed or limited by Parliament*; under which limitations the crown still continues hereditary."

First, it is in general *hereditary*, or descendible to the next heir, on the death or demise of the last proprietor. All regal governments must be either hereditary or elective; and as no instance can be found wherein the crown of England has ever been asserted to be elective, by any authority but that of the regicides at the trial of King Charles I. it must of consequence be hereditary. Yet an hereditary by no means intends a *jure-divino* right to the throne, save only so far as kingdoms, like other human fabrics, are subject to the general and ordinary dispensations of Providence. Nor, indeed, have a *jure-divino* and an *hereditary* right any necessary connection with each other, as some have very weakly imagined. The hereditary right which the laws of England acknowledge, owes its origin to the founders of our Constitution, and to them only. The founders of our English monarchy might perhaps, if they had thought proper, have made it elective; but they rather chose, and upon good reason, to establish originally a succession by inheritance. This has been acquiesced in by general consent, and ripened by degrees into common law; the very same title that every private man has to his own estate. Lands are not *naturally* descendible any more than thrones; but the law has thought proper, for the benefit and peace of the public, to establish hereditary succession in the one as well as the other.

Secondly, as to the particular mode of inheritance, it in general corresponds with feudal path of descents, chalked out by the common law in the succession to landed estates, yet with one or two material exceptions. Like estates, the crown will descend lineally to the issue of the reigning monarch, as it did from King John to Richard II. through a regular degree of six lineal generations. As in common descents, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. But among the females the crown descends by right of primogeniture to the eldest daughter and her issue, and, not as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect. The doctrine of representation also prevails in the descent of the crown, as it does in other inheritances, whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done. Lastly, on failure of lineal descendants, the crown goes to the next collateral relations of the late King, provided they are lineally descended from the blood-royal; that is, from that royal stock which originally acquired the crown. But herein there is no objection (as in the case of common descents previous to the recent statute) to the succession of a brother, an uncle, or other collateral relation of the *half* blood; provided only, that the one ancestor, from whom both are descended, be that from whose veins the blood-royal is communicated to each. The reason of which diversity between royal and common descents may be understood by recurring to the general rules of descent at common law. See title *Descent*.

Thirdly, the doctrine of *hereditary* right does by no means imply an *indefeasible* right to the throne. No man will surely assert this who has considered our laws, constitution and history without prejudice, and with any degree of attention. It is unquestionably in the breast of the supreme legislative authority of this kingdom, the King and both Houses of Parliament, to defeat this hereditary right, and by particular entails, limitations, and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly consonant to our laws and constitution, as may be gathered from the expression so frequently used in our statute-book of "the King's Majesty, his heirs and successors." In which we may observe, that as the word *heirs* necessarily implies an inheritance or hereditary right generally subsisting

in the royal person; so the word *successors*, distinctly taken, must imply that this inheritance may sometimes be broken through, or that there may be a successor without being the heir of the King.

Fourthly, however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it. And hence, in our law, the King is said never to die in his political capacity; because immediately upon the natural death of Henry, William, or Edward, the King survives in his successor. For the right of the crown vests *eo instanti* upon his heir; either the *hæres natus*, if the course of descent remains unimpeached, or the *hæres factus*, if the inheritance be under any particular settlement. So that there can be no *interregnum*; but, as Hale observes, the right of sovereignty is fully invested in the successor by the very descent of the crown. 1 *Hist. P. C.* 61. Hence the statutes passed in the first year after the restoration of Charles II. are always called the acts in the 12th year of his reign; and all the other legal proceedings of that reign are reckoned from the year 1648, and not from 1660.

On this principle, that the King commences his reign from the day of the death of his ancestor, it hath been held that compassing his death before coronation, or even before proclamation, is compassing of the King's death within the statute of 25 *Edw. 3. stat. 5. c. 2*; he being King presently, and the proclamation and coronation only honourable ceremonies for the further notification thereof. 3 *Inst.* 7; 1 *Hale's Hist. P. C.* 101. See title *Treason*.

However acquired, therefore, the crown becomes in the successor absolutely hereditary; unless by the rules of the limitation it should be otherwise ordered and determined.

In these four points consists the constitutional notion of hereditary right to the throne; which is further elucidated by the learned commentator, from whom much of the foregoing and following abstract is taken, in a short historical view which he gives of the succession to the crown of England, from Egbert to the present time; of the doctrines of our ancient lawyers, and of the several statutes that have from time to time been made to create, to declare, to confirm, to limit, or to bar, the hereditary title to the throne. In the pursuit of this inquiry, he states, that from the days of Egbert, the first sole monarch of this kingdom, to the present, the four cardinal maxims above mentioned have ever been held the constitutional canons of succession to the crown. It is true this succession, through fraud or force, or sometimes through necessity, when in hostile times the crown descended on a minor, or the like, has been very frequently suspended; but has generally at last returned back into the old hereditary channel, though sometimes a very considerable period has intervened. And even in those instances where the succession has been violated, the crown has ever been looked upon as hereditary in the wearer of it. Of which the usurpers themselves were so sensible, that they for the most part endeavoured to vamp up some feeble show of a title by descent, in order to amuse the people, while they gained the possession of the kingdom. And when possession was once gained, they considered it as the purchase or acquisition of a new estate of inheritance, and transmitted, or endeavoured to transmit, it to their own posterity, by a kind of hereditary right of usurpation. See 1 *Comm.* c. 3. p. 190—7.

It is not very easy to say whether Mary and Elizabeth took the crown by inheritance or special parliamentary limitation. When the act 35 *H. 8. c. 1.* passed, they had both by a preceding act (28 *H. 8. c. 7.*) been declared illegitimate, and not capable of inheriting the crown. The act 35 *H. 8.* without repealing the former, limited the succession to them and the heirs of their bodies respectively, under certain circumstances, and upon certain conditions. On the accession of Mary the clauses of 28 *H. 8. c. 7.* by which her illegitimacy had been declared, were repealed (1 *M. st. 2. c. 1.*) and in 1 *M. st. 3. c. 1.* she is called the "inheritrix to the

imperial crown," but the act 35 H. 8. c. 1. was not formally repealed. Elizabeth did not formally repeal the clauses of 28 H. 8. c. 7. which affected her legitimacy; but by 1 Eliz. c. 3. she was recognized as being lineally and lawfully descended of the blood royal of the realm; at the same time, however, the limitation of the crown by 35 H. 8. c. 1. was expressly confirmed. The inference from the whole seems to be, that though neither of them chose to rely on the parliamentary limitation alone, neither thought it right entirely to forego the security which it afforded. *Coleridge's Note, 1 Comm. 195.*

It may be worth while in this place to advert to the statement of an acute modern writer as to the succession of King James I. to the crown of England. See *Hallam's Constitutional History of England, from Henry VII. to George II. vol. 1. cap. 6.*

"The popular voice in favour of James was undoubtedly raised in consequence of a natural opinion that he was the lawful heir to the throne. But this was only according to vulgar notions of right which respect *hereditary succession* as something *indefeasible*. In point of fact, neither James nor any of his posterity were legitimate sovereigns according to the senses which that word ought properly to bear. The House of Stuart no more came in by a lawful title than the House of Brunswick; by such a title, I mean, as the constitution and established laws of this kingdom had recognised. No private man could have recovered an acre of land without proving a better right than they could make out to the crown of England. What then had James to rest upon? What renders it absurd to call him or his children usurpers? He had that which the flatterers of his family most affect to disdain, *the will of the people*; not certainly expressed in regular suffrage or declared election, but unanimously and voluntarily ratifying that which could in itself give no right,—the determination of the council to proclaim his accession to the throne. It is probable (adds the writer) that what has been just said may appear paradoxical to those who have not considered this part of our history, yet it is capable of satisfactory proof. This proof consists of four propositions: 1. That a lawful King of England, with the advice and consent of Parliament, may make statutes to limit the inheritance of the crown as shall seem fit. 2. That a statute passed in the 35th of H. 8. (c. 1.) enabled that prince to dispose of the succession by his last will signed by his own hand. 3. That Henry did execute such will, by which in default of issue from his children the crown was entailed upon the descendants of his younger sister, Mary Duchess of Suffolk, before those of Margaret Queen of Scots. [*Blackstone*, however, affirms that this power of making a will was never carried into execution.] 4. That such descendants of Mary were living at the decease of Elizabeth." The writer then proceeds to prove the four preceding propositions, and concludes thereon against the legal title of King James I. to the throne, and in favour of such right being vested in the descendants of the House of Suffolk. See also *Luder's Essay on the Right of Succession to the Crown in the Reign of Elizabeth*, who also supports the position as to the want of legal title in the House of Stuart.

Hallam concludes the subject by the following statement: "There is much reason to believe that the consciousness of this defect in his parliamentary title put James on magnifying, still more than from his natural temper he was prone to do, the internal rights of primogenitary succession as something indefeasible by the legislature; a doctrine which, however it might suit the schools of divinity, was in diametrical opposition to our statutes." [*Bolingbroke*, (the author adds, in a note,) was of this opinion, considering the act of recognition of James as the era of hereditary right, and of all those exalted notions concerning the power of prerogative of kings and the sacredness of their persons.] "Through the servile spirit of those times, however, it made a rapid progress, and,

interwoven by cunning and bigotry with religion, became a distinguishing tenet of the party who encouraged the Stuarts to subvert the liberties of the kingdom. In James's proclamation on ascending the throne he set forth his hereditary right in pompous and, perhaps, unconstitutional phrases. It was the first measure of Parliament to pass an act of recognition, acknowledging that on the decease of Elizabeth the imperial crown of the realm of England did by inherent birthright, and lawful and undoubted succession, descend and come to his most excellent Majesty, as being lineally, justly, and lawfully next and sole heir of the blood royal of this realm. Stat. 1 Jac. 1. c. 1. *The will of Henry VIII. it was tacitly agreed by all parties to consign to oblivion!* and this most wisely, not on the principles which seem rather too much insinuated in this act of recognition, but on such substantial motives of *public expediency*, as it would have shown an equal want of patriotism and of good sense, for the descendants of the House of Suffolk to have withstood.

If the throne be at any time vacant, (which may happen by other means besides that of abdication, as if all the blood-royal should fail, without any successor appointed by parliament,) the right of disposing of this vacancy seems naturally to result to the Houses of Lords and Commons, the trustees and representatives of the nation. For there are no other hands in which it can so properly be entrusted; and there is a necessity of its being entrusted somewhere, else the whole frame of government must be dissolved and perish.

The preamble to the Bill of Rights expressly declares, that "the Lords Spiritual and Temporal, and Commons assembled at Westminster, lawfully, fully, and freely represent all the estates of the people of this realm." The Lords are not less the trustees and guardians of their country than the members of the House of Commons. It was justly said, when the royal prerogatives were suspended by the indisposition of the King (George III.) in 1788, that the two Houses of Parliament were the organs by which the people expressed their will. And in the House of Commons, on the 16th of December in that year, two declaratory resolutions were accordingly passed, importing: 1. The interruption of the royal authority; 2. That it was the duty of the two Houses of Parliament to provide the means of supplying that defect. On the 23d of the same month a third resolution was passed, empowering the Lord Chancellor of Great Britain to affix the great seal to such *Bill of Limitations* as might be necessary to restrict the power of the future Regent to be named by parliament: this bill was accordingly brought forward, but happily arrested in its progress by the providential recovery of the King in March, 1789. It is observable, however, that no bill was ever afterwards introduced to guard against a future emergency of a similar nature: on the grounds, undoubtedly, of delicacy to the monarch, in the hope of the improbability that such a circumstance should recur in future; and in the confidence of the omnipotence of parliament if necessarily called upon again. See the *Journals of the Lords and Commons, sub an. 1788-9.*

Towards the end of King William's reign, the King and Parliament thought it necessary to exert their power of limiting and appointing the succession, in order to prevent the vacancy of the throne; which must have ensued upon their deaths, as no farther provision was made at the Revolution than for the issue of Queen Mary, Queen Anne, and King William. It had been previously, by the stat. 1 W. & M. stat. 2. c. 2. enacted, that every person who should be reconciled to, or hold communion with, the See of Rome, who should profess the Popish religion, or who should marry a Papist, should be excluded, and for ever incapable to inherit, possess, or enjoy the crown; and that in such case the people should be absolved from their allegiance [to such person], and the crown should descend to such persons, being Protestants, as would have inherited the same in case the person so reconciled, holding communion, professing, or

marrying, were naturally dead. To act, therefore, consistently with themselves, and at the same time pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the Princess Sophia, Electress and Duchess Dowager of Hanover. For upon the impending extinction of the Protestant posterity of Charles I. the old law of regal descent directed them to recur to the descendants of James I.; and the Princess Sophia being the youngest daughter of Elizabeth, Queen of Bohemia, who was the daughter of James I. was the nearest of the ancient blood-royal, who was not incapacitated by professing the Popish religion. On her, therefore, and the heirs of her body, being Protestants, the remainder of the crown, expectant on the death of King William and Queen Anne, without issue, was settled by stat. 12 & 13 W. 3. c. 2. See also 4 & 5 Ann. c. 4. by which the Princess Sophia and her future issue were naturalized.

This is the last limitation of the crown that has been made by parliament, and all the several actual limitations from the time of Henry IV. to the present, (stated at large in 1 *Comm.* c. 3.) do clearly prove the power of *the King and Parliament* to new model or alter the succession. And, indeed, it is now again made highly penal to dispute it; for by stat. 6 Ann. c. 7. it is enacted, that if any person maliciously, advisedly, and directly, shall maintain by writing, or printing, that the *Kings* of this realm, *with the authority of Parliament*, are not able to make laws to bind the crown, and the descent thereof, he shall be guilty of high treason; or if he maintains the same only by preaching, teaching, or advised speaking, he shall incur the penalties of a *præmunire*.

The Princess Sophia dying before Queen Anne, the inheritance thus limited descended on her son King George I., and having taken effect in his person, from him it descended to King George II., from him to his grandson and heir, King George III., from him to his son King George IV., and on the death of the latter to our present sovereign William IV.

The *title to the crown* therefore, though at present hereditary, is not quite so absolutely hereditary as formerly; and the common stock or ancestor, from whom the descent must be derived, is also different. Formerly the common stock was King Egbert, then William the Conqueror; afterwards, in James I.'s time, the two common stocks united, and so continued till the vacancy of the throne, occasioned by the abdication of James II. in 1688: now it is the Princess Sophia, in whom the inheritance was vested by the King and parliament. Formerly the descent was absolute, and the crown went to the next heir without any restriction; but now, upon the new settlement, the inheritance is conditional; being limited to such heirs only of the body of the Princess Sophia, as are *Protestant members of the Church of England*, and are married to none but Protestants.

In these heirs of the Princess Sophia, (to use, with some modification, the expressions of a modern historian, already quoted in the course of this article,) the right to the crown is as truly hereditary as it ever was in the Plantagenets and the Tudors. But they derive it not from those ancient families. The blood, indeed, of Cerdic, and of the Conqueror, flows in the veins of his present Majesty. Our Edwards and Henrys illustrate the almost unrivalled splendour and antiquity of the House of Brunswick. But they have transmitted no more right to the allegiance of England than Boniface of Este, or Henry the Lion. That right rests wholly on the Act of Settlement, and resolves itself into the sovereignty of the legislature. We have, therefore, an abundant security that no prince of the House of Brunswick will ever countenance the silly theories of imprescriptible hereditary right, which flattery and superstition seem still to render current in other countries. He would brand his own brow with the names of upstart and usurper. For the history of the Revolution, and that change in the succession which ensued upon it, will, for ages to come, be as fresh and familiar

as the recollections of yesterday. And if the people's claim be, as surely it is, the primary foundation of magistracy, it is perhaps more honourable to be nearer the source, than to deduce a title through a series not free from some whose vices or deficiencies may have sullied the splendour of their descent.

The Bill of Rights was reckoned hasty and defective, some matters of great importance had been omitted, and in the period which elapsed from the passing of that statute to the Act of Settlement, new abuses had called for new remedies. It was, therefore, determined to accompany that settlement with additional securities for the subject's liberty, and eight articles were inserted in the act, to take effect only from the commencement of the new limitation to the House of Hanover. Some of them appeared to spring from a natural jealousy of the unknown and foreign line; some should not strictly have been postponed so long, but it is necessary to be content with what it is practicable to maintain. These articles were: 1. That whoever should hereafter come to the possession of the crown should join in communion with the Church of England as by law established. 2. That in case the crown should come to any person not being a native of the kingdom, the nation should not be obliged to engage in any war for the defence of any dominions or territories, which do not belong to the crown of England, without the consent of parliament. 3. That no person who should hereafter come to the possession of the crown should go out of the dominions of England, Scotland, or Ireland, without consent of parliament. [This article was repealed by stat. 1 Geo. 1. c. 51.] 4. That all matters relating to government cognizable by the Privy Council should be transacted there, and all resolutions taken thereon should be signed by the privy councillors advising and consenting to the same. [This provision was repealed by stat. 4 Ann. c. 8. and see 6 Ann. c. 7. and tit. *Privy Council*.] 5. That no person born out of the kingdom of England, Scotland, or Ireland, or the dominions thereunto belonging, (although he be naturalized or made a denizen,) except such as are born of English parents, shall be capable of being of the Privy Council, or a member of either House of Parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands or tenements from the crown to himself, or any others in trust for him. [By 1 Geo. 1. stat. 2. c. 4. it is enacted, that no bill of naturalization shall be received without a clause disqualifying the party to sit in Parliament.] 6. That no person having an office or place of trust or profit under the king, or receiving a provision from the crown, shall be capable of serving as a member of the House of Commons. [This has been repealed and otherwise provided for. See tit. *Parliament*.] 7. That judges' commissions be made *quam diu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it shall be lawful to remove them. [See tit. *Judges*.] 8. That no pardon under the great seal of England be pleadable to an impeachment by the Commons in Parliament. [See tit. *Impeachment*.]

As to offences in denying the King's title, see this Dict. tit. *Misprision*; in oppugning it, tit. *Treason*.

II. The first and most considerable branch of the King's royal family, regarded by the laws of England, is the Queen; as to whom see this Dict. tit. *Queen*.

The Prince of Wales, or heir-apparent to the crown, and also his royal consort; and the Princess Royal, or eldest daughter of the King, are likewise peculiarly regarded by the laws. For, by stat. 25 Edw. 3. to compass or conspire the death of the former, or to violate the chastity of the latter, is as much high treason as to conspire the death of the King, or violate the chastity of the Queen. See this Dictionary, tit. *Treason*. The heir-apparent to the crown is usually made Prince of Wales and Earl of Chester, by special creation and investiture; but being the King's *eldest son*, he is by inheri-

ance Duke of Cornwall, without any new creation. 3 Rep. 1; *Seld. tit. Lon.* 2, 5.

The observations in *Coke's* reports, however, as well as the words of the statute, it has been remarked, limit the dukedom of Cornwall to the first begotten son of a King of England, and to him only. But although from this it is manifest that a Duke of Cornwall must be the first begotten son of a King, yet it is not necessary that he should be born after his father's accession to the throne.

This is, on the whole, a strange species of inheritance, and perhaps is the only mode of descent which depends upon the authority of a statute. In the Prince's Case, reported by Lord *Coke*, the question was, whether the original grant to Edward the Black Prince, who was created in the 11th of *Edw.* 3. Duke of Cornwall, and who was the first duke in England after the Duke of Normandy, had the authority of parliament; or was an honour conferred by the King's charter alone? If the latter, the limitation would have been void, as nothing less than the power of Parliament can alter the established rules of descent. But notwithstanding it is in the form of a charter, it was held to be an act of the legislature. It concludes, *per ipsum regem et totum concilium in parlamento*. — *Christian's Note on 1 Comm. c. 4.* (See printed Parliament Rolls, 5 H. 4. nu. 22. and 38 H. 6. nu. 29. for full information on this subject. See also this Dictionary, tit. *Prince*.)

The rest of the royal family may be considered in two different lights, according to the different senses in which the term royal family is used. The larger sense includes all those, who are by any possibility inheritable to the crown. Such, before the Revolution, were all the descendants of William the Conqueror, who had branched into an amazing extent by intermarriages with the ancient nobility. Since the Revolution and Act of Settlement, it means the Protestant issue of the Princess *Sophia*, now comparatively few in number, but which in process of time may possibly be as largely diffused. The more confined sense includes only those who are within a certain degree of propinquity to the reigning prince, and to whom, therefore, the laws pay an extraordinary regard and respect.

At the time of passing the Regency Act, stat. 5 G. 3. c. 27. (see *post*, V. 2.) the bill, which was framed on the plan of the Regency Act in the preceding reign, empowered his Majesty to appoint either the Queen, or any other person of his royal family usually resident in Great Britain, to be Regent until the successor to the crown should attain eighteen years of age. A doubt arising on the question who were the royal family, it was explained by the law lords to be the descendants of King George II. It was, therefore, found necessary expressly to insert in the act the name of her Royal Highness the Princess Dowager of Wales, widow of the King's eldest son deceased, and mother of King George III. as she was not held to be comprehended under the general description of the royal family. See *Belsham's Memoirs of King George III.*

The younger sons and daughters of the King, and other branches of the royal family, who are not in the immediate line of succession, were, therefore, little farther regarded by the ancient law than to give them a certain degree of precedence before all persons and public officers, as well ecclesiastical as temporal. This is done by stat. 31 Hen. 8. c. 10. which enacts, that no person, except the King's children, shall presume to sit or have place at the side of the cloth of estate in the parliament chamber; and that certain great officers therein named shall have precedence above all dukes, except only such as shall happen to be the King's son, brother, uncle, nephew, (which latter Sir *E. Coke*, 4 *Inst.* 362, explains to signify grandson or *nepos*;) or brother's or sister's son.

Indeed, under the description of the King's children, his grandsons are held to be included, without having recourse

to Sir *E. Coke's* interpretation of nephew; and, therefore, when his late Majesty King George II. created his grandson Edward (the second son of Frederick Prince of Wales, deceased,) Duke of York, and referred it to the House of Lords to settle his place and precedence, they certified that he ought to have place next to the late Duke of Cumberland, the then King's youngest son; and that he might have a seat on the left hand of the cloth of estate. *Lds'. Journ.* Ap. 24, 1760. But when, on the accession of King George III. those royal personages ceased to take place as the children, and ranked only as the brother and uncle of the King, they also left their seats on the side of the cloth of estate; so that when the Duke of Gloucester, his Majesty's second brother, took his seat in the House of Peers, he was placed on the upper end of the earl's bench, (on which the dukes usually sit,) next to his Royal Highness the Duke of York. *Lds'. Journ.* 10 Jan. 1765. And in 1718, upon a question referred to all the judges by King George I. it was resolved by ten against the other two, that the education and care of all the King's grand-children, while minors, did belong of right to his Majesty as King of this realm, even during their father's life. *Fortesc. Ab.* 401—440. And they all agreed, that the care and approbation of their marriages, when grown up, belonged to the King, their grandfather. And the judges have more recently concurred in opinion, that this care and approbation extend also to the presumptive heir of the crown; though to what other branches of the royal family the same did extend, they did not find precisely determined. *Lds'. Journ.* 28th Feb. 1772; 11 *St. Tr.* 290. The most frequent instances of the crown's interposition go no farther than nephews and nieces, but examples are not wanting of its reaching to distant collaterals. Therefore, by stat. 28 H. 8. c. 18. (repealed among other statutes of treason by 1 Ed. 6. c. 12.) it was made high treason for any man to contract marriage with the King's children, or reputed children, his sisters or aunts, *ex parte paterna*, or the children of his brethren or sister; being exactly the same degrees to which precedence is allowed by the stat. 31 H. 8. before mentioned. And now by stat. 12 G. 3. c. 11. no descendant of the body of King George II. (other than the issue of princesses married into foreign countries,) is capable of contracting matrimony, without the previous consent of the King signified under the great seal; and any marriage contracted without such consent is void: but it is provided by the act, that such of the said descendants as are above the age of twenty-five, may, after a twelvemonth's notice given to the King's Privy Council, contract and solemnize marriage without the consent of the crown; unless both Houses of Parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. All persons solemnizing, assisting, or being present at any such prohibited marriage shall incur the penalties of *præmunire*.

In 1793 a marriage was solemnized at Rome, according to the forms, and by a minister, of the church of England, between his Royal Highness the Duke of Sussex and Lady Augusta Murray, daughter of the Earl of Dunmore, who, on their return to England, were re-married at St. George's, Hanover Square. The second marriage attracted the notice of George III., and at his instigation a suit was commenced in the Court of Arches, and a decree pronounced in 1794 declaring both marriages void. A bill for perpetuating the evidence of the first marriage has lately been filed in the Court of Chancery by Sir Augustus d'Este and his sister, the children of his Royal Highness by the above lady. For further particulars concerning the claim of Sir Augustus d'Este, see *Law Mag.* vol. vii. 176.

III. In order to assist the King in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law hath assigned him a diversity of councils to advise with. These are, his *Parliament*, his *Peers*,

and his *Privy Council*. See this Dictionary under those titles.

For law matters the judges of the courts of law are held to be the King's council, as appears frequently in our statutes, particularly the 14 *Edw. 3. c. 5.* and in other books of law. So that when the King's council is mentioned generally, it must be defined, particularized, and understood, *secundum subjectam materiam*; and if the subject be of a legal nature, then by the King's council is understood his council for matters of law, namely, his judges. Therefore, when by the 16 *R. 2. c. 5.* it was made a high offence to import into this kingdom any Papal bulls, or other processes from Rome; and it was enacted, that the offenders should be attached by their bodies, and brought before the King and his council to answer for such their offence; here, by the expression of the King's council were understood the King's judges of his courts of justice, the subject matter being legal; thus being the general way of interpreting the word council, 3 *Inst. 125.* See further title *Judges*.

Upon the same principle, in cases where fine and ransom is imposed for any offence at the King's pleasure, this does not signify any extra-judicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice, *voluntas regis in curia, non in camera.* 1 *Hab. P. C. 375.*

IV. It is in consideration of the duties incumbent on the King by our constitution that his dignity and prerogative are established by the laws of the land; it being a maxim in the law, that protection and subjection are reciprocal. 7 *Rep. 5.* And these reciprocal duties are most probably what was meant by the Convention Parliament in 1688, when they declared that King James II. had broken the *original contract* between king and people. But, however, as the terms of that original contract were in some measure disputed, being alleged to exist principally in theory, and to be only deducible by reason and the rules of natural law, in which deduction different understandings might very considerably differ; it was, after the Revolution, judged proper to declare these duties expressly, and to reduce that contract to a plain certainty. So that whatever doubts might be formerly raised about the existence of such an original contract, they must now entirely cease; especially with regard to every prince who hath reigned since the year 1688.

The principal duty of the King is to govern his people according to law. And this is not only consonant to the principles of nature, reason, liberty, and society, but has always been esteemed an express part of the common law of England, even when prerogative was at the highest. See our ancient authors, *Bract. l. 1. c. 8; l. 2. c. 16. § 3; Fortesc. cc. 2, 34.* But to obviate all doubts and difficulties concerning this matter, it is expressly declared by stat. 12 & 13 *W. 3. c. 2.* "That the laws of England are the birthright of the people thereof; and all the Kings and Queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws; and all their officers and ministers ought to serve them respectively according to the same; and therefore all the laws and statutes of this realm for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, are ratified and confirmed accordingly." See further tit. *Liberties*.

As to the terms of the original contract between King and people, these it seems are now couched in the Coronation Oath, which by stat. 1 *W. & M. st. 1. c. 6.* is to be administered to every King and Queen who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops in the presence of all the people; who, on their parts, do reciprocally take the oath of allegiance to the crown.

This Coronation Oath is conceived in the following terms:

"The Archbishop or Bishop shall say, Will you solemnly promise and swear to govern the people of this [kingdom of England,—see now stat. 5 *Ann. c. 8. § 1.* as to the union of Scotland, and 39 & 40 *G. 3. c. 67.* as to the union of Ireland, and which together is called 'the United Kingdom of Great Britain and Ireland,'] and the dominions thereto belonging, according to the statutes in Parliament agreed on; and the laws and customs of the same? The King or Queen shall say, I solemnly promise so to do.—Abp. or Bp. Will you to your power cause law and justice, in mercy, to be executed in all your judgments? K. or Q. I will.—Abp. or Bp. Will you to the utmost of your power maintain the laws of God, the true profession of the Gospel, and the Protestant reformed religion established by the law; and will you preserve unto the bishops and the clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them or any of them? K. or Q. All this I promise to do.—After this the King or Queen, laying his or her hand upon the Holy Gospels, shall say: The things which I have here before promised I will perform and keep; so help me God. And then shall kiss the book."

It is also required, both by the Bill of Rights, 1 *W. & M. st. 2. c. 2.* and the Act of Settlement, 12 & 13 *W. 3. c. 2.* that every King and Queen of the age of twelve years, either at their coronation or on the first day of the first parliament upon the throne in the House of Peers (which shall first happen), shall repeat and subscribe the declaration against Popery, according to the 30 *Car. 2. st. 2. c. 1.*

The foregoing is the form of the Coronation Oath, as it is now prescribed by our laws; the principal articles of which appear to be at least as ancient as the *Mirror of Justices* (c. 1. § 2.) and even as the time of *Bracton*. See *l. 3. tr. 1. c. 9.* But the wording of it was changed at the Revolution, because (as the statute alleges) the oath itself had been framed in doubtful words and expressions with relation to ancient laws and constitutions at this time unknown. For these old coronation oaths, see 1 *Comm. c. 6. p. 235, in n.*; and *Rot. Claus. 1 Edw. 2.* In a roll of 5 *Edw. 2.* preserved in Canterbury cathedral, marked K. 11. is the form of the Coronation Oath *si Rex fuerit literatus* in Latin, and *si Rex non fuerit literatus* in French, as required to be administered by the Archbishop of Canterbury, "*ad quem de jure & consuetudine Ecclesie Cant' antiqua & approbata pertinet Regis Anglie inungere & coronare.*"

However, in what form soever this oath be conceived, it is most indisputably a fundamental and express original contract; though doubtless the duty of protection is impliedly as much incumbent on the sovereign before coronation as after; in the same manner as allegiance to the King becomes the duty of the subject immediately on the descent of the crown, before he has taken the oath of allegiance, or whether he ever takes it at all. In the King's part of this original contract are expressed all the duties that a monarch can owe to his people, viz. to govern according to law; to execute judgment in mercy; and to maintain the established religion. And with respect to the latter of these three branches, the Act of Union, 5 *Ann. c. 8.* recites and confirms two preceding statutes; the one of the Parliament of Scotland, the other of the Parliament of England; which enact, the former, that every King, at his accession, shall take and subscribe an oath to preserve the Protestant religion, and Presbyterian church government in Scotland; the latter, that at his coronation he shall take and subscribe a similar oath to preserve the settlement of the church of England within England, Ireland, Wales and Berwick, and the territories thereto belonging. The 39 & 40 *G. 3. c. 67.* for the union of Great Britain and Ireland, recognizes and confirms this part of the act for the Union with Scotland. See article V. of the Union with Ireland, and this Dict. title *Ireland*. See also the act of the Irish Parliament, 33 *H. 8. c. 1.* by which it is

enacted that the Kings of England shall always be Kings of Ireland.

V. 1. It has been observed, that one of the principal bulwarks of civil liberty, or, in other words, of the British constitution, is the limitation of the King's prerogative, by bounds so certain and notorious, that it is impossible he should ever exceed them, without either the consent of the people, or a violation of that contract which we have seen expressly subsists between the prince and the subject. When we more particularly consider this prerogative minutely, in order to mark out, in the most important instances, its particular extent and restrictions, one conclusion will evidently follow; that the powers which are vested in the crown by the laws of England are necessary for the support of society, and do not intrench any farther on our *natural*, than is expedient for the maintenance of our *civil liberties*.

There cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining with decency and respect the limits of the King's prerogative. This was formerly considered as a high contempt in a subject, and the glorious Queen Elizabeth herself directed her parliament to abstain from judging of or meddling with her prerogative. It is no wonder, therefore, that her successor James I. should consider such a presumption as little less than blasphemy and impiety. But whatever might be the sentiments of some of our princes, this was never the language of our ancient constitution and laws. The sentiments of *Bracton* and *Fortescue*, at the distance of two centuries from each other, may be seen by a reference to the place cited in the preceding division IV. And *Sir Hen. Finch*, under Charles I., after the lapse of two centuries more, though he lays down the law of prerogative in very strong and emphatical terms, yet qualifies it with a general restriction in regard to the liberties of the people. The King, says he, has a prerogative in all things that are not injurious to the subject; for in them all it must be remembered, that the King's prerogative stretcheth not to the doing of any wrong. *Finch*, l. 84, 85. *Nihil enim aliud potest Rex, nisi id solum quod de jure potest.* *Bract.* l. 3. tr. 1. c. 9.

The nature of our constitution is that of a limited monarchy, in which the legislative power is lodged in the King, Lords, and Commons; but the King is intrusted with the executive part, and from him all justice is said to flow; hence he is styled the head of the Commonwealth, supreme governor, *parens patriæ*, &c.; but still he is to make the law of the land the rule of his government, that being the measure as well of his power as of the subjects' obedience: for as the law asserts, maintains, and provides for the safety of the King's royal person, crown, and dignity, and all his just rights, revenues, powers, and prerogatives, so it likewise declares and asserts the rights and liberties of the subject. 1 *And.* 153; *Co. Lit.* 19, 75; 4 *Co.* 124.

Hence it hath been established as a rule, that all prerogatives must be for the advantage of the people, otherwise they ought not to be allowed by law. *Moor*, 672; *Shon. P. C.* 75.

Although the King is the fountain of justice, and intrusted with the whole executive power of the law, yet he hath no power to alter the laws which have been established, and are the birthright of every subject, for by those very laws he is to govern; and as they prescribe the extent and bounds of his prerogative, in like manner they declare and ascertain the rights and liberties of the people, therefore admit of no innovation or change but by act of parliament. 4 *Inst.* 164; 2 *Inst.* 54, 478; 2 *Hal. Hist. P. C.* 131, 282; *Vaugh.* 418; 2 *Salk.* 510.

The rights and prerogatives of the crown are in most things as ancient as the law itself; for though the statute 17 *Edm. 2. c. 1.* commonly called the statute *De prærogativa Regis*, seems to be introductive of something new, yet for

the most part it is but a collection of certain prerogatives that were known law long before. *Bendl.* 117; 2 *Inst.* 263, 496; 10 *Co.* 64. And this statute does not contain the King's whole prerogative, but only so much thereof as concerns the profits of his coffers. *Plowd.* 314.

The nature of the government of our King, says *Fortescue*, is not only regal, but political; if it were merely the former, regal, he would have power to make what alterations he pleased in our law, and impose taxes and other hardships upon the subject, whether they would or no; but his government being political, he cannot change the laws of the realm without the people consent thereto, nor burthen them against their wills. It is also said by the same writer, that the king is appointed to protect his subjects in their lives, properties, and laws; for which end and purpose he has the delegation of power from the people; likewise our King is such by the fundamental law of our land; by which law the meanest subject enjoys the liberty of his person and property in his estate; and it is every man's concern to defend these, as well as the King in his lawful rights. *Fortescue, de Laud. leg. Angl.* 17, &c.

If a King hath a kingdom by title of descent, where the laws have taken good effect and rooting, or if a King conquers a *Christian* kingdom, after the people have laws given them for the government of the country, to which they submit, no succeeding King can alter the same without the parliament. 7 *Rep.* 17. It has nevertheless been held, that conquered countries may be governed by what laws the King thinks fit, and that the laws of England do not take place in such countries until declared so by the conqueror, or his successor; here, in case of infidels, their laws do not cease, but only such as are against the law of God; and where the laws are rejected or silent, they shall be governed according to the rule of natural equity. 2 *Salk.* 411, 412, 666.

If the King makes a new conquest of any country, the persons there born are his subjects; for by saving the lives of the people conquered he gains a right and property in such people, and may impose on them what laws he pleases. *Dyer*, 224; *Vaugh.* 281.

But until such laws given by the conquering prince, the laws of the conquered country hold place; (unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent;) for in all such cases the laws of the conquering country prevail. 2 *P. Wms.* 75, 76.

If there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go carry their laws with them, therefore such new found country is to be governed by the laws of England; though after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, will not bind them. 2 *P. Wms.* 75; 2 *Salk.* 411. And see *Campbell v. Hall, Corp.* 204; *Spragge v. Stone*, cited *Dougl.* 35, 37, 38.

Questions of this nature are not at present likely often to arise, since (as in the instance of annexing the crown of Corsica to the British crown in 1794) all such transactions are now regulated by express stipulations; which neither leave to the prerogative of the conquering monarch, nor the laws of his kingdom, any power to interfere.

By the word *prerogative* is usually understood that special pre-eminence which the King hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology from *præ* and *rego*, something that is required or demanded before, or in preference to all others. And hence it follows, that it must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the King enjoys alone in contradistinction to others; and not to those which he enjoys in common with any of his subjects; for if once any prerogative of the crown could be held in common with the subject, it would cease to be prerogative

any longer, *Finch*, therefore, lays it down as a maxim, that the prerogative is that law in case of the King, which is law in no case of the subject. *Finch, L. 85.*

Prerogatives are either *direct* or *incidental*. The direct are such positive substantial parts of the royal character and authority as are rooted in, and spring from, the King's political person, and of which we are about to state the law at some length. But such prerogatives as are *incidental* bear always a relation to something else, distinct from the King's person, and are indeed only exceptions in favour of the crown, to the general rules established for the rest of the community; such as that no costs shall be recovered against the King; that he can never be a joint-tenant; and that his debt shall be preferred before that of a subject. These, and an infinite number of other instances, will better be understood by referring to the subjects themselves, to which these incidental prerogatives are exceptions. As to his prerogative relating to his debts, however, here reckoned among those considered as incidental, see *post*, VI. at some length; and this Dictionary, titles *Execution, Extent, Judgment, &c.* Other incidental prerogatives are, that where the title of the King and a common person concur, the King's title shall be preferred. *1 Inst. 30.* No distress can be made upon the King's possession, but he may distrain out of his fee in other lands, &c. and may take distresses in the highway. *2 Inst. 131.* An heir shall pay the King's debt, though he is not named in the bond; and the King's debt shall be satisfied before that of a subject, from which there is a prerogative writ. *1 Inst. 180, 386.* But this is where the debt is in equal degree with that of the subject. See *93 Hen. 8. c. 39.* at large; *post*, VI.; and *Cro. Car. 283; Hardr. 23.* Goods and chattels may go in succession to the King, though they may not to any other sole corporation. *1 Inst. 90.* In the hands of whomsoever the goods of the King came, their lands are chargeable, and may be seized for the same; and the King is not bound by sale of his goods in open market. *2 Inst. 713.* No entry will bar the King, and no judgment is final against him, but with a *salvo jure regis*. *Litt. 178; Finch, 46;* but see *post*, 2, as to the *nullum tempus* act, *9 G. 3. c. 9. &c.* The King may plead several matters without being guilty of double pleading, and the party shall answer them all. *Rev. De q. p. 57.* In his pleading he need not plead an Act of Parliament as a subject is bound to do. *4 Rep. 75.* He is not bound to join in demurrer on evidence, and the court may direct the jury to find the matter specially. *Finch, 82; 5 Rep. 104.* The King's own testimony of any thing done in his presence is of as high a nature and credit as any record; whence, in all original writs or precepts, he useth no other witness than himself, as *teste meipso*. *1 Inst. 41, 57.*

It may not be unapt here to mention one of the prerogatives of the crown with respect to the descent of lands, that wherever either a general or special custom of descents would operate so as to sever lands, before held by the King *jure coronæ*, from the person of his successor, there that custom cannot prevail, "for the crown and the lands whereof the King is seised *jure coronæ* are *concomitantia*." Thus, if the King dies, leaving two sons by different wives, and the elder having succeeded, and having been seised of lands in fee, dies without issue, the younger will on succeeding to the crown inherit these lands, though of the half-blood only to the person last seised. So, if a King die, leaving two daughters, the eldest alone will, with the crown, take all the lands whereof he was seised *jure coronæ*, and not as coparcener with her sister. These two are instances where the general custom as regards subjects will not prevail against the *jure coronæ*. So, if the King purchase lands of the nature of gavelkind, where by the custom all the sons inherit equally, yet upon the King's demise his eldest son shall succeed to those lands alone in exclusion of any other sons. See *1 Inst. 15.*

It is also held, that the King is by his prerogative *universal proprietor*, as all property is presumed to have been originally in the crown; and that he partitioned it out in large districts to the great men who deserved well of him in the wars, and were able to advise him in time of peace. Hence the King hath the direct dominion; and all lands are holden mediately or immediately from the crown. *Co. Lit. 1; Dyer, 184; 1 Bend. 237; Seld. Mare Claus.*

If the sea leaves any shore by the water suddenly falling off, such derelict lands belong to the King; but if a man's lands lying to the sea are increased by insensible degrees, they belong to the soil adjoining. *Dyer, 326; 2 Rol. Abr. 170.* This distinction was fully established in *Rex v. Lord Yarborough, 3 Barn. & C. 91; 5 Bing. 163;* and see *4 Barn. & C. 495.*

So, if a river, so far as there is a flux of the sea, leaves its channel, it belongs to the King; for the English sea and channels belong to the King; and, having never distributed them out to the subjects, he hath a property in the soil. *2 Rol. Abr. 170.*

But if a river, in which there is no tide, should leave its bed, it belongs to the owners on both sides; for they have in that case the property of the soil; this being no original part or appendix to the sea, but distributed out as other lands. *2 Rol. Abr. 170.*

If land be drowned, and so continue for years; if it be after regained, every owner shall have his interest again, if it can be known by the boundaries. *8 Co. Sir Francis Barrington's case.*

It is said, that there is a custom in Lincolnshire, that the lord of the manor shall have derelict lands; and that as such it is a reasonable custom; for if the sea wash away the lands of the subject, he can have no recompence, unless he should be entitled to what he regains from the sea. — *Dicit.*

The King hath the *sovereign dominion* in all seas and great rivers, which is plain from *Selden's* account of the ancient Saxons, who dwelt very successfully in all naval affairs; therefore the territories of the English seas and rivers always resided in the King. *Seld. Mar. Cl. 251, &c.; 1 Rol. Abr. 168, 169; 1 Co. 141; 5 Co. 100.*

And as the King hath a prerogative in the seas, so hath he likewise a right to the fishery and to the soil; so that if a river as far as there is a flux of the sea leaves its channel, it belongs to the King. *Dyer, 326; 2 Rol. Abr. 170.*

Hence the Admiralty Court, which is a court for all maritime causes or matters arising on the high seas, is deemed the King's court, and its jurisdiction derived from him who protects his subjects from pirates, and provides for the security of trade and navigation. *4 Inst. 142; Molloy, 66.*

From the King's dominion over the sea it was holden, that the King, as protector and guardian of the seas, might, before any statute made for commissions of sewers, provide against inundations by lands, banks, &c. and that he had a prerogative herein as well as in defending his subjects from pirates, &c. *10 Co. 141.*

But notwithstanding the King's prerogative in seas and navigable rivers, yet it hath been always held, that a subject may fish in the sea: which being a matter of common right, and the means of livelihood, and for the good of the commonwealth, cannot be restrained by grant or prescription. *8 Edw. 4. 18, 19; Bro. Custom, 46; Fitz. Bar. 1 Mod. 105; 2 Salk. 637.*

Prima facie any subject has a right to take fish found on the sea shore between high and low water mark; but such general right may be abridged by the existence of an exclusive right in some individual. And the public have not any common law right of bathing in the sea; and, as incident to it, of crossing the sea shore on foot, or with bathing machines for that purpose. *Bagott v. Orr, 2 Bos. & P. 472; Blundell v. Catteral, 5 Barn. & A. 268.*

Also it is held, that every subject of common right may

fish with lawful nets, &c. in a navigable river as well as in the sea; and the King's grant cannot bar them thereof; but the crown only has a right to royal fish, and that the King only may grant. 6 *Mod.* 73; *Salk.* 357, *S. C. & S. P.* See title *Fish*, &c.

It is also said, that the King, as a perpetual sign and acknowledgment of his dominion of the seas, hath several creatures reserved to him under the denomination of royal creatures, as swans, sturgeons, and whales, all which are natives of seas and rivers. 7 *Co.* 16. See *post*, 4.

2. The law ascribes to the King the attributes of *sovereignty* or pre-eminence. See *Bract.* l. 1. c. 8. He is said to have *imperial dignity*, and in charters before the Conquest is frequently styled *Basileus* and *Imperator*; the titles respectively assumed by the emperors of the East and West. His realm is declared to be an *empire*, and his crown *imperial*, by many Acts of Parliament, particularly 24 *Hen.* 8. c. 12; 25 *Hen.* 8. c. 28; which at the same time declare the King to be the supreme head of the realm in matters both civil and ecclesiastical; and, of consequence, inferior to no man upon earth, dependent on no man, accountable to no man. See also 24 *G.* 2. c. 24; 5 *G.* 3. c. 27.

No King of England used any seal of arms till the reign of Richard I. Before that time, the seal was the King sitting in a chair of state on one side of the seal, and on horseback on the other side; but this King sealed with a seal of two lions; and King John was the first that bore three lions; and afterwards Edward III. quartered the arms of France, which was continued until the Union between Great Britain and Ireland. King Henry VIII. was the first to whom Majesty was attributed; before which, our Kings were called Highness, &c. *Lex Constitut.* 47, 48.

The meaning of the legislature when it uses these terms of *empire* and *imperial*, and applies them to the realm and crown of England, is only to assert that our King is equally sovereign and independent within these his dominions, as any emperor is in his empire, and owes no kind of subjection to any other potentate upon earth.

Hence it is, that no suit or action can be brought against the King, even in civil matters, because no court can have jurisdiction over him. All jurisdiction implies superiority of power; authority to try would be van and idle without authority to redress; and the sentence of a court would be contemptible unless that court had power to command the execution of it; but who, says *Finch*, shall command the King? *Finch*, l. 83. Hence it is likewise, that *by law the person of the King is sacred*, even though the measures pursued in his reign be completely tyrannical and arbitrary; for no jurisdiction upon earth has power to try him in a criminal way, much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the Pope, the independence of the kingdom would be no more; and if such a power were vested in any domestic tribunal, there would soon be an end to the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

Are then, it may be asked, the subjects of England totally destitute of remedy in case the crown should invade their rights, either by private injuries or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

As to private injuries, if any person has, in point of property, a just demand upon the King, he must petition him in his Court of Chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion. *Finch*, l. 255. See this Dictionary, title *Chancery*; and *post*, as to the perfection ascribed to the King.

As to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law has also assigned a remedy. For as a King cannot misuse his powers without the advice of evil counsellors, and the assistance of wicked

ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the law of the land. But at the same time it is a maxim in those laws, that the King himself can do no wrong; since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.

As to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, these are cases which the law will not, out of decency, suppose; being incapable of distrusting those whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable. For, wherever the law expresses its distrust or abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the very idea of sovereignty. If therefore (for example) the two Houses of Parliament, or either of them, had avowedly a right to animadvert on the King, or each other, or if the King had a right to animadvert on either of the Houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be overturned; and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of law therefore is, that neither the King, nor either House of Parliament (collectively taken) is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any adequate remedy. For which reason all oppressions, which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule or express legal provision; but if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

Indeed, it is found by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides, and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity, nor will sacrifice their liberty by a scrupulous adherence to those political maxims which were originally established to preserve it. And, therefore, though the positive laws are silent, experience furnishes us with a very remarkable case, wherein nature and reason prevailed. When King James II. invaded the fundamental constitution of the realm, the Convention Parliament declared an abdication, whereby the throne was considered vacant, which induced a new settlement of the crown. And so far as this precedent leads, and no further, we may now be allowed to lay down the law of redress against public oppression. If, therefore, any future prince should endeavour to subvert the constitution by breaking the original contract between King and people, should violate the fundamental laws, and should withdraw himself out of the kingdom, we are now authorized to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. In these, therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.

It may not be amiss to conclude this part of the subject with observing, that all persons born in any part of the King's dominions, and within his protection, are his subjects; thus are those born in Ireland, Scotland, Wales, the King's plantations, or on the English seas; who by their birth owe such an inseparable allegiance to the King, that they cannot by any act of theirs renounce or transfer their subjection to any foreign prince. 7 *Co.* 1, &c.; *Calvin's case*; *Molloy*, 370;

Co. Lit. 129; *Dyer*, 500. See titles *Aliens*, *Allegiance*, *Treason*.

Besides the attribute of sovereignty, the law also ascribes to the King, in his political capacity, absolute *perfection*. The King can do no wrong. Which ancient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the King, nor is he answerable for it personally to his people. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice. *Plowd.* 487.

Or perhaps it means that, although the King is subject to the passions and infirmities of other men, the constitution has prescribed no mode by which he can be made personally amenable for any wrong that he may actually commit. The law will therefore presume no wrong where it has provided no remedy. The *inviolability of the King* is essentially necessary to the free exercise of those high prerogatives which are vested in him, not for his own private splendor and gratification, as the vulgar and ignorant are too apt to imagine, but for the security and preservation of the real happiness and liberty of his subjects.

The King moreover is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing; in him is no folly or weakness. If, therefore, the crown should be induced to grant any franchise or privilege to a subject, contrary to reason, or any way prejudicial to the commonwealth, or a private person, the law will not suppose the King to have meant either an unwise or an injurious action; but declares that the King *was deceived* in his grant; and, therefore, such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents whom the crown has thought proper to employ. See title *Grants of the King*. But a latitude of supposing a possibility of some failure of this personal perfection is allowed in the case of inquiries frequently instituted by Parliament, even as to those acts of royalty which are most properly and personally the King's own; but which are to be conducted in those assemblies with the decency and respect due to the kingly character. See further *Parliament*.

The following is a concise statement of the remedies for the various injuries which may proceed from, and also for those which may affect, the rights of the crown.

The distance between the sovereign and his subjects is such, that it can rarely happen that any *personal* injury can immediately and directly proceed from the prince to any private man; and as it can so seldom happen, the law in decency supposes that it never can or will happen at all. But injuries to the rights of *property* can scarcely be committed by the crown, without the intervention of its officers, against whom the law furnishes various methods of detecting their errors or misconduct.

The common law methods of obtaining possession or restitution from the crown of either real or personal property are, by *petition of right*, (already alluded to above,) or *monstrans de droit*, manifestation or plea of right; as to both which see title *Monstrans de Droit*.

The methods of redressing such injuries as the crown may receive from a subject are, either by such usual common-law actions as are consistent with the royal prerogative and dignity; or by such prerogative modes of process as are peculiarly confined to the crown. As the King, by reason of his legal ubiquity, cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff, such as an *assise* or *ejectment*. *Bro. Ab.* 1; *Prerogative*, 89. But he may bring a *quare impedit*, which always supposes the plaintiff to be seised or possessed of the advowson;

and he may prosecute this writ like every other by him brought, as well in the Court of King's Bench as of Common Pleas, or in whatever court he pleases. *F. N. B.* 32; 3 *Comm.* c. 17. So too he may bring an action of *trespass* for taking away his goods; but such actions (of trespass) are not usual, though in strictness maintainable for breaking his close or other injury done upon his soil and possession. *Bro. Ab.* 1; *Prerogative*, 130; *F. N. B.* 90; *Y. B.* 4 H. 4, 4.

Much easier and more effectual remedies are, however, usually obtained by prerogative modes of process. Such is that of *inquisition* or inquest of office, as to which see title *Inquest*. Where the crown hath unadvisedly granted any thing by letters patent which ought not to be granted, or where the patentee hath done any act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of *scire facias* in Chancery. See *Dyer*, 198; 3 *Lev.* 220; 4 *Inst.* 88. So also, if upon office untruly found for the King, he grants the land over to another, he who is grieved thereby, and traverses the office itself, is entitled before issue joined, to a *scire facias* against the patentee in order to avoid the grant. *Bro. Ab.* 1; *Scire Facias*, 69, 185. See title *Scire Facias*. An *information* on behalf of the crown is a method of suit for recovering money, or obtaining damages for any personal wrong to the lands or possessions of the crown; as to which see title *Information*. A writ of *quo warranto* is in the nature of a writ of right for the King against any person claiming or usurping any office, franchise, or liberty, to inquire *by what authority* he supports his claim, in order to determine the right. *Finch*, l. 322; 2 *Inst.* 282. See title *Quo Warranto*. And something of the same nature is the writ of *mandamus*, as to which see titles *Corporation*, *Mandamus*.

The law also determines that in the King can be no negligence or laches, and therefore no delay will bar his right. *Nullum tempus occurrit Regi* has been the standing maxim upon all occasions; for the law intends that the King is always busied for the public good, and therefore has not leisure to assert his right within the times limited to his subjects. *Finch*, l. 82; *Co. Litt.* 90. This maxim applies also to criminal prosecutions which are brought in the name of the King; and therefore by the common law there is no limitation in treasons, felonies, or misdemeanors. By stat. 7 W. 3. c. 7. an indictment for treason, except for an attempt to assassinate the King, must be found within three years after the commission of the treasonable act. See title *Treason*. But where the legislature has affixed no limit, *nullum tempus occurrit Regi* holds true; thus a man may be convicted of murder at any distance of time within his life after the commission of the crime. This maxim obtains still in full force in Ireland. 1 *Ld. Mountm.* 365.

In civil actions relating to landed property, by stat. 9 G. 3. c. 16. commonly called the *Nullum Tempus* Act, the King, like a subject, is limited (in respect to claims in Great Britain) to sixty years. For the occasion of passing this act, see *Belsham's Memoirs of George III.* sub. an. 1768. See also the *stats.* 21 Jac. 1. c. 23; 11 G. 3. c. 4. The provisions of the 9 G. 3. c. 16. were extended to Ireland by the 19 G. 3. c. 47.

The King is also expressly bound by two of the recent statutes of limitations, viz. the 2 & 3 W. 4. c. 100. for shortening the time in claims of *modus decimandi*; and the 2 & 3 W. 4. c. 71. for shortening the time of prescription in certain cases. See further *Modus*, *Tithes*, and the various titles relative to incorporeal hereditaments.

In the King also can be no *stain* or *corruption of blood*; for if the heir to the crown were attainted of treason or felony, and afterwards the crown should descend to him, this would purge the attainer *ipso facto*. *Finch*, l. 82; *Rot. Parl.* 1 R. 3.

Neither can the King, in judgment of law, as King, ever be a *minor* or under age; and therefore his royal grants and

assents to acts of parliament are good, though he has not in his natural capacity attained the age of twenty-one. *Co. Litt.* 43; 2 *Inst. Præm.* 9. Indeed by stat. 28 *H. 8. c. 17.* power was given to future Kings to rescind and revoke all acts of parliament that should be made while they were under the age of twenty-four; but this was repealed by stat. 1 *Edw. 6. c. 11.* so far as related to that prince; and both statutes are declared by stat. 24 *G. 2. c. 24.* to be determined. It hath also been usually thought prudent, when the heir-apparent has been very young, to appoint a protector, GUARDIAN, or REGENT for a limited time; but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the King is no minority, and therefore he hath no legal guardian.

The methods of appointing a GUARDIAN or REGENT, in case of an infant-heir to the crown, have been so various, and the duration of his power so uncertain, that from hence alone it may be collected that his office is unknown to the common law; and therefore the surest way is to have him made by authority of the great council in parliament. 4 *Inst.* 58. The stats. 24 *H. 3. c. 12*; 28 *H. 8. c. 7.* [q. 177] provided, that the successor, if a male, and under eighteen, or a female, and under sixteen, should be till such age in the government of his or her natural mother, (if approved by the King,) and such other counsellors as his majesty should by will or otherwise appoint; and he accordingly appointed his sixteen executors to have the government of his son Edward VI. and the kingdom, which executors elected the Earl of Hertford protector. The stat. 24 *G. 2. c. 24.* in case the crown should descend to any of the children of Frederic, then late Prince of Wales, under the age of eighteen, appointed the princess dowager; and the stat. 5 *G. 3. c. 27.* in case of a like descent to any of the children of King George III. empowered the King to name either the queen, the princess dowager, or any descendant of King George II. residing in this kingdom, to be guardian and regent, till the successor attained such age, assisted by a council of regency, the powers of them all being expressly defined and set down in the several acts. See ante, II.

By the statute 1 *W. 4. c. 2.* "to provide for the administration of the government in case the crown should descend to the Princess Alexandrina Victoria when under the age of eighteen," her mother, the Duchess of Kent, (widow of the deceased Duke of Kent, the fourth son of King George III.) was appointed her guardian, with authority, in the name of the princess and in her stead, under the style and title of regent, to exercise the royal power during such minority, in case the King, William IV. should die without issue; with a proviso, that if any child of his should be born after his decease, all the powers of the act should cease and determine, § 1. If on the demise of the crown there should not be any child living born of his queen, the privy council are directed to cause the princess to be proclaimed as sovereign, but subject to and saving the rights of any issue of King William IV. which might be afterwards born; and such reservation was also to be added to the oath of allegiance till parliament should otherwise order, § 2. If at the death of King William IV. no child of his should be living, but a child should be afterwards born, his Queen is to be guardian of the child, and regent until the child shall be eighteen, § 3. Such child shall be proclaimed King or Queen, § 4. In case of the birth of such posthumous child, parliament shall meet forthwith, and the laws regarding parliament and all offices, &c. shall apply as on a demise of the crown, § 5. All acts of royal power exercised during the regency otherwise than according to the direction of this act declared void, § 6. Oath of regent to be administered by and taken before the privy council, § 7. The regent on taking the oath "shall make, subscribe, and audibly repeat," the declaration against Popery required by the 30 *Car. 2. st. 2.* and produce a certificate of having taken the sacrament, § 8. The King or

Queen under age prohibited from marrying without the consent of the regent, § 9. Regent disabled from giving royal assent to any bill for changing the order of succession to the crown contrary to act, 1 *W. 3. c. 2*; or for altering the English act, 13 & 14 *Car. 2. c. 4*; or the Scotch act, 1702, c. 3. for securing the Protestant religion, § 10. If the Duchess of Kent shall during his Majesty's lifetime, without his consent, or after his death if any such regent shall marry a Roman Catholic, or a foreigner, without consent of parliament, or shall cease to reside in the United Kingdom, she shall cease to be regent, § 11. In case of the decease of the Queen of William IV. and his subsequent marriage, the act shall determine, § 12.

As to the mode of proceeding in appointing a *custos* or guardian of the realm, and executing the sovereign authority in case of a demise of the crown, while the successor is in foreign parts, see *Macpherson's Original Papers*, containing the secret history of Great Britain, from the Restoration to the accession of the House of Hanover, 4to. 1776, vol. ii. p. 475, &c.; a paper from the minister of the Elector of Hanover, asking the opinion of his friends in England concerning the measures to be taken in the event of Queen Anne's death; and p. 481, &c. a letter from the Earl of Sunderland to the Elector's minister at the Hague, inclosing an answer to the minister's inquiries, and the powers of commissioners necessary on such an occasion.

Upon King George III.'s illness in 1811, the act 51 *G. 3. c. 1.* was passed to provide for the administration of the royal authority, and the care of his Majesty's person during the continuance of such illness. By this act the Prince of Wales was appointed "REGENT of the United Kingdom of Great Britain and Ireland," under certain restrictions, many of which were afterwards removed. The other acts passed for regulating the regency were 52 *G. 3. c. 6, 7*; 53 *G. 3. c. 14*; and 55 *G. 3. c. 16*.

From the maxim that the King, as King, cannot be a minor, grants, leases, &c. made by him, though under age, bind presently, and cannot be avoided by him either during his minority, or when he comes of age: for it is a maxim of politics, that he who is to govern the kingdom should never be considered as incapable, from minority, of governing his own affairs. *Dy. 209. pl. 22*; *Plond. 289*; *Co. Lit. 43*; 5 *Co. 27*; *Raym. 90*.

The law ascribes to the King's Majesty, in his political capacity, an absolute immortality. The King never dies. Henry, Edward, or George may die, but the King survives them all: for immediately upon the decease of the reigning prince, in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir, who is *eo instanti* King to all intents and purposes: and so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his *demise*, *demissus regis vel coronæ*, an expression signifying merely a transfer of property. By the term *demise of the crown*, therefore, is understood, that in consequence of the disunion of the King's natural body from the body politic, the kingdom is transferred or demised to his successor, and so the royal dignity remains perpetual. *Plond. 177, 234*. Thus, too, when Edward IV. in the 10th year of his reign, was driven from his throne for a few months by the house of Lancaster, this temporary transfer of his dignity was denominated his *demise*; and all process was held to be discontinued, as it then was upon the natural death of the King. *M. 49 H. 6. pl. 1—8*.

King Henry II. took his son into a kind of subordinate regality with him, so that there were *Reg. Pater* and *Rex Filius*: but he did not divest himself of his sovereignty, but reserved to himself the homage of his subjects. And notwithstanding this King, by consent of parliament, created his son John King of Ireland; and King Richard II. made Robert de Vere Duke of Ireland; and Edward III. made

his eldest son Lord of Ireland, with royal dominion; yet it has been expressly held, that the King cannot regularly make a King within his own kingdom. *4 Inst.* 357, 360. Henry de Beauchamp, Earl of Warwick, was by King Henry VI. crowned King of Wight Island; but it was resolved that this could not be done without consent of parliament; and even then our greatest men have been of opinion that the King could not by law create a King in his own kingdom, because there cannot be two kings of the same place: and afterwards the same King Henry made the same Earl of Warwick *Primus Comes totius Angliæ*. *Hal. Hist. Coron.*

A King cannot resign or dismiss himself of his office of King without consent of parliament; nor could Henry II. without such consent divide the sovereignty: there is a sacred bond between the King and his kingdom that cannot be dissolved without the free and mutual consent of both in Parliament; and though in foreign kingdoms there have been instances of voluntary cessions and resignations, which possibly may be warranted by their several constitutions, yet by the laws of England, the King cannot resign his sovereignty without his Parliament. *Hale's H. Cor.*

3. In the exercise of those branches of the royal prerogative which invest this our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers, consists the executive part of the government. This is wisely placed in a single hand by the British Constitution, for the sake of unanimity, strength, and dispatch. The King of England is therefore not only the *chief*, but properly the *sole magistrate* of the nation; all others acting by commission from and in due subordination to him.

In the exertion of lawful prerogative, the King is and ought to be absolute, that is, so far absolute that there is no legal authority that can either delay or resist him. He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases, unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary, declaring that thus far the prerogative shall go, and no farther. For otherwise the power of the crown would indeed be but a name and a shadow, insufficient for the ends of government, if, where its jurisdiction is clearly established and allowed, any man, or body of men, were permitted to disobey it in the ordinary course of law. It is not now meant to speak of those extraordinary resources to first principles which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression: and yet the want of attending to this obvious distinction has occasioned these doctrines of absolute power in the prince, and of national resistance by the people, to be much misunderstood and perverted by the advocates for slavery on the one hand, and the demagogues of faction on the other. Civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society. Society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey.

In the exertion, therefore, of these prerogatives, which the law has given him, the King is irresistible and absolute, according to the forms of the constitution; and yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the parliament will call his advisers to a just and severe account. Thus the King may make a treaty with a foreign state, which shall irrevocably bind the nation; and yet, when such treaties have been judged pernicious, impeachments have pursued those ministers by whose agency or advice they were concluded.

With regard to foreign concerns, the King is the delegate or representative of his people. It is impossible that the

individuals of a state, in their collective capacity, can transact the affairs of that state with any other community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the King, therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates, who would scruple to enter into any engagement that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the King's concurrence is the act only of private men: and so far is this point carried by our law, that it hath been held, that should all the subjects of England make war with a King in league with the King of England, without the royal assent, such war is no breach of the league. *4 Inst.* 152. And by the *2 H. 5. c. 6.* any subject committing acts of hostility upon any nation in league with the King, was declared to be guilty of high treason; and though that act was repealed by the *20 H. 6. c. 11.* so far as relates to making this offence high treason, yet still it remains a very great offence against the law of nations, and punishable by our laws, either capitally or otherwise, according to the circumstances of the case.

The King, therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home. How far the municipal laws of England intermeddle with or protect the right of these messengers from one potentate to another, may be seen in this Dict. tit. *Ambassadors*, and more fully, *1 Comm. c. 7.*

It is also the King's prerogative to make treaties, leagues, and alliances with foreign states and princes: for it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power; and then it is binding upon the whole community: and in England the sovereign power, *quoad hoc*, is vested in the person of the King. Whatever contracts, therefore, he engages in, no power in the kingdom can legally delay, resist, or annul. Although, lest this plenitude of authority should be abused to the detriment of the public, the constitution (as has been already hinted) hath here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives, advise or conclude any treaty which shall afterwards be judged to derogate from the honour and interest of the nation.

Upon the same principle, the King has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power. *Puff. b. 8. c. 9. § 6.* This right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him, against his will, in a state of war. Whatever hostilities, therefore, may be committed by private citizens, the state ought not to be affected thereby, unless that should justify their proceeding, and thereby become partner in the guilt. Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers. In order to make a war completely effectual, it is necessary with us in England that it be publicly [actually or virtually] declared and duly proclaimed by the King's authority; and then all parts of both contending nations, from the highest to the lowest are bound by it. And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of parliamentary impeachment, for improper or in-

glorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative.

The power of making war or peace is enumerated by Lord Hale *inter jura summi imperii*, and in England is lodged singly in the King; though, says he, it ever succeeds best when done by parliamentary advice. 1 *Hale's Hist. P. C.* 159; 7 *Co.* 25.

A general war, according to the same writer, is of two kinds, 1. *Bellum solemniter denunciatum*. 2. *Bellum non solemniter denunciatum*. The first is, When war is solemnly declared or proclaimed by our King against another prince or state, which is the most formal solemnity of a war now in use. 2dly, When a nation slips suddenly into a war without any solemnity, which happens by granting letters of marque, by a foreign prince invading our coasts, or setting on the King's navy at sea; and hereupon a real, though not a solemn, war may arise and hath formerly arisen; therefore to prove a nation to be at enmity with England, or to prove a person to be an alien enemy, there is no necessity of showing any war proclaimed; but it may be averred, and so put upon the trial of the country, whether there was a war or not. 1 *Hale's Hist. P. C.* 163. See further also as connected with this subject, titles *Letters of Marque*; *Safe Conduct*.

In all these prerogatives of the King respecting this nation's intercourse with foreign nations, he is considered as the delegate or representative of his people: but in domestic affairs, he is considered in a great variety of characters, and from thence there arises an abundant number of other prerogatives.

First, He is a constituent part of the supreme legislative power, and as such has the prerogative of rejecting such provisions in parliament, as he judges improper to be passed. The expediency of which constitution is evinced at large under tit. *Parliament*. It may here be added, that the King is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised (any person or persons, bodies politic or corporate, &c.) affect not him in the least, if they may tend to restrain or diminish any of his rights or interests. 11 *Rep.* 74. Yet where an act of parliament is expressly made for the preservation of public rights, and suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the King as the subject. 11 *Rep.* 71. The King may likewise take the benefit of any particular act, though he be not especially named. 7 *Rep.* 32.

The King is considered, in the next place, as the generalissimo, or the first in military command, within the kingdom.

In this capacity of General of the Kingdom, the King has the sole power of raising and regulating fleets and armies. Of the manner in which they are raised and regulated, more is said in other places. We are now only to consider the prerogative of enlisting and governing them, which indeed was disputed and claimed, contrary to all reason and precedent, by the Long Parliament of King Charles I.; but, upon the restoration of his son, was solemnly declared by the 13 *Car.* 2. c. 6. to be in the King alone; for that the sole supreme government and command of the militia within all his Majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, ever was and is the undoubted right of his Majesty, and his royal predecessors, Kings and Queens of England; and that both or either house of parliament cannot nor ought to pretend to the same. See title *Militia*.

This statute, it is obvious to observe, extends not only to fleets and armies, but also to forts and other places of strength within the realm, the sole prerogative as well of erecting, as manning and governing of which belongs to the King in his capacity of general of the kingdom. 2 *Inst.* 30.

And all lands were formerly subject to a tax for building of castles wherever the King thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted; and therefore called by our Saxon ancestors the *trinoda necessitas*, viz. *pontis reparatio, arvis constructio, and expeditio contra hostem*. *Conell's Inter. tit. Castellorum operatio*. *Seld. Jun. Angl.* 1, 42. See title *Castles, Forts, &c.*

It is partly upon the same, and partly upon a fiscal foundation, to secure his marine revenue, that the King has the prerogative of appointing ports and havens, or such places only, for persons and merchandize to pass into and out of the realm, as he in his wisdom sees proper. See title *Harbours and Havens*; and to this head may be referred also the prerogative as to the erection of beacons and lighthouses; as to which see 4 *Inst.* 148; 12 *Co.* 13; *Carter*, 90; 2 *Keb.* 114; 3 *Inst.* 204; and title *Beacons*.

To this branch of the prerogative may also be referred the power which has been vested in the King, from time to time, by various acts, and by the recent statute 8 & 4 *W.* 4. c. 52, of allowing or prohibiting the importation or exportation of arms, gunpowder, military stores, &c.; and likewise the right which the King has, wherever he sees proper, of confining his subjects to stay within the realm, or of recalling them when beyond the seas.

By the common law, every subject may go out of the kingdom for merchandize or travel, or other cause, as he pleases, without any licence for that purpose; this appears from the statute 5 *R.* 2. c. 2. made to restrain persons passing out of the realm, but excepts lords, great men, and notable merchants; as also by the statute 26 *H.* 8. c. 10. which gave power to the King, during his life, to restrain persons from trading to certain countries; which acts had been vain and idle if the King, by his prerogative, might have done it. *F. N. B.* 85; *Dyer*, 165, 296; 2 *Rol. Rep.* 12; 3 *Mod.* 131; *Stil.* 442.

But notwithstanding this general liberty allowed by the common law, it appears plainly that the King by his prerogative, and without any help of an act of parliament, may prohibit his subjects from going out of the realm; but this must be by some express prohibition; as by laying on embargos, which can be only done in time of danger, or by writ of *ne exeat regno*, which, from the words *quamplurima nobis & coronæ nostræ præjudicialia ibidem prosequi intendis*, appears to be a state writ, though it is never granted universally, but to restrain a particular person, on oath made, that he intends to go out of the realm; indeed, *Fitzherbert* says, that the King may restrain his subjects by proclamations, and assigns as a reason for it, that the King may not know where to find his subject, so as to direct a writ to him. 12 *Co.* 33; 11 *Co.* 92; *Fitz. N. B.* 89; 2 *Inst.* 54. See title *Embargo, Ne exeat Regno*.

As the King may restrain any of his subjects from going abroad, in like manner he may command them to return home; and disobeying a privy seal for this purpose is the highest contempt. 1st, It is a disobedience to the command of the King himself, directed to the party. 2dly, The command is, that he shall return upon his faith and allegiance, which is the strongest compulsion that can be used. 3dly, The thing required by the King is the principal duty of a subject, viz. to be at the service of his King and country. *Dyer*, 128 b; *Lane*, 44; *Moor*, 109; 3 *Inst.* 179.

The punishment for this offence is seizing the party's estate till he return; and of this there are many instances in our books; and when he does return he shall be fined. 1 *Hank. P. C.* c. 22. § 4.

William de Brittain, in the 19th of *Edm.* 2. refusing to return on the King's writ, his goods and chattels, lands and tenements, were seized into the King's hands; so in the case of Edward of Woodstock, Earl of Kent, in the same reign. *Dyer*, 128 b.

So in the case of one Bartue, who married the Duchess of Suffolk, they obtained a licence from Queen Mary to go out of the realm, under pretence of recovering debts as executors to the duke; when in reality it was on account of the religion established by Queen Mary, and living with other fugitives under the protection of the Palsgrave of the Rhine, in Germany, who was an eminent Calvinist, were sent to by privy seal, but the messenger, in endeavouring to serve them with his letters, being obstructed and abused by their attendants, a certificate was made of this, and their lands and tenements seized. *Dyer*, 176; *Jenk. Cent.* 220.

So in the case of Sir Francis Englefield, who departed the kingdom on a licence obtained for three years, but not returning at the expiration of the three years, a privy seal was sent to him by Queen Elizabeth, which he not obeying, and this matter being certified into Chancery by the queen, under her sign manual, his lands and tenements were seized in the fifth year of her reign, by virtue of a commission under the great seal. 1 *Leon.* 9; *Moor*, 109; 1 *And.* 95, *S. C.* See also 7 *Co.* 18; *Poph.* 18; 4 *Leon.* 135.

So in the case of Sir Robert Dudley, who intending to travel, obtained a licence from James the First to go to Venice; but before his departure, he, by indenture inrolled, for valuable consideration, as was expressed in the deed, (but none paid, conveyed the manor of Killingworth, with other lands, to the Earl of Nottingham and others, in fee, with a proviso, that on tender of an angel of gold, all should be void; and with a covenant on the part of the bargainees, that they should make all such estates as the said Sir Robert should appoint; the bargainees were not parties to the deed, nor had they notice of it till some time after; but afterwards they made a lease to Sir Robert Lee, to the intent that Lady Dudley should take the profits of part of the premises for ten years, if their estate continued so long unrevoked. The King hearing that Sir Robert had been guilty of some bad practices beyond sea, in the fifth year of his reign, sent his privy seal to him, which he not obeying, the great question in this case was, whether those lands thus conveyed were forfeited; and adjudged that they were, the conveyance being fraudulent as to the King. *Lane*, 42, &c.

In these cases it hath been held, that the King hath only an interest in the offender's lands till he return; and that his restoring them is not a matter of grace but of right. *Lanc.* 48.

The King is also considered as the fountain of justice, and general conservator of the peace of the kingdom. All jurisdiction exercised in these kingdoms, that are in obedience to our King, is derived from the crown; and the laws, whether of a temporal, ecclesiastical, or military nature, are called his laws; and it is his prerogative to take care of the due execution of them. Hence it is that all judges derive their authority from the crown, by some commission warranted by law. *Fleta*, c. 17; *Co. Lit.* 99 a, 144; see title *Judges*.

From the inherent right inseparable from the King to distribute justice among his subjects, it hath been held that an appeal from the Isle of Man lies to the King in council, without any reservation in the grant of the Isle of Man of any such right; and though there had been exclusive words, yet the grant must have been construed to be void on the King's being deceived, rather than the subject should be deprived of a right inseparable to him as a subject, of applying to the crown for justice. 1 *P. Wms.* 329.

A consequence of this prerogative is the legal ubiquity of the King; his Majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice. *Fortesc.* c. 8; 2 *Inst.* 186. His judges are a mirror by which the King's image is reflected. It is the regal office, and not the royal person, that is always present in court, always ready to undertake prosecutions or pronounce judgment for the benefit and protection of the subject; and from this ubiquity it follows, that the King can never be

nonsuit; for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court; but the attorney-general may enter a *non vult prosequi*, which has the effect of a nonsuit. *Co. Lit.* 199. For the same reason, also, in the forms of legal proceedings, the King is not said to appear by his attorney, as other men do; for in contemplation of law he is always present in court. *Finch*, L. 81.

From the same original, of the King's being the fountain of justice, may also be deduced the prerogative of issuing proclamations, which is vested in the King alone. These proclamations have then a binding force, when they are grounded upon and enforce the laws of the realm. 3 *Inst.* 162. For though the making of laws is entirely the work of a distinct part, the legislative branch of the sovereign power; yet the manner, time, and circumstances of putting these laws in execution, must frequently be left to the discretion of the executive magistrate; and therefore his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject where they do not either contradict the old laws, or tend to establish new ones, but only enforce the execution of such laws as are already in being, in such manner as the King shall judge necessary. Thus the established law is, that the King may prohibit any of his subjects from leaving the realm: a proclamation, therefore, forbidding this, in general, for three weeks, by laying an embargo upon all shipping in time of war, will be equally binding as an act of parliament, because founded upon a prior law. 4 *Mod.* 177, 179.

But a proclamation to lay an embargo in time of peace upon all vessels laden with wheat (though in time of a public scarcity,) being contrary to law, and particularly to a statute then in force (22 *C. 2.* c. 13.) the advisers of such a proclamation, and all persons acting under it, always found it necessary to be indemnified by special acts of parliament. See stats. 7 *G. 3.* c. 7; 30 *G. 3.* c. 1; and title *Embargo*.

By the stat. 31 *H. 8.* c. 8. it was enacted that the King's proclamations should have the force of acts of parliament; a statute, which was calculated to introduce the most despotic tyranny, and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after, by stat. 1 *Edm. 6.* c. 12. It was anciently held, though that is not now law, that the King might suspend, *dispense* with, or alter any particular law that he deemed hurtful to the public; and it has been said, that he may dispense with a penal statute wherein his subjects have not any interest. 4 *Inst.* 7; 4 *Rep.* 36; but by stat. 1 *W. & M. st. 2.* c. 2. it is declared and enacted, "that no dispensation by *non obstante* of or to any statute, or any part thereof, be allowed, but that the same shall be held void and of none effect, except a dispensation be allowed in such statute." It is plain, however, that the King, by his prerogative, may in certain cases and on special occasions, issue proclamations for prevention of offences, to ratify and confirm an ancient law, or, as some books express it, *quod terrorem populi*, to admonish them that they keep the laws on pain of his displeasure; and such proclamations being grounded on the laws of the realm, are of great force. *Fortesc. de Laud.* c. 9; 11 *Co.* 87; 12 *Co.* 74, 75; *Dal.* 20, pl. 10; 2 *Rol. Abr.* 209; 3 *Inst.* 162.

It is likewise clear, that the subject is obliged, on pain of fine and imprisonment, to obey every proclamation legally made, and though the thing prohibited were an offence before, that yet the proclamation is a circumstance which highly aggravates it, and on which alone the party disobeying may be punished. 12 *Co.* 74; *Hob.* 251. It is clearly agreed, that no private person can make any proclamation of a public nature, except by custom, as is usual in some cities and boroughs; this being a prerogative act, with which alone the King is intrusted. *Bro. Procl.* pl. 1; 12 *Co.* 75; *Crom. Juris.* 41.

But, according to the principles already laid down, the

King, by his proclamation, cannot change any part of the common law, statutes, or customs of this realm; nor can he by his proclamation create any offence which was not an offence before. 11 Co. 87 b; 12 Co. 75.

On this foundation it hath been held that the King's proclamation prohibiting the importation of wines from France, on pain of forfeiture, was against law, and void; there being at that time no war subsisting between the nations. 2 Inst. 63.

So where an act was made by which foreigners were licensed to merchandize within London; and Henry IV. by proclamation, prohibited the execution of it, and ordered it should be in suspense *usque ad proximum parlamentum*; and this was held to be against law. 12 Co. 75.

On a conference between some lords of the privy council, and the two chief justices (of which Lord Coke was one,) and chief baron and baron Altham, the question was,

1st, Whether the King by proclamation might prohibit new buildings in and about London?

2d, If the King might prohibit the making starch of wheat?

And the judges were of opinion that the subject could not be restrained in these particulars by the King's proclamation. 12 Co. 74.

The King, by proclamation, may call or dissolve parliament, and declare war or peace; for these are prerogative acts with which he is intrusted, as the executive part of the law; but if there be an actual war, it is not necessary in pleading to shew that such war was proclaimed. 3 Inst. 162; 1 Hal. H. P. C. 163; Owen, 45; Rast. Ent. 605; see ante.

The King, by proclamation, may legitimate foreign coin, and make it current money of this kingdom, according to the value imposed by such proclamation; he may legitimate base coin, or mixed below the standard of sterling; he may enhance coin to a higher denomination or value, and may devalue money that is current in use and payment; and in all these cases a proclamation, with a *proclamation writ* under the great seal, is necessary. Co. Lit. 207 b; 5 Co. 114 b; Dar. 21; 1 Hal. H. P. C. 192, 197; see title Coin.

The King, by proclamation, may appoint fasts and days of thanksgiving and humiliation, and issue proclamations for preventing and punishing immorality and profaneness, and enjoin reading the same in churches and chapels. Comp. Incumb. 354.

A proclamation must be under the great seal, and if denied, is to be tried by the record thereof; but if a man pleads he was prevented doing a thing by proclamation, it seems the better opinion that he need not aver that such proclamation was under the great seal; for alleging that such proclamation was made, it shall be intended to have been duly made. Cro. Car. 180; see 1 Rol. Rep. 172; vide Cro. Car. 190.

The King is likewise the *fountain of honour*, of *office*, and of *privilege*; and this in a different sense from that wherein he is styled the fountain of justice; for here he is really the parent of them. It is impossible that government can be maintained without a due subordination of rank, that the people may know and distinguish such as are set over them, in order to yield them that due respect and obedience; and also that the officers themselves being encouraged by emulation, and the hopes of superiority, may the better discharge their functions; and the law supposes that no one can be so good a judge of their several merits and services, as the King himself who employs them. It has, therefore, intrusted with him the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such as deserve them. And, therefore, all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the crown, either expressed in writing by writs or letters-patent, as in the creation of peers and baronets; or by corporal investiture, as in the creation of a simple knight. See titles *Precedency*, *Peer*.

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From the same principle also arises the prerogative of *erecting and disposing of offices*; for honours and offices are in their nature convertible and synonymous. All officers under the crown carry in the eye of the law an honour along with them; because they imply a superiority of parts and abilities, being supposed to be always filled with those that are most able to execute them. And, on the other hand, all honours in their original had duties or offices annexed to them; an earl, *comes*, was the conservator or governor of a county; and knight, *miles*, was bound to attend the King in his wars. For the same reason, therefore, that honours are in the disposal of the King, offices ought to be so likewise; and as the King may create new titles, so may he create new offices; but with this restriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices, for this would be a tax upon the subject, which cannot be imposed but by act of parliament. 2 Inst. 533. Wherefore, in *H. 4.* a new office being created by the King's letters-patent for measuring cloths, with a new fee for the same, the letters-patent were, on account of the new fee, revoked and declared void in parliament.

On this subject it hath been further said, that the King, as the fountain of justice, hath an undoubted prerogative in creating officers, and all officers are said to derive their authority mediately or immediately from him; those who derive their authority from him are called the officers of the crown, and are created by letters-patent; such as the great officers of state, judges, &c.; and there needs no stronger evidence of a right in the crown herein, than that the King hath created all such officers time immemorial. Dyer, 176; 2 Rol. Abr. 152; 4 Co. 32; 2 Inst. 425, 540; 12 Co. 116; 1 Rol. Rep. 206; Show. Par. Ca. 111; 1 Lev. 219.

But though all such officers derive their authority from the crown, and from whence the King is termed the universal officer and disposer of justice; yet it hath been held, that he hath not the office in him to execute it himself, but is only to grant or nominate; nor can the King grant any new powers to such officers, but they must execute their offices according to the rules prescribed by law. Co. Lit. 3, 114; 2 Vent. 270; 4 Inst. 125; 6 Co. 11, 12.

Neither can the King create any new office inconsistent with our constitution or prejudicial to the subject. 2 Inst. 540; 2 Sid. 141; Moor, 808; 4 Inst. 200.

And on this foundation an office created by letters-patent for the sole making of all bills, informations and letters-missive in the council of York was unreasonable and void. 1 Jon. 231. See further title *Office*.

Upon the same, or a like reason, the King has also the prerogative of conferring privileges upon private persons, such as granting place or precedence to any of his subjects as shall seem good to his royal wisdom. 4 Inst. 361. See title *Precedence*. Or such as converting aliens, or persons born out of the King's dominions, into denizens, whereby some very considerable privileges of natural-born subjects are conferred upon them. See title *Aliens*. Such also is the prerogative of erecting corporations; which is grounded upon this foundation, that the King, having the sole administration of the government in his hands, is the best and the only judge in what capacities, with what privileges, and under what distinctions, his people are the best qualified to serve and act under him.

Another light in which the laws of England consider the King, with regard to domestic concerns, is as the arbiter of domestic commerce, by the establishment of *markets*, the regulating of *weights and measures*, and of the *coin*. See this Dictionary under those titles.

The King is, lastly, considered by the laws of England as the *head and supreme governor* of the national church.

To enter into the reasons upon which this prerogative is founded, is matter rather of divinity than law. [It shall only, therefore, be observed, that by stat. 26 H. 8. c. 1. (reciting

that the King's Majesty justly and rightfully is and ought to be the supreme head of the church of England, and so had been recognized by the clergy of this kingdom in their convocation,) it is enacted, that the King shall be reputed the only supreme head in earth of the church of England, and shall have annexed to the imperial crown of this realm, as well the title and style thereof, as all jurisdictions, authorities, and commodities, to the said dignity of supreme head of the church appertaining. And another statute to the same purport was made, 1 *Eliz. c. 1*. See titles *Oaths, Supremacy*.

In virtue of this authority the King convenes, prorogues, restrains, regulates, and dissolves, all ecclesiastical synods or convocations. This was an inherent prerogative of the crown long before the time of Henry VIII. as appears by the stat. 8 *H. 6. c. 1*. and the many authors, both lawyers and historians, vouched by Sir *E. Coke. 3 Inst. 322, 323; 5 Rep. 9*. So that the stat. 25 *H. 8. c. 19*. which restrains the convocation from making or putting in execution any canons repugnant to the King's prerogative, or the laws, customs, and statutes of the realm, was merely declaratory of the old common laws, 12 *Rep. 72*; that part of it only being new which made the King's royal assent actually necessary to the validity of every canon. See further titles *Bishop, Convocation*. As head of the church, the King is likewise the *dernier resort* in all ecclesiastical causes; an appeal lying ultimately to him in Chancery from the sentence of every ecclesiastical judge; which right was restored to the crown by stat. 25 *H. 8. c. 19*. See title *Courts Ecclesiastical*.

The Kings of England not having the whole legislative power, if the King and clergy make a canon, though it bind the clergy in *re ecclesiastica*, it does not bind laymen; for they are not represented in the convocation, but in Parliament. In the primitive church, the laity were present at all synods; and when the empire became Christian, no canon was made without the emperor's consent, and indeed the emperor's consent included that of the people, he having in himself the whole legislative power; but the kings of this kingdom have it not. 2 *Salk. 412, 678*. See title *Canon Law*.

4. The King's *fiscal prerogatives*, or those which regard his *revenue*, are such as the British constitution hath vested in the royal person, in order to support his dignity and maintain his power; being a portion which each subject contributes of his property, in order to secure the remainder.

This revenue is either ordinary or extraordinary. The King's ordinary revenue is such as has either subsisted time out of mind in the crown, or else has been granted by parliament, by way of purchase or exchange, for such of the King's inherent hereditary revenues as were found inconvenient to the subject.

It is not, however, to be understood, that the King is at present in the actual possession of the whole of this revenue. Much (nay, the greatest part,) of it is at this day in the hands of subjects; to whom it has been granted out from time to time by the Kings of England, which has rendered the crown, in some measure, dependent on the people for its ordinary support and subsistence. So that among the royal revenues are now reckoned, what lords of manors and other subjects frequently look upon to be their own absolute inherent rights, because they are, and have been, vested in them and their ancestors for ages, though in reality originally derived from the grants of our ancient princes. See 1 *Comm. c. 8*.

The King's *ordinary revenues* are stated by the learned commentator to arise from 1. The custody of the temporalities of *bishops*. 2. A corody from each bishopric. 3. The *tithe* in extra-parochial places. 4. *First-fruits* and *tithes* of all spiritual preferments. 5. The *demesne lands* of the crown. (See stats. 26 *G. 3. c. 37; 30 G. 3. c. 50*.) 6. Military *tenures*, *purveyance*, and pre-emption. 7. *Hinc licences*. 8. *Forest courts*. 9. *Fines* and *fees* in courts of

justice. 10. *Royal fish*. 11. *Shipwrecks*. 12. *Mines*. 13. *Treasure-trove*. 14. *Waifs*. 15. *Estrays*. 16. *Forfeitures* of lands and goods for offences; in which are included *deodands*. 17. *Escheats* of lands. 18. The custody of *idiots*. As to all which, see this Dictionary, under title *Taxes*, and the several other appropriate titles.

The *ordinary revenue*, or proper patrimony of the crown, was very large formerly, and capable of being increased to a magnitude truly formidable: for there are very few estates in the kingdom that have not, at some period of time or other since the Norman conquest, been vested in the hands of the King, by forfeiture, escheat, or otherwise. But fortunately for the liberty of the subject, this hereditary landed revenue, by a series of improvident management, is sunk almost to nothing; and the casual profits arising from the other branches of the *census regalis*, are likewise almost all of them alienated from the crown. In order to supply the deficiencies of which, we are now obliged to have recourse to new methods of raising money, unknown to our early ancestors; which methods constitute the King's *extraordinary revenue*. For the public patrimony being got into the hands of private subjects, it is but reasonable that private contributions should supply the public service. And, perhaps, if every gentleman in the kingdom was to be stripped of such of his lands as were formerly the property of the crown, was to be again subject to the inconveniences of purveyance and pre-emption, the oppression of forest laws, and the slavery of feudal tenures, and was to resign into the King's hands all his royal franchises of waifs, wrecks, estrays, treasure-trove, mines, deodands, forfeitures, and the like; he would find himself a greater loser than by paying his *quota* to such taxes as are necessary to the support of government. The thing, therefore, to be wished and aimed at in a land of liberty is *by no means the total abolition of taxes*, which would draw after it very pernicious consequences, and the very supposition of which is the height of political absurdity; but wisdom and moderation, not only in granting, but also in the method of raising, the necessary supplies; by contriving to do both in such a manner as may be most conducive to the national welfare, and at the same time most consistent with economy and the liberty of the subject; who, when properly taxed, contributes only some part of his property, in order to enjoy the rest. See further titles *Taxes, National Debt, Excise, Customs, &c.*

By these taxes a vast sum of money is annually raised; but the *civil list* is properly the whole of the King's revenue in his own distinct capacity; the rest being rather the revenue of the public, or its creditors, though collected and distributed again in the name and by the officers of the crown; it now standing in the same place as the hereditary income did formerly; and as that has gradually diminished, the parliamentary appointments have increased.

Formerly the expenses defrayed by the civil list were those that in any shape related to civil government; as the expenses of the royal household; the revenues allotted to the judges; all salaries to officers of state, and every of the King's servants; the appointments to foreign ambassadors; the maintenance of the Queen and royal family; the King's private expenses, or privy purse; and other very numerous outgoings, as secret-service money, pensions, and other bounties, which sometimes so far exceeded the revenues appointed for that purpose, that application was made to parliament to discharge the debts contracted on the civil list.

The whole revenue of Queen Elizabeth did not amount to more than 600,000*l.* a year; that of King Charles I. was 800,000*l.*; and the revenue voted for King Charles II. was 1,200,000*l.* though complaints were made (in the first years at least) that it did not amount to so much. The revenue of the Commonwealth between the time of Charles I. and Charles II. was upwards of 1,500,000*l.* A striking instance (says Mr. Christian in his note on this passage in the Com-

mentaries) to prove that the burthens of the people are not necessarily lightened by a change in the government.

Under the revenue of the civil lists above mentioned were included all manner of public expenses; among which Lord Clarendon, in his speech to the parliament, computed that the charge of the navy and land forces amounted annually to 800,000*l.* which was ten times more than before the former troubles. The same revenue, subject to the same charges, was settled on King James II. by stat. 1 Jac. 2. c. 1; but by the increase of trade and more frugal management, it amounted on an average to a million and a half *per annum*; besides other additional customs granted by parliaments, stat. 1 Jac. 2. c. 3, 4, which produced an annual revenue of 400,000*l.* out of which his fleet and army were maintained at the yearly expense of 1,100,000*l.* After the Revolution, when parliament took into its hands the annual support of the forces, both maritime and military, a civil list revenue was settled on the new King and Queen, amounting, with the hereditary duties, to 700,000*l. per annum*: and the same was continued to Queen Anne and King George I. That of King George II. was augmented to 800,000*l.* by stat. 1 G. 2. c. 2; and that of King George III. was from time to time settled and increased by several statutes; viz. 1 G. 3. c. 1. 800,000*l.*; 17 G. 3. c. 21. 100,000*l.*; and 44 G. 3. c. 80. 60,000*l.* more; and by 52 G. 3. c. 6. (amended by 55 G. 3. c. 15.) 70,000*l.* more during the King's indisposition. By the latter acts it was provided that an account of any accumulation of arrears should from time to time be laid before parliament. The civil list of King George IV. was settled by 1 G. 4. c. 1. at 850,000*l.* for England, and 207,000*l.* for Ireland.

His present Majesty having upon his accession placed his interest in the hereditary revenues of the crown, as well as in the funds, derivable from any droits of the crown or admiralty, from the West India duties, or from any casual revenue, either in his Majesty's foreign possessions or in the united kingdom, at the disposal of parliament, (which in former settlements of the civil list had been reserved to the crown,) by the 1 W. 4. sess. 2. c. 25. the clear yearly sum of 510,000*l.* is granted to his Majesty out of the consolidated fund, commencing from the death of George IV. and to be paid to his Majesty for life. By § 9, the annuities of 15,000*l.*, 6,000*l.*, and 2,500*l.*, granted to his Majesty in the reigns of George III. and George IV. are to cease and determine, as well as the annuity of 6,000*l.* granted to the Queen when Duchess of Clarence. By § 13, whenever the total charge on the civil list in any year shall exceed the 510,000*l.*, an account, stating the particulars of the exceedings, shall be submitted to parliament within thirty days after the same shall have been ascertained. The charges on the civil list are divided into five classes, which are estimated in the schedule to the act thus: First class, for their Majesty's privy purse, 110,000*l.*; second class, salaries of his Majesty's household, 130,000*l.*; third class, expenses of his Majesty's household, 171,500*l.*; fourth class, special and secret service, 23,200*l.*; fifth class, pensions, 75,000*l.* The lords of the treasury may appropriate out of the quarterly payments any sum not exceeding one-fourth of the whole amount of the class for defraying any charge on that particular class before it is applied to any other class. By § 8, no other payments than those specified in the above schedule are to be charged upon the civil list thereby granted.

By stat. 47 G. 3. st. 2. c. 24. the King is empowered to direct the execution of any trusts to which lands vested in him by escheat, &c. or in right of the crown on the duchy of Lancaster, might have been liable, and to bestow such lands, or reward discoverers. See also stat. 52 G. 3. c. 148. respecting the King's privy purse.

Upon the whole, it is doubtless much better for the crown, and also for the people, to have the revenue settled upon the modern footing, rather than the ancient; for the crown,

because it is more certain, and collected with greater ease; for the people, because they are now delivered from the feudal hardships, and other odious branches of the prerogative. And though complaints have sometimes been made of the increase of the civil list, yet, if we consider the sums that have been formerly granted, the limited extent under which it is now established, the expenses defrayed by it, the revenues and prerogatives given up in lieu of it by the crown, the numerous branches of the present royal family, and, above all, the diminution of the value of money compared with what it was worth in the last century, we must acknowledge these complaints to be void of any rational foundation; and that it is impossible to support that dignity, which a King of Great Britain should maintain, with an income in any degree less than what is now established by parliament.

As to the land revenue of the crown, see stat. 10 G. 4. c. 50. repealing former acts, and consolidating and amending their provisions.

VI. By *Magna Charta*, 9 H. 3. c. 8. "the King nor his bailiffs shall levy any debts upon lands or rents so long as the debtor hath goods and chattels to satisfy, neither shall the pledges be distrained so long as the principal is sufficient; but if he fail, then shall the pledges answer the debt; howbeit they shall have the debtor's lands and rents until they be satisfied, unless he can acquit himself against the pledges."

Goods and chattels.] By order of the common law, the King for his debt has execution of the body, lands, and goods of his debtor; this is an act of grace, and restrains the power the King had before. 2 Inst. 19.

Pledges be distrained.] This act does not extend, nor was ever taken to extend, to sureties in a bond or recognizance, if they may be so called, being bound themselves equally with the principal, as sureties to perform covenants and agreements are in like manner; but to pledges and manufacturers only, who by express words are not responsible, unless their principals become insolvent, and so are conditional debtors only. And so the act has always been construed, and the words themselves imply as much. *Hurd*. 378.

By *Magna Charta*, c. 18, "the King's debtor dying, the King shall be served before the executor."

By this statute, the King by his prerogative shall be preferred in satisfaction of his debt by the executors before any other; and if the executors have sufficient to pay the King's debt, the heir, nor any purchaser of his lands, shall not be charged. 2 Inst. 32.

Stat. West. 1; 3 Edw. 1. c. 19. enacts, "that the sheriff having received the King's debt, upon his next account shall discharge the debtor thereof, in pain to forfeit three times so much to the debtor, and to make fine at the King's will. And the sheriff and his heirs shall answer all monies that they whom he employed receive; and if any other that is answerable to the Exchequer by his own hands do so, he shall render thrice so much to the plaintiff, and make fine as before. And on payment of the King's debt, the sheriff shall give a talley to the debtor, and the process for levying the same shall be showed him on demand without fee, on pain to be grievously punished."

The King's debt.] Under this word, debt, all things due to the King are comprehended, and not only debt in the proper sense, but duties on things due, as rents, fines, issues, amercements, and other duties to the King received or levied by the sheriff; for debt in its large sense signifies whatever a man doth owe; and *debere dicitur quia deest habere; debitori enim deest quod habet, cum sit creditoris, maxime in casu domini Regis.* 2 Inst. 198.

The sheriff and his heirs shall answer.] This is to be understood *quoad restitutionem*, but not *quoad penam*; that is, for the civil, but not for the criminal part; for this is a maxim in law. 2 Inst. 198.

of this statute. And the case in question seemed a hard case to the court, because the party himself was the cause why there was no appearance, by beating the party so heinously the very day before they ought to have appeared, that they were disabled thereby to appear. *Hard. 334.*

W. put 100*l.* out at interest to defendant, and took bond in the name of one J. who became *felo de se*, and the plaintiff was relieved against the King on this trust, in equity upon this statute. *Sed quære*, whether this statute extends to any equity against the King, otherwise than in case of pleas by way of discharge? But it was likewise decreed in this cause that the plaintiff should be saved harmless from all others. *Hard. 176.*

And the matter so showed be sufficiently proved.] Scire facias issued against T. the father, and T. the son, to show cause wherefore they did not pay the King 1000*l.* for the mesne profits of certain lands holden by them from his Majesty, for which land judgment was given for him in the Exchequer, and the mesne rates were found by inquisition, which returned that the said mesne profits came to 1000*l.* upon which inquisition this *scire facias* issued; whereupon the sheriff returned that T. the father was dead, and T. the son appeared, and pleaded that he took the profits but as a servant to his father, and by his command, and rendered an account to his father for the profits, and also that judgment for the lands was given against his father and him for default of sufficient pleading, and not for the truth of the fact; and he showed this statute, which he pretended aided him for his equity; whereupon the King demurred. *Tanfield*, chief baron, said, that the matter in equity ought to be sufficiently proved, and here is nothing but the allegation of the party, and the demurrer for the King; and, if the demurrer be in law an admittance of the allegation, and so a sufficient proof within the statute, is to be advised on; and for that point the case is but this: A *scire facias* issues to have execution of a recognizance, which within this act ought, by pretence and allegation of the defendant, to be discharged for matter in equity, and the defendant pleads his matter in equity, and the King, supposing this not to be in equity within this statute, demurs in law, whether that demurrer be an insufficient proof of the allegation within the statute or not? *Adjournatur. Lane, 51.*

By § 33 of the said stat. 33 *H. 8. c. 39.* it is provided, that the said act shall not take away any liberties belonging to the duchy and county palatine of Lancaster.

Process and executions for debts in the Court of Exchequer shall be made in the Exchequer by such officer as hath been used, as by this act is limited, § 34.

The stat. 34 & 35 *H. 8. c. 2.* directs how the King's receivers and collectors shall be charged; and the stat. 7 *Edm. 6. c. 1.* makes further regulations on that subject, and requires all officers to find sureties for duly accounting. See title *Accounts, Public.*

The stat. 13 *Eliz. c. 4.* enacts, "that all the lands, &c. which any accountant of the Queen, her heirs and successors, hath while he remains accountable, shall for the payment of the debts of the Queen, her heirs and successors, be liable, and put in execution in like manner, as if such accountant had stood bound by writ obligatory (having the effect of the statute staple) to her Majesty, her heirs and successors, for payment of the same, § 1.

The Queen, by her letters-patent, granted *catalla usagatorum et felonum de se*, within such a precinct; one who was indebted to the Queen is *felo de se* within the precinct. It was ruled, that notwithstanding the grant by the letters-patent, the Queen shall have the goods for satisfying her debt. 3 *Leo. 113*; *Mo. 126, 127, S. C.* between the Queen of the first part, the Bishop of Sarum of the second part, and Oliver Coxhead of the third part; and there, *per Manwood*, chief baron, the patent does not extend to have the goods of *felo de se* against the Queen for her debt, because it wanted

the words (*licet tangat nos*); but he agreed, that if the lands of the felon be liable to [sufficient to answer] all the debt of the Queen, the court may in discretion take all the lands in extent, and leave the goods to the patentee. And as to a petition of Coxhead praying a discharge of the lands, &c. by him purchased of the officer debtor to the Queen, it was answered, that the land was subject to the Queen's extent for all arrears of receipts by his office, received before the conveyance thereof, though the receipt be after the conveyance, and that by reason of the statute; but as to another office accepted after the conveyance of the land, the arrears of that shall not charge the land so conveyed.

B. L. having purchased a long term for years in houses, afterwards purchased the inheritance; afterwards he became receiver of North Wales, and having occasion for 500*l.* assigned over the term by way of mortgage to J. S. Afterwards on the marriage of E. L. his son, he settled the houses in St. Clement's (*inter alia*) on himself for life, remainder to E. L. his son, and the heirs of his body. There was issue of the marriage, a daughter, the wife of P.; after this B. L. mortgages these houses to N. for 1800*l.* The King extends these houses for the debt of B. L.; N. gets an assignment of the extent, and a privy seal for the debt. Resolved, first, that by the statute of Elizabeth, the land and the real estate of B. L. was bound and stood liable to answer the King's debt, although he was not actually a debtor to the King, nor any extent against him in several years after. Secondly, that where a term is attendant on the inheritance, he shall have a right to the term: but if it be a term in gross, and assigned before any actual extent, the assignment will stand good, and the term not liable to the King's debt. 2 *Vern. 389, 390.*

If either of the Queen's officers, on rendering of his account, shall be found in arrear, and such arrears shall not be paid within six months after the account past, the Queen, &c. may sell so much of his estate as will answer the debt, and the overplus of the sale is to be rendered to the accountant, or his heirs, by the officer that receives the purchase-money, without further warrant. Stat. 13 *Eliz. c. 4. § 2, 3.*

Upon this statute many questions were moved; first, if the debtor died, whether the land might be sold? Secondly, when the account is determined after his death? Thirdly, When the accountant, after becoming debtor, and in arrear, makes feoffment, or other estate over, or charges or incumbers the land, either to his issue or others of his blood, to prevent the Queen's selling, or on other consideration, whether she may sell the land, the words of the act being make sale, &c. of so much of the lands, &c. of every such accountant or debtor so found in arrear, &c. and that the sale shall be good and available in law against the party accountant, and his heirs claiming as heirs. Fourthly, if the accountant was seised of land in tail, whether this land may be sold to be good against the issue; for the ousting of which doubts the statute of 27 *Eliz. c. 3.* was made; but this gives remedy only, that the land shall be sold after the death of the debtor, and when the account is made after his death; therefore to remedy the other mischiefs, the statute 29 *Eliz. c. 7.* was made (but the same, being only a temporary act, is expired.) *Mo. 646, &c. pl. 895,* (where part of the last-mentioned act is set forth and explained.)

If such accountant or debtor purchase lands in others' names in trust for their use, that being found by office or inquisition, those lands also shall be liable to satisfy the debt in such a manner as before is expressed. Stat. 13 *Eliz. c. 4. § 5.*

Lands purchased by accountants since the beginning of the Queen's reign, either in their own names, or in the names of others in trust for their use, shall be also liable to be sold for the discharge of their debts as aforesaid, rendering the overplus to the accountant, § 6.

Provided, that bishops' lands shall be only chargeable for subsidies or tenths, as they were before making this act, and not otherwise, § 9.

Neither shall this act extend to charge any accountant whose yearly receipt exceeds not 300*l.* otherwise than as he was lawfully chargeable before this act, § 10.

Neither shall this act extend to such accountants, as by order of their offices, and charge, immediately after their accounts past, are to lay out money again; such as are treasurers of war, garrisons, navy, provision of victuals, or for fortifications or buildings, and the master of the wardrobe; unless the Queen, &c. command present pay, § 11, 12.

Neither does this act extend to sheriffs, escheators, or bailiffs of liberties, concerning whose accounts the course remains the same as before, § 13.

Lands bought of an accountant *bonâ fide*, and without notice of any fraudulent intent in the accountant, shall be discharged; and if they be bound by office, yet shall they, on traverse, be discharged without livery, *ouster le main*, or other suit, § 14.

If a man is receiver to the King, and not indebted, but is clear and sells his land, and ceases to be receiver, and afterwards is appointed receiver again, and then a debt is contracted with the King, the former sale is good. 2 *Mod.* 247.

The Queen, &c. being satisfied by sale of lands, the sureties shall be discharged for so much, and if any yet remain unpaid, the sureties shall pay the residue rateably according to their abilities. Stat. 13 *Edw. c. 4.* § 15.

By stat. 20 *Car. 2. c. 2.* all receivers of monies or duties for the King's use, are to pay damages of twelve per cent. per annum from the expiration of two months after the receipt by them, till they pay the same into the Exchequer.

By stat. 25 *Geo. 3. c. 35.* for the more easy and effectual sale of lands of the crown debtors, the Court of Exchequer, on application of the attorney-general in a summary way, may order the estate of any debtor to the King to be sold; and compel the production of title-deeds, &c. and apply the same in liquidation of the King's demand, under a writ of extent, or *diem clausit extremum*. (See title *Execution*.) The surplus, after satisfaction of the debt and costs, to be paid to the party entitled to the estate.

By the stat. 41 *G. 3. c. 90.* § 1. when upon any account declared, &c. in the Court of Exchequer in England, or on judgment of that court, any debt is due to his Majesty, a copy of such account shall be exemplified, and transmitted to and enrolled in the Exchequer in Ireland, and process be issued against the debtor's body and effects in Ireland. By § 2, money levied in Ireland shall be paid into the Irish Exchequer, and transmitted to the English Exchequer. By § 3, 4, so *vice versa*, on accounts declared in the Exchequer of Ireland. By 48 *G. 3. c. 47.* the King shall not sue in Ireland any person in respect of any estate, unless where the right has accrued, or shall first accrue, within sixty years before the commencement of such suit; persons having enjoyed sixty years' possession quieted. In what cases rents, &c. of estates shall be deemed in charge, § 2. Estates, the reversion of which is in the crown, shall be sued for within sixty years after determination of the particular estate, § 3. Lands shall be holden of the crown upon the usual tenures, services, and duties, § 4. Rents paid to the King shall remain payable, § 5. Incumbents of benefices shall not be liable to arrears of crown rents accrued before their incumbency, § 6. By stat. 4 *G. 4. c. 18.* all the powers of the 39 & 40 *G. 3. c. 88.* relating to the disposition of the King's private estates are extended to lands in possession of any King at the time of his accession. The statute 11 *G. 4. c. 23.* enabled the late King (George IV.) to appoint certain persons to affix his royal signature to instruments requiring such signature. (This statute, however, is now expired.)

VII. In King John's Magna Charta of Liberties, there was a clause making it lawful for the barons of the realm to

choose twenty-five barons to see the charter observed by the King, with power, on any justice or other minister of the King's failing to do right, and acting contrary thereto, for four of the said barons to address the King, and pray that the same might be remedied; and if the same were not amended in forty days, upon the report of the four barons to the rest of the twenty-five, those twenty-five barons, *with the commonalty of the whole land*, were at liberty to distress the King, take his castles, lands, &c. until the evils complained of should be remedied, according to their judgment; *saving the person of the King, Queen, and their children*; and when the evils were redressed, the people were to obey the King as before. *King John's Magna Charta, c. 73.* But this clause was admitted in King Henry III.'s Magna Charta, though in a statute made at Oxford, anno 42 Henry III. to reform misgovernment, it was enacted, that twenty-four great men should be named, twelve by the King, and twelve by the parliament, to appoint justices, chancellors, and other officers, to see Magna Charta observed. These regulations seem (like the constitution, framed by an assembly in a neighbouring nation, before they had directly discarded a monarchical form of government) too laboured and unnatural to succeed in practice; the checks now formed by the law, on the power of the crown, are of a nature in reality more forcible, though in appearance more loyal, than a measure which placed the sovereign in subjection to a dangerous aristocracy.

The barons' wars seem to have proceeded in some measure from a like power granted to them, as by the charter of King John; and probably the parliament's wars in the time of King Charles I. from their examples.

But whatever attempts might have been previously made, it cannot but be observed, that most of the laws for ascertaining, limiting, and restraining, the prerogative of the crown, have been made within the compass of little more than a century past, from the Petition of Right in 3 *Car. 1.* to the present time, so that the powers of the crown are now to all appearance greatly curtailed and diminished since the reign of King James I. particularly by the abolition of the Star Chamber and High Commission Courts, in the reign of Charles I.; and by the disclaiming of martial law, and the power of levying taxes on the subject by the same prince; by the disuse of forest laws for a century past; and by the many excellent provisions enacted under Charles II. especially by the abolition of military tenures, purveyance, and pre-emption, the Habeas Corpus Act, and the act to prevent the discontinuance of parliaments for above three years; and since the Revolution, by the strong and emphatical words in which our liberties are asserted in the Bill of Rights and Act of Settlement, by the act for triennial, since turned into septennial, elections; by the exclusion of certain officers from the House of Commons; by rendering the seats of the judges permanent, and their salaries liberal and independent; and by restraining the King's pardon from obstructing parliamentary impeachments: besides all this, if we consider how the crown is impoverished and stripped of all its ancient revenues, so that it must greatly rely on the liberality of parliament for its necessary support and maintenance, we may, perhaps, be led to think that the balance is inclined, pretty strongly, to the popular scale, and that the executive magistrate has neither independence nor power enough left, to form that check upon the Lords and Commons, which the founders of our constitution intended.

On the other hand, however, it is to be considered that every prince in the first parliament after his accession, has by long usage a truly royal addition to his hereditary revenue settled upon him for his life, and has never any occasion to apply to parliament for supplies, but upon some public necessity of the whole realm. This restores to him that constitutional independence which at his first accession seems, it must be owned, to be wanting; and then, with regard to power, we may find, perhaps, that the hands of government

are at least sufficiently strengthened, and that an English monarch is now in no danger of being overborne either by the nobility or the people. The instruments of power are not, perhaps, so open and avowed, as they formerly were, and therefore are the less liable to jealous and invidious reflections; but they are not the weaker upon that account. In short, our national debt and taxes have, in their natural consequences, thrown such a weight of power into the executive scale of government, as we cannot think was intended by our patriot ancestors, who gloriously struggled for the abolition of the then formidable parts of the prerogative, and by an unaccountable want of foresight, established this system in their stead. The entire collection and management of so vast a revenue being placed in the hands of the crown, have given rise to such a multitude of new officers, created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation. To this may be added the frequent opportunities of conferring particular obligations, by preference in loans, subscriptions, tickets, remittances, and other money transactions, which will greatly increase this influence, and that over those persons whose attachment, on account of their wealth, is frequently the most desirable; and the same may be said with regard to the officers in our numerous army, and the places which the army has created; all which put together, give the executive power so persuasive an energy with respect to the persons themselves, and so prevailing an interest with their friends and families, as will amply make amends for the loss of external prerogative.

Upon the whole, therefore, it seems clear, that whatever may have become of the *nominal*, the *real* power of the crown has not been too far weakened by any transactions in the last century: much is, indeed, given up, but much is also acquired. The stern commands of prerogative have yielded to the milder voice of influence; the slavish and exploded doctrine of non-resistance has given way to a military establishment by law; and to the disuse of parliaments has succeeded a parliamentary trust of an immense perpetual revenue. When, indeed, by the free operation of the sinking fund, our national debts shall be lessened, when the posture of foreign affairs, and the universal introduction of a well-planned and national militia, will suffer our formidable army to be thinned and regulated, and when, in consequence of all, our taxes shall be gradually reduced, this adventitious power of the crown will slowly and imperceptibly diminish, as it slowly and imperceptibly rose; but till that shall happen, it will be our special duty, as good subjects and good Englishmen, to reverence the crown, and yet guard against corrupt and servile influence from those who are entrusted with its authority: to be LOYAL, yet FREE; OBEDIENT, and yet INDEPENDENT; and, above every thing, to hope that we may long, very long, continue to be governed by a sovereign, who in all those public acts that have personally proceeded from himself, hath manifested the highest veneration for the free constitution of Britain, hath already, in more than one instance, remarkably strengthened its outworks, and therefore will never harbour a thought, or adopt a persuasion, in any the remotest degree, detrimental to public liberty. 1 Com. c. 8.

For further matters relative to the King, see titles *Parliament*, *Government*, *Grants of the King*, *Lease of the King*.

KING or HERALDS, or *King at Arms*, *Rex Heraldum*. A principal officer at arms, that hath the pre-eminence of the society. Among the Romans he was called *pater patratus*. See titles *Herald*, *Garrier*.

KING of the MINSTRELS, at *Tutbury in com. Staff.* His power and privilege appear by a charter of Richard II. confirmed by Henry VI. in the 21st year of his reign. *Cowell*.

KING'S ADVOCATE, in Scotland, His office is similar, but in some respects superior, to that of the King's attorney-general in England. It is his province to prosecute all cri-

iminal actions, and bring the criminals to punishment, without the intervention of any grand jury, and at the expense of the public. *Scotch Dict.*

A question lately arose on an appeal before the House of Lords, between the lord advocate and the attorney-general, as to which was entitled to precedence; the point was ultimately decided in favor of the latter.

KING'S BENCH.

BANCUS REGIUS, from the Saxon *Banca*, a Bench or Form.] The Supreme Court of Common Law in the Kingdom. 4 Inst. 73.

- I. Of the Court itself generally.
- II. Of its Criminal Jurisdiction.
- III. Of its Civil Jurisdiction, &c.
- IV. Of the Officers of the Court, and the mode of proceeding therein.

I. The Court of King's Bench is so called because the King used formerly to sit in court in person, the style of the court still being *coram ipso rege*. During the reign of a Queen it is called the Queen's Bench; and under the usurpation in Cromwell's time it was styled the Upper Bench.

This court consists of a chief justice and four puisne judges, who are by their office the sovereign conservators of the peace, and supreme coroners of the land; yet though the king used himself to sit in this court, and still is supposed so to do, he did not, neither by law is he empowered, to determine any cause or motion, but by the mouth of his judges, to whom he has committed his whole judicial authority. 4 Inst. 71. See 4 Burr. 851; 2 Inst. 46.

As to the varying number of the judges of this court formerly, see tit. *Judges*.

It has been said that King Henry III. sat in person with the justices in *Banco Regis* several times, being seated on a high bench, and the judges on a lower one at his feet: this, however, is a doubtful point. King Edward IV. sat three days in the second year of his reign, wholly to see, as he was young, the form of administering justice. King James I. it is also said, sat there for a similar reason. See 3 Com. c. 4. in n. It is said that in Westminster Hall, under the modern erections for the Courts of King's Bench and Chancery, there still remain a stone bench or table, and a stone chair, used by some of our ancient kings when they sat in parliament, or for the administration of justice. See *Antiquities of Westminster*, quarto, 1807.

This court, which is the remnant of the ancient *Aula Regia*, is not, nor can it be, from the nature and constitution of it, fixed to any certain place, but may follow the king's person wherever he goes. See stat. 28 Eliz. 1. stat. 3. c. 5. For which reason all process issuing out of this court in the king's name is returnable, "*ubicunque fuerimus in Anglia*, wheresoever we shall then be in England." See titles *Courts*, *Common Pleas*. It hath, indeed, for some centuries past, usually sat at Westminster, being an ancient palace of the crown, but might remove with the king to York or Exeter, if he thought proper to command it. And we find that after Edward I. had conquered Scotland, it actually sat at Roxburgh. M. 20, 21 E. 1; Hale, H. C. L. 200. And this moveable quality, as well as its dignity and power, are fully expressed by *Bracton*, when he says that the justices of this court are "*capitales, generales, prepositi, et majores, à latere regis residentes: qui omnium aliorum corrigere tenentur injurias et errores*." *Bract. l. 3. c. 10*. And it is moreover especially provided in the *Articula super cartas*, 28 E. 1. c. 5. that the king's chancellor and the justices of his bench, shall follow him, so that he may have at all times near unto him some that be learned in the laws.

After the division of the courts, and the establishment of the Court of Common Pleas for the express purpose of determining civil suits, the Court of King's Bench was accustomed, in ancient times, to be especially exercised in all cri-

iminal matters and pleas of the crown, leaving the judging of private contracts and civil actions to the Common Pleas and other courts. *Glanvil. lib. 1. c. 2, 3, 4; lib. 10. c. 18; Smith de Rep. Ang. lib. 2. c. 11; 4 Inst. fol. 70.*

Toward the latter end of the Norman period, the *Aula Regis*, which was before one great court where the *justiciar* presided, was divided into four distinct courts, i. e. the Court of Chancery, King's Bench, Common Pleas, and Exchequer. *Madox, c. 19; Bracton, lib. 3. c. 7. fol. 105; see titles Courts, Common Pleas, &c.*

The Court of King's Bench retained the greater similitude with the ancient *Curia* or *Aula Regis*, and was always ambulatory, and removed with the King wherever he went. It hath always retained a supreme original jurisdiction in all criminal matters; for in these the process both issued from and was returnable into this court; but in trespass it might be made returnable into either the King's Bench or Common Pleas, because the plea was criminal as well as civil. *2 Inst. 24; 4 Inst. 70; Co. Lit. 71; Dyer, 187; Crompt. of Courts, 78; 1 Rol. Ab. 71.*

II. The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined in it, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other superior remedy. It protects the liberty of the subject by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown side or crown office, the latter in the plea side of the court. *3 Comm. c. 4.*

On the crown side, that is, in the crown office, this court takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace. Into this court also, indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar or at *nisi prius*, by a jury of the county out of which the indictment is brought. But informations in the King's Bench can be filed for misdemeanors only, as no man can be put upon his trial for a capital offence, or for misprision of treason, without the accusation against him being found sufficient by twelve of his countrymen. See tit. *Information*. And it possesses the power, in all cases where an impartial trial cannot be had in the county out of which the indictment is brought, to direct the trial to take place in some other county. And by the 38 *G. 3. c. 52*, in all indictments removed into the King's Bench by *certiorari*, and in all informations filed there, if the venue be laid in any city or town corporate, the court, at the instance of the prosecutor or defendant, may order the issue to be tried by a jury of the next adjoining county. London, Westminster, Southwark, Bristol, and Chester, are entirely exempted from the operation of the act; and Exeter, except in cases of indictments removed by *certiorari*.

Into this Court of King's Bench hath reverted all that was good and salutary of the jurisdiction of the Court of Star Chamber (*Camera Stellata*), which was a court of very ancient original, finally abolished, on account of the abuse of its jurisdiction, by 16 *C. 1. c. 10*. See title *Star Chamber*.

To state its powers more particularly, this court is termed the *Custos Morum* of all the realm, and by the plenitude of its power, wherever it meets with an offence contrary to the first principles of justice, and of dangerous consequence if not restrained, adapts a proper punishment to it. *1 Sid. 168; 2 Hawk. P. C. c. 3. § 4.*

The judges of this court are the supreme coroners of the kingdom. And the court itself is the principal court of criminal jurisdiction known to the laws of England; for which reason, by the coming of the Court of King's Bench into any county (as it was removed to Oxford on account of the

sickness in 1665) all former commissions of oyer and terminer and general gaol delivery, are at once absorbed and determined *ipso facto*.

But according to Lord Hale, the King's Bench, by coming into any county, does not determine any other commission, but suspends its session during the term, and in vacation time the commissioners may proceed again upon their former commission. A special commission, he adds, may sit in term time in the county where the King's Bench sits; but then the King's Bench must adjourn during its session. *2 Hale's P. C. 4; see also 2 Hawk. P. C. c. 3. § 3. post.*

The justices of B. R. are the sovereign justices of oyer and terminer, gaol delivery, and of eyre, and coroners of the land; and their jurisdiction is general all over England: by their presence the power of all other justices in the county, during the time of this court's sitting in it, is suspended, as has already been noticed; for in *præsentia majoris cessat potestas minoris*; but such justices may proceed by virtue of a special commission, &c. *H. P. C. 156; 4 Inst. 73; 2 Hawk. P. C. c. 3.*

If an indictment in a foreign county be removed before commissioners of oyer and terminer into the county where the King's Bench sits, they may proceed; for the King's Bench not having the indictment before them, cannot proceed for this offence; but if an indictment is found in the vacation time in the same county in which the King's Bench sits, and in term time the King's Bench is adjourned, there may be a special commission to hear it. *4 Inst. 73.*

By the 25 *G. 3. c. 18*, when any session of oyer and terminer, and gaol delivery of the gaol of Newgate, for the county of Middlesex, shall have been begun to be holden before the essoign day of any term, the same sessions shall be continued to be holden, and the business thereof finally concluded, notwithstanding the happening of such essoign day of any term, or the sitting of his majesty's Court of King's Bench at Westminster, or elsewhere in the county of Middlesex; and all trials, &c. had at such session so continued to be holden, shall be good and effectual to all intents and purposes. The 32 *G. 3. c. 48*, made a similar provision for the sessions of the peace and of oyer and terminer, before the justices of the peace for the same county.

By the 4 & 5 *W. 4. c. 36*, his majesty is empowered to establish a new court, to be called the "Central Criminal Court," for the trial of offences committed in London and Middlesex, and certain parts of Essex, Kent, and Surrey. See further tit. *London*.

Justices of this court have a sovereign jurisdiction over all matters of a criminal and public nature, judiciously brought before them, to give remedy either by the common law or statute; and their power is original and ordinary; when the king hath appointed them, they have their jurisdiction from the law. *4 Inst. 74.*

This court has a particular jurisdiction, not only over all capital offences, but also over all other misdemeanors of a public nature, tending either to a breach of the peace or to oppression or faction, or any manner of misgovernment; and it is not material whether such offences, being manifestly against the public good, directly injure any particular person or not. *4 Inst. 71; 11 Co. 98; 2 H. P. C. c. 3. § 3.*

And for the better restraining such offences, it has a discretionary power of inflicting exemplary punishment on offenders, either by fine, imprisonment, or other infamous punishment, as the nature of the crime, considered in all its circumstances, shall require; and it may make use of any prison which shall seem most proper; and it is said that no other court can remove or bail persons condemned to imprisonment by this court. *2 Hawk. P. C. c. 3. § 5.* Newgate is as much the prison of this court as the King's Bench prison is: every prison in the kingdom is the prison of this court. *1 Burr. 541.*

This court hath so sovereign a jurisdiction in all criminal

matters, that an act of parliament appointing that all crimes of a certain denomination shall be tried before certain judges, doth not exclude the jurisdiction of this court, without express negative words; and therefore it hath been resolved, that stat. 33 H. 8. c. 12. which enacts, that all treasons, &c. within the king's house, shall be determined before the lord steward of the king's house, &c. doth not restrain this court from proceeding against such offences. 2 Inst. 549; 2 Jones, 53.

But where a statute creates a new offence which was not taken notice of by the common law, and erects a new jurisdiction for the punishment of it, and prescribes a certain method of proceeding, it seems questionable how far this court has an implied jurisdiction in such a case. 1 Sid. 296; 2 Hawk. P. C. c. 3. § 6.

This court, by the plenitude of its power, may as well proceed on indictments removed by *certiorari* out of inferior courts, as on those originally commenced here, whether the court below be determined, or still *in esse*, and whether the proceedings be grounded on the common law, or on a statute making a new law concerning an old offence. Dals. 25; 44 E. 3. 31 b; Crompt. Juris. 131.

But the Court of King's Bench will not give judgment on a conviction in the inferior court, where the proceedings are removed by *certiorari*, but will allow the party to waive the issue below, and to plead *de novo*, and to go to trial upon an issue joined in *B. R.* Carth. 6.

Nor can a record, removed into the King's Bench from an inferior court, regularly be remanded after the term in which it came in; yet if the court perceives any practice in endeavouring to remove such record, or that it is intended for delay, they may, in discretion, refuse to receive it, and remand it back before it is filed. 2 Hawk. P. C. c. 3. § 7. and several authorities there cited.

Also by the construction of the statutes, which give a trial by *nihi prius*, the King's Bench may grant such a trial in cases of treason or felony, as well as in common cases, because for such trial, not the record, but only a transcript, is sent down. 4 Inst. 74; Raym. 364; 2 Hawk. P. C. c. 3. § 7.

And by stat. 6 H. 8. c. 6. it is enacted, "That the King's Bench have full authority, by discretion, to remand as well the bodies of all felons removed thither, as their indictments, into the counties where the felonies were done; and to command the justices of gaol delivery, justices of the peace, and all other justices, to proceed thereon after the course of the common law, as the said justices might have done if the said indictments and prisoners had not been brought into the said King's Bench." This act extends not to high treason. Raym. 367; 2 Hawk. P. C. c. 3. § 8, 9.

As the judges of this court are the sovereign justices of oyer and terminer, gaol delivery, conservators of the peace, &c. as also the sovereign coroners, therefore, where the sheriff and coroners may receive appeals by bill, *a fortiori* the judges may; also this court may admit persons to bail in all cases, according to their discretion. 4 Inst. 79; 9 Co. 118 b; 4 Inst. 74; Vaugh. 157.

In the county where the King's Bench sits, there is every term a grand inquest, who are to present all criminal matters arising within that county, and then the same court proceeds upon indictments so taken; or if, in vacation, there be any indictment of felony before the justices of peace of oyer and terminer or gaol delivery there sitting, it may be removed by *certiorari* into *B. R.* and there they proceed *de die in diem*, &c. 2 Hale's Hist. P. C. 3.

It may award execution against persons attainted in parliament, or any other court, when the record of their attainder, or a transcript, is removed, and their persons brought thither by *habeas corpus*. Cro. Car. 176; Cro. Jac. 495. Pardons of persons condemned by former justices of gaol delivery, ought to be allowed in *B. R.*, the record and prisoner being removed thither by *certiorari* and *habeas corpus*. 2 Hawk. P. C. c. 6. § 19.

Into the court of *B. R.* indictments from all inferior courts and orders of sessions, &c. may be removed by *certiorari*; and inquisitions of murder are certified of course into this court, as it is the supreme court of criminal jurisdiction; hence also issue attachments for disobeying rules or orders, &c. 4 Inst. 71, 72.

III. On the first division of the courts it was intended to confine the jurisdiction of the Court of King's Bench to matters merely criminal, and accordingly soon afterwards it was enacted by *Magna Charta*, c. 11. that common pleas should not follow the king's court, but be held in a certain place; hence it was, that the Court of King's Bench could not determine a mere real action. 17 Edw. 3. 50; 1 Rol. Abr. 536, 537.

But notwithstanding common pleas could not be immediately holden in *Banco Regis*, yet where there was a defect in the court where by law they were holden originally, they might be holden in *B. R.*; as if a record came out of the Common Pleas by writ of error, there they might hold pleas to the end; so where the plea in a writ of right was removed out of the county by a *pone* in *B. R.* on a writ of *mesne replevin*, &c. 2 Inst. 23; 4 Inst. 72, 113; and see Saund. 256; Show. P. C. 57.

On the plea side or civil branch, this court has an original jurisdiction and cognizance of all actions of trespass or other injury alleged to be committed *vi et armis*; of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy, and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party.

So any action *vi et armis*, where the king is to have fine, as ejectment, trespass, forcible entry, &c. being of a mixed nature, may be commenced in *B. R.* 2 Inst. 23.

The same doctrine was afterwards extended to all actions on the case whatsoever. F. N. B. 86, 92; 1 Lil. Prac. Reg. 503. But no action of debt or detinue, or other mere civil action, could by the common law be prosecuted by any subject in this court, by original writ out of Chancery. 4 Inst. 76; Tyre's Just. Filizar, 110. Though an action of debt, given by statute, may be brought in the King's Bench as well as in the Common Pleas. Carth. 234. And yet this court might always have held plea of any civil action (other than actions real) provided the defendant was an officer of the court, or in the custody of the marshal or prison keeper of this court, for a breach of the peace or any other offence. 4 Inst. 71. And in process of time, it began, by a fiction, to hold plea of all personal actions whatsoever, and continued to do so for ages; it being surmised that the defendant was arrested for a supposed trespass, which he never had in reality committed; and being thus in the custody of the marshal of this court, the plaintiff was at liberty to proceed against him for any other personal injury; which surmise of being in the marshal's custody, the defendant was not at liberty to dispute. See 4 Inst. 72.

Also any officer or minister of the court entitled to the privilege thereof, might be there sued by bill in debt, covenant, or other personal action. 2 Inst. 23; 4 Inst. 71; 2 Bulst. 123.

From hence, as we hinted before, the notion arose that if a man was taken up as a trespasser in the King's Bench, and there in custody, they might declare against him in debt, covenant, or account; for this likewise was a case of privilege, since the Common Pleas could not procure the prisoners of the King's Bench to appear in their court, and therefore it was an exception out of *Magna Charta*. 4 Inst. 71; Cro. Car. 330.

This court is likewise a court of appeal, into which may be removed, by writ of error, the determinations of all in-

ferior courts of record in England (excepting the courts of London, of the Cinque Ports, and of a few other places,) and to which a writ of error also lay from the Court of King's Bench in Ireland, previous to the stat. 23 G. 3. c. 28. See title *Ireland*.

Formerly a writ of error lay from the Common Pleas into the Court of King's Bench, but this was altered by the 1 W. 4. c. 70. See further title *Error*.

The Court of King's Bench, as it is the highest court of common law, hath not only power to reverse erroneous judgments for such errors as appear the defect of the understanding, but also to punish all inferior magistrates and all officers of justice, for wilful and corrupt abuses of their authority against the obvious principles of natural justice; the instances of which are so numerous, and so various in their kinds, that it seems needless to attempt to insert them. 2 Hawk. P. C. c. 3. § 10; Vaugh. 157; 1 Salk. 201.

This court grants writs of habeas corpus to relieve persons wrongfully imprisoned, and may bail any person whatsoever. See titles *Bail*, *Habeas Corpus*. Writs of *mandamus* are granted by this court, to restore officers in corporations, colleges, &c. unjustly turned out, and freemen wrongfully disfranchised, also writs of *inhibition* in the name of *quo warranto* against persons or corporations usurping franchises and liberties against the king, and on misuser of privileges to seize the liberties, &c. In this court also the king's letters-patent may be repealed by *scire facias*, &c. *Prohibitions* are likewise issued from this court to keep inferior courts within their proper jurisdiction. See these several titles.

IV. The officers on the crown side are, the king's coroner and attorney, commonly called the clerk of the crown or master of the crown office; the secondary; the clerk of the rules; the examiner; calendar-keeper; and clerks in court.

The officers on the plea side are, the chief clerks; secondary or master; their deputy; marshal; clerk of the rules; clerk of the papers; clerk of the day-rules; clerk of the dockets; clerk of the declarations; clerk of the bails, postens, and escheats; signer of writs; signer of the bills of Middlesex; *custos brevium*; clerk of the upper treasury; clerk of the outer treasury; flacer; exigenter, and clerk of the outlawries; clerk of the errors; deputy marshal; marshal and associate to the chief justice; train-bearer; clerk of the Nisi Prius in London and Middlesex; clerks of the Nisi Prius to the different counties appointed by the *custos brevium*; crier at Nisi Prius in London and Middlesex; receiver-general of the seal office; criers; ushers; tipstaffs.

In this court there were formerly two ways of proceeding, viz by original writ or by bill. Now by the Uniformity of Process Act (2 W. 4. c. 34.) personal actions can no longer be commenced in this or any of the superior courts of Westminster, by original writ, but must be brought upon the writs given by that act. See title *Process*.

KINGELD (rather *King-geld*.) Escuage or royal aid. As in a charter of King Henry II. to the abbot and monks of Mireval. Mon. Ang. i. 380.

KING'S BENCH PRISON for providing relief for the poor prisoners confined in the King's Bench, Fleet, and Marshalsea prisons. See 53 G. 3. c. 123. For the limits of the rules of the prison, see Reg. Gen. 3 T. R. 584; 7 T. R. 82; and 6 East, 2.

KING'S HOUSEHOLD or Civil List. See title *King V.*

KING'S PALACE. The limits of the king's palace at Westminster extend from Charing Cross to Westminster Hall, and shall have such privileges as the ancient palaces. Stat. 28 H. 8. c. 12. The stat. 33 H. 8. c. 12. whereby any person striking another in the king's palace, should have his right hand cut off, be imprisoned during life, and also be fined, was repealed by the 9 G. 4. c. 31. § 1. See tit. *Striking*.

KING'S PREROGATIVE. See title *King*, V., &c.

KING'S SILVER, the money which was paid to the king, in the Court of Common Pleas, for a licence granted to a man to levy a fine of lands, tenements, or hereditaments to another person; and this must have been compounded according to the value of the land, in the alienation office, before the fine would pass. 2 Inst. 511; 6 Rep. 30, 13. See title *Fine of Lands*.

KING'S STORES. See tit. *Public Stores*.

KING'S SWAN-HERD. See *Swan-herd*.

KINTAL. See *Quintal*.

KINTLIDGE, a term used among merchants and seafaring persons for a ship's ballast. Merch. Dict.

KIPE, [from Sax. *Cypa*.] A basket or engine made of osiers, broad at one end, and narrower by degree, used in Oxfordshire and other parts of England, for the taking of fish; and fishing with those engines is called *kiping*. This manner of fishing with baskets of the same kind and shape, is practised by the barbarous inhabitants of Ceylon, in the East Indies, as appears in the relation and figure of it given by Mr. Knox, in his Travels, p. 28.

KIPPER-TIME. No salmon shall be taken between Gravesend and Henley-upon-Thames in kipper-time, viz. between the Invention of the Cross (May 3) and the Epiphany. Rot. Parl. 50 Edw. 3; Cowell. See title *Fish*.

KIRBY'S QUEST. An ancient record remaining with the remembrancer of the Exchequer; so called from its being the inquest of John de Kirby, treasurer to King Edward I.

KIRK-MOTE. See *Chirchgremot*.

KNAVE. An old Saxon word, which had at first a sense of simplicity and innocence, for it signified a boy; Sax. *cnapa*; whence a knave-child, i. e. a boy, as distinguished from a girl in several old writers: "a knave-child between them two they gate." *Gower's Poems*, p. 52, 106; and *Wicliffe*, in his old translation; *Exod.* i. 16; if it be a knave-child, i. e. a son or male child. After, it was taken for a servant boy, and at length for any servant man; also it was applied to a minister or officer that bore the weapon or shield of his superior, as *schild-knape*, whom the Latins call *armiger*, and the French *escuyer*. See the old statute 14 Edw. 3. c. 3. And it was sometimes, of old, made use of as a titular addition; as *Johannes C. filius Willielmus C. de Derby*, knave, &c. 22 H. 7. 36. In the vision of *Piers Plowman*, "cokes and her knaves even cokes pyes hate," cokes and their boys, or skillions. Cowell. The present use of the word to denote a false, dishonest, or deceitful fellow, has arisen by long perversion.

KNAVESHIP. A portion of grain, given to the servant at the mill where it is ground, from tenants of lands bound to grind there. Scotch Dict. See *Thrillage*.

KNIGHT, [Saxon, *cniht*; Latin, *miles*;] and *equus auratus*. From the gilt spurs he usually wore, and thence called anciently knights of the spur. The Italians term them *cavallieri*; the French *chevaliers*; the Germans, *rytters*; the Spaniards, *cavalleros*, &c.

Blackstone remarks, that it is observable that almost all nations call their knights by some appellation derived from a horse. 1 Comm. 404. Christian in his note on this place adds, that it does not appear the English word knight has any reference to a horse; for knight, or *cniht*, in the Saxon signified *puer servus*, an attendant. See *Spelm.* in *vv. Knight*, *Miles*. There is now only one instance where it is taken in that sense, and that is knight of a shire, who properly serves in parliament for such a county; but in all other instances it signifies one who bears arms, who, for his virtue and martial prowess, is by the king, or one having his authority, exalted above the rank of a gentleman, to a higher degree of dignity. The manner of making them, Camden, in his *Britannia*, thus shortly expresseth: *Nostris vero temporibus, qui equestrem dignitatem suscipiunt, floris genibus lecti in humero percutitur, princeps his verbis Gallicè affatur; sus*

vel sois Chevalier au nom de Dieu, i. e. Surge aut sis eques in nomine Dei. This is meant of knights bachelors, which is the lowest, but most ancient degree of knighthood with us. As to the privilege belonging to a knight, see in *Fern's Glory of Generosity*, p. 116.

Of knights there are two sorts, one spiritual, so called by divines in regard of their spiritual warfare, the other temporal. *Cassaneus de Gloria Mundi*, par 9. *considerat.* 2. See *Selden's Titles of Honour*, fol. 770.

Chief justice Popham affirmed, he had seen a commission granted to a bishop, to knight all the persons in his diocese. *Godb.* 398.

Of the several orders, both of spiritual and temporal knights, see *Mr. Ashmole's Inst. of the Knights of the Garter*.

He who served the king in any civil or military office or dignity, was formerly called *miles*; it is often mentioned in the old charters of the Anglo-Saxons, which are subscribed by several of the nobility, viz. after bishops, dukes, and earls, *per A. B. militem*, where *miles* signifies some officer of the courts, as minister was an officer to men of quality. Thus we read in *Ingulphus*, *De dono F. quondam Militis Kenulfi Regis*, fol. 860.

Afterwards the word was restrained to him who served only upon some military expedition; or rather to him who by reason of his tenure was bound to serve in the wars; and in this sense the word *miles* was taken *pro vassallo*. Thus in the laws of William the Conqueror: *Manibus ei sese dedit, cuncta sua ab eo miles à Domino recepit.* And he who by his office or tenure was bound to perform any military service, was furnished by the chief lord with arms, and so *adoptabatur in militem*, which the French call *adoubet*, and we to dub such a person a knight. But before they went into the service, it was usual to go into a bath and wash themselves, and afterwards they were girt with a girdle; which custom of bathing was constantly observed, especially at the inauguration of our kings, when those knights were made, who for that reason were called knights of the bath. *Cowell*.

They were, says *Blackstone*, called *milites*, because they formed a part of the royal army, in virtue of their feudal tenures, (see title *Tenures*, III. 2;) one condition of which was, that every one who held a knight's fee immediately under the crown, (which in Edward II.'s time amounted to 20*l.* per annum, *stat. de milit.* 1 *Edw.* 2.) was obliged to be knighted, and attend the king in his wars, or fine for his non-compliance. The exertion of this prerogative, as an expedient to raise money in the reign of Charles I. gave great offence, though then warranted by law, and the recent example of Queen Elizabeth. It was, therefore, abolished by *stat. 16 Car. 1. c. 20.* Considerable fees used to accrue to the king on the performance of the ceremony. Edward VI. and Queen Elizabeth appointed commissioners to compound with the persons who had lands to the amount of 40*l.* a year, and who declined the honour and expense of knighthood. See 1 *Comm.* 404; and also 2 *Comm.* 62, 69; 1 *Inst.* 69, b; 2 *Inst.* 593, and the notes on 1 *Inst.*

KNIGHTS BACHELORS, [from *Bas Chevalier*, an inferior knight. 1 *Comm.* 404, in n.] The most ancient, though the lowest order of knighthood amongst us; for we have an instance of King Alfred's conferring this order on his son Athelstan. *Wil. Malms. lib.* 2; 1 *Comm.* 404. See *Knights of the Chamber*.

KNIGHTS BANERET, [*Milites Vexillarii.*] Knights made only in the time of war; and though knighthood is commonly given for some personal merit, which, therefore, dies with the person, yet John Coupland, for his valiant service performed against the Scots, had the honour of baneret conferred on him and his heirs for ever, by patent; 29 *Edw.* 8. See title *Baneret*. These knights rank in general next after knights of the garter. By *stats. 5 R. 2. st. 2. c. 4; 14 R. 2. c. 11*, they are ranked next after barons; and their precedence

before the younger sons of viscounts was confirmed by order of King James I. in the tenth year of his reign. But in order to be entitled to this rank, they must be created by the king in person in the field, under the royal banners in time of open war, else they rank after baronets. 1 *Comm.* 403.

KNIGHTS OF THE BATH, [*Milites Balnei.*] Have their name from their bathing the night before their creation. See *Knight*. The most honourable Military Order of the Bath was introduced by King Henry IV. in 1399, and revived by King George I. in the year 1725, who erected the same into a regular military order for ever; to consist of thirty-seven knights, besides the sovereign. See the antiquity and ceremony of their creation in *Dugdale's Antiquities of Warwickshire*, 531, 532. They have each three honorary esquires; and they now wear a red ribbon across their shoulders; have a prelate of the order, (the Bishop of Rochester,) several heralds, and other officers, &c. See 1 *Comm.* 404.

By statute, 2d January, 1815, it was ordained, that the order should be composed of three classes, viz.:

First class, to consist of knights grand crosses, not to exceed seventy-two, exclusive of the sovereign and princes of the blood royal; one-sixth of which may be appointed for civil and diplomatic purposes. The remainder must have attained the rank of major-general, or rear-admiral in the navy, and must have been previously appointed to the second class.

Second class, not to exceed upon the first institution 180, exclusive of foreign officers holding British commissions, of whom not exceeding ten may be admitted as honorary knights commanders; in the event of actions of signal distinction, or of future wars, this class may be increased. To be entitled to the distinctive appellation of knighthood; to have the same rights and privileges as knights bachelors; but to take precedence of them.

Third class, companions of the order; they are to take precedence of esquires, but not entitled to the appellation, style, &c. of knights bachelors.

No officer can be nominated unless he shall have received a medal or other badge of honour, or shall have been especially mentioned in despatches in the London Gazette, as having distinguished himself in action.

KNIGHTS OF THE CHAMBER, [*Milites Cameræ.*] Seem to be such knights bachelors as are made in time of peace, because knighthood in the king's chamber, and not in the field; they are mentioned in *Rot. Parl.* 28 *Edw.* 3; 29 *Edw.* 3. p. 1. m. 39; 2 *Inst.* 466.

KNIGHTS OF THE GARTER, [*Equites garterii; vel periscelidis*, otherwise called *Knights of the Order of St. George.*] The most noble Order of the Garter was founded by King Edward III. A. D. 1344, who, after he had obtained many notable victories, for furnishing this honourable order, made choice in his own realm and all Europe of twenty-five the most excellent and renowned persons for virtue and honour, and ordained himself and his successors, kings of England, to be the sovereign thereof, and the rest to be fellows and brethren, bestowing this dignity on them, and giving them a blue garter, decked with gold, pearl, and precious stones, and a buckle of gold, to wear daily upon the left leg only; a kirtle, crown, cloak, chaperon, a collar, and other magnificent apparel, both of stuff and fashion, exquisite and heroic, to wear at high feasts, as to so high and princely an order was meet. *Smith's Repub. Angl. lib.* 1. c. 20. And, according to *Camden* and others, this order was instituted upon King Edward III. having great success in a battle, wherein the king's garter was used for a token. See *Selden's Tit. of Hon.* 2, 5, 41.

But *Polydore Virgil* gives it another original, and says, that the king in the height of his glory, the kings of France

and Scotland being both prisoners in the tower of London at one time, first erected this order, A.D. 1350, (see *infra*.) from the Countess of Salisbury's dropping her garter, in a dance before his majesty, which the king taking up, and seeing some of his nobles smile, he said, *Honi soit qui mal y pense*, interpreted, "Evil (or shame) be to him that evil thinketh;" which has ever since been the motto of the garter; declaring such veneration should be done to that silken tie, that the best of them should be proud of enjoying their honours that way.

Camden in his *Britannia* saith, that this order of knights received great ornament from King Edward IV. And King Charles I. as an addition to their splendour, ordered all the knights companions to wear on their upper garment, the cross encircled with the garter and motto. The honourable society of this order is a college or corporation, having a great seal, &c.

The site of the college is the royal castle of Windsor, with the chapel of St. George, and the chapter-house in the castle, for their solemnity on St. George's day, and at their feasts and installations.

At a chapter held 3d June, 1788, the number of knights was fixed at twenty-five, exclusive of the sovereign and the sons of his majesty and his successors, who had been or should be elected.

Besides the above number, and one extra knight, (Earl Grey,) most of the sovereigns of Europe belong to this order, which holds the highest rank among the British orders of knighthood, and is second to none in the world in dignity.

Attached to the order are a dean and canons, &c. and twenty-six poor knights, that have no other subsistence but the allowance of this house, which is given them in respect of their daily prayer to the honour of God and St. George, and these are vulgarly called Poor Knights of Windsor.

There are also certain officers belonging to the order, as prelate of the garter, which office is inherent to the Bishop of Winchester for the time being, the chancellor of the garter, the Bishop of Sarum, registrar, chivalry Dean of Windsor, the principal knight at arms, knight porter to mail, and four pursuivants, the usher of the garter, being likewise usher of the black rod.

A knight of the garter wears daily abroad, a blue garter, decked with gold, pearl, and precious stones, on the left leg; and in all places of assembly, upon his coat on the left side of his breast, a star of silver embroidery; and the picture of St. George enamelled upon gold, and beset with diamonds, at the end of a blue ribbon that crosses the body from the left shoulder; and when dressed in his robes, a mantle, &c. &c. &c.

KNIGHTS OF THE ORDER OF ST. JOHN OF JERUSALEM, [*Milites Sancti Johannis Hierosolymitani*.] Were an order of knighthood, that began about A.D. 1120, Honorius being pope. They had their denomination from John the charitable patriarch of Alexandria, though vowed to St. John the Baptist, their patron; *Fern's Glory of Generosity*, p. 127. They had their primary abode in Jerusalem, and then in the Isle of Rhodes, until they were expelled thence by the Turks, A.D. 1523. Their chief seat subsequently was in the Isle of Malta, where they performed great exploits against the Infidels, especially in the year 1595. They continued to hold the latter island until 1798, when they surrendered it to Buonaparte, then on his way to Egypt, from whom it was afterwards taken by this country. They lived after the order of Friars, under the rule of St. Augustine, of whom mention is made in the stats. 25 H. 8. c. 2; 26 H. 8. c. 2. They had in England one general prior that had the government of the whole order within England and Scotland; *Reg. Orig.* fol. 20; and was the first prior in England, and sat in the House of Lords. But towards the end of Henry VIII.'s days they in England and Ireland, being found to adhere to the pope too much against the king,

were suppressed, and their lands and goods given to the king, by stat. 32 H. 8. c. 24. For the occasion and propagation of this order more especially described, see the treatise entitled *The Book of Honour and Arms*, lib. 5. c. 18. See also titles *Hospitallers*, *Templars*, and the succeeding articles.

KNIGHTS OF MALTA. These knights took their name and original from the time of their expulsion from Rhodes, A.D. 1523. The island of Malta was then given them by the Emperor Charles V. whence they were therefore called Knights of Malta. See the preceding article.

KNIGHT MARSHALL, [*Marescallus Hospitii Regis*.] An officer of the king's house, having jurisdiction and cognizance of transgressions within the king's house, and verge of it; as also of contracts made within the same house, whereto one of the house is a party. *Reg. of Writs*, fol. 185 a, and 191 b, and *Spelm. Gloss.* in voce *Marescallus*. See *Constable*, *Marshal*.

KNIGHTS OF RHODES. The knights of St. John of Jerusalem, after they removed to Rhode island. See stat. 32 H. 8. c. 24. and *ante*, title *Knights of the Order of St. John*.

KNIGHTS OF THE SHIRE, [*Milites Comitatus*.] Otherwise called knights of parliament; two knights or gentlemen of worth, chosen on the king's writ, in *pleno comitatu*, by the freeholders of every county that can dispense 40s. a year; and these, when every man that had a knight's fee was customarily constrained to be a knight, were obliged to be *militēs gladio cincti*, for so runs the writ at this day; but now *notabiles armigeri* may be chosen. Their expenses were formerly borne by the county, during their sitting in parliament, under stat. 35 H. 8. c. 11. They are to have 600*l.* per annum freehold estate, &c. See stat. 9 Ann. c. 5. By the Reform Act (2 W. 4. c. 45.) many counties have been divided into two districts for the return of knights of the shire, others have had an additional member given to them, and the constituencies of all have been greatly increased, and are no longer confined to freeholders, but are extended to copyholders and leaseholders. See further title *Parliament*.

KNIGHTS TEMPLARS. See *Templars*, *Hospitallers*, and *ante*, *Knights of St. John*, &c.

KNIGHTS OF THE THISTLE. The most ancient Order of the Thistle was instituted by King Aethelwulf, revived by King James II. in 1679, and was re-established by Queen Anne, 31st December, 1703. It is limited to the sovereign and eleven knights, but there is at present five extra knights. Its officers are a dean, Lord Lyon, king of arms, secretary, and gentleman usher of the green rod. The knights wear a green ribbon over their shoulders, and were otherwise honourably distinguished.

KNIGHTS OF ST. PATRICK. The most illustrious Order of St. Patrick was instituted by King George III. February, 1763. It consists of the sovereign, a grand master, (who is the lord lieutenant of Ireland for the time being,) and fourteen knights; besides which, there are at present six extra knights.

The officers of this order are a prelate, (the Archbishop of Armagh,) a chancellor, (the Archbishop of Dublin,) a registrar, (the Dean of St. Patrick,) with a secretary, genealogist, usher of the black rod, and Ulster king of arms attending the order.

These two last orders obtain no rank in England. See title *Precedency*.

KNIGHTS OF ST. MICHAEL AND ST. GEORGE. This order was instituted 27th April, 1818, for the United States of the Ionian Islands, and for the ancient sovereignty of Malta and its dependencies, under the name and title of the most distinguished Order of St. Michael and St. George. It consists of the sovereign, a grand master, (the Duke of Cambridge,) eight knights grand crosses, twelve knights commanders, and twenty-four knights, exclusive of British subjects, holding high and confidential employment in the

service of the said United States, and in the government of Malta and its dependencies. The officers are a prelate for the Ionian islands, a prelate for Malta, a king at arms, registrar, and secretary.

KNIGHTEN-GYLD. Was a *gyld* in London, consisting of nineteen knights, which King Edgar founded, giving them a portion of void ground lying without the walls of the city, now called Portsoken Ward. *Stow's Annals*, p. 151. This in *Mon. Angl. par. 2, fol. 82, a*, is written *enmitene-geld*.

KNIGHTS COURT. A court baron, or honour court, held twice a year under the Bishop of Hereford, at his palace there; wherein those who are lords of manors, and their tenants, holding by knights service of the honour of that bishopric, are suitors; which court is mentioned in *Butterfield's Surv. fol. 244*. If the suitor appear not at it, he pays 2s. suit-silver for respite of homage. *Cowell*.

KNIGHTHOOD. See *Knight*.

KNIGHT SERVICE. See title *Tenure*, III, 2.

KNIGHTS FEE, [*Feodum militare*.] Is so much inheritance, as is sufficient yearly to maintain a knight with convenient revenue; which in Henry III.'s days was 15*l*. *Camd. Brit.* p. 111. In the time of Edward II. 20*l*. See *ante*, title *Knight*. *Sir Thomas Smith* (in his *Repub. Ang.* lib. 1. c. 18.) rates it at 40*l*. *Stow*, in his *Annals*, p. 285, says, there were found in England, at the time of the Conqueror, 60,211 knights fees, according to others 80,215;

whereof the religious houses before their suppression were possessed of 28,015—*Octo carucata terra' faciunt fiod in unius militis. Mon. Ang. p. 2, fol. 285 a*. Of this see more in *Selden's Titles of Honour*, fol. 691; and *Bracton*, lib. 5, tract. 1, c. 2; also 1 *Inst.* 69 a. A knight's fee contained twelve plow-lands, 2 *Inst.* fol. 596; or 480 acres. Thus *Virgata terræ continet 24 acres*, 4 *virgatae terræ* make a hide, and five hides make a knight's fee, whose relief is five pounds. *Cowell*. *Selden* insists that a knight's fee was estimable neither by the value nor the quantity of the land, but by the services or numbers of the knights reserved. *Tit. Hon. part 2, c. 5, § 26*.

KNOPA. A knob, nob, bosse, or knot.

KNOW-MEN. The Lollards in England, called Here-tics, for opposing the church of Rome before the Reformation, went commonly under the name of Knowmen, and just-fast-men; which titles were first given them in the diocese of Lincoln, by Bishop Smith, anno 1500.

KYDDIERS. Mentioned in stat. 13 *Eliz. c. 35*. See *Kidder*.

KYLYW. Signifies some liquid thing, and in the north it is used for a kind of liquid victuals. It is mentioned as an exaction of foresters, &c. *Mon. Ang. tom. 1. p. 722*.

KYSTE, [*Sax.*] A coffin or chest for burial of the dead. *Ex. Reg. Episc. Lincoln. MS.*

KYTH. Kin or kindred. *Cognatus*.

L.

LAB

L AAS, [*jacques, à laz, i. e. Frons.*] A net, gin, or snare, *Lit. Dict.*

LABEL, [*appendix lemniscus.*] Is a narrow slip of paper or parchment, affixed to a deed, writing, or writ, hanging at or out of the same; and an appending seal is called a label. See *Deed*.

LABINA. Watery land: *in qua facile labitur. Mon. Angl. tom. 2. p. 372.*

LABORARIIS. Is an ancient writ against persons refusing to serve and do labour, and who have no means of living; or against such as, having served in the winter, refuse to serve in the summer. *Reg. Orig. 189.*

LABOUR. Is the foundation of property. Bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein. *2 Comm. 5.*

LABOURERS. Justices of peace and stewards of leets, &c. have power to hear and determine complaints relating to non-payment of labourers' wages. *4 Edw. 4. c. 1.* Labourers taking work by the great, and leaving the same unfinished, unless for non-payment of wages, or where they are employed in the King's service, &c. are to suffer one month's imprisonment, and forfeit *5l.* The wages of labourers are to be yearly assessed for every county by the sheriff, and justices of leets, in the Easter sessions, and in corporation by the head officers, under penalties. *5 Eliz. c. 4.* And the sheriff is to cause the rates and assessments of wages to be proclaimed. *1 Jac. 1. c. 6.*

All persons fit for labour, shall be compelled to serve by the day in the time of hay or corn harvest; and labourers in the harvest time may go to other counties, having testimonials. From the middle of March to the middle of September, labourers are to work from five o'clock in the morning till seven or eight at night, being allowed two hours for breakfast and dinner, and half an hour for sleeping the three hot months; and all the rest of the year from twilight to twilight, except an hour and an half for breakfast and dinner, on pain of forfeiting *1d.* for every hour absent. See *5 Eliz. c. 4.*

So much of this stat. *5 Eliz. c. 4.* and *1 Jac. 1. c. 6.* as authorized magistrates to fix the price of wages, was repealed by *58 Geo. 3. c. 40*; as was also a clause in the former, relating to assaults by servants on their masters, by the *9 Geo. 4. c. 31.*

Justices of peace may hear and determine disputes concerning the wages of servants and labourers, not exceeding *10l.* *20 Geo. 2. c. 19.*—Extended to the tanners in the stanaries, by *27 Geo. 2. c. 6.*—Justices may punish servants on complaint of the masters, *20 Geo. 2. c. 19. § 2.*—The *20 Geo. 2. c. 19.* shall extend to all servants employed in husbandry, though hired for less than a year, *31 Geo. 2. c. 11. § 3.*

The *20 Geo. 2. c. 19.* extends to labourers of all descriptions, and not merely those in the particular trades or business there enumerated, and therefore includes wages earned by a labourer who contracted to dig and stean a well, to be paid for by the foot, and who employed another to assist him

LÆSÆ

in the work, who is paid by the labourer originally contracted with. *8 East, 118.*

The powers of *20 Geo. 2. c. 19. § 4.* enabling magistrates to hear complaints of masters against their apprentices, and adjust the same, extends to a complaint in writing preferred by the master and certified by the oath of another person. *12 East, 248.*—If under this stat. a magistrate sentence an offender for misconduct to be committed, he must also sentence him to be corrected and held to hard labour. *14 East, 605.*

By *6 Geo. 3. c. 25.* artificers, labourers, and other persons, absenting themselves from the service of their employers, before the expiration of the term contracted for, shall be punished by imprisonment for not less than one month, nor more than three. The court granted a mandamus to the justices of Kent, to hear an application of the journeymen millers, under *10 Geo. 1. c. 1. § 2.* praying the justices to make a rate of wages. *14 East, 395.*

By the *6 Geo. 4. c. 129.* the statutes relating to combinations by workmen were repealed. It contains, however, a variety of provisions to protect persons from being compelled to leave their employment by violence or intimidation. See further *Apprentices, Combinations, Manufacturers, Servants.*

LACE. Mills used solely for the manufacture of lace, are not within the factory act (*3 & 4 W. 4. c. 103.*) As to gold and silver lace, see *Gold*; and further *Frames, Manufacturers.*

LACERTA. A fathom. *Domesday.*

LACHES, [from the Fr. *lascher, i. e. laxare*; or *lasche, ignavus.*] Slackness or negligence; as it appears in *Littleton*, where laches of entry means a neglect in the heir to enter. And probably it may be an old English word; for when we say there is laches of entry, it is all one as if it were said, there is a lack of entry; and in this signification it is used. *Lit. 136.* See *Infant, Heir, &c.*

LACTA. A defect in the weight of money: whence is derived the word *Lach.* *Du Fresne.*

LADA. Hath divers significations; 1st, from the Saxon *lathian*, to convene or assemble, it is taken for a lath, or inferior court of justice. See *Luthe, Truthing-reve.* 2dly, It is used for purgation by trial, from *ladain*; and hence the *lada simplex*, and *lada triplex* or *lada plena*, among the Saxons, mentioned in the laws of King Ethelred and King Henry I. 3dly, Lada is applied to a lade or course of water; Camden uses water-lade or water-course: and *Spelman* says that lada is a canal to carry water from a wet ground; sometimes lada signifies a broad way. *Spelm. Gloss. Mon. Ang. tom. 1. p. 854.*

LADE. Lode, i. e. The mouth of a river; from Sax. *ludian, purgare*, because the water is there clearer; from hence *Crucklade, Lechlade, &c.*

LADIES. For the order of trial of duchesses, countesses, and baronesses, for treason, when indicted thereof, see the ancient stat. *2 Hen. 4. c. 14.* and tit. *Peers, Treason.*

LÆDORIUM. Reproach. *Girald. Camb. c. 14.*

LÆSÆ MAJESTATIS, CRIMEN. The crime of

high treason. So denominated by *Glanvil*, l. 1. c. 2. See *Treason*.

LÆSIONE FIDEI. Suits *pro*. The clergy, so early as the reign of King Stephen, attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro læsione fidei*, as a spiritual offence against conscience, in case of non-payment of debts, or any breach of civil contracts. But they were checked by the constitutions of Clarendon, 10 Hen. 2. c. 15. See *Courts Ecclesiastical*.

LÆTARE JERUSALEM. See *Quadragesimalia*.

LAFORDSWICK, [Sax. *hlaford*, i. e. dominus, and *swic*, proditiō, infidelitas erga dominum.] A betraying one's lord or master. This word is found in King Canute's laws, c. 61. And in the laws of King Hen. 1. Leg. 1. c. 13.

LAGA, (*lex*). The law, *Magna Charta*. Hence we deduce *Saxon-lage*, *Mercen-lage*, *Dane-lage*, &c.

LAGAN. Goods sunk in the sea, [from Saxon *liggan* cubare.] When mariners in danger of shipwreck cast goods out of the ship, and because they know they are heavy and sink, fasten a buoy or cork to them, that they may find and have them again, if the ship be lost, these goods are called *lagan*; and so long as they continue upon the sea, belong to the lord admiral; but if they are cast away upon the land, they are then a wreck, and belong to the lord entitled to the same. 5 Co. Rep. 108. *Lagan* is used in old authorities to denote that right which the chief lord of the fee had to take goods cast on shore by the violence of the sea, &c. Bract. lib. 3. cap. 2. See *Flotsam, Wreck*.

LAGEDAYUM, *Laghdlay*. A law-day, or time of open court. Conell, edit. 1727.

LAGEMAN. [*Legamannus*; *Legamannus*, Spelm. *Homo habens legem*; homo legalis seu legitimus; such as we call now good men of the jury.] The word is frequently used in *Domesday*, and the laws of Edward the Confessor, c. 38. Sir Edw. Coke says, a *Lageman* was he who had *socum et sacam super homines suos*, i. e. a jurisdiction over their persons and estates; of which opinion were Somner and Lambard, and that it signifies the Thanes, called afterwards Barons, who sat as judges to determine rights in courts of justice. In *senatus consult' de Monticulis Wallie*, c. 3. it is said, let twelve laghmen, which Lambard renders men of law, viz. six English and six Welsh, do right and justice, &c. *Blount*.

LAGEN, [*lagena*, *Fleta*, lib. 2. c. 8, 9.] In ancient times it was a measure of six sextarii. Hence perhaps our flagon. The lieutenant of the Tower has the privilege to take *unam lagenam vini, a de canonicis et ceteris*, of all wine saps that come up to the Thames. Sir Peter Leycester, in his *Antiquities of Cheshire*, interprets *lagena vini*, a bottle of wine.

LAGHDAY, or *Lahday*. See *Lagedayum*, *Law-day*; *Lagham*, see *Lageman*.

LAGHSLITE, **LAGSLITE**, **LASHLITE**. [Sax. *lag*, lex, et *slite*, raptio.] A breaking or transgressing of the law; and sometimes the punishment inflicted for so doing. Leg. H. 1. c. 13.—Spelman, and tit. *Overherness*.

LAGON. See *Lagan*.

LAIA. A broad way in a wood; the same with *lada*, which see, *Mon. Ang. tom. 1. p. 483*.

LAIRWHITE, **LECHERWHITE**, **LEGERGELDUM**. [From Sax. *legan*, concumbere, and *wite*, multa.] *Pœna vel multa offendentium in adulterio et fornicatione*; and the privilege of punishing adultery and fornication did anciently belong to the lords of some manors, in reference to their tenants. *Fleta*, lib. 1. c. 47; 4 Inst. 206.

LAMMAS-DAY. The first of August, so called *quasi lamb-mass*; on which day the tenants that held land of the cathedral church of York (which is dedicated to St. Peter ad Vincula) were bound by their tenure to bring a live lamb into the church at high mass. It is otherwise said to come from the Sax. *hlaffmœsse*, viz. *loaf-mass*, as on that day the English made an offering of bread made with new wheat.

LAMPRAYS. See *Fish*.

LAMPS. None but British oil to be used for lamps in private houses, under penalty of 40s. 8 Ann. c. 9. § 18. See *Candles*. By 11 Geo. 3. c. 29. for paying and lighting London, the wilfully breaking or extinguishing any lamp incurs the penalty of 20s. for each lamp or light destroyed or extinguished. See *London*.

LANCASTER. Was erected into a county palatine, anno 50 Edm. III. and granted by the king to his son John for life, that he should have *jura regalia*, and a king-like power to pardon treasons, outlawries, &c. and make justices of peace and justices of assize within the said county, and all processes and indictments to be in his name. See *Counties Palatine*.

There is a seal for the county palatine and another for the duchy, i. e. such lands as lie out of the county palatine, and yet are part of the duchy: for such there are, and the dukes of Lancaster hold them, but not as counties palatine, for they had not *jura regalia* over those lands. 2 Lutm. 1236; 3 Salk. 110, 111. See *Chancellor of the Duchy*. The stat. 37 Hen. 8. c. 16. annexed lands to the duchy of Lancaster, for the enlargement of it. Process against an outlawed person in the county palatine of Lancaster, is to be directed to the chancellor of the duchy, who shall thereupon issue like writs to sheriff, &c. 5 & 6 Edw. 6. c. 26. The 17 Car. 2. concerning causes of replevin shall be of force in the Court of Common Pleas for the county palatine of Lancaster, 19 Car. 2. c. 5. By 17 Geo. 2. c. 7. the chancellor or vice-chancellor may by commission empower persons to take affidavits in any cause, &c. depending in the Chancery or Courts of Sessions, in any plea whatsoever, civil or criminal.—A quay to be made at Lancaster, 23 Geo. 2. c. 12. See 19 Geo. 3. c. 45; 27 Geo. 3. c. 34. enabling the chancellor and council of the duchy to sell fee-farm rents. By 34 Geo. 3. c. 46. the chancellor or vice-chancellor of the duchy and county may authorize persons to take special bail in actions depending in the Court of Common Pleas of the said county. The justices of the said court to make rules as to justifying bail, &c. By 34 Geo. 3. c. 58. to prevent the removal of suits from the inferior courts of the county into the said Court of Common Pleas, security is to be given by the defendants removing such suits for payment of the sum demanded, if recovered in the Court of Common Pleas.

By the 4 & 5 Wm. 4. c. 62. the practice of the Court of Common Pleas at Lancaster has been greatly improved, and the process for the commencement and prosecution of personal actions assimilated to that recently adopted in the superior courts.

By § 16. power is given to the parties in any action to state a special case without proceeding to trial.

§ 17. The judges of the said court may make rules for altering and regulating the mode of pleading and transcribing records, and touching the admission of documents in evidence.

§ 18. Writs of Inquiry under the 8 & 9 Wm. 3. c. 11. are to be executed before the sheriff, unless otherwise ordered.

§ 19. Every other writ of inquiry shall be made returnable on any day certain, to be named in the writ.

§ 20. In any action in which the sum sought to be recovered shall not exceed 20*l.*, the said court may direct the issue joined to be tried before the sheriff, or any judge of any court of record, for the recovery of debt in the county.

§ 23. The defendant in all personal actions, except for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of plaintiff's daughter or servant, may pay money into court.

§ 24. The king, in right of his duchy and county palatine of Lancaster, may appoint all or any of the judges of the courts at Westminster, judges of the Court of Common Pleas at Lancaster.

§ 25. empowers the judges of the courts at Westminster to regulate the fees to be taken in the C. P. at Lancaster.

By § 26 rules for new trials may be moved for before any of the courts at Westminster; but by § 27. judgment and execution are not to be stayed, unless the party moving enters into recognizances with sureties. And by § 28. nothing therein contained shall prevent the Court of C. P. at Lancaster from granting any new trial, &c.

§ 29. Service of subpoenas on witnesses in any part of England and Wales shall be valid, to compel their appearance; but, § 30. they shall not be proceeded against for making default, unless their expenses were tendered at the time of serving the subpoenas.

§ 31. Where final judgment shall be obtained in the C. P. at Lancaster, and the person or effects cannot be found within the jurisdiction, any of the courts at Westminster may issue execution, &c.

And by § 32. if the rules of the Court of C. P. at Lancaster cannot be enforced, they may be made rules of one of the courts at Westminster.

§ 34. Rules made for the courts of Westminster may be adopted by the judges of the C. P. at Lancaster.

§ 35. The same costs for preparing pleadings in the C. P. at Lancaster are to be allowed as in the courts at Westminster.

The king has the same privileges and immunities in respect of property held by him as duke of Lancaster as in respect of crown property. An immediate grant under the duchy seal, of property then under lease, the lease not being recited in the grant, was held void. Held also, that, as it appeared that the property had been in the crown temp. *Car. I.*, a user from that time could not establish a prescription. *Atcock v. Cooke*, 5 Bingham, 340.

See further, *Counties Palatine, Durham*.

LANCETI. *Agricolæ quidam, sed ignotæ originis*. A sort of servile tenants under the ancient feudal system. See *Spelm.* in *v. Larcels*.

LAND[terra.] Signifies generally not only arable ground, meadow, pasture, woods, moors, waters, &c. but also messuages and houses; for in conveying the land, the buildings pass with it. *Co. Lit.* 4, 19. In a more restrained sense it is arable ground; and the land of every man is said in the law to be inclosed from that of others, though it lie in the open field; so that for any trespass therein he shall have the writ *quare clausum fregit*, &c. *Doch. & Stud.* 8. In a grant land may extend to meadow, or pasture, &c. But in writs and pleadings it signifies arable only. 1 Vent. 260.

Coke on Lit. lib. 1. cap. 2. sect. 14. says, *Terra est nomen generalissimum & comprehendit omnes species terræ*, but properly *terra dicitur à terrendo, quia vomere teritur*; and anciently it was written with a single *r*, and in that sense includes whatever may be ploughed. The earth hath in law a great extent upwards, for *cujus est solum ejus est usque ad cælum*. *Co. 9 Rep. Alured's case*. See 2 Comm. cc. 1, 2: and *Herediments*.

LANDA. A lawn or open field without wood. *Cowell*.

LANDBOC [from the Saxon *Land* and *Boc*, Liber.] Was a charter or deed whereby land was held. *Spelm. Gloss*.

LANDCHEAP [Saxon, *Land-Ceap*, from *Ceapan*, to buy and sell.] An ancient customary fine, paid at every alienation of land lying within some manor, or liberty of a borough. At Malden in Essex, there is to this day a custom called by the same name, that for certain houses and lands sold within that place, thirteen pence in every mark of the purchase-money shall be paid to the town; and this custom of *landcheap* they claim (*inter alia*) by a grant from the Bishop of London, made anno 5 Hen. 4.

LANDEA. A ditch in marshy lands to carry water into the sea. *Du-Cange*.

LANDEFRICUS [Lanfricus.] The lord of the soil, or the landlord: from Saxon *land*, and *riga rector*. *Leg. Ethelred*, c. 6.

LANDEGANDMAN. One of the inferior tenants of a manor. See *Spelman*.

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LAND-GABLE. A tax or rent issuing out of land, according to *Domesday*. *Spelman* says a penny for every house; the Welsh used *pridgavel* or *landgavel*.

This Landgavel or Landgabel, in the register of *Domesday*, was a quit-rent for the site of a house, or the land whereon it stood, the same with what we now call ground-rent. *Domesday*; in *Lincoln*.

LANDIMERS, *Agrimensores*. Measurers of land, so called of old; from the Sax. *Gemæra*, i. e. *Terminus*; and hence we say *Meers*.

LANDIRECTA. In the Saxon times the duties which were laid upon all that held land were termed *Trinoda necessitas*, viz. expedition, *burghote* and *brigbote*: which duties the Saxons did not call *servitia*, because they were not feudal, arising from the condition of the owners, but *landirecta*, rights that charged the very land, whoever did possess it. *Spelm. of Feuds*. See *Trinoda Necessitas*.

LANDLORD. He of whom lands or tenements are holden; and a landlord may distrain on the lands of common right, for rent services, &c. *Co. Lit.* 57, 205. In London, if a tenant commit felony, &c. whereby his goods and chattels become forfeit; the landlord shall be paid his rent for two years, before all other debts, except to the King, out of the goods found in the house. *Priv. Lond.* 75. See *London*.

LANDLORD and TENANT. For the law relating to, see *Distress, Ejectment, Lease, Rent, Replevin*, &c.

LAND-MAN, *Terricola*. The terre-tenant.

LAND-TAX. A tax imposed in Great Britain on lands and tenements (and on personal property,) by acts formerly passed annually for that purpose.

The assessment or valuation of estates hereafter mentioned, made in the year 1692, though by no means a perfect one, had this effect, that a supply of half a million sterling was equal to 1s. in the pound of the value of the estates given in. And according to this valuation, from the year 1693 to 1708, the land-tax continued an annual charge upon the subject, above half the time at 4s. in the pound; sometimes at 3s.; sometimes at 2s.; twice at 1s. (A. D. 1732 and 3;) but without any total intermission.

By statute 38 Geo. 3. c. 60. this tax, as imposed by the last annual act, 38 Geo. 3. c. 5. on lands and tenements in Great Britain, is made perpetual; being fixed under that act at 4s. in the pound.—A duty of 4s. in the pound on pensions, offices, and personal estates, in England and Wales, has since that time been annually granted.

By the act 38 Geo. 3. c. 60. the land-tax, so by that act made perpetual, is also made subject to redemption or purchase, either by the owner of the land liable to the tax, or on failure of redemption by him within certain periods, then by any other person inclined to purchase: the sums paid for such redemption or purchase are made applicable to the decrease of the national debt: the purchase-money being in all cases so regulated by the price of the funds as to produce an interest one eleventh part more than the amount of the land-tax redeemed or purchased.—Two modes of sale are allowed, the one by which the land is actually exonerated from the tax, and the other by which the tax remains chargeable on the land, but becomes payable to the person purchasing: the first of these is therefore properly *redemption*: the latter *purchase*.

The act 38 Geo. 3. c. 60. was amended by several subsequent acts; and by 42 Geo. 3. c. 116. (and acts still subsequent, viz. 45 Geo. 3. c. 77; 46 Geo. 3. c. 133; 49 Geo. 3. c. 67; 50 Geo. 3. c. 58; 51 Geo. 3. c. 99; 52 Geo. 3. c. 80; 54 Geo. 3. c. 173; 57 Geo. 3. c. 100,) more effectual provisions are made for carrying the measure into effect. By all these several acts powers are given to corporations, tenants in tail, &c. to sell part of their estate for the purpose of exonerating the remainder from the land tax.—By 46 Geo. 3. c. 133, small livings and the lands of charitable institutions may be exonerated gratis.

By the 7 & 8 Geo. 4. c. 75; 9 Geo. 4. c. 38; 2 & 3 W. 4. c. 127; 3 & 4 W. 4. c. 95; and 4 & 5 W. 4. c. 60., various additional commissioners have been appointed, and a number of new regulations made, for carrying the acts relating to the land-tax into execution.

By the 4 & 5 W. 4. c. 11., continuing the duties on offices and pensions, those on personal estates having been taken off by the 3 & 4 W. 4. c. 121., the sums paid into the Exchequer in contracts for the redemption of the land-tax, under the directions of the 42 Geo. 3. c. 116. are hereafter to be placed to the account of the consolidated fund.

The ancient method of taxation was by *escuage*, which was on land held by *knight service*; and by tallage on the cities and boroughs; and it was made in this manner: when the king wanted money for his wars, those tenants that did not attend him in person paid him an aid, and the aid was assessed before the justices itinerant. It was generally a gift of all the inhabitants as a body corporate; if they did not give according to the wants of the crown, the justiciar inquired into their behaviour, and if there were any forfeitures of their charters, *quo warrantos* came out, to seize their liberties into the king's hands. But Edward I. found this way of taxing by *escuage* and tallage to be very incomplete, because wars were drawn out into great length and expense; and therefore he formed into distinct bodies the tenants in *capite* that held great baronies, and these were called the *barones majores*, (the now Peers of Parliament,) and the representatives of the *barones minores* and of several corporations, viz. the citizens and burgesses, of whom he made one body; which now composes the House of Commons. *Gilb. Treat. of the Excheq.* 192.

King Edward I. confirmed to the people *Magna Charta*, which they had long contended for, and also the charter of the forests; and for *Magna Charta* they granted the king a fifteenth, by the name of *quindecimam partem omnium bonorum*; so that instead of particular assessments in cities and boroughs, there was one universal assessment of the fifteenth of all their substance: this fifteenth seems to have been at first made out of the ecclesiastical tenth; for the popes claimed the tenths of all benefices; it was therefore easy to know, by the pope's collections of his tenths, what was the value of every ecclesiastical benefice, for the pope's tenth was reckoned at 2s. per pound, and therefore the fifteenth must be 1s. 4d. The benefice consisted of the glebe and the tenth part of the township; therefore by the value of the benefice, deducting the glebe, they knew the true value of the township, and how to set a fifteenth upon it: so that the fifteenth of the townships were certain sums, set by the king's taxors and collectors under the act of parliament; and commissions were granted to the taxors and collectors of them under the great seal; but in collecting of the fifteenths the sums only appeared in the books below. And the collectors of every township either returned their collection into the Exchequer, or else there were head collectors for the whole county, who returned it thither; there were likewise commissioners appointed, to supervise such taxation and collections. But about the time of Edward III. there were certain established sums set upon every township; and so as the king's wants increased, they gave one, two, or three fifteenths. See *Gilb.* 193, 194.

We find in the times of Henry VIII., Queen Elizabeth, and King James I., that they raised both subsidies and fifteenths; this was, because the value of things increased, and therefore the old fifteenths were not according to the then true value of townships. And therefore they contrived that the subsidy should be raised by a pound-rate upon lands, and likewise a pound-rate upon goods; and we find in the subsidy 4 Charles I. (which is said to be the greatest subsidy that ever was given, and which passed upon the petition of right,) there was 4s. in the pound laid upon land, and 2s. 8d. upon goods. Now 4s. upon land amounts to three fifteenths, and 2s. 8d. which was upon goods, to two fifteenths; but in this they had no regard to the old rates made in the tax-book of the

several townships, otherwise than to discover the value of the lands; but a method is chalked out by the act of parliament to appoint commissioners, assessors, and collectors, in order to rate and get in the said subsidy. *Ibid.*

This was found very inconvenient, because the commissioners used to be favourable to their own county, therefore it was found necessary to revive so far the ancient method as to appoint a certain sum; and in the time of the civil war the Long Parliament would not settle any persons to appoint commissioners, but the appointment of commissioners was made in the act itself: and in this new manner of taxing, they appointed the sum to be levied on each particular county, in the act itself, as well as the commissioners' names, and where to levy it; and the six associated counties, viz. London, Middlesex, Kent, Sussex, Surrey, and Hertford, being not spoiled and pillaged in the civil wars, and more hearty to the parliament interest, were taxed higher than any other counties in England. *Gilb.* 194, 195, 196.

After the Revolution, to support King William in his wars with France, it was necessary to come into a land-tax; and from 1684 to 1693 the tax was made by a pound-rate, like the former subsidies; but when the people found that the war was likely to hold, about 1693, the tax was mightily lessened, every body being willing to ease his neighbour; and then they came to lay a rate upon every county, and the associating counties, being very zealous for the government in the Revolution, and having taxed themselves higher than their neighbours in 1693, it was argued that those counties were better able to bear the tax, and therefore in 1693 they laid the disproportioned sums which became the standard of the land-tax. *Ibid.*

LAND-TENANT. He that possesses land let, or hath it in his manual occupation. 14 Edw. 3. stat. 1. c. 3. See *Tertenant*.

LANGEMANNI. Lords of manors; the word is thus interpreted by Sir Edward Coke. 1 Inst. 5. They are mentioned in *Domesday*.

LANGIOLUM. An under garment made of wool, formerly worn by the monks, which reached down to their knees; so called because *lanæa fit*. *Mon. Ang. tom.* 1. p. 419.

LANGUAGE of Law Records, Pleadings, &c. See *Pleading*, I. 3.

LANIS DE CRESCENTIA WALLIÆ TRADUCENDIS ABSQUE CUSTUMA, &c. An ancient writ that lay to the customer of a port, to permit one to pass wool without paying custom, he having paid it before in Wales. *Reg. Orig.* 279.

LANTERIUM. The lantern, cupola, or top of a steeple. *Cowell. edit.* 1727. *Angl. Sacr.* p. 1. pag. 775.

LANO NIGER. A sort of base coin, formerly current in this kingdom. *Mém. in Scac.* Mich. 22 Edw. 1.

LAPIS CALAMINARIS. Stealing, or removing with such intent, from any mine, bed, or vein, is felony by stat. 7 & 8 Geo. 4. c. 29. § 37. and punishable as simple larceny.

LAPIS MARMORIUS. A marble stone about twelve feet long and three feet broad, placed at the upper end of Westminster-hall, where was likewise a marble chair erected on the middle thereof, in which our kings anciently sat at their coronation dinner, and at other times the Lord Chancellor. Over this marble table are now erected the Courts of Chancery and King's Bench. *Orig. Juridical.*

LAPIS PACIS. The same with *Osculum pacis*. *Du Fresne.*
LAPSE [*Lapsus*.] A slip or omission of a patron to present to a church, within six months after it becomes void. See *Admonson*, II.

LAPSED LEGACY. See *Legacy*.

LARCINNY [*l. Larrecin*; Lat. *Latrocinium*] A theft of felony of another's goods.

Blackstone, with more immediate reference to its derivation, *Latrocinium*, always spells the name thus, *LARCINNY*; and distinguishes the offence into two sorts, *simple Larcinny*, or plain theft unaccompanied with any other atrocious circum-

stance, and mixed or compound larceny; which also includes in it the aggravation of a taking from the house, or person. 4 *Comm. c. 17*. As to that species of the latter which consists in an open and violent taking from the person, see *Robbery*.

Formerly this offence was designated, either grand or petit larceny, according to the value of the thing stolen: the former being the technical description if the value exceeded twelve pence; the latter, if not amounting to that sum. But now, by the 7 & 8 *Geo. 4. c. 29. §. 2*. the distinction between grand and petit larceny is abolished, and every larceny, whatever be the value of the property stolen, shall be subject to the same incidents in all respects as grand larceny; and every Court whose power was before limited to the trial of petty larceny, shall have power to try every larceny, the punishment of which cannot exceed the punishment mentioned in the act for simple larceny, and also to try all accessaries to such larceny.

The offence of larceny or larciny, then (for either mode of spelling may be adopted) shall be considered according to the following arrangement:

- I. 1. *Of Simple Larceny.*
2. *Of its Punishment.*
- II. *Of mixed or compound Larceny.*
1. *In a Dwelling House, &c.*
2. *From the Person.*

I. 1. Simple Larceny is, "the felonious taking and carrying away of the personal goods of another."

First, it must be a *taking*. This implies the consent of the owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon trust, can ground a larceny. As if A. lends B. a horse, and he rides away with him; or if one sends goods by a carrier, and he carries them away, these are no larcenies, 1 *Hal. P. C. 504*. But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are larcenies; for here the *animus furandi* is manifest, since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. 3 *Inst. 107*. But bare non-delivery shall not of course be intended to arise from a felonious design; since that may happen from a variety of other accidents. Neither by the common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But if he had not the possession but only the care and oversight of the goods, as the butler of plate, and the shepherd of sheep, and the like, the embezzling of them is felony and larceny at common law. 1 *Hal. P. C. 506*, 3 *Inst. 108*. So if a guest rob his inn or tavern of a piece of plate, it is larceny, for he hath not the possession delivered to him but only the use. 1 *Hawk. P. C. 3, §. 6*.

By the 7 & 8 *Geo. 4. c. 29. §. 45*. (repealing 3 & 4 *Will. & Mary. c. 9*. the former stat. relating to this subject,) it is declared, to be felony if a tenant or lodger steal any chattel or fixture let to be used by him in or with any house or lodging, and the indictment may be in the common form for larceny.

It was decided upon the former statute, that a wife could not be guilty with her husband, for she was under his coercion. *O. B. 1783, No. 30*. Nor without her husband, if it appeared the lodgings were let to him. *O. B. 1761, No. 17*. Nor even if it appeared that the lodgings were let jointly to both the husband and wife, for that was construed to be the act of the husband only. *O. B. 1758, No. 105*. But now, by the recent statute, the wife may be found guilty without her husband, although the lodgings were taken by him. Under the former act it was held that the offender must be a lodger at the time the larceny is committed, *O. B.*

1785, No. 74; and the property stolen must be such as may reasonably be construed the furniture of the sort of lodging taken. *Leach's Hawk. P. C. 1. c. 33. §. 19, in n*.

If the clerk of a banker or merchant has the care of money, or if he has access to it, for special and particular purposes, and is sent to the bag or drawer for money, for the purpose of paying a bill, or if he is sent for the purpose of bringing money generally out of the bag or drawer, and, at the time he brings that money, he clandestinely and secretly takes out other money for his own use, he is as much guilty of a felony as if he had no permission or access to it whatever. So if a servant be sent to a library for one particular book, and he takes another, or being sent for a hat and sword, and he steals a cane; in all these cases it has been said the offenders are guilty of felony, for though the property is delivered, the possession of it remains in the true owners. *O. B. 1784, p. 1295, 1304*. So also where a person being left in an apartment pawns the furniture or other property under his care, with a felonious design to steal it, it is felony. *O. B. 1785, p. 717; O. B. 1786; Leach's Hawk. P. C. 1. c. 33. §. 6, in n*.

Where by a delivery of goods not only the possession but the right of property passes, it is clear no subsequent conversion can be construed into larceny, whatever the intent of the party may be. Thus, where the defendant bought a horse at a fair, of the prosecutor, to whom he was known, and, having mounted the horse, said to the prosecutor, that he would return immediately and pay him, to which the prosecutor answered "very well;" the defendant rode the horse away, and never returned: this was holden to be no larceny, because the property as well as the possession was parted with. *R. v. Herry, 1 Leach 47. 2 East, P. C. 679*. So where the defendant bought goods and desired them to be sent to him, with a bill and receipt; and the shopman who brought them left them, upon being paid for them by two bills, which, however, afterwards turned out to be mere fabrications; the judges held that this was not larceny, because the prosecutor had parted with the property as well as the possession, upon receiving what was deemed at the time, by his servant, to be payment. *R. v. Parkes, 2 Leach, 614. 2 East, P. C. 671*. Where the servant of a pawnbroker, who had a general authority from his master to act in his business, delivered up a pledge to the pawnbroker upon receiving a parcel, which he supposed to contain diamonds, and under that belief parted with the pledge entirely, but the parcel contained stones of no value, this was holden to be no larceny. *R. v. Jackson, R. & M. 119*. So, where the defendant sent to a hatter, in the name of one of his customers, for a hat, and it was accordingly delivered to the messenger, upon the credit of the customer; the judges held, that this was not larceny, the owner having parted with his property in the hat. *R. v. Adams, R. & R. 223*.

Under some circumstances a man may be guilty of felony in taking his own goods; as if he steals them from a pawnbroker, or any one to whom he hath delivered and entrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on the road, with intent to charge the hundred with the loss according to the statute of Winchester (now repealed.) *Fost. 123, 4*.

So where the owner delivers goods to a carrier, and afterwards secretly steals them from him with an intent to charge him with them, &c. because the carrier had a special property, and the possession for a time. 3 *Inst. 110; Dalt. 373; Pult. 126*.

In further explanation of this part of the subject the following is deserving of attention:

To make the crime of larceny there must be a felonious taking; or an intent of stealing the thing, when it comes first to the hands of the offender, at the very time of receiving. 3 *Inst. 107; Dalt. 367*. And if one intending to steal goods, gets possession of them by ejectment, replevin, or other

process at law unduly obtained, by false oath, &c. it is a felonious taking. 3 *Inst.* 64; *Kel. Rep.* 43, 44. If a man hath possession of goods once lawfully, though he afterwards carry them away with an ill intention, it is no larceny; where a tailor embezzles cloth delivered to him to make a suit of clothes, &c. it is not felony. *H. P. C.* 61; 5 *Rep.* 31. And if I lend a person my horse to go to a certain place, and he goes there, and then rides away with him, it is not larceny; but remedy is to be had by action for the damage; though if one comes on pretence to buy a horse, and the owner gives the stranger leave to ride him, if he rides away with the horse, it is felony; for here an intention is implied. *Wood's Inst.* 364, 365. In the above cases, there is a lawful possession by delivery, to extenuate the offence; but persons having the possession of goods by delivery, may in some instances be guilty of felony, by taking away part thereof; as if a carrier open a pack, and take out a part of the goods; a miller, who has corn to grind, takes out a part of the same, with an intent to steal it, &c. in which cases the possession of part, distinct from the whole, was gained by wrong, and not delivered by the owner, &c. *H. P. C.* 62; *S. P. C.* 25; 1 *Hawk. P. C. c.* 33, § 5.

To constitute larceny the property must also be taken from the possession of the owner; therefore, to state a case more at large which has already been repeatedly alluded to, where A. intending to go a distant journey, hires a horse fairly and *bona fide* for that purpose, and evidences the truth of such intention by actually proceeding on his way, and afterwards rides off with the horse, it is no theft; because the felonious design was hatched subsequent to the delivery; and the delivery having been obtained without fraud or design, the owner parted with his possession as well as his property. *O. B.* 1784, p. 1294; and thereby gave to A. dominion over the horse; upon trust that he would return him when the journey was performed. *O. B.* 1786, p. 333, 4. But if the delivery of property be obtained with a preconcerted design to steal the thing delivered, although the owner, in this case, parts with the thing itself, he still retains in law the constructive possession of it; therefore, where a man, having feloniously obtained the delivery of a bill of exchange under the fraudulent and delusive pretence of discounting it, converted it to his own use, and it appearing upon the evidence that the owner never meant to part with possession, it was held to be felony. *O. B.* 1784, p. 294. So also where a horse was obtained with the same design, upon pretence of trying its paces. *O. B.* 1779, p. 363; *O. B.* 1784, p. 293. So also to obtain the delivery of money, with design feloniously to take it away, under the false pretence of having found a diamond ring of great value, has been determined by nine judges to be a taking from the possession of the owner, and consequently felony. *O. B.* 1785, p. 160. So also to obtain the delivery of goods under the pretence of purchasing them, and then to run away with them. *Raym.* 276. And in general where the delivery of the property is made for a certain, special, and particular purpose, the possession is still supposed to reside, unparted with, in the first proprietor. Therefore, where a master delivers goods to his servant to carry to a customer, but instead of so doing he converts them on his way to his own use, it is a felonious taking; for the master had a right to countermand the delivery of them, and therefore the possession remained in him at the time of the conversion. *O. B.* 1782, No. 375; *O. B.* 1783, No. 28. So also if a watchmaker steals a watch, delivered to him to clean. *O. B.* 1779, No. 83. Or if one steal clothes delivered for the purpose of being washed. *O. B.* 1758, No. 18. Or goods in a chest delivered with the key for safe custody. *O. B.* 1770, No. 83. Or guineas delivered for the purpose of being changed into half guineas. *O. B.* 1778, No. 52. Or a watch delivered for the purpose of being pawned. *O. B.* 1784, No. 613. In all these instances the goods taken have been thought to remain in the possession

of the proprietor, and the taking of them away held to be felony. *Leach's Hawk. P. C. c.* 33, § 5. in n. So where a person employed to drive cattle, sells them, it is larceny, for he has the custody merely, and not the right to the possession. *Moody's C. C.* 368. Also where a carter went and disposed of his master's cart, it was adjudged to be felony. 2 *East, P. C.* 565.

If one servant delivers goods to another servant, this is a delivery by the master; yet if the master or another servant delivers a bond, or cattle to sell, and the servant goes away with the bond, and receives the money thereon due, or receives the money for the cattle sold, and goes away with the same, this was held to be no felony or larceny within the stat. 21 *Hen. 8. c.* 7. (which is now repealed by the 7 & 8 *Geo. 4. c.* 27.) *Dalt.* 388; *H. P. C.* 62; 3 *Inst.* 105. So if a servant receives his master's rents; for the master did not deliver the money to the servant, and it must be of things delivered to keep; and if things delivered to the servant to keep, are under 40s. value, and he goes away with them, this is only a breach of trust, by reason of the delivery; but if the goods were not delivered to him, it is felony and larceny to go away with or embezzle them, though under the value of 40s. &c. *Dalt.* 369. Where, however, goods, of which the master has never been in possession, are delivered to the servant for the master's use, and the servant, instead of delivering them to his master, by depositing them in his house or the like, converts them to his own use, this is no larceny at common law. 2 *East, P. C.* 568. Therefore, if a shopman receive money from a customer of his master, and instead of putting it into the till secrete it; 2 *Leach*, 841; or if a banker's clerk receive money at the counter, and instead of putting it into the proper drawer, purloins it, 2 *Leach*, 835; or receive a bond for the purpose of being deposited in the bank, and convert it to his own use, 1 *Leach*, 28; 2 *East, P. C.* 570; in these cases, it has been held that the clerk or shopman is not guilty of larceny.

Now, by the 7 & 8 *Geo. 4. c.* 29, § 47. a clerk or servant receiving any chattel, money, or valuable security, for or on account of their master, and fraudulently embezzling the same, is to be deemed to have stolen such chattel, &c.; but the offence is still treated as an embezzlement, and ranked under that head.—See *Embezzlement*.

Secondly, There must not only be taking, but a carrying away; *cepit et asportavit*, was the old law Latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the fact, or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs, these have been adjudged sufficient carryings away to constitute a larceny. 3 *Inst.* 108, 109. Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it, this is larceny. 1 *Hawk. P. C. c.* 33, § 18.

A man was detected in taking the contents of a bale of goods in a waggon. It appeared that the bale laid horizontally, and that he had set it on its end; but as it had not been removed from the place, this was held, upon a case reserved, not to be a sufficient carrying away. But where a man with a felonious intention had removed goods from the head to the tail of a waggon, it was held a sufficient removal to constitute a carrying away. *O. B.* 1784, p. 734. So a diamond ear-ring snatched from a lady's ear, but lodging in the curls of her hair, and not taken by the thief, was held to be a sufficient asportation. *O. B.* 1784, No. 537; *Leach's Hawk. P. C. c.* 33, § 18. in n. And where the prisoner drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket, but whilst the book was still about the person of the prosecutor, the latter suddenly raised his hand, whereupon the prisoner let the book

drop, and it fell again into the pocket: this was considered a sufficient asportation to constitute larceny. *R. & M.* 78.

Thirdly, This taking and carrying away must also be *felonious*; that is, done *animo furandi*. This requisite, besides excusing those who labour under incapacities of mind or will, indemnifies also mere trespassers, and other petty offenders. As if a servant takes his master's horse, without his knowledge, and brings him home again; if a neighbour takes another's plough that is left in the field, and uses it upon his own land, and then returns it; if, under colour of arrear of rent, where none is due, one distrein another's cattle or seize them; all these are misdemeanors and trespasses, but no felonies. *1 Hal. P. C.* 509. The ordinary discovery of a felonious intent, is where the party doth it clandestinely; or, being charged with the fact, denies it; but this is by no means the only criterion of criminality, for in cases that may amount to larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent, or *animum furandi*; wherefore they must be left to the due and attentive consideration of the Court and Jury.

Fourthly, This felonious taking and carrying away must be of the *personal goods of another*; for if they are things *real*, or savour of the *realty*, larceny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot, in their nature, be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass; which depended on a subtilty in the legal notions of our ancestors. These things were parcel of the real estate; and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence so as to be changed into moveables, and at the same time by one and the same continued act, carried off by the person who severed them, they could never be said to be taken from the proprietor in this their newly acquired state of mobility (which is essential to the nature of larceny,) being never, as such, in the actual or constructive possession of any one but of him who committed the trespass. He could not, in strictness, be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief sever them at one time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid; and come again at another time, when they are so turned into personalty, and takes them away, it is larceny; and so it is if the owner, or any one else, has severed them. *3 Inst.* 109; *1 Hal. P. C.* 510. See *8 Rep.* 33; *Dalt.* 372. This question is now, however, very much put at rest by the statute law. (*7 & 8 Geo. 4. c. 29.*) See several of its provisions under *tits. Fences, Fixtures, Gardens.*

By § 37 of the same statute, to steal or sever with such intent any metal, lapis calaminaris, manganese, mundick, wad, black cauke, black lead, or coal, from any mine, bed, or vein, is felony, punishable as simple larceny; and by § 23, to steal any paper or parchment, written or printed, being evidence to the title or any part of the title to any real estate, is made a misdemeanor punishable by transportation for seven years, fine or imprisonment. By § 21, stealing, or fraudulently taking from the place of its deposit, or obliterating, &c. any record, writ, process, interrogatory, affidavit, &c. or original document, is a misdemeanor, punishable in like manner. By § 22, stealing, or for any fraudulent purpose destroying, or concealing, any will, codicil, or testamentary instrument, is likewise made a misdemeanor, punishable by transportation, imprisonment, &c.

In indictments for stealing any of the things mentioned in the three last sections of the above act, it is not necessary to allege that they are the property of any person, or are of any value.

Bonds, Bills, and Notes, being mere *choses in action*, were held also at the common law not to be such goods whereof larceny might be committed; being of no intrinsic value, and not importing any property in possession of the person from whom they are taken. *8 Rep.* 33. But by *2 Geo. 2. c. 25.* they were put upon the same footing with respect to larcenies as the money they were meant to secure. This statute was repealed by the *7 & 8 Geo. 4. c. 27.*, but by the *7 & 8 Geo. 4. c. 29. § 5.*, if any person shall steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposits in any savings bank, or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money, or for payment of money, whether of this kingdom, or of any foreign state, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing, every such offender shall be deemed guilty of felony, of the same nature, and in the same degree, and punishable in the same manner, as if he had stolen any chattel of the like value, with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby, and remaining unsatisfied, or with the value of the goods or valuable thing mentioned in the warrant or order.

Larceny also cannot at common law be committed of treasure-trove, or wrecks, waifs, estrays, &c. till seized by the king, or him who hath the franchise: for till such seizure no one hath a determinate property therein. See *Dalt.* 370; *3 Inst.* 208; *H. P. C.* 67.—By the *7 & 8 Geo. 4. c. 29. § 18.* plundering or stealing from any ship in distress, or wrecked, &c., or any goods, &c. belonging thereto, is a felony, punishable with death; but where there are no circumstances of cruelty, or the goods are of small value, the offender may be prosecuted and punished as for simple larceny.

Larceny cannot also be committed of such animals in which there is no property either absolute or qualified, as of beasts that are *feræ naturæ*, and unreclaimed, such as deer, hares, and conies, in a forest, chace, or warren; fish in an open river or pond; or wild fowls at their natural liberty. *1 Hal. P. C.* 511; *Fost.* 366. But if they are reclaimed and confined, and may serve for food, it is otherwise, even at common law: for of deer so inclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larceny may be committed. *1 Hawk. P. C. c. 33. § 26; 1 Hal. P. C.* 511. See *Deer Stealers, Fish.* It is said that if swans be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond: otherwise it is only a trespass. *Dalt. Jus. c. 156.* But, of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitæ naturæ*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool, larceny may be committed. *Dalt.* 21; *Crompt.* 36; *1 Hawk. P. C. c. 33. § 28; 1 Hal. P. C.* 507; *the King v. Martin*, by all the judges, *P. 17 Geo. 3.* And also of the flesh of such as are either *domitæ* or *feræ naturæ* when killed. *1 Hal. P. C.* 511. As to those animals which do not serve for food, and which, therefore, the law holds to have no intrinsic value, as *dogs* of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to

larceny. 1 *Hal. P. C.* 512. For the punishment now inflicted by statute for stealing dogs or other animals, not the subject of larceny at common law, see tit. *Dogs*.

As to stealing oysters, see that title.

Notwithstanding, however, that no larceny can be committed unless there be some property in the thing taken, and an owner, yet, if the owner be unknown, provided there be a property, it is larceny to steal it; and an indictment will lie for the larceny of the goods of a person unknown. 1 *Hal. P. C.* 512. This is the case of stealing a shroud out of a grave, which is the property of those, whoever they were, that buried the deceased; but stealing the corpse itself, which has no owner (though a matter of great indecency,) was no felony, unless some of the grave-clothes were stolen with it. It was, however, punishable by indictment as a misdemeanor, even though the body were taken for the improvement of the science of anatomy; it being a practice contrary to common decency, and shocking to the general sentiments and feelings of mankind. See 2 *Term Rep.* 733.

Where a person finds the goods of another that are lost, and converts them to his own use, it is no larceny; *H. P. C.* 61; even should he deny the finding of them, or secrete them. 1 *Hale*, 506. But it seems that in some extraordinary cases the law will rather feign a property, where in strictness there is none, than suffer an offender to escape justice. 1 *Hawk. P. C. c.* 33. § 29.

And the above doctrine does not apply if he knows the owner; and, therefore, where a bureau was given to a carpenter to repair, and he found money secreted in it which he converted to his own use, it was held to be a felony. 8 *Ves.* 405; 2 *Leach*, 952. So if a hackney-coachman convert to his own use a parcel left by a passenger in his coach, by mistake, it is a felony if he know the owner; or if he took him up or set him down at any particular place where he might have inquired for him. 2 *East P. C.* 664; 1 *Leach*, 413, 415, n. And in all cases where there are marks on the property by which the owner may be traced, a conversion of it by the finder will be a larceny. 2 *Russ.* 102.

It must be proved on the trial that the goods stolen are the absolute or special property of the person named in the indictment. If he be described as a certain person to the jurors unknown, and it appears in evidence that his name is known, the prisoner will be acquitted. See 3 *Camp.* 261; 1 *Holt*, 595; 2 *East, P. C.* 651.

Where goods are stolen from a bailee, they may be described either as the property of the bailor or bailee, 2 *Hale*, 181, although they were never in the real owner's possession, but in that of the bailee merely. *R. & R.* 136. The property must not, however, be laid in one who has neither the actual nor constructive possession of the goods. *R. & R.* 225. Thus if it appear the person named is merely servant to the owner, the prisoner must be acquitted, for the possession of the servant is the possession of the master. *R. & R.* 412.

By the 7 & 8 *Geo. 4. c.* 29. § 44. (before noticed) in case of the larceny of any fixtures in any square, street, or other like place, it is not requisite to allege the same to be the property of any person. See further, *Indictment*, VI.

2. Many learned and scrupulous men have questioned the propriety, if not lawfulness, of inflicting capital punishment for simple theft. The natural punishment for injuries to property seems to be the loss of the offender's own property; and might be universally the case were all men's fortunes equal. But as those who have no property themselves are generally the most ready to attack the property of others, it has been found necessary, instead of a pecuniary, to substitute a corporal punishment.

Our ancient Saxon laws nominally punished theft with death, if above the value of twelvpence; but the criminal was permitted to redeem his life by a pecuniary ransom; but in the ninth year of Henry I. this power of redemption

was taken away, and all persons guilty of larceny above the value of 12d. were directed to be hanged. 1 *Hal. P. C.* 12; 3 *Inst.* 53. And grand larceny, or the stealing above the value of 12d. continued liable to be visited with death at common law until the passing of the late statute, already mentioned, by which the distinction of grand and petit larceny was abolished. The value of the goods stolen is now immaterial, and every theft, whatever be the amount of property taken, is punishable under the third section of the same act, which provides that every person convicted of simple larceny, or of any felony by that act made punishable like simple larceny, shall (except as otherwise provided in the act, be liable to be transported for seven years, or be imprisoned not exceeding two years, and if a male to be once, twice, or thrice publicly whipped in addition to such imprisonment; and by § 4 such offenders (and persons convicted of any misdemeanor punishable under the act) may be sentenced to be imprisoned, or imprisoned and kept to hard labour in the common gaol or house of correction, and may also be kept in solitary confinement for the whole or any portion of such imprisonment, or such imprisonment with hard labour.

By 7 & 8 *Geo. 4. c.* 28. § 7. no person convicted of felony shall suffer death unless for some felony, which was excluded from the benefit of clergy before or on the first day of the then session of parliament, or which is made punishable with death by some statute passed after that day.

An acquittal of larceny in one county may be pleaded in bar of a subsequent prosecution for the same stealing in another county: and an averment that the offences in both indictments are the same, may be made out by witnesses, or inquest of office, without putting it to trial by jury; though that of later years hath been the usual method. 2 *Hawk. P. C. c.* 35. § 4. But it is no plea in appeal of larceny, that the defendant hath been found not guilty in an action of trespass brought against him by the same plaintiff for the same goods; for larceny and trespass are entirely different; and a bar in an action of an inferior nature will not bar another of a superior. 2 *Hawk. P. C. c.* 35. § 5. If a person be indicted for felony or larceny generally, and upon the evidence it appears that the fact is but a bare trespass, he cannot be found guilty, and have judgment on the trespass, but ought to be indicted anew; though it may be otherwise where the jury find a special verdict, or when the fact is specially laid, &c. In trespass, where the taking is felonious, no verdict ought to be given unless the defendant hath before been tried for the felony. 2 *Hawk. P. C. c.* 47. § 6. All felony includes trespass, so that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony or larceny in carrying them away; and in every indictment of larceny there must be the words *felonice cepit & asportavit*, &c. *H. P. C.* 61; 1 *Hawk. P. C. c.* 33. § 2.

II. 1. Larceny in the dwelling-house, though it seems to have a higher degree of guilt than simple larceny, yet is not at all distinguished from the other at common law; unless where it is accompanied with the circumstance of breaking the house by night, and then it falls under another description, viz. that of *Burglary*.

By the 7 & 8 *Geo. 4. c.* 29. § 11 & 12. breaking and entering any dwelling-house, and stealing to any amount; stealing in a dwelling-house, any person being put in fear; or stealing therein to the value of 5*l.*, were made capital felonies. But by the 2 & 3 *Wm. 4. c.* 62. the punishment of death for stealing to the value of 5*l.* in a dwelling-house was abolished, and transportation for life substituted. And the 3 & 4 *Wm. 4. c.* 44. takes away the capital punishment for breaking and entering any dwelling-house and stealing to any amount, and in lieu thereof subjects the offender to transportation for life, or for not less than seven years, or previously to transportation to imprisonment for not exceeding four years or less than one year, with or without hard labour. See further as to stealing in dwelling-houses, &c. *Buildings, Burglary*, &c.

By the 7 & 8 Geo. 4. c. 29. § 14. offenders breaking and entering any building within the same curtilage as the house, but not being considered as part thereof, for the purposes mentioned in § 12 of the statute, and stealing therein any chattel, may be transported for life, &c. See *Buildings, House*. And by § 15. persons breaking and entering any shop, warehouse, or counting-house, and stealing therein any chattel, &c. are liable to the same punishment.

2. The offence of *privately stealing from a man's person*, as by picking his pocket, or the like, privily without his knowledge, was debarred the benefit of clergy, so early as 8 Eliz. c. 4. which was repealed by 48 Geo. 3. c. 129. But then it must have been such a larceny as stood in need of benefit of clergy, viz. of above the value of 12d. else the offender would not have judgment of death, for the statute created no new offence; but only prevented the prisoner from praying the benefit of clergy, and left him to the regular judgment of the ancient law. This severity seemed to be owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with which they were practised (even in the queen's court and presence) at the time when the former statute was made; besides that it was an infringement of property in the manual occupation or corporal possession of the owner, which was an offence even in a state of nature. 4 Comm. c. 17.

Now by the stat. 7 & 8 Geo. 4. c. 29. § 6. to steal any chattel, &c. from the person of another renders the offender liable to transportation for life &c., or not less than seven years imprisonment and whipping. See further on the subject of larceny, *False Pretences, Felony, Indictment, &c.*

LARDARIUM. The larder, or place where the lard and meat were kept. *Paroch. Antiq.* 496.

LARDERARIUS REGIS. The king's larderer, or clerk of the kitchen. *Concill.*

LARDING-MONEY. In the manor of Bradford, in the county of Wilts, the tenants pay to their lord a small yearly rent by this name, which is said to be for liberty to feed their hogs with the masts of the lord's woods, the fat of a hog being called lard; or it may be a commutation for some customary service of carrying salt or meat to the lord's larder. This was called *lardarium* in old charters; *et decimam lardarii de hoga*. *Mon. Ang. tom. 1. p. 321.*

LARONS [*Fr.*] Thieves; mentioned in the 18 Edm. 2. for view of frankpledge.

LASCARS. By the 3 & 4 Wm. 4. c. 54. (for the encouragement of British shipping and navigation, § 18, ships trading eastward of the Cape of Good Hope, within the limits of the East India Company's charter, may be navigated by Lascars, or other natives of countries within those limits.

LASTATINUS. Often occurs in *Walsingham*, and signifies an assassin or murderer. *Anno 1271.*

LAST [*Sax. hlastan, i. e. onus, Fr. last.*] Denotes a burden in general, and particularly a certain weight or measure of fish, corn, wool, leather, pitch, &c. As a last of white herrings is twelve barrels; of red herrings, twenty cades or a thousand; and of pilchards, ten thousand; of corn, ten quarters, and in some parts of England twenty-one quarters; of wool, twelve sacks; of leather, twenty dickers, or ten score; of hides or skins, twelve dozen; of pitch, tar, or ashes, fourteen barrels; of gunpowder, twenty-four firkins, weighing a hundred pounds each, &c. See 32 Hen. 8. c. 11. (repealed); 1 Jac. 1. c. 33; 15 Car. 1. c. 7; and tit. *Weights and Measures*.

LAST-COURT. In the marshes of Kent, is a court held by the twenty-four jurats, and summoned by the bailiffs; wherein orders are made to lay and levy taxes, impose penalties, &c. for the preservation of the said marshes. *Hist. of Imbanking and Draining*, 54.

LASTAGE [*lastagum.*] A custom exacted in some fairs and markets to carry things bought where one will by the

interpretation of *rastal*; but it is more accurately taken for the ballast or lading of a ship. Lastage is also defined to be that custom which is paid for wares sold by the last; as herrings, pitch, &c.

LASTAGE AND BALLASTAGE. See *Ballast*.

LAST HEIR [*Ultimus hæres.*] He to whom land comes by escheat for want of lawful heirs; that is, in some cases the lord of whom they held, but in others the king. *Bract. lib. 7. c. 17.* See *Descent, Escheat, Heir, Tenure*.

LATERA. Sides-men, companions, assistants. *Concill.*

LATERARE. To lie side-ways in opposition to lying end-ways, used in the description of lands. *Chart. Antiq.*

LATHE, LETHE, LEID, or LETHIEN [*Læstum, Leda, Sax. læthe.*] A great part of a county, containing three or four hundreds or wapentakes, as it is used in Kent and Sussex, in the latter of which is called a rape. 1 Comm. 116; *Leg. Edw. Confess. c. 35; Pat. 1 Hen. 4. par. 8. m. 8.* See *Trithing*.

LATHREVE, LEDGREVE, or TRITHINGREVE. The officer under the Saxon government who had authority over that division called a lathe. See *Trithingreve*.

LATIMER. Is used by Sir Edward Coke for an interpreter. 2 Inst. 515. It seems that the word is mistaken, and should be *latiner*, because heretofore he that understood Latin, which in the time of the Romans was the prevailing language, might be a good interpreter. *Camden* agrees, that it signifies a Frenchman or interpreter, and says the word is used in an old inquisition. *Britan. fol. 598.* It may be derived or corrupted from the *Fr. latinier, q. d. latiner. Concill.*

LATIN. There are three sorts of Latin. 1. Good Latin, allowed by grammarians and lawyers. 2. False or incongruous Latin, which in times past would abate original writs, though not make void any judgment writ, declaration, or plea, &c. And, 3. Words of art, known only to the sages of the law, and not to grammarians, called Lawyers' Latin. 1 Lil. Abr. 146, 147. See 38 Edm. 3. c. 15. which directed all pleas, &c. to be debated in English, and recorded in Latin; but now, by 4 Geo. 2. c. 26; 6 Geo. 2. c. 14. the records and proceedings are to be in English. Formerly the use of a word not Latin at all, or not so in the sense in which used, might in many cases be helped by an *Anglice*, though where there was a proper Latin word for the thing intended to be expressed, nothing could help an improper one. And when there was no Latin for a thing, words made which had some countenance of Latin were allowed good, as *velvetum, Anglice velvet*, &c. 10 Rep. 133. See *Pleading, l. 3, Process*.

LATINARIUS. An interpreter of Latin, or Latiner, from the *Fr. latinier*. 2 Inst. 515. See *Latimer*.

LATITAT. A writ whereby all men are originally called to answer in personal actions in the King's Bench; having its name upon a supposition that the defendant doth lurk and lie hid, and cannot be found in the county of Middlesex to be taken by bill, but is gone into some other county, to the sheriff of which this writ is directed, to apprehend him there. *F. N. B. 78. Terms de Ley.*

The origin of it is this: In ancient time, while the King's Bench was moveable, when any man was sued, a writ was sent forth to the sheriff of Middlesex, or any other county where the court was resident, called a bill of Middlesex, to take him; and if the sheriff returned *non est inventus*, then a second writ was sued out, reciting that it was testified that the defendant lurked and lay hid in another county, and thereby the sheriff of that county was commanded to attach the party in any other place where he might be found; and when the tribunal of the King's Bench came to be settled at Westminster, the same course was observed for a long time; but afterwards, by the contrivance of clerks, it was devised to put both these writs into one, and so attach the defendant upon a fiction that he was not in the county of Middlesex, but lurking elsewhere; and that therefore he was to be ap-

prehended by the sheriff of the county where he was suspected to be, and lie hid.

As this writ is in effect abolished by the Uniformity of Process Act, 2 Wm. 4. c. 39. by which a writ of summons is made the only process for commencing non-bailable actions, and a writ of *capias* the process for commencing those where the defendant is arrested, it is unnecessary further to expound the law relating to *laicitas*, which will be found at large in Mr. *Tidd's Book of Practice*, 9th ed.

For other matters connected with and explanatory of the subject of this title, see *Ac-etiam, Capias, Common Pleas, King's Bench, Practice, Process, &c.*

LATRO [*Latrocinium*.] He who had the sole jurisdiction *de latrone* in a particular place; it is mentioned in *Leg. Wm. 1. See Infangthef.*

LAVATORIUM. A laundry, or place to wash in. Applied to such a place in the porch or entrance of cathedral churches, where the priest and other officiating members were obliged to wash their hands, before they proceeded to Divine service. See *Liber Statut. Eccl. Paul. London. MS. f. 59.*

LAVERBREAD. In the county of Glamorgan, and some other parts of Wales, they make a sort of food of a sea-plant, which seems to be the oyster-green, or sea liverwort; and this they call laverbread.

LAVINA. See *Labina*.

LAUDARE. To advise or persuade. *Leg. Edw. Confess. c. 39; Hoveden, 729.* *Laudare* signifies also to arbitrate; and *laudator*, an arbitrator. *Knight, 25, 26.*

LAUDUM. An arbitrament or award. *Walsingham, 60.*

LAUNCEGAYS. A kind of offensive weapons now disused, and prohibited by the 7 Rich. 2. c. 13.

LAUND or LAUND [*landa*.] An open field without wood. *Boun.*

LAURELS. Pieces of gold coined in the year 1619, with the king's head laureated, which gave them the name of laurels; the twenty-shilling pieces whereof were marked with XX., the ten shillings X., and the five shilling piece with V. *Camd. Annal. Jac. 1. MS.*

LAW [*Sax. lag; Lat. lex*, from *lego*, or *legendo*, choosing; or rather *à ligando*, from binding.] The rule and bond of men's actions; or it is a rule for the well-governing of civil society, to give to every man that which doth belong to him.

Law, in its most general and comprehensive sense, is thus defined by *Blackstone*, in the *Commentaries*: A rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey. 1 *Comm. Introd. § 2.*

Laws in their more confined sense, and in which it is the business of works of this nature to consider them, denote the rule, not of action in general, but of human action or conduct. And this perhaps (it has been acutely observed) is the only sense in which the word *law* can be strictly used; for in all cases where it is not applied to human conduct, it may be considered as a metaphor, and in every instance a more appropriate term (as *quality* or *property*) may be found. When law is applied to any other object than man, it ceases to contain two of its essential ingredients, *disobedience* and *punishment*. 1 *Comm. Introd. § 2*, and Mr. *Christian's* notes there.

Municipal law is by the same great commentator defined to be—"A rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." The latter clause of this sentence seems to Mr. *Christian* to be either superfluous or defective. If we attend to the learned judge's exposition, perhaps we may be inclined to use the words "*establishing and ascertaining what is right or wrong*;" and all cavil or difficulty will vanish. See 1 *Comm. 43—53.*

Every law may be said to consist of several parts: Declaratory, whereby the rights to be observed, and the wrongs

to be eschewed, are clearly defined and laid down: Directory, whereby the subject of a state is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: Remedial, whereby a method is pointed out to recover a man's private rights or redress his private wrongs: Vindictory, which imposes the sanction whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty. See 1 *Comm. 53.*

According to *Bracton*, *Lex est sanctio justa, jubens honesta et prohibens contraria*: And the schoolman says, *Lex humana est quoddam dictamen rationis, quo diriguntur humani actus*. This law is *rectum*, as it discovers that which is crooked or wrong: And *justa* requires five properties; *possibilis, necessaria, conveniens, manifesta, nullo privato commodo*. 2 *Inst. 56, 587.*

Laws are arbitrary or positive, and natural; the last of which are essentially just and good, and bind every where and in all places where they are observed: Arbitrary laws are either concerning such matter as is in itself morally indifferent, in which case both the law and the matter, and subject of it, is likewise indifferent, or concerning the natural law itself, and the regulating thereof; and all arbitrary laws are founded in convenience, and depend upon the authority of the legislative power which appoints and makes them, and are for maintaining public order. Those which are natural laws are from God; but those which are arbitrary, are properly human and positive institutions. *Selden on Fortescue, c. 17.*

The laws of any country began, when there first began to be a state in the land: and we may consider the world as one universal society, and then that law by which nations were governed, is called *jus gentium*: if we consider the world as made up of particular nations, the law which regulates the public order and right of them, is termed *jus publicum* and that law which determines the private rights of men, is called *jus civile*. *Selden, ubi supra.*

No law can oblige a people without their consent; this consent is either *verbis* or *factis*, i. e. it is expressed by writing, or implied by deeds and actions; and where a law is grounded on an implied assent, *rebus et factis*, it is either common law or custom; if it is universal, it is common law, and if particular to this or that place, then it is custom. 3 *Salk. 112.*

The law in this land hath been variable; the Roman laws were in use anciently in Britain, when the Romans had several colonies here, each of which was governed by the Roman laws: afterwards we had the laws called *Merchetlage*, *West Saxonlage*, and *Danelage*; all reduced into a body, and made one by King *Edw. Confess. Magna Charta, c. 1. § 14; Camd. Britan. 94.*

At present the laws of England are divided into three parts: 1. The common law, which is the most ancient and general law of the realm, and common to the whole kingdom, being appropriate thereto, and having no dependence upon any foreign law whatsoever. See *Common Law*.

2. Statutes or acts of parliament, made and passed by the king, lords, and commons in parliament; being a reserve for the government to provide against new mischiefs arising through the corruption of the times: and by this the common law is amended where defective, for the suppression of public evils; though where the common law and statute law concur or interfere, the common law shall be preferred. See *Statutes*.

3. Particular customs; but they must be particular, for a general custom is part of the common law of the land. *Co. Lit. 15, 115.* See *Custom*.

Blackstone divides the municipal law of England into two kinds, *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written, that is, the statute law.

The *lex non scripta*, or unwritten law, includes not only

general customs, or the common law, properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions. 1 *Comm. Introd.* § 3.

There is another division of our laws more large and particular; as into the prerogative or crown law; the law and custom of parliament; the common law; the statute law; reasonable customs; the law of arms, war, and chivalry; ecclesiastical or canon law; civil law, in certain courts and cases; forest law; the law of marque and reprisal; the law of merchants; the law and privilege of the stannaries, &c. But this large division may be reduced to the common division: and all is founded on the law of nature and reason, and the revealed law of God, as all other laws ought to be. 1 *Inst.* 11.

The law of nature is that which God at man's creation infused into him, for his preservation and direction; and this is *lex æterna*, and may not be changed: and no laws shall be made or kept, that are expressly against the law of God, written in his scripture; as to forbid what he commandeth, &c. 2 *Shep. Abr.* 356.

All laws derive their force *à lege naturæ*; and those which do not, are accounted as no laws. *Portescue*: No law will make a construction to do wrong; and there are some things which the law favours, and some it dislikes; it favoureth those things that come from the order of nature, 1 *Inst.* 189, 197. Also our law hath much more respect to life, liberty, freehold inheritance, matters of record, and of substance, than to chattels, things in the personality, matters not of record, or circumstances. *Ibid.* 187; 4 *Rep.* 124.

As to the mode of interpreting laws, see 1 *Comm.* § 2.—Of the general foundation of the laws of England, *Id.* § 3.—And of the countries subject to the laws of England, *Id.* § 4.—See also *Ireland, Scotland, Plantations, Statutes, Common Law, Canon Law, Civil Law, &c.* &c.

Law hath also a special signification, wherein it is taken for that which is lawful with us, and not elsewhere; as tenant by the curtesy of England, is called tenant by the law of England.

LAW OF ARMS, [Lex armorum.] Is that law which gives precepts how to proclaim war, make and observe leagues and treaties, to assault and encounter an enemy, and punish offenders in the camp, &c. The law and judgment of arms are necessary between two strange princes of equal power, who have no other method of determining their controversies, because they have no superior or ordinary judge, but are supreme and public persons; and by the law of arms, kings obtain their rights, rebels are reduced to obedience, and peace is established: but when the laws of arms and war do rule, the civil laws are of little or no force. *Treat. Laws*, 57.

It is a kind of law among all nations, that in case of a solemn war, the prince that conquers gains a right of dominion, as well as property, over the things and persons he has subdued; and it is for this reason, because both parties have appealed to the highest tribunal that can be, viz. the trial by arms and war; wherein the great judge and sovereign of the world, in a more especial manner, seems to decide the controversy. *Hale's Hist. L.* 73, 74.

Common things concerning arms and war, are under the cognizance of the constable and marshal of England, 13 *R. 2.* st. 1. c. 2. See *Constable, Court of Chivalry*.

LAW-BOOKS. All books written in the law are either historical, as the *Year-Books*; explanatory, such as *Staundford's Treatise of the Royal Prerogative*; miscellaneous, as the abridgments of the law; monological, being on one certain subject, such as *Lambard's Justice of Peace, &c.*—*Fulbeck's Parallel*, c. 3. The books of reports have such great weight with the judges, that many of them are as highly

valued as the *Responsa Prudentum* among the Romans, which were authoritative. *Wood's Inst.* 10.

The decisions of courts (says *Blackstone*) are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of reports which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides, and the reasons the court gave for its judgment, taken down in short notes by persons present at the determinations. And these serve as indexes to, and also to explain the records, which always, in matters of consequence and nicety, the judges direct to be searched.

These reports are extant in a regular series, from the reign of King Edward II. inclusive; and from this time to that of King Henry VIII. were taken by the prothonotaries or chief scribes of the court at the expense of the crown, and published annually; whence they are known under the denomination of the *Year-Books*. *Blackstone* proceeds to express his wish that this beneficial custom had been continued. He laments the deficiency and inaccuracy of the many reports from that time to the period in which he wrote; and the neglect of the appointment which King James I., at the instance of Lord Bacon, made of two reporters, with a stipend for that purpose. 1 *Comm. Introd.* § 3.

This evil has however been since, in a great measure, remedied, by several periodical publications of reports of the cases determined in the courts of law and equity, soon after the end of the terms in which they are decided. The public encouragement given to these works is perhaps a more adequate mode of reward than royal munificence could devise, even in a reign distinguished for the patronage of learning and genius.

Some of the most valuable of the ancient reports are those published by Lord Chief Justice Coke; and these are generally cited, by way of excellence, as *The Reports*; thus, 1 *Rep.*; 2 *Rep.* &c., while other reports are cited by the name of the reporter, 1 *Ventr.*; 1 *Salk.* &c.

Besides the reporters, there are also other authorities to whom great veneration and respect are paid by the students of the common law. Such are *Glanvil, Bracton, Britton, Fleta, Hengham, Littleton, Statham, Brooke, Fitzherbert, Staundforde*, and others of ancient date.—(*Hale, Hawkins, Foster*, and others of more modern times, among whom the author of the *Commentaries* holds an honourable rank.) Their treatises are cited as authority, and are evidences that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers (according to *Blackstone*) in point of time, whose works are of any intrinsic authority in the courts of justice, is Sir Edward Coke; commonly called Lord Coke, from his having been, as was already mentioned, lord chief justice.—He left four volumes of institutes; the first being a very extensive comment upon a little excellent treatise of *Tenures* compiled by Judge *Littleton*, in the reign of Edward IV. This is generally called *Coke-Littleton*, (meaning *Coke upon Littleton*) and is so cited by lawyers, or still more usually as *First Institute*. This has been since enlarged by the very learned and laborious notes of Mr. Hargrave and Mr. Butler, and, taken altogether, is a book of the greatest value and highest authority in the law.

There have also appeared a vast variety of abridgments of general law; and systems of particular branches of it; the most valuable of which are Sir John *Cockyns' Digest*, and *Bacon's Abridgment*, the latter founded chiefly on MS. treatises of Chief Baron Gilbert, and lately edited by Sir H. Gwillim and C. E. Dodd, Esq. These with the statutes at large, and other publications, swell lawyers' libraries to a size which they perhaps, as well as their clients, would be glad

to see lessened. But the delay imputed to, rather than suffered in, courts of justice, and the multiplication of cases and determinations, are a price which every free and opulent commercial nation must pay for the innumerable blessings it enjoys, under such a government as that long established in this country. See *Montesquieu's Spirit of Laws*, lib. vi. c. 2.

LAW-DAY, [*Lagedayum*.] Called also View of Frankpledge or court-leet; was any day of open court, and commonly used for the courts of a county or hundred.

LAWING OF DOGS. The cutting off several claws of the fore-feet of dogs, in the forest. See *Forest*.

LAWLESS-COURT. A Court held on King's Hill, at Rochford in Essex, on Wednesday morning next after Michaelmas-Day yearly, at cock-crowing; at which court they whisper and have no candle, nor any pen and ink, but a coal; and he that owes suit or service there, and appears not, forfeits double his rent. This court is mentioned by Camden, who says, that this servile attendance was imposed on the tenants, for conspiring at the like unseasonable time to raise a commotion. *Camd. Britan.* It belongs to the honour of Raleigh, and is called Lawless, because held at an unlawful hour, or *quia dicta sine lege*. The title of it is in rhyme, and in the court rolls runs thus:—

King's-hill in }
Rochford. } ss. *Curia de Domino Rege,*
Dicta sine lege,
Tenta est ibidem
Per ejusdem consuetudinem,
Ante ortum solis
Luceat niri polus,
Senescallus solus
Nisi scribit niri colis
Tuties voluerit
Gallus ut cantaverit,
Per cujus soli sonitus
Curia est summonitus;
Clamat clam pro rege
In curia sine lege,
Et nisi citd venerint
Citius permutuerint,
Et nisi clam accedant
Curia non attendat.
Qui venerit cum lumine erat in regimine
Et dum sunt sine lumine, capti sunt in crimine,
Curia sine cura.
Jurata de injuria.

Tenta ibidem die Mercurii (ante diem) proximi post festum Sancti Michaelis, anno regni regis, &c.

LAWLESS MAN. [*Exlex*.] An outlaw. *Bract. lib. 3. c. 11.*

LAW OF MARQUE, [from the Germ. *march*, i. e. *limes*.] Is where they that are driven to it do take the shipping and goods of that people of whom they have received wrong, and cannot get ordinary justice in another territory, when they can take them within their own bounds and precincts. 27 *Edw. 3. st. 2. c. 17.* See *Letter of Marque*.

LAW MARTIAL. See *Courts Martial*.

LAW MERCHANT, [*lex mercatoria*.] A special law differing from the common law of England, proper to merchants, and part of the law of the realm. And the *charta mercatoria*, 13 *Edw. 1. st. 3.* grants this perpetual privilege to merchants coming into this kingdom. See also 27 *Edw. 3. st. 2. c. 2.* (repealed) 13. 17. 19. 20.; *Co. Lit.* 182; and tit. *Custom of Merchants*.

LAW PROCEEDINGS. Of all kinds, as writs, processes, pleadings, &c. are to be in the English language, by 4 *Geo. 2. c. 26*; 5 *Geo. 2. c. 27.* Except known abbreviations and technical terms, 6 *Geo. 2. c. 14.* See *Pleadings*, i. 3.

LAW SPIRITUAL, [*lex spiritualis*.] The ecclesiastical

law, allowed by our laws where it is not against the common law, nor the statutes and customs of the kingdom; and regularly according to such ecclesiastical or spiritual laws, the bishops and other ecclesiastical judges proceed in causes within their cognizance. *Co. Lit.* 342. It was also called Law Christian, and, in opposition to it, the common law was often called *Lex Terrena, &c.* See *Canon Law, Courts Ecclesiastical*.

LAW OF THE STAPLE, [mentioned in 27 *Edw. 3. st. 2. c. 22.*] Is the same with Law Merchant. See 4 *Inst.* 237, 238, and tit. *Staple*.

LAWYER [*Legista, Legispiritus, Jurisconsultus*. By the Saxons called *lahman*.] A counsellor, or one learned in the law. See *Attorney, Barrister*.

LAY-CORPORATIONS. Are of two sorts, civil and eleemosynary. The civil are such as are erected for a variety of temporal purposes. The eleemosynary sort are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them to such persons as he hath directed. See *Corporation*.

LAY INVESTITURE of BISHOPS. Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all Christendom; and this was promiscuously performed by the laity as well as the clergy, till at length, it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture the elected bishops could neither be consecrated nor receive any secular profits. This right was acknowledged in the Emperor Charlemagne, A. D. 773, by Pope Hadrian I. and the council of Lateran, and universally exercised by other Christian princes; but the policy of the Court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishoprics is said to have been in the crown of England (as well as other kingdoms in Europe) even in the Saxon times: because the rights of confirmation and investiture were in effect (though not in form) a right of complete donation. But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting those investitures, which was *per annulum et baculum*, by the prince's delivering to the prelate a ring, and pastoral staff or crosier; pretending that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction: and Pope Gregory VII., towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them. This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority; and long and eager were the contests occasioned by this papal claim. But at length, when the Emperor Henry V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future *per sceptrum*, and not *per annulum et baculum*; and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier, the Court of Rome found it prudent to suspend for a while its other pretensions.

This concession was obtained from King Henry I. in England, by means of that obstinate and arrogant prelate Arch-

bishop Anselm: but King John (about a century afterwards) in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops, reserving only to the crown the custody of the temporalities during the vacancy; the form of granting a licence to elect (which is the original of our *congé d'elire*), on refusal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause. This grant was expressly recognized and confirmed in King John's *Magna Charta*, and was again established by statute 25 *Edw. 3. st. 6. § 3*.

But by 25 *Hen. 8. c. 20*, the ancient right of nomination was in effect restored to the crown. See 1 *Comm. 377*; and *Bishop*.

LAY-FEE [*feodum laicum*.] Lands held in fee of a laylord, by the common services to which military tenure was subject; as distinguished from the ecclesiastical holding in *frankalmoin*, discharged from those burdens. *Kennel's Gloss. See Tenures*.

LAYMAN. One that is not of the clergy; the Latin word *laicus* signifying as much as *populus*, that which is common to the people, or belongs to the laity. *Lit. Dict.*

LAYSTALL [Sax.]. A place to lay dung or soil in.

LAZARETS. Places where quarantine is to be performed by persons coming from infected countries. Escaping from them felony. See 1 *Jac. 1. c. 31*; 26 *Geo. 2. c. 6*; 29 *Geo. 2. c. 8*; and *Plagues*.

LAZZI. The Saxons divided the people of the land into three ranks: the first they called *Edilingi*, which were such as are now nobility; the second were termed *Fritlingi*, from *fritling*, signifying that he was born a freeman, or of parents not subject to any servitude, which are the present gentry: and the third and last were called *Lazzi*, as born to labour, and being of a more servile state than our servants, because they could not depart from their service without the leave of the lord, but were fixed to the land where born, and in the nature of slaves; hence the word *lazzi*, or *lazy*, signifies those of a servile condition. *Nithardus de Saxonibus*, lib. 24.—It is remarkable that the lower class of people at *Naples* are called *Lazarani*.

LEA OF YARN. A quantity of yarn so called; and at Kidderminster it is to contain 200 threads on a reel four yards about. See 22 & 23 *Car. 2. c. 8*.

LEAD. By the 7 & 8 *Geo. 4. c. 29. § 44*, stealing, ripping, cutting, or breaking with intent to steal, any lead, iron, brass, or other metal, or any utensil or fixture, fixed in or to any building, or any thing made of metal, fixed in any land, being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, &c. is felony, and the offender punishable as in the case of simple larceny.

LEAGUE. An agreement between princes, &c. Also a measure of way by sea, or an extent of land, containing most usually three miles. Breakers of leagues and truces, how punished for offences done upon the seas. See 4 *H. 5. c. 7*; 31 *H. 6. c. 4*. See *Conservator of the Truce*; *Truce*.

LEAK, or **LECHE** [from Sax. *Leccian*, to let out water.] In the bishoprick of Durham is used for a gutter; so in Yorkshire any slough or watery hole upon the road is called by this name; and hence the water-tub to put ashes in to make a lee for washing of clothes, is in some parts of England termed a *leche*. *Cowell*.

LEAKAGE. An allowance to merchants importing wine out of the customs for the waste and damage it is supposed to receive by being kept. See 3 & 4 *W. 4. c. 57. § 19*, and *tit. Warehousing of Goods*.

LEAP. A net, engine, or wheel, made of twigs, to catch fish in. 4 & 5 *W. & M. c. 28*. See *Lepa*.

LEAP-YEAR. See *Bissextile Year*.

LEASE [from *locatio*, letting; otherwise called a *demise*,

dimissio, from *dimittere*, to depart with.] A letting of lands, tenements, or hereditaments, to another for term of life, years, or at will, for a rent reserved. *Co. Lit. 48*.

A **LEASE** is properly a conveyance of any lands or tenements, usually in consideration of rent, or other annual recompence, made for life, for years, or at will; but always for a less time than the lessor hath in the premises; for if it be for the whole interest it is more properly an assignment than a lease. He that letteth is called the *lessor*, and he to whom the lands, &c. are let is called the *lessee*. *Shep. Touchst. c. 14*; 2 *Comm. c. 20*.

A lease for years is also thus defined: a contract between lessor and lessee for the possession and profit of lands, &c. on the one side, and a recompence for rent or other income on the other. *Bac. Abr. Leases*.

This word is also sometimes, though improperly, applied to the estate, *i. e.* the title, time, or interest the lessee hath in the thing demised; and then it is rather referred to the thing taken or had, and the interest of the taker therein; but it is more accurately applied rather to the manner or means of attaining or coming to the thing letten. See *Shep. Touchst. c. 14*.

The usual words of operation in a lease are "demise, grant, and to farm let,—*dimitti, concessi, & ad firmam tradidi*." *Farm* or *firm* is an old Saxon word signifying provisions. *Spebm. Gloss. 229*. And it came to be used instead of rent or render, because anciently the greater part of rents were reserved in provisions; in corn, in poultry, and the like, till the use of money became more frequent; so that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *foarme*: though at present, by a gradual departure from the original sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created either in corporeal or incorporeal hereditaments; though delivery of seisin is indeed incident and necessary to one species of leases, *viz.* leases for life of corporeal hereditaments, but to no other.

Whatever restriction, by the severity of the feudal law, might, in times of very high antiquity, be observed with regard to leases (see *Tenures*), yet by the common law, as it has stood for many centuries, all persons seised of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore tenant in fee-simple might let leases of any duration, for he hath the whole interest; but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner: nor could a husband, seised *jure uxoris*, make a firm or valid lease for any longer term than the joint-lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee-simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee simple; such as parsons and vicars, with consent of the patron and ordinary. *Co. Lit. 44*. So also bishops and deans, and such other sole ecclesiastical corporations as are seised of the fee-simple of land in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years or for life, estates in tail or in fee, without any limitation or control. And corporations aggregate might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now by several statutes, this power, where it was unreasonable, and might be made an ill use of, is restrained; and where in the other cases the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called the *restraining*, the latter the *enabling*, statute. 2 *Comm. c. 20*. See *post. II*.

Further information on this subject may be conveniently classed under the following divisions:

I. Of leases in general, and of what things they may be made.

1. How a lease may be made; of the nature of a lease, and leasehold estate; and the construction of words in granting thereof.
2. By whom leases may be granted; and herein shortly of leases under powers.—[See Power.]
3. Of the liability of lessees to repairs; of covenants in leases, and how far assignees are affected by them.—[See Covenant, Assignment.]
4. Of the expiration, surrender, &c. of leasehold tenures, and of notices to tenants to quit.—[See Ejectment.]

II. Of leases under the enabling and restraining statutes.

III. Of acceptance of rent.

1. Where it shall
 2. Where it shall not
- } confirm a lease.

For other matters relative to leases, see *Bac. Abr. "Leases and Terms for Years,"* recommended by Blackstone to particular notice; *Shep. Touchst. c. 14*; and *Decd. Rent, Surrender*, and the other titles above referred to. See also *4 Geo. 2. c. 28*; *11 Geo. 2. c. 19*. (amended by *4 & 5 W. 4. c. 22*.) under tit. *Rent*.

I. Generally, to the making of a good lease several things necessarily concur; there must be a lessor not restrained from making a lease; a lessee not disabled to receive; a thing demised which is demisable, and a sufficient description of the thing demised, &c. If it be for years, it must have a certain commencement and determination; it is to have all the usual ceremonies, as sealing, delivery, &c. and there must be an acceptance of the thing demised. *Lit. § 56*; *1 Inst. 46*; *Plomd. 273, 523*. Whether any rent be reserved upon a lease for life, years, or at will, or not, is not material, except only in the cases of leases made by tenant in tail, husband and wife, and ecclesiastical persons under *32 Hen. 8. c. 28*. (See post, II.) *Shep. Touchst. c. 14*.

A lessor who hath the fee cannot reserve rent to any other but himself, his heirs, &c. And if he reserves a rent to his executors, the rent shall be to the heir, as incident to the reversion of the land. *1 Inst. 47*.

Neither can a power of re-entry upon breach of covenant in a lease be reserved to a stranger to the estate. *4 Taunt. 23*.

The lessor may take a distress on the tenements let for the rent; or may have action of debt for the arrears, &c. Also land leased shall be subject to those lawful remedies which the lessor provides for the recovery of his rent, possession, &c. into whose hands soever the land comes. *Cro. Jac. 300*.

Leases for lives or at will, or for years, may be made of any thing corporeal or incorporeal that lieth in livery or grant. *Shep. Touch. 268*. Consequently land, advowsons, tithes, commons, franchises, estovers, annuities, rent charges, or corodies, may be leased for years.

Some incorporeal hereditaments, however, form an exception to the above rule. Dignities which are only grantable by the crown cannot be granted for years. *Co. Lit. 16 b*; *9 Rep. 97 b*. Neither can offices of public trust, particularly those relating to the administration of justice. *9 Rep. 97 b*; *Cro. Car. 587. S. P.* But as the inconvenience and danger of their passing to unskilful executors, &c. are avoided by leasing them for years during the life of the grantee, such form of demise has been held good. *6 Mod. 57. S. C. Ld. Ray. 1005*.

But offices requiring mere common diligence, and which may be executed by deputy without affecting the public, may be leased for years, as the offices of postmaster-general; *Hard. 352*; king's printer, *ibid. 352*; warden of ports and havens, *ib. 354*; and such as are ministerial in courts of justice, as surveyor of the green-wax, sealer of writs and sub-pœnas, &c. *Bro. Abr. Leases, 40*.

Goods and chattels may also be leased for years. Thus,

cattle and other live and dead stock may be demised by themselves, and the lessee shall have the use and profit of them during the term; and if they die, they become his absolute property. *Bro. Abr. Leases (A.)* So their young shall belong to the lessee, wherein they differ from dead stock; for the lessor shall, at the end of the lease, have any addition made to it as part of the original thing demised. *Ibid.*

No tenant shall take leases of above two farms, in any town, village, &c. nor hold two unless he dwell in the parish under penalties and forfeitures, by *25 Hen. 8. c. 18. § 14*. See also *21 Hen. 8. c. 18*. to which statutes there is not any regard now paid.

1. A lease may be made either in writing or by word of mouth: it is sometimes made and done by record, as *fine, recovery* (now abolished,) &c. and sometimes and most frequently by writing, called a lease by indenture; albeit, it may be also made by deed-poll; and sometimes also it is (as it may be of land or any such like thing grantable without deed for life, or never so many years,) by word of mouth, without any writing; and then it is called a lease-parol. *Sheph. Touchst. c. 14*.—But by the statute of frauds, *29 Geo. 2. c. 3*. leases of lands must be in writing, and signed by the parties themselves, or their agents duly authorized, otherwise they will operate only as leases at will; except leases not exceeding three years.

A parol agreement to lease lands for four years creates only a tenancy at will. *4 Term Rep. 680*.—But see *8 Term Rep. 3*. that a lease by parol enures as a tenancy from year to year; the meaning of the statute of frauds being that such an agreement should not operate as a term.

A lease may be made by all the ways above mentioned, either for life, for years, or at will.—For life; as for life of the lessee, or another, or both.—For years, i. e. for a certain number of years, as 10, 100, 1000, or 10,000 years, months, weeks, or days, as the lessor and lessee do agree. And then the estate is properly called a term for years; for this word term doth not only signify the limits and limitation of time, but also the estate and interest that doth pass for that time. These leases for years do some of them commence in *præ-senti*, and some in *futuro* at a day to come; and the lease that is to begin in *futuro* is called an *interesse termini*, or future interest.—At will; i. e. when a lease is made of land to be held at the will and pleasure of the lessor and lessee together; and such a lease may be made by word of mouth, as well as the former. *Sheph. Touchst. c. 14*.

If the lease be but for half a year, or a quarter, or any less time, this lessee is respected as a tenant for years, and is stiled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of. *Lit. § 58*.

These estates for years were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord; and yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own; and, therefore, they were not allowed to have a freehold estate; but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated by a common recovery, suffered by the tenant of the freehold, which annihilated all leases for years then subsisting, unless afterwards renewed by the recoverer, whose title was supposed superior to his by whom those leases were granted. *Co. Lit. 46*.

While estates for years were thus precarious, it is no wonder that they were usually very short, like the modern leases upon rack-rent; and, indeed, we are told, that by the ancient

law no leases for more than forty years were allowable; because any longer possession (especially when given without any livery, declaring the nature and duration of the estate,) might tend to defeat the inheritance. *Mirr. c. 2. § 27; Co. Lit. 45, 46.* Yet this law, if ever it existed, was soon antiquated; for we may observe, in Madox's collection of ancient instruments, some leases for years of a pretty early date, which considerably exceed that period; and long terms for three hundred or one thousand years were certainly in use in the time of Edward III. and probably of Edward I. But certainly when by 21 Hen. VIII. c. 5. the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before, and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages; continuing subject, however, to the same rules of succession, and with the same inferiority to freeholds, as when they were little better than tenancies at the will of the landlord. 2 *Comm. c. 9.*

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years, and therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined; for every such estate must have a certain beginning and certain end. *Co. Lit. 45.*

A demise having no certain commencement is void; for every contract sufficient to make a lease ought to have certainty in commencement, in the continuance, and in the end. *Vaugh. 85; 6 Rep. 53.*

But *id certum est, quod certum reddi potest*: therefore if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years; for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. 6 *Rep. 35.* If no day of commencement is named in the creation of this estate, it begins from the making or delivery of the lease. *Co. Lit. 46.* A lease for so many years as J. S. shall live is void from the beginning; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. *Co. Lit. 45.* And the same doctrine holds if a parson make a lease of his glebe for so many years as he shall continue parson of Dale, for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good; for there is a certain period fixed beyond which it cannot last, though it may determine sooner on the death of J. S. or his ceasing to be parson there. *Co. Lit. 45.*

The law reckons an estate for years inferior in interest, as compared to an estate for life, or an inheritance; an estate for life, even if it be *pur autre vie*, is a freehold; but an estate for a thousand years is only a chattel, and reckoned part of the personal estate. *Co. Lit. 45.* Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As if one grants lands to another to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro*, because it cannot be created at common law without livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter. 5 *Rep. 94.* And because no livery of seisin is necessary to a lease for years, such lessee is not said to be seised, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called, as has been already remarked, his interest in the term, or *interesse termini*; but when he has actually so entered, and thereby accepted the grant, the estate is then and not before vested in him, and he is possessed, not properly of the land, but of the term of years; the possession or seisin of the land

remaining still in him who hath the freehold. *Co. Lit. 46.* Thus the word *term* does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the term may expire, during the continuance of the time, as by surrender, forfeiture, and the like. For which reason if one grant a lease to A. for the term of three years, and after the expiration of the said term, to B. for six years, and A. surrenders or forfeits his lease at the end of one year, B.'s interest shall immediately take effect; but if the remainder had been to B. from and after the expiration of the said three years, or from or after the expiration of the said time, in this case B.'s interest will not commence till the time is fully elapsed, whatever may become of A.'s term. *Co. Lit. 45.*

A freehold lease for three lives differs from a chattel lease only in this, viz. that the *habendum* is to the lessee, his heirs and assigns, for and during the natural lives of him the said C. D., E. his wife, and T. D. his son, and during the natural life of every and either of them longest living. And in every covenant, the lessee covenants for himself, his heirs and assigns; and the covenants are the same as in a chattel lease, with the addition of a letter of attorney at the end, to deliver possession and seisin, as in a deed of feoffment. *Diet.*

Though a lease for life cannot be made to commence *in futuro*, by the common law, because livery cannot be made to a future estate, yet where a lease is made for life, *habendum* at a day to come, and after the day the lessor makes livery, there it shall be good; and a lease in reversion may be made for life, which commences at a day that is future. 5 *Rep. 94; Hob. 814; 1 Inst. 5.* A lease for years may begin from a day past, or to come, at Michaelmas last, Christmas next, three or four years after, or after the death of the lessor, &c. though a term cannot commence upon a contingency which depends on another contingency. 1 *Inst. 5; 1 Rep. 156.* If one make a lease for years, after the death of A. B. if he die within ten years, this is a good lease, in case he dies within that time, otherwise not. *Plowd. 70.* And where a man has a lease of lands for eighty years, and he grants it to another to hold for thirty years, to begin after his death, it will be good for the whole thirty years, provided there be so many of the eighty to come at the time of the death of the lessor. *Bro. Grant. 54; 1 Rep. 155.* A lease made from the lessor's death, until a certain year, (*i. e.* A. D. 1800,) is good; and if a lease be during the minority of J. S. or until he shall come to the age of twenty-one years, these are good leases; and if he dies before his full age, the lease is ended. *Hob. 155.* A person grants a rent of 20*l.* a year till one hundred pounds be paid, it is a lease of the rent for five years. *Co. Lit. 42.* If a man makes a lease of land to another, until he shall levy out of the profits one hundred pounds, or he is paid that sum, &c. this will be a lease for life, determinable on the payment of the hundred pounds, if livery and seisin be made; but if there is no livery, it will not be good for years, but void for uncertainty. 21 *Assis. 18; Plowd. 27; 6 Rep. 35.* See *Livery of Seisin.*

A lease for years to such person as A. B. shall name, is not good; though it may be for so many years as he shall name, not as shall be named by his executors, &c. for it must be in the lifetime of the parties. *Hob. 173; Moor. 911.*

If one makes a lease for a year, and so from year to year, it is a lease for two years; and afterwards it is but an estate at will. 1 *Mod. 4; 1 Lutm. 213.* And if from three years to three years, it is a good lease for six years; also if a man make a lease for years without saying for how many, it may be good for two years, to answer the plural number. *Wood's Instit. 265.*

If a parson makes a lease of his glebe for three years, and so from three years to three years, so long as he shall be parson, it is a good lease for six years, if he continue parson so long. 6 *Rep. 35; 3 Cro. 511.*

Lease for one year, and so for two or three years, or any further term of years, as lessor and lessee shall think fit and

agree, after the expiration of the said term of one year; this is a good lease for two years; and after every subsequent year begun, is not determinable till that be ended. 1 *Wils. part 1*, p. 262. But if the original contract were only for a year, or if it were at so much per annum rent, without mentioning any time certain, it would be a tenancy at will after the expiration of the year; unless there were some evidence by a regular payment of rent, annually or half-yearly, that the intent of the parties was that he should be tenant for a year. *Bull. N. P.* 84 (2d ed.)

In case of a tenancy from year to year, as long as both parties please, if the tenant die intestate, his administrator has the same interest in the land which the intestate had. 3 *T. R.* 18.

A lessee hath a term for a year by parol, and so from year to year, so long as both parties please; if the lessee enters on a second year, he is bound for that year, and so on; and if there is a lease by deed for a year, and so from year to year as long as both parties agree, this is binding but for one year; though if the lessee enters upon the second year, he is for that year bound: if it is for a year, and so from year to year, so long as both parties agree, till six years expire, this is a lease for six years, but determinable every year at the will of either party; but if it is for a year, and so from year to year till six years determine, this is a certain lease for six years. *Mod. Ca.* 215. If A. make a lease of land to B. for ten years, and it is agreed between them that he shall pay fifty pounds at the end of the said term, and if he do so, and pay fifty pounds at the end of every ten years, then the said B. shall have a perpetual demise and grant of the lands, from ten years to ten years continually following, *extra memoriam hominum*, &c. Though this be a good lease for the first ten years, as for all the rest it is uncertain and void; by covenant a further lease may be made for the like term of years. *Plowd.* 192; 2 *Shep. Abr.* 376.

A. and B. covenant in a lease for sixty-one years, "that at any time within one year after the expiration of twenty years of the said term of sixty-one years, upon the request of the lessee, and his paying 6*l.* to the lessors, they would execute another lease of the premises unto the lessee, for and during the further term of twenty years, to commence from and after the expiration of the said term of sixty-one years, and so in like manner at the end and expiration of every twenty years, during the said term of sixty-one years, for the like consideration, and upon the like request, would execute another lease for the further term of twenty years, to commence at and from the expiration of the term then last before granted." Under this covenant the lessee cannot claim a further term of twenty years after the end of the lease, if he has omitted to claim a farther term at the end of the first and second twenty years in the lease. 1 *T. R.* 229. See *Bateman v. Murray*, *Parl. Cases*, tit. *Lease*.

A lease made to a man for seven years, if D. shall live so long, who is dead when the lease is made; by this the lessee hath an absolute lease for seven years. 9 *Rep.* 63. Lease for life is granted, and says, that if the lessee within one year do not pay 20*s.* then he shall have but a lease for two years; here, if he pays not the money, he shall have only the two years, although livery of seisin be had thereon. 1 *Inst.* 218. If a lease be made to A. B. during his own life and the lives of C. and D. it is one entire estate of freehold, and shall continue during the three lives, and the life of the survivor of them; and though the lessee can have it no longer than his own life, yet his assignee shall have the benefit of it so long as the other two are living. 5 *Rep.* 18; *Moor.* 32. Where one grants land by lease to A. B. and C. D., to hold to them during their lives, although the words "and the longest liver of them" be omitted, they shall hold it during the life of the longest liver. 5 *Rep.* 9. A lease is made to a person for sixty years, if A. B. and C. D. so long

live; and afterwards A. B. dies, by his death the lease is determined. Though if the lease be made to one for the lives of A. B. and C. D. the freehold doth not determine by the death of one of them; and if in the other case of a term, the words or "either of them" be inserted in the lease, it will be good for both their lives. 15 *Rep.* 66.

A lease was made to a man for ninety-nine years, if he should so long live; and if he died within the term, the son to have it for the residue of the term; this was adjudged void as to the son, because there can be no limitation of the residue of a term which is determined. *Cro. Eliz.* 216. But if the words of the lease be, to hold during the residue of the ninety-nine years, and not during the rest of the term, in this case it may be good to the son also. 1 *Rep.* 158; *Dyer*, 253.

A lease was made for twenty-one years, if the lessee lived so long, and in the service of the lessor; the lessor died within the term, and yet it was held that the lease continued, for it was by the act of God that the lessee could serve no longer. *Cro. Eliz.* 643.

If a lease be to a man and to her whom he shall take to wife, it is void; because there ought to be such persons at the time of the commencement of the lease which might take. 4 *Leon.* 158. When a lease in reversion is granted as such after another lease, and that lease is void by assuage, &c. the reversionary lease, expectant upon the lease for years that is void, is void also. *Cro. Car.* 289. But where a man recites a lease, when in truth there is no lease, or a lease which is void, and misrecites the same in a point material, and grants a further lease, to commence after the determination thereof; in such case the new lease shall begin from the time of delivery. *Dyer*, 93; 6 *Rep.* 36; *Vaugh.* 73, 80, &c.

A man makes a lease for years to one, and afterwards makes a lease for years to another, of the same land; the second lease is not void, but shall be good for so many years thereof as shall come after the first lease ended. *Noy's Max.* 67. And if one make a lease for years, and afterwards the lessor enters upon the lands let, before the term is expired, and makes a lease of these lands to another, this second lease is a good lease until the lessee doth re-enter; and then the first lease is revived, and he is in thereby. 2 *Lill. Abr.* 152. It hath been held that a lease may be void as to one, and stand good to another; and leases voidable or void for the present, may after become good again. 1 *Inst.* 46; 3 *Rep.* 51. If a lease be made to two, to hold to them and two others, it is voidable as to the two other persons; and when the two first die, the lease is at an end. 2 *Leon.* 1.

A lease which is only voidable, and not absolutely void, must be made void by the lessor by re-entry; but if a lease be void absolutely, there needs no re-entry; and as a voidable lease is made void by re-entry, and putting out the lessee, so it is affirmed by accepting and receiving the rent, which acknowledges the lessee to be tenant. 21 *Car. B. R.*; 2 *Lil.* 149.

When a term for years in lease, and a fee-simple, meet in one person, the lease is drowned in the inheritance; yet in some cases it may have continuance, to make good charges and payments, &c. *Poph.* 39; 2 *Nels. Abr.* 1100. If a lease for years is made to a man and his heirs, it shall go to his executors. 1 *Inst.* 46, 388. And a lease for years, notwithstanding it be a very long lease, cannot be intailed by deed; but may be assigned in trust to several uses. 2 *Lil. Abr.* 150. A lease is sealed by the lessor, and the lessee hath not sealed the counterpart, action of covenant may be brought upon the lease against the lessor; but where the lease is sealed by the lessee, and not the lessor, nothing operates. *Yels.* 18; *Owen*, 100.

If lessee for years loses his lease, if it can be proved that there was such a term let to him by lease, and that is not determined, he shall not lose his term; so it is of any other

estate in lands, if the deed that created it be lost, for the estate in the land is derived from the party that made it, and not from the deed, otherwise than instrumentally and declarative of the mind and intent of the party, &c. 2 *Lil. Abr.* 152.

A man out of possession cannot make a lease of lands, without entering and sealing the lease upon the land. *Dalis.* 81. The lessee is to enter on the premises let; and such lessee for years is not in possession, so as to bring trespass, &c. until actual entry; but he may grant over his term before entry. 1 *Inst.* 46; 2 *Lil.* 160. If a lessee of a future interest never enters by virtue of his term, but enters before, and continues after the commencement of the term, and then the lessor ousts him, the lessee may assign over his term of the land. 1 *Lev.* 47. But a lease to begin at Michaelmas, if the lessee enters before Michaelmas, and continues the possession immediately, is a disseisin. *Ibid.* 46.

If a lease be made of a close of land, by a certain name, in the parish of A., in the county of B., whereas the close is in another county, the said parish extending into both counties, such a lease is good to pass such land; though where a house is leased without a name, and the parish is mistaken, it hath been held otherwise. *Dyer*, 276, 292.

Land and mines are leased to a tenant; this only extends to the open mines, and the lessee shall not have any others, if there are such; and if land and timber are demised, the lessee is not empowered to sell it. 2 *Lev.* 184; 2 *Mod.* 193. A man makes a lease of lands for life, or years, the lessee hath but a special interest in the timber trees, as annexed to the land, to have the mast and shadow for his cattle; and when they are severed from the lands, or blown down with wind, the lessor shall have them as parcel of his inheritance. 4 *Rep.* 62; 11 *Rep.* 81.

A demise of premises in Westminster, late in the occupation of A., particularly describing them, part of which was a yard, does not pass a cellar situate under that yard, which was then in the occupation of B., another tenant to the lessor; and the lessor in an ejectment brought to recover the cellar, is not estopped by his deed from going into evidence, to show that the cellar was not intended to be demised. Whether parcel or not of the thing demised is always matter of evidence. 1 *T. R.* 701.

Declarations by tenants are admissible evidence after their death, to show that a certain piece of land is parcel of the estate which they occupied; and proof that they exercised acts of ownership in it, not resisted by contrary evidence, is decisive. 2 *T. R.* 53.

If the substance of a lease be put in writing, and signed by the parties, though it be not sealed, it shall have the effect of a lease for years, &c. *Wood's Inst.* 266. But a lease in writing, though not under seal, cannot be given in evidence, unless it be stamped. 1 *T. R.* 735. Articles with covenant to let and make a lease of lands, for a certain term, at so much rent, have been adjudged a lease. *Cro. Eliz.* 486. In a covenant with the words "have, possess, and occupy lands, in consideration of a yearly rent," without the word demise, it was held a good lease; and a licence to occupy, take the profits, &c. which passeth an interest, amounts to a lease. 3 *Bulst.* 204; 3 *Salk.* 223. An agreement of the parties, that the lessee shall enjoy the lands, will make a lease; but if the agreement hath a reference to the lease to be made, and implies an intent not to be perfected till then, it is not a perfect lease until made afterwards. *Bridg.* 18; 2 *Shep. Abr.* 374. If a man, on promise of a lease to be made to him, lays out money on the premises, he shall oblige the lessor afterwards to make the lease; the agreement being executed on the lessee's part, where no such expense hath been, a bare promise of the lease for a term of years, though the lessee have possession, shall not be good without some writing. *Preced. Chan.* 561. See *Agreement*.

A paper containing words of present contract, with an

agreement that the lessee should take possession immediately, and that a lease should be executed in future, operates only as an agreement for a lease, and not as a lease itself. 1 *T. R.* 735. But an instrument containing words of present demise will operate as a lease, if such appears to be the intention of the parties, though it contain a clause for a future lease. *Poole v. Bentley*, 12 *East*, 168; 15 *East*, *R.* 244; 3 *Taunt.* 65.

An instrument on an agreement-stamp reciting that A. in case he should be entitled to certain copyhold premises on the death of B. would immediately demise the same to C., declaring that he did thereby agree to demise and let the same, with a subsequent covenant to procure a licence to let from the lord, operates as an agreement for a lease, and not as an absolute demise. 2 *T. R.* 739.

Words in an agreement that A. shall hold and enjoy, &c. if not accompanied with restraining words, operate as words of present demise; otherwise, if they be followed by others, which show that the parties intended that there should be a lease in future. The whole must depend on the intention of the parties. 5 *T. R.* 163.

These words in an instrument, "Be it remembered, that I. B. hath let, and by these presents doth demise," &c. held to operate as a present demise, although the instrument contained a further covenant for a future lease. 5 *T. R.* 165.

The provision as to a future lease does not necessarily prevent the instrument from operating as a present demise, especially if the terms of the future lease are ascertained at the time of signing the instrument. 8 *Bing.* 182. It is to be collected from the whole instrument, whether it is intended to operate as a present demise or as a mere executory agreement. 7 *Bing.* 590; 8 *Bing.* 178. Though the words are "agree to let," it may be a present demise, if such appears the intention. 7 *Bing.* 594. If the words of the instrument are ambiguous, the court will call in aid the acts of the parties done under it as a clue to their intention. 8 *Bing.* 181. "G. F. does this day agree to let to J. S. three cottages for ten years; he further agrees to build a store-house, and make a cellar, at the rent of 35*l.*; he agrees to pay the ground rent, and has this day received 4*l.* from J. S. in earnest." Held, an actual demise, and not a mere agreement. 7 *Bing.* 590; and see 8 *Bing.* 178; 2 *N. & M.* 187.

A lease at will, is at the will of the lessor or lessee, or regularly at the will of both parties. 1 *Inst.* 55. According to the strict letter of the old law, such a tenancy, as it existed only by the mutual will of the lord and tenant, might have been put an end to at any time by either party. *Co. Lit.* 55*a*; 2 *Comm.* 145. But in modern times estates at will have been looked upon with an unfavourable eye by the courts of law, and it is now clearly settled that where the relation of landlord and tenant is created without any limitation as to time, it is a tenancy from year to year, and not determinable at the will of either party, not even at the end of the current year, unless by a regular notice to quit. 3 *T. R.* 16; 6 *T. R.* 297; 7 *T. R.* 83; 8 *T. R.* 3; 3 *East*, 165. However a tenancy at will may still be created if two parties agree to let and take certain premises so long as both shall please, reserving a compensation accruing from day to day, without reference to any aliquot portion of a year; this will be strictly a tenancy at will. 4 *Taunt.* 128. And it would seem that a person who is permitted to live in a house rent-free, and without any limitation as to time, is still in the eye of law a tenant at will. *Russ. & R. C. C.* 498, 525. And see *post*, 4.

2. All persons seised or possessed of lands, may dispose of them according to the nature and quantity of their estates, provided they are under no legal disability. Where such disability exists, the demise may be either void or voidable.

He that is seised of an estate for life, may make a lease for his life according as he is seised; also he may make a lease for years of the estate, and it shall be good as long as the estate for life doth last; one possessed of lands for years

may make a lease for all the years except one day, or any short part of the term; and if lessee for years make a lease for life, the lessee may enjoy it for the lessor's life, if the term of years last so long; but if he gives livery and seisin upon it, this is a forfeiture of the estate for years. *Wood's Inst.* 267.

If a person having an interest for three years make a lease for five years, it will be good for the three years, for though he exceed his authority, the lease is only void for the excess. *Bull. N. P.* 106.

If tenant in tail or for life make a lease generally, it shall be construed for his own life. *1 Inst.* 42.

No restraint is imposed on civil corporations, as mayor and commonalty, bailiffs, burgesses, and the like, by common law or by statute, and they may therefore, consistently with their bye-laws, lease their lands for life or years, so as to bind their successors. *1 Sid.* 161, 162.

With respect to statutable leases by ecclesiastical corporations, and tenants in tail, see *post*, II.

Joint-tenants, tenants in common, and coparceners, may make leases for life, years, or at will, of their own parts, which shall bind their companions; and in some cases, persons who are not seised of lands in fee, &c. may make leases for life or years, by special power enabling them to do it; when the authority must be exactly pursued. *Wood's Inst.* 267. But there is a difference, where there is a general power to make leases, and a particular power. See *ante*, and *8 Rep.* 69.

If joint-tenants join in a lease, this shall be but one lease, for they have but one freehold; but if tenants in common join in a lease, it shall be several leases of their several interests. *2 Ro. Abr.* 64; *Com. Dig.* tit. *Estates*, (G. 6.); *Bac. Abr. Leases*, (15.)

A lease by a feme covert is altogether void, for by marriage the free agency of the woman is suspended. *Co. Lit.* 46 b, 551 b; *2 Comm.* 293.

If an infant be seised of land in fee-simple, and he make a lease for years of it, rendering no rent, this lease is void; but if there be a rent reserved upon the lease, then the lease is but voidable, and may, by the acceptance of the rent by the infant after his full age, be made good. *Shep. Touchst.* c. 14, cites *9 H. 7. c. 24*; *18 E. 4. c. 2*; *Plowd.* 545. In *3 Burr.* 1806, it is said to have been long settled, that an infant may make a lease without rent, to try his title; and that all leases by an infant, whether with or without rent, if made by deed, are voidable only. See *Infant*, and *Bac. Abr. tit. Leases B.*; and addenda, (ed. by *Gwillim & Dodd.*)

By *1 W. 4. c. 65. § 12.* infants and femes covert may by their guardians, &c. apply to the Courts of Chancery or Exchequer, or to the Courts of Equity of the counties palatine of Lancaster and Durham, as to land within their jurisdiction, by petition or motion in a summary way; and by the order of those Courts respectively may by deed surrender leases for lives or years, and take new leases for lives or years of the premises comprised therein.

By *§ 16.* infants and femes covert may, under the direction of the Court of Chancery, accept of surrenders of leases, and grant renewals thereof; and by *§ 17.* infants may grant leases of their lands, under the direction of the Court, where it is for the benefit of their estates.

By *§ 18.* if persons bound to renew are out of the jurisdiction of the Court, it may, on the petition of the parties entitled to such renewals, appoint persons to renew leases in the names of the individuals who ought to have renewed.

An idiot, or person *non compos mentis*, may make leases which will be *prima facie* binding; though after office found, the king, as guardian of insane persons, may avoid such leases. *Co. Lit.* 247 a; *4 Rep.* 123; and so after his death, they may be avoided by his heir. *Ibid.*

For the provisions of the *1 W. 4. c. 65.* with respect to leases to or by lunatics, see *Idiots*, IV. 2.

By various acts of parliament, and also by private settlements, a power is granted of making leases in possession, but not in reversion, for a certain time; the object being that the estate may not be incumbered, by the act of the party, beyond a specific time. Yet persons who had this limited power of making in possession only, had frequently demised the premises to hold from the day of the date; and the Courts in several instances had determined that the words "from the day of the date," excluded the day of making the deed, and that in consequence these were leases in reversion, and void; but this question having been brought again before the Court of B. R., it was determined that the words "from the day" might either be inclusive or exclusive; and therefore that they ought to be construed so as to effectuate these important deeds, and not to destroy them. *Pugh v. Leeds, (Duke,) Comp.* 714; and see *Doug.* 53, 185, *in notis.*

The lease of a tenant for life, who has power of leasing under certain conditions, must strictly comply with the conditions; and if it vary from them in the interest demised, or the rent reserved, it cannot be supported against the remainder-man. *5 T. R.* 567.

Under a settlement, with power to every tenant for life in possession to lease for any term of years not exceeding 21 years, or for the life or lives of any one, two, or three person or persons, so as no greater estate than for three lives, be at any one time in being in any part of the premises; held that a lease made by tenant for life for ninety-nine years, determinable on lives, as it might exceed twenty-one years, was void at law, and not even good *pro tanto* for the twenty-one years. *10 East*, 158.

Of all kinds of power the most frequent is that to make leases. In the making such leases, all the requisites particularly specified in the power must be strictly observed; and such leases must contain all such beneficial clauses and reservations as ought to be for the benefit of the remainder-man; the principle being, that the estate must come to him in as beneficial a manner as the ancient holders held it. See *1 Burr.* 120, and tit. *Power*.—If a man hath power to lease for ten years, and he leaseth for twenty, the lease shall be good in equity for ten years. *1 Ch. Ca.* 28. See further *Shep. Touchst.* c. 14, *in n.*

Where lessor leased lands which he held in fee, with others, of which he was only tenant for life, at one entire rent, and the lease was not well executed according to the power, it was held, that the lease was good for the lands in fee, though bad for the other lands, for the rent might be apportioned. *2 Mau. & Sel.* 276.

A lease executed by the tenant for life, in which the reversioner, who was then under age, is named, but who does not execute the lease, is void on the death of the tenant for life; and an execution by the reversioner only afterwards is no confirmation of it, so as to bind the lessee in an action of covenant. *1 T. R.* 86.

Under the settlement of an estate with a power to the tenant in possession to let all or any part of the premises, so as the usual rents be reserved, a lease of tithes which had not been let before was held void. In these cases, the intention of the parties is to govern the Court in construing the power. *3 T. R.* 665.

Where tenant for life has a power "to grant leases in possession, but not by way of reversion or future interest," a lease *per verba de presenti* is not contrary to the power; though the estate, at the time of making the lease, was held by tenants at will, or from year to year; if, at the time, they received directions from the grantor of the lease to pay their rent to the lessee. *Dougl.* 565, *Goodtitle v. Fenucan.*

Under a power to demise for twenty-one years in possession, and not in reversion, a lease dated in fact on 17th February, *habendum* from 25th March next ensuing, the date thereof, is good if not executed and delivered till after the 25th March, for it then takes effect as a lease in possession with

reference back to the date actually expressed. 10 *E. R.* 427.

A lease purported on the face of it to have been made on the 25th of March, 1783, *habendum* to the lessee from the 25th of March now last past, for 35 years. There was evidence to show that the lease was not executed until after the 25th March, 1783. Held, that it took effect from the delivery, and not from the date; and consequently that the term commenced on the 25th March, 1783, and not on the 25th of March, 1782. 4 *B. & C.* 272, and see *ibid.* 908.

Under a power "to lease all manors, messuages, lands, &c. so as there be reserved as much rent as is now paid for the same," such parts of the estates enumerated in the power as have never been demised may be let; but in a family settlement of an estate consisting of some ground always occupied with the family seat, and of lands let to tenants upon rents reserved, the qualification annexed to the power of leasing, "that the ancient rent must be reserved," excludes the mansion-house and lands about it never let. *Doug.* 565—9, 574.

Under a power to lease, reserving the best rent, a lease at £43 a year cannot be impeached by shewing that two specific offers to give £50 and £60 for the premises were rejected by the lessor, for all other requisites of a good tenant may be regarded by him as well as the mere amount of the rent offered. 10 *East*, 278.

Where premises have been jointly let by one demise at one rent, and the power directs that the letting shall be at the accustomed rent, a part of such premises may be demised, reserving a rent bearing the same proportion to the old rent that the premises demised by the new lease bore to the whole premises formerly demised. 5 *B. & Adol.* 363.

Under a power to a tenant for life to lease for years, reserving the usual covenants, &c. a lease made by him containing a proviso that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, was held void, the jury finding that such covenant was unusual. 1 *T. R.* 705.

By the Bankrupt Act, 6 *G. 4. c.* 16. § 77. the powers vested in any bankrupt, which he might execute for his own benefit, may be executed by his assignees; and this clause, of course, extends to any power of leasing which he may possess.

By the Insolvent Act, 7 *G. 4. c.* 57. and which has been continued by subsequent statutes, powers of leasing vested in insolvents may be exercised by their assignees.

3. If a house falls down by tempest, &c. the lessee hath an interest to take the timber to re-edify it for his habitation. 4 *Rep.* 63.

Tenants suffering houses to be uncovered or in decay; taking away wainscot, &c. fixed to the freehold, unless put up by the lessee and taken down before the term is expired; cutting down timber-trees to sell; permitting young trees to be destroyed by cattle, &c.; ploughing up ground that time out of mind hath not been ploughed; not keeping banks in repair, &c. are guilty of waste. 1 *Inst.* 52; *Dyer*, 37; 1 *Salk.* 368.

Lessees are bound to repair their tenements, except it be mentioned in the lease to the contrary. Though a lessee for years is not obliged to repair the house let to him, which is burnt by accident, if there be not a special covenant in the lease that he shall leave the house in good repair at the end of the term; yet if the house be burnt by negligence, the lessee shall repair it, although there be no such covenant. *Pasch.* 24 *Char. B. R.* A lessee at will is not bound to sustain or repair, as tenant for years is. If the house of such tenant is burnt down by negligence, action lies not against the tenant; but action lies for voluntary waste, in pulling down houses or cutting woods, &c. 5 *Rep.* 13. See *Fire*.

In an action of covenant for non-repair, the question is, whether the covenant to repair has been substantially com-

plied with. Minute damage, as the non-repair of the broken glass of a sky-light, is not sufficient to constitute a breach; and where the verdict is for the defendant, the court will not grant a new trial to enable the plaintiff to recover nominal damages. 1 *M. & Rob.* 173.

A lessee who covenants to pay rent and to repair, with an exception of casualties by fire, is liable upon the covenant for rent, though the premises are burnt down, and not rebuilt by the lessor after notice. 1 *T. R.* 310; *Anstr. Rep.* *Scac.* 687; or if there is no covenant under seal, the landlord may in such case recover for use and occupation; *Baker v. Holtzapffel*, 4 *Taunt.* 45; *sed vide Ry. & Moo.* 268, from which it appears the tenant cannot be liable in this action if he has no beneficial occupation; but see *Brown v. Quilter*, *Amb.* 619, where the tenant was relieved in equity, the landlord having recovered the value against the insurer: but in general equity will not relieve or grant an injunction in such a case; *Holtzapffel v. Baker*, 18 *Ves.* 115.

A covenant on the part of the lessor, at the end of eighteen years of the term, or before, on the request of the lessee, to grant a new lease of the premises for the like term of twenty-one years, at the like rent, with all covenants as in that indenture contained, was held to be satisfied by a tender of such a new lease, containing all the former covenants, except the covenant for future renewal. 7 *East*, 237. See *Comp.* 819.

A lessee of land in the Bedford Level cannot, to an action by his landlord for a breach of covenant, object that the lease was void by the 15 *Car. 2. c.* 17. because not registered; that act not avoiding it between the parties themselves, but only postponing its priority with respect to subsequent incumbrances. 10 *Last*, 350.

Covenant will lie against an original lessee, before he takes actual possession; and so before actual possession, against an assignee, under an absolute indefeasible assignment of the whole interest in the term; and against a mortgagee of the term, though he has never entered. *Williams v. Bosunquet*, 1 *Brod. & B.* 238, which over-rules the contrary decision of *Eaton v. Jaques*, *Dough.* 455.

A covenant on the part of a lessor, his executors, &c. and assigns, not to hire persons to work on the premises, who were settled in other parishes, without a parish certificate, was held not to run with the land, or bind the assignee of the lessee. 10 *East*, 130.

But a covenant in a lease, that the lessee, his executors and administrators, shall constantly reside on the demised premises during the demise, is binding on the assignee of the lessee, though he be not named. 2 *H. Bla.* 133.

Whether a covenant by the lessee to insure is, in general, a covenant running with the land, is a question not decided; but if all the premises are situate within the London bills of mortality, it is decided to be so, since the Building Act, which extends to that district, compels the insurance office to have the money insured laid out in rebuilding the premises. *Vernon v. Smith*, 5 *B. & A.* 1.

If a lease contain a covenant that the lessee, his executors, &c. shall not set, let, or assign over, the whole or part of the premises, without leave in writing, on pain of forfeiting the lease, the administratrix of the lessee cannot under-let without incurring a forfeiture, though for less time than the whole term: a parol licence to let part of the premises does not discharge the lessee from the restriction of such a proviso. 2 *T. R.* 425. And so even if part be let to be occupied exclusively by a partner, the original lessee still residing in part of the premises. 1 *M. & S.* 297.

Where the lessee covenanted not to allow any trade or business to be exercised upon the premises, held that the assignment of the lease to a schoolmaster who had sixty pupils was a breach of this covenant. 1 *M. & S.* 95.

An assignee of a bankrupt, a devisee, and a personal representative, are assignees in law to the purpose of being

liable to actions on a covenant for rent in a lease to the bankrupt, devisor, or intestate. *Dougl.* 184. But whether the transfer to them was such an assignment as would occasion a forfeiture under a provision not to assign, was for some time a much litigated question. *3 Wils.* 237. *Dougl.* 184, in note. *2 Eq. Ca. Abr.* 100. It is, however, now settled, that the common covenant and proviso against assigning do not apply to assignments in law, and that the assignee under a commission of bankrupt may assign a lease without consent of the lessor, notwithstanding such proviso. *3 M. & S.* 358.

And so a warrant of attorney to confess judgment, on which a lease is taken in execution, and sold, is no forfeiture of the lease under a covenant not to let, set, assign, &c. *8 T. R.* 57. But it being afterwards proved that the tenant gave the warrant of attorney to the creditor for the express purpose of enabling the creditor to take the lease in execution, this was held a fraud on the covenant, and the landlord recovered the premises in ejectment. *8 T. R.* 300.

However, a special provision guarding against the bankruptcy of the tenant, may be inserted; for instance, a proviso in a lease for twenty-one years, that the landlord shall re-enter on the tenant's committing any act of bankruptcy, whereon a commission shall issue, is good. *2 T. R.* 133.

And so where one leased for twenty-one years, if the tenant, his executors, &c. should so long continue to inhabit and dwell in the farm-house, and actually occupy the lands, &c., and not let, or assign over, or part with the lease: held that the tenant having become bankrupt, and the assignees having sold the lease, and the bankrupt being out of possession and occupation of the farm, the lessor might maintain ejectment without a previous re-entry. *8 East*, 185.

The bankruptcy of the lessee was formerly no bar to an action of covenant (made before his bankruptcy) brought against him for rent due after the bankruptcy. *4 T. R.* 94. But now the bankrupt will be discharged from the rent and covenants if the assignees accept the lease; or in case they decline it, if the bankrupt, within fourteen days after notice of their declining, shall deliver up the lease to the lessor; *6 Geo. 4. c. 16. § 75.* The former bankrupt act (*49 Geo. 3. c. 121. § 19.*) was held only to apply to cases between the lessor and lessee, and not to cases between the lessee and the assignee of the lessee. *Buck*, 189; *3 B. & A.* 521. And the lessee who has assigned over, is not discharged by the circumstance of his assignee having become bankrupt, and having delivered up the lease to the lessor; for the statute of the *6 Geo. 4. c. 16.* does not put an end to the lease, but merely discharges the bankrupt personally from the rents and covenants. *3 B. & Adol.* 211.

Though a bankrupt cannot give a lien on any particular goods, yet he may take a demise, and agree that the rent shall be payable on a particular day, *e. g.* he may agree to pay half-a-year's rent in advance, where by the custom of the country half-a-year's rent becomes due on the day on which a tenant enters: and in this case the law gives the landlord a power of distraining on that day. *2 T. R.* 600. See *Distress, Rent*.

If both lessee and lessor sign a lease, the lessee is estopped from pleading *nil habuit in tenementis* to an action of debt for rent by the lessor. *6 T. R.* 62.

Under a proviso that all assignments of a lease shall be void if not enrolled, under-leases are not included; and an under-lease is no assignment to the effect of working a forfeiture under a proviso not to assign. *Dougl.* 56 to 58, 184. But what cannot be supported as an assignment, shall be good as an under-lease, against the party granting it. *Dougl.* 188, in note.

When the whole term is made over by the lessee, although in the deed by which that is done, the rent and a power of entry for non-payment is reserved to him, and not to the original lessor, this is an assignment and not an under-lease. *Palmer v. Edwards*, *Dougl.* 187, in note; and *8 Taunt.* 593;

but it has lately been held, that it is a lease and not an assignment, though it is clear that in such a case the lessor cannot distrain, since he has no reversion. *Preece v. Corrie*, *5 Bing.* 24. However, in *Curtis v. Wheeler, Moo. & Mal.* 493, it was held by Lord Tenterden, that a tenant from year to year, under-letting from year to year, had a reversion which entitled him to distrain. In that case the under-lease was of parts of the premises demised.

A landlord cannot maintain an action of covenant for rent against an under-tenant who holds for a term less than the time granted in the original lease. *Hadford v. Hatch*, *Dougl.* 12.

A lessee for twenty-one years, at a pepper-corn rent for the first half-year, and a rack-rent for the rest of the term, who by agreement was to put the premises in repair, and covenanted to pay the land-tax, and all other taxes, rates, assessments, and impositions, having assigned his term for a small sum in gross, was held not to be liable to pay the expense of a party-wall, either by the provisions of *11 Geo. 3. c. 78. § 41.* or by the covenant, but the charge must in such case be borne by the original landlord; for the statute intended to throw that burthen on persons to whom long leases had been granted, with a view to an improvement of the estate, and who afterwards under-let at a considerable increase of rent. *8 T. R.* 458.

A lessor, who has a right of re-entry for breach of a covenant not to under-let, does not, by waiving his re-entry on one under-letting, lose his right on a subsequent similar cause of forfeiture. *4 Taunt.* 735.

And if a lessee exercise a trade contrary to the covenants of his lease, the landlord does not, by merely lying by and witnessing the act for six years, waive the forfeiture, for there must be an express waiver. *3 Taunt.* 78.

So a right of re-entry, accruing by the tenant's omission to repair within three months after notice, is not waived by the acceptance of rent falling due during the three months. And such right is only suspended, not waived, by an agreement to allow the tenant further time to repair. *1 N. & M.* 1.

Where a tenant for years under a lease delivered up possession of the premises and the lease, in fraud of his landlord, to a person claiming under a hostile title, with the intention of enabling him to assert such hostile title, and not to hold under the lease, it was held a forfeiture of the term. *1 C. M. & R.* 187.

By *32 Hen. 8. c. 34.* grantees of reversions have the same remedy against lessees, their executors, &c. as their grantors had. See *Covenant*, III.

4. Lands are leased at will, the lessee cannot determine his will before or after the day of payment of the rent, but it must be done on that very day; and the law will not allow the lessee to do it to the prejudice of the lessor, as to the rent; nor that the lessor shall determine his will to the prejudice of the lessee, after the land is sown with corn, &c. *Sid.* 339; *Lev.* 109. For where lessee at will sows the land, if he does not himself determine the will, he shall have the corn; and where tenant for life sows the corn, and dies, his executors shall have it; but it is not so of tenant for years, where the term ends before the corn is ripe, &c. *5 Rep.* 116. The lessor and lessee, where the estate is at will, may determine the will when they please; but if the lessor doth it within a quarter, he shall lose that quarter's rent; and if the lessee doth it, he must pay a quarter's rent. *2 Salk.* 413. By words spoken on the ground, by the lessor in the absence of the lessee, the will is not determined, but the lessee is to have notice. *1 Inst.* 55. If a man makes a lease at will, and dies, the will is determined; and if the tenant continues in possession, he is tenant at sufferance. *Ibid.* 57. But where a lessor makes an estate at will to two or three persons, and one of them dies, it has been adjudged this doth not determine the estate at will. *5 Rep.* 10. Tenant at will grants over his estate to another, it determines his will. *1 Inst.* 57.

As to the time when the landlord's right to make an entry or distress, or bring an action, to recover land in the possession of a tenant at will, is to be deemed to have accrued, see 3 & 4 W. 4. c. 27. § 7. under tit. *Limitation of Actions*.

Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers which tenant for life is entitled to, that is to say, house-bote, fire-bote, plough-bote, and hay-bote. *Co. Lit.* 45. See *Bote, Estovers*.

With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him and tenant for life, that where the term of tenant for years depends upon a certainty, as if he holds from Midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before Midsummer, the end of his term, the landlord shall have it, for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he could never reap the profits of. *Lit.* § 68. But where the lease for years depends upon an uncertainty, as upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife, or if the term of years be determinable upon a life or lives, in all these cases an estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant or his executors shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. *Co. Lit.* 56. Not so if it determine by act of the party himself; as if tenant for years does any thing that amounts to forfeiture, in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default. *Co. Lit.* 55. See a recent case on emblements, 5 *Barn. & Adol.* 105. And see 2 *Comm.* 144, and tit. *Emblements*.

Persons for whose lives estates are held by lease, &c. remaining beyond sea, or being absent seven years, if no proof be made of their being alive, shall be accounted dead. 19 *Car.* 2. c. 6. See *Life Estate, Occupancy*.

A lease in 1785 for three, six, or nine years, determinable at the end of three or six years, by either of the parties, in 1788, 91, 94, is a lease for nine years, determinable on giving reasonable notice to quit. 3 *T. R.* 463.

A proviso in a lease, that either party, his executors or administrators, might upon notice to the other party, his heirs, executors, or administrators, determine it, extends to the devise of the lessor, who was entitled to the rent and reversion. 12 *East*, 464.

Under a lease for fourteen or seven years, the lessee only has the option of determining it. 9 *East*, 16.

A surrender is either in fact, or by operation of law. *Co. Lit.* 338 a. Since the Statute of Frauds, a surrender of things lying in possession cannot be made by parol; but a note in writing is sufficient. A surrender of things lying in grant, must however be still made by deed; *Wils.* 26; as at common law, *Co. Lit.* 338 a.

Where a lease came into the hands of the original lessor, by an agreement entered into between him and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually, towards the goodwill already paid by such assignee," such agreement operates as a surrender of the whole term. 1 *T. R.* 441.

The mere cancelling a lease is not a surrender within the Statute of Frauds, nor is the recital in a second lease that it was granted in part consideration of the surrender of a former lease, it not purporting in the terms of it to be of itself a surrender. See 6 *East*, 86.

But where a lease of lands belonging to a bishoprick was surrendered by deed-poll, and a new lease granted in consequence of such surrender, which was afterwards avoided by the succeeding bishop, it was held the first lease was not revived by such avoidance. 1 *Barn. & Adol.* 847.

A., the tenant of a house, three cottages, and a stable and yard, let to him for seven years at an entire rent, assigned all the premises to B. for the remainder of the term, the house and cottages being in the occupation of under-tenants, the stable and yard in that of A. The landlord accepted a sum of money, as rent, up to the day of the assignment, which was in the middle of a quarter. B. took possession of the stable and yard only. The occupiers of the cottages subsequently left them, and before the expiration of the term, the landlord re-let them. A. paid no rent after the assignment, but the landlord received rent from the under-tenants; and before the term expired, he advertised the whole premises to be let or sold: held that there was a surrender, by operation of law, of all the premises. 1 *C. M. & R.* 31.

Where a tenant under-let part of the premises, and surrendered the remainder to his landlord, the latter is not entitled to recover against the sub-lessee, upon giving half-a-year's notice to quit, in his own name. *Pleasant v. Benson*, 14 *East*, 234.

If a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day, and quit at Candlemas; though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects, and therefore the landlord can only put an end to the tenancy at Candlemas. 5 *T. R.* 471.

Where the term of a lease is to end on a precise day, there is no occasion for a notice to quit, because the lease is of course at an end, unless the parties come to a fresh agreement. 1 *T. R.* 54, 159, 162, 165. But a demand of possession, and notice in writing, are necessary to entitle the landlord to double rent or value. 8 *East*, 358. In the case of a tenancy from year to year, there must be half-a-year's notice to quit, ending at the expiration of the year; six calendar months' notice is not sufficient. And there is no distinction between houses and lands as to the time of giving notice to quit. 1 *T. R.* 54, 159, 162, 163.

If a tenant hold under an agreement for a lease at a yearly rent, by which it is stipulated that an agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessor's son power to take the house for himself when he came of age, the son must make his election in a reasonable time after he comes of age. The delay of a year is unreasonable, and the tenant cannot be ejected upon half a year's notice to quit, served after such a delay; but if the son had elected within a week or a fortnight, that would have been reasonable. 2 *T. R.* 436.

Under an agreement of demise, dated in January, of a dwelling-house, land, &c. to carry on a manufacture, to commence as to the land on 25th December last, and as to the rest of the premises from the 1st May: held that a notice to quit served on 28th September, to quit at the expiration of the current year of holding, was good. *Doe d. Bradford v. Watkins et al.*, 7 *East*, 551. See 11 *East*, 498.

A notice to quit the T. B. (the name of a farm) where the principal mansion was, must be intended to mean T. B. *cum soens*. 14 *East*, 245.

Tenant from year to year before a mortgage or grant of the reversion, is entitled to six months' notice to quit, before the end of the year, from the mortgagee or grantee. 1 *T. R.* 380, 382. But ejectment will lie by a mortgagee against a tenant, under a lease from a mortgagor, made subsequent to the mortgage, without notice to quit. *Ketch v. Hall, Dougl.* 21. And see *Ejectment*, V.

Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice to quit as the original lessor must have given. 3 *T. R.* 159.

Where a landlord, about to sell his premises, gave his tenant a regular notice to quit, but promised not to turn him

out unless they were sold: held that the tenant was bound to quit after the expiration of six months from the service of the notice, whenever desired by his landlord, and that if he did not, he was a trespasser. 10 *East*, 13.

Where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery of a notice to quit, to his servant at the dwelling-house, is strong presumptive evidence that the master received the notice, and ought to be left to the jury. 4 *T. R.* 464.

If notice to quit at Midsummer be given to a tenant holding from Michaelmas, he may insist on the insufficiency of the notice at the trial, though he did not make any objection at the time it was served. 4 *T. R.* 361.

Since the new stile, a demise of land to hold from the Feast of St. Michael, means from *new* Michaelmas, and cannot be shown by extrinsic evidence to refer to *old* Michaelmas; and a notice to quit at *old* Michaelmas, though given half a year before *new* Michaelmas, is bad. 11 *East*, 312. But in this case the demise was by deed; where, however, the tenant held under a written agreement, not under seal, from Lady-day, a notice to quit on the 6th April was held good, it being proved by parol evidence, which was admissible, that the parties meant *old* Lady-day. *Doe v. Benson*, 4 *B. & A.* 588.

It seems that a receiver appointed by the Court of Chancery, with authority to let lands from year to year, may also determine such tenancies by a regular notice to quit. 12 *East*, 57.

Under a proviso that either the landlord or the tenant, or their respective executors or administrators, might determine a lease at the end of fourteen years, by six months' notice in writing under his or their hands; a notice signed by two only of these executors, on behalf of themselves and the third executor, was held not to be good, although the third executor joined in the ejectment. 5 *East*, 491.

II. The enabling statute, 32 *Hen. 8. c. 28.* empowers three manner of persons to make leases, to endure for three lives or one-and-twenty years, which could not do so before; as, first, tenant in tail may by such leases bind his issue in tail, but not those in remainder or reversion. secondly, a husband seised in right of his wife, in fee-simple or fee-tail, provided the wife joins in such lease, may bind her and her heirs thereby: lastly, all persons seised of an estate in fee-simple in right of their churches, which extends not to parsons and vicars, may (without the concurrence of any other person) bind their successors. But then many requisites must be observed, which the statute specifies, otherwise such leases are not binding. *Co. Lit.* 44. 1st, the lease must be by indenture, and not by deed-poll or parol: 2d, it must begin from the making, or day of the making, and not at any greater distance of time: 3d, if there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring: 4th, it must be either for twenty-one years or three years, and not for both: 5th, it must not exceed the term of three lives, or twenty-one years, but may be for a shorter time: 6th, under this statute, 32 *Hen. 8.* it must have been of corporeal hereditaments and not of such things as lie merely in grants; for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to distress; but now by the statute 5 *Geo. 3. c. 17.* a lease of tithes or other incorporeal hereditaments alone may be granted by any bishop or any such ecclesiastical or eleemosynary corporation, and the successor shall be entitled to recover the rent by an action of debt, which (in case of a freehold lease) he could not have brought at the common law: 7th, it must be of lands and tenements most commonly letten for twenty years past; so that if they had been let for above half the time (or eleven years out of the twenty) either for life, for years, at will, or by copy of court-roll, it is sufficient: 8th, the most usual and customary form of

rent for twenty years past, must be reserved yearly on such lease: 9th, such lease must not be made without impeachment of waste. These are the guards imposed by the statute (which was avowedly made for the security of farmers, and the consequent improvement of tillage,) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence here given.

Next follows, in order of time, the disabling or restraining statute, 1 *Eliz. c. 19.* (made entirely for the benefit of the successor) which enacts, that all grants by archbishops and bishops (which include even those confirmed by the dean and chapter, the which, however long and unreasonable, were good at common law), other than for the term of twenty-one years, or three lives, from the making, or without reserving the usual rent, shall be void. Concurrent leases, if confirmed by the dean and chapter, are held to be within the exception of this statute, and therefore valid, provided they do not exceed, together with the lease in being, the term permitted by the act. *Co. Lit.* 45. But by a saving expressly made, this statute of 1 *Eliz.* did not extend to grants made by any bishop to the crown; by which means Queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her own use, or with intent to be granted out again to her favourites, whom she thus gratified without any expense to herself: to prevent which for the future, the 1 *Jac. 1. c. 3.* extends the prohibitions to grants and leases made to the king, as well as to any of his subjects. 11 *Rep.* 71.

Then came 13 *Eliz. c. 10.* explained and enforced by 14 *Eliz. c. 11, 14*; 18 *Eliz. c. 11*; 43 *Eliz. c. 20.*, which extend the restrictions laid by the 1 *Eliz. c. 19.* on bishops, to certain other inferior corporations, both sole and aggregate. From laying all which together, we may collect, that all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, are restrained from making any leases of their lands, unless under the following regulations: 1st, they must not exceed twenty-one years or three lives, from the making: 2d, the accustomed rent, or more, must be yearly reserved thereon (and they must be of lands, &c. which have been before demised, 1 *Bing.* 28): 3d, houses in corporations or market towns may be let for forty years, provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them, and provided the lessee be bound to keep them in repair; and they may also be aliened in fee-simple for lands of equal value in recompence: 4th, where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years: 5th, no lease, by the equity of the statute, shall be made without impeachment of waste; *Co. Lit.* 45: 6th, all bonds and covenants tending to frustrate the provisions of the 13 & 18 *Eliz.* shall be void.

Concerning these restrictive statutes two general observations are to be made. First, That they do not, by any construction, enable any persons to make such leases as they were by common law disabled to make. Therefore a parson or vicar, though he is restrained from making longer leases than for twenty-one years or three lives, even with the consent of the patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, without obtaining such consent. *Co. Lit.* 44. Secondly, That though leases contrary to these statutes are declared void, yet they are good against the lessor, during his life, if he be a sole corporation; and are also good against an aggregate corporation, so long as the head of it lives, who is presumed to be the most concerned in interest. For the statute was intended for the benefit of the successor only; and no man shall take an advantage of his own wrong. *Co. Lit.* 45; 2 *Comm. c. 20.*

The power of leasing lands belonging to hospitals and houses for the poor, is further restrained by the 39 *Eliz. c. 5* § 2. whereby all leases, grants, conveyances, or estates made

by any corporation so to be founded, exceeding twenty-one years, and that in possession, and whereupon the accustomed yearly rent, or more by the greater part of twenty years' rent before the making of such lease, shall not be reserved and yearly payable, shall be void.

Where a new thing is demised with lands accustomedly let, though there be great increase of rent, the lease is void: but more rent than the accustomed rent may be reserved. *5 Rep. 5; 6 Rep. 37.*

By the *29 & 40 Geo. 3. c. 41.* where any part of the possessions of any archbishop, bishop, master and fellows, dean and chapter, master or guardian of any hospital, or any other person or persons, or body or bodies politic or corporate, having any ecclesiastical living, shall be demised by several leases which were formerly demised by one lease under one rent; or where a part shall be demised for less than the ancient rent, and the residue shall be retained in the possession of the lessor; the several rents reserved on the separate demises of the specific parts shall be taken to be the ancient rents within the meaning of the *32 Hen. 8. c. 28; 1 Eliz. c. 19; 13 Eliz. c. 10; and 14 Eliz. c. 11.*

A guardian during the minority of an infant tenant in tail, who was but one year old, made a lease for twenty years, and it was adjudged not good by the *32 Hen. 8. c. 28.* to bind the issue in tail; and it is the same in the case of tenant in dower, tenant by the curtesy, or husband seised in right of his wife, because they have no inheritance. *Dyer, 271.*

If a lease of the wife's land is not warranted by the statute, it is a good lease against the husband, though not against the wife: the husband and wife cannot bind him in reversion or remainder. *1 Inst. 362.*

A lease by the husband of a feme covert's estate, though not within *32 Hen. 8. c. 28.* is only voidable. But a mortgage of a feme covert's estate, though in form of a lease, is void. *Dougl. 53, 54, in n.*

If a bishop have two chapters, as there may be two or more to one bishoprick, both chapters must confirm leases made by the bishop. *1 Inst. 131.* A lease by a bishop made to begin presently for twenty-one years, when there is an old lease in being, is good, notwithstanding the statute of *1 Eliz. c. 19; Moor Cas. 241.* But if such lease is to commence at a day to come it will be void. *1 Leon. 44.* Lease for three lives by a bishop of tithes, is void against the successor, although the usual rent be duly reserved. *Moor Cas. 1078.*

Leases of a dean and chapter are good, without confirmation of the bishop. *Dyer, 273; 2 Nels. Abr. 1096.* Where there is a chapter and no dean, they may make grants, &c. and are within the statute. *1 Mod. 204.* A prebendary is seised in right of the church within the equity of the statute *32 Hen. 8. c. 28; 4 Leon. 51.* A prebendary's lease confirmed by the archbishop, who is his patron, is good, without confirmation of dean and chapter. *3 Bulstr. 290.* But where a prebendary made a lease for years of part of his prebend, and this was confirmed by the dean and chapter, because it was not confirmed likewise by the bishop, who was patron and ordinary of the prebend, the lease was adjudged void. *Dyer, 60.* If a prebend hath rectories in two several dioceses belonging to his prebend, and his lease of them is confirmed by the bishop, dean, and chapter of the diocese of which he is prebendary, it is good, though not confirmed by the other. *Sid. 75.*

A chancellor of a cathedral church may make a lease, and it is said it will be good against the successor, though not confirmed, &c. *Sid. 158.* If a parson or vicar makes a lease for life or years, of lands usually letten, reserving the customary rent, &c. it must be confirmed by the patron and ordinary, for they are out of the statute *32 Hen. 8. c. 28.* And if the parson and ordinary make a lease for years of the glebe to the patron, and afterwards the patron assigns this lease to another, such assignment is good, and is a confirmation of that lease to the assignee. *5 Rep. 15.* Ancient covenants in

former leases may be good to bind the successor, so as to discharge the lessee from payment of pensions, tenths, &c. but of any new matter they shall not. *1 Vent. 223.*

A lease for years of a spiritual person will be void by his death, if it is not according to the statutes; and a lease for life is voidable by entry, &c. of the successor; and so in like cases leases not warranted by statute are void or voidable on the deaths of their makers: acceptance of rent on a void lease shall not bind the successor. *2 Cro. 173.*

If a bishop be not bishop *de jure*, leases made by him to charge the bishoprick are void, though all judicial acts by him are good. *2 Cro. 353.* And where a bishop makes a lease, which may tend to the diminution of the revenues of the bishoprick, &c. which should maintain the successor; there the deprivation or translation of the bishop is all one with his death. *1 Inst. 329.*

A manor belonging to a bishop's see had been usually leased out for lives at a certain rent—the bishop grants a lease excepting the demesnes, but reserving the whole of the former rent, and received only part of it in payment according to the proportion, deducting for the demesnes excepted. The successor was held to be entitled to the full rent reserved under the lease. *Dyke v. Bath and Wells (Bishop,) Parl. Cases, tit. Rent, Case 1.*

There is yet another restriction with regard to college leases by *18 Eliz. c. 6.* which directs that one-third of the old rent then paid should for the future be reserved in wheat or malt, reserving a quarter of wheat for each *6s. 8d.* or a quarter of malt for every *5s.*; or that the lessees should pay for the same according to the price that wheat and malt should be sold for, in the market next adjoining to the respective colleges, on the market day before the rent becomes due. This is said to have been an invention of Lord Treasurer Burleigh and Sir Thomas Smith, then principal secretary of state; who observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the new-found Indies, which effects were likely to increase to a greater degree, devised this method for upholding the revenues of colleges. Their foresight and penetration have, in this respect, been very apparent: for though the rent so reserved in corn was at first but one-third of the old rent, or half of what was still reserved in money, yet now the proportion is nearly inverted, and the money arising from corn-rents is, *communibus annis*, almost double to the rents reserved in money. *2 Comm. c. 20.*

It has been observed that the price of a quarter of wheat brings at present near *50s.* and the colleges receiving one-third of their rent in corn, i. e. a quarter of wheat, or its value, for every *13s. 4d.* which they are paid in money, it follows, that the corn-rent will be in proportion to the money-rent, nearly as four to one. But these rents united are very far from the present value. Colleges, therefore, in order to obtain the difference, generally take a fine upon the renewal of their leases. It was a great object in colleges to restrain those in possession from making long leases, and impoverishing their successors, by receiving the whole value of the lease by a fine at the commencement of the term. The corn-rent has made the old rent approach in some degree nearer to its present value: otherwise it should seem the principal advantage of a corn-rent is to secure the lessor from the effect of a sudden scarcity of corn. *Christian's Note to 2 Comm. c. 20. p. 322.*

The leases of beneficed clergymen are farther restrained in case of their non-residence, by *13 Eliz. c. 20; 14 Eliz. c. 11; 18 Eliz. c. 11; 43 Eliz. c. 9;* which direct, that if any beneficed clergyman be absent from his cure above fourscore days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of the parish, but that all leases made by him of the profits of such benefice, and all covenants and agreements of a like nature, shall cease and be void; except in the case of licensed plu-

ralists, who are allowed to demise the living on which they are non-resident, to their curates only; provided such curates do not absent themselves above forty days in any one year. On these statutes it has been determined, that where an incumbent has leased his rectory, and had been afterwards absent for more than eighty days in a year, his tenant could not maintain an ejectment against a stranger who had got into possession without any right or title whatever. 2 *Term Rep.* 749. If the curate leases over, the lease will become void by his absence; but not by the absence of the incumbent. *Gibbs*, 740.

But now, by 57 *Geo. 3. c. 99.* these statutes are repealed as far as relates to spiritual persons holding farms, and to leases of benefices and livings, and to buying and selling, and to the residence of spiritual persons on their benefices.

By 13 *Eliz. c. 20.* it is enacted that all chargings of benefices with cure with any person, or with any profit out of the same, to be yielded or taken, other than rents to be reserved upon leases thereafter to be made according to the meaning of the act, should be utterly void. By the 48 *Geo. 3. c. 84. § 10.* this act, and the statutes explaining and continuing it, were wholly repealed; but by the 57 *Geo. 3. c. 99. § 1.* (taking effect 10th July, 1817,) the 48 *Geo. 3. c. 84.* was in its turn repealed. The effect, therefore, of the 57 *Geo. 3. c. 99. § 1.* is to revive the clause of the 13 *Eliz. c. 20.* as to chargings of benefices, and consequently a demise by a parson of his benefice subsequent to the 57 *Geo. 3. c. 99.* for securing an annuity, is void, it being in substance a charging of the benefice. 10 *Barn. & C.* 241. And so also a warrant of attorney for securing an annuity charged on a benefice, and executed to the intent that the grantee might obtain a sequestration. 1 *Barn. & Adol.* 378. But a demise of a rectory for securing an annuity made between the passing of the 48 *Geo. 3. c. 84.* (7th July, 1803,) and of the 57 *Geo. 3. c. 99.* is valued. 6 *Barn. & C.* 126. And so also is an assignment made, after the passing of the last acts, of a term granted between the passing of the two acts for securing an annuity out of a benefice for the term when created, was legal, and the assignment is only a continuance of the same security. 9 *Barn. & C.* 344.

III. 1. If a bishop, before the statute 1 *Eliz. c. 19. § 5.* leased part of his bishoprick for term of years, reserving rent, and then died, and after another was made bishop, who accepted and received the rent when due; by this acceptance the lease was made good, which otherwise the new bishop might have avoided. It is the same if baron and feme, seised of lands in right of the feme, join and make a lease or feoffment, reserving rent, and the baron dies, after whose death the feme receives or accepts the rent; by this the lease or feoffment is confirmed, and shall bar her from bringing a *cui in vita*. *Co. Lit.* 211. Tenant in tail made a lease for years, rendering 20s. rent, and afterwards released 19s. and died; the issue in tail accepted the 12d. rent; the better opinion was, that by the acceptance of the shilling for rent he had affirmed the lease, and could not distrain for the 19s. rent. *Dyer*, 304. Tenant for life, remainder in tail; a stranger levies a fine to him in remainder, who leased the lands to the conusor, rendering rent, the tenant for life died, and the issue in tail accepted the rent; adjudged, that by the fine and acceptance of the rent, the lease was affirmed. *Dyer*, 299. See *Smith v. Stapleton*, *Plond.* 426, 434.

Lord and tenant; the rent is behind many years, the tenant made a feoffment in fee, and the lord accepted the rent of the feoffee which became due in his time; adjudged, that by such acceptance he shall lose all the arrearsages, and cannot avow for the same. 3 *Rep.* 65; *Penant's case*. Lease for years, rendering rent, with a clause of re-entry; the lessee paid the rent, which the lessor accepted and put into a bag, but afterwards finding brass money amongst it, he refused to carry it away, and entered for the condition broken; but adjudged

unlawful, because after he had accepted the rent he is barred. 5 *Rep.* 118; *Wade's case*.

Acceptance of the next rent due, at a day afterwards, will bar one to enter for a condition broken before by reason of non-payment of the rent; because the lessor thereby affirmeth the lease to have continuance. *Co. Lit.* 211. And taking a distress affirmeth the continuance of the rent; but if rent was due at a day before, and thereby the condition was broken, one may receive the rent, and yet re-enter; and if he accept of part of the rent, he may enter for a condition broken, and retain the lands until he has the whole rent. 3 *Rep.* 64; *Co. Lit.* 203.

If an infant accepts of rent at his full age, it makes the lease good, and shall bind him. *Plow.* 418.

If a lessor accepts of rent from an assignee, knowing of the assignment, it bars him from action of debt against the lessee, for the privity of contract is extinguished; but after such acceptance, the lessor or his assigns may maintain an action against the first lessee upon his covenant for payment of the rent. 1 *Saund.* 241; 3 *Rep.* 24. But acceptance of rent from the assignee has been adjudged a sufficient notice of the assignment, so that the lessor could not resort to the first lessee. 2 *Bulst.* 151.

Lessee for years assigned his term, and died intestate; the lessor brought debt against his administrator, who pleaded the assignment, and that the plaintiff had notice, and had accepted the rent of the assignee; adjudged, that by the death of the lessee, the privity of contract was determined, and the action would not lie against the administrator. *Cro. Eliz.* 715; cited in *Walker's case*. 3 *Rep.* 24.

Tenant for life makes a lease for years to commence on a certain day, and dies before the expiration of the lease, in the middle of a year. The remainder-man receives rent from the lessee, who continues in possession (but not under a fresh lease,) for two years together, on the days of payment mentioned in the lease. This is evidence from which an agreement will be presumed between the remainder-man and the lessee, that the lessee should continue to hold from the day and according to the terms of the original demise; and notice to quit on that day is proper. 1 *H. Black.* 97.

2. If a parson, &c. makes a lease for years not warranted by the 32 *Hen. 8. c. 34.*, but it is void by his death; acceptance of rent by a new parson or successor will not make it good. 1 *Saund.* 241. And if a tenant for life makes a lease for years, there no acceptance will make the lease good, because the lease is void by his death. *Dyer*, 46, 239.

Tenant in tail made a lease for years, rendering rent to him and his heirs, and died; his son and heir accepted the rent, and was afterwards executed for treason, leaving issue a son; the king accepted the rent, but that did not make the lease good, the lands being in his hands by the attainder, and not in the reverter. *Dyer*, 115. Lease for years, with condition that the lessee shall not alien or assign, without the assent of the lessor, and if he did, that then the lessor should re-enter, he assigned part of the land without assent, &c. and then the lessor, before notice of the assignment, accepts the rent, and afterwards entered for the condition broken; and adjudged lawful; for the condition being collateral, he might assign the land so secretly, that it may be impossible for the lessor to know it. 3 *Rep.* 65; *Penant's case*; *Cro. Eliz.* 558 *S. C.*

Lease for twenty-one years, rendering rent, on condition, that if the lessee did let any part of it above three years, then the lease may be void, and that the lessor might enter; he let it out for three years, and so from three years to three years, during the term of twenty-one years, if he so long lived; the lessor accepted the rent of the assignee, and afterwards entered; this was a breach of the condition, and the acceptance of it afterwards did not dispense with it, because the original lease was void and determined. *Cro. Car.* 361. If tenant in tail make a lease for years to commence after his

death, rendering rent, in such case acceptance of rent by the issue will not make the lease good to bar him, because the lease did not take effect in the life of his ancestor. *Plowd.* 418.

Where one in remainder, after the expiration of an estate for life, gave notice to the tenant to quit on a certain day, and afterwards accepted half a year's rent; such acceptance being only evidence of a holding from year to year is rebutted by the previous notice to quit, and therefore the notice remains good. See 1 *T. R.* 161.

The lessor's receiving rent after a forfeiture is no waiver, unless the forfeiture were known to him at the time. 2 *T. R.* 425; 6 *T. R.* 220; 3 *Taunt.* 78.

A lease void in its creation as against a remainder-man, does not become valid in law by his accepting rent, and suffering the lessee to make improvements after his remainder vests in possession; though it seems that in such case equity would afford relief. See *Doe v. Butcher*, *Doughl.* 50—54, *in n.*

Where a lease is *ipso facto* void by the condition or limitation, no acceptance of rent afterwards can make it have continuance as between the grantor and grantee; but it is otherwise of a lease voidable only. See *Doughl.* 578, *in n.* See further on this subject, *Covenant, Disclaimer, Distress, Ejectment, Forfeiture, Injunction, Rent, Replevin, &c.*

LEASES OF THE KING. Leases made by the king, of part of the duchy of Cornwall, are to be for three lives, or thirty-one years, and not to be made dishonourable of waste, whereon the ancient rent is to be reserved; and estates in reversion, with those in possession, are not to exceed three lives, &c. See 13 *Car.* 2. c. 4.

All leases and grants made by letters-patent, or indentures under the great seal of England, or seal of the Court of Exchequer, or by copy of court-roll, according to the custom of the manors of the duchy of Cornwall, not exceeding one, two, or three lives, or some term determinable thereon, &c. are confirmed; and covenants, conditions, &c. in leases for lives or years, shall be good in law, as if the king were seised in fee simple. 1 *Jac.* 2. c. 9. See 5 & 6 *W. & M.* c. 18; 12 *Ann.* c. 22. Leases from the crown of lands in England and Wales, and under the seals of the duchy of Lancaster, &c. for one, two, or three lives, or terms not exceeding fifty years, allowed time for enrolment, &c. by 10 *Ann.* c. 18. Leases made by the Prince of Wales of lands, &c. in the duchy of Cornwall, for three lives, or thirty-one years, on which is reserved the most usual rent paid for the greatest part of twenty years before, shall be good against the king, the prince, and their heirs, &c. and the conditions of such leases be as effectual as if the prince had been seised of an absolute estate in fee-simple in the lands. 10 *Geo.* 2. c. 29. See *Cornwall, King.*

LEASE AND RELEASE. A conveyance of the fee-simple, right, or interest in lands or tenements under the Statute of Uses, 27 *Hen.* 8. c. 10. giving first the possession, and afterwards the interest, in the estate conveyed. Though the deed of feoffment was the usual conveyance at common law, yet, since the Statute of Uses, 27 *Hen.* 8. c. 10. the conveyance by lease and release has taken place of it, and is become a very common assurance to pass lands and tenements; for it amounts to a feoffment, the use drawing after it the possession without actual entry, &c. and supplying the place of livery and seisin, required in that deed: in the making it, a lease or bargain and sale for a year, or such like term, is first prepared and executed, "to the intent," as is expressed in the deed, "that by virtue thereof the lessee may be in actual possession of the land intended to be conveyed by the release; and thereby, and by force of the statute 27 *Hen.* 8. c. 10. for transferring of uses into possession, be enabled to take and accept a grant of the reversion and inheritance of the said lands, &c. to the use of himself and his heirs for ever." Upon which the release is accordingly made, reciting the lease, and declaring the uses; and in these

cases a pepper-corn rent in the lease for a year is a sufficient reservation to raise an use, to make the lessee capable of a release. 2 *Vent.* 35; 2 *Mod.* 282.

Blackstone says, this species of conveyance was first invented by Serjeant *Moore*, soon after the Statute of Uses, and is now the most common of any, and therefore not to be shaken; though very great lawyers, as particularly Mr. *Noy*, attorney-general to King Charles I., formerly doubted its validity. 2 *Mod.* 252. It is thus contrived: a lease, or rather bargain and sale upon some pecuniary consideration for one year, is made by the tenant of the freehold, to the lessee or bargainee. Now this, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the use of the term for a year; and then the statute immediately annexes the possession. He therefore being thus in possession is capable of receiving a release of the freehold and reversion, which must be made to a tenant in possession, and accordingly the next day a release is granted to him. This is held to supply the place of livery of seisin, and thus a conveyance by lease and release is said to amount to a feoffment. *Co. Lit.* 270; *Cro. Jac.* 604.

The form of this conveyance is originally derived to us from the common law; and it is necessary to distinguish in what respect it operates as a common law conveyance, and in what manner it operates under the Statute of Uses. At the common law, where the usual mode of conveyance was by feoffment with livery of seisin, if there was a tenant in possession, so that livery could not be made, the reversion was granted, and the tenant attorned to the reversioner. As by this mode the reversion or remainder of an estate might be conveyed without livery, when it depended on an estate previously existing, it was natural to proceed one step further, and to create a particular estate for the express and sole purpose of conveying the reversion; and then by a surrender or release, either of the particular estate to the reversioner, or of the reversion to the particular tenant, the whole fee vested in the surrenderee or releasee. It was afterwards observed, that there was no necessity to grant the reversion to a stranger; and that if a particular estate was made to the person to whom it was proposed to convey the fee, the reversion might be immediately released to him, which release, operating by way of enlargement, would give the releasee (or releasee as he is sometimes termed) a fee. In all these cases, the particular estate was only an estate for years; for at the common law the ceremony of livery of seisin is as necessary to create even an estate of freehold, as it is to create an estate of inheritance. Still an actual entry would be necessary on the part of the particular tenant; for without actual possession the lessee is not capable of a release operating by way of enlargement. But this necessity of entry for the purpose of obtaining the possession, was superseded or made unnecessary by the Statute of Uses, (27 *Hen.* 8. c. 10. above alluded to); for by that statute the possession was immediately transferred to the *cestui que use*; so that a bargainee under that statute is as much in possession, and as capable of a release before or without entry, as a lessee is at the common law after entry. All, therefore, that remained to be done to avoid, on the one hand, the necessity of livery of seisin from the grantor, and to avoid, on the other, the necessity of an actual entry on the part of the grantee, was, that the particular estate (which, for the reasons above mentioned, should be an estate for years,) should be so framed as to be a bargain and sale within the statute. Originally it was made in such a manner as to be both a lease at the common law, and a bargain and sale under the statute; but as it is held, that where conveyances may operate both by the common law and statute, they shall be considered to operate by the common law, unless the intention of the parties appears to the contrary, it became the practice to insert, among the operative words, the words *bargain and sell*; (in fact, it is more accurate to insert no other operative words;) and to express that the bargain and sale, or lease,

is made to the intent and purpose that thereby, and by the statute for transferring uses into possession, the lessee may be capable of a release. The bargain and sale therefore, or lease for a year, as it is generally called, operates, and the bargainee is in the possession by the statute. The release operates by enlarging the estate or possession of the bargainee to a fee. This is at the common law; but if the use be declared to the releasee in fee-simple, it continues an estate at the common law; but if the use is declared to a third person, the statute again intervenes, and annexes or transfers the possession of the releasee to the use of the person to whom the use is declared. It has been said, that the possession of the bargainee under the lease is not so properly merged in, as enlarged by, the release; but at all events it does not, after the release, exist distinct from the estate passed by the release. 1 *Inst.* 271. *b. in n.* See *Release I.*

As the operation of a lease and release depends upon the lease or bargain and sale, if the grantor is a *body corporate*, the lease will not operate under the Statute of Uses; for a *body corporate* cannot be seised to an use, and therefore the lease of possession, considered as a bargain and sale under the statute, is void; and the release then must be of no effect for want of a previous possession in the releasee. In cases of this nature, therefore, it is proper to make the conveyance by feoffment, or by a lease and release with an *actual entry* by the lessee previous to the release; after which the release will pass the reversion. It may also be observed, that in *exchanges*, if one of the parties die before the exchange is executed by entry, the exchange is void. But if the exchange is made by lease and release, this inconvenience is prevented, as the statute executes the possession without entry; and all incidents annexed to an exchange at common law will be preserved. 1 *Inst.* 271. *b. in n.*

When an estate is conveyed by lease and release, in the lease for a year there must be the words *bargain and sell* for money; and five shillings or any other sum, though never paid, is a good consideration, whereupon the bargainee for a year is immediately in possession on the executing of the deed, without actual entry: if only the words *demise, grant, and to farm let*, are used, in that case the lessee cannot accept of a release of the inheritance, until he hath actually entered, and is in possession. 2 *Lil. Abr.* 435. But where *Littleton* says, that if a lease is made for years, and the lessor releases to the lessee before entry, such release is void; because the lessee had only a right, and not the possession; and such release shall not enure to enlarge the estate, without the possession: though this is true at common law it is not so now upon the Statute of Uses. 2 *Mod.* 250, 251. And if a man make a lease for life, remainder for life, and the first lessee dieth, on which the lessor releases to him in remainder, before entry, this is a good release to enlarge the estate, he having an estate in law capable of enlargement by release, before entry had. 1 *Inst.* 270.

No person can make a bargain and sale, who hath not possession of the lands; but it is not necessary to reserve a rent therein; because the consideration of money raises the use. If a lease be without any such consideration the lessee hath not any estate till entry, nor hath the lessor any reversion; and therefore a release will not operate, &c. 1 *Inst.* 270, 278; *Cro. Car.* 169; 1 *Mod.* 263. On lease at will, a release shall be good by reason of the privity between the parties; but if a man be only tenant at sufferance, the release will not enure to him; and as to the person who hath the reversion it is void, for such tenant hath not any possession, there being no estate in him. *Lit.* § 461, 462; *Cro. Elis.* 21; *Dyer*, 251.

A lease and release make but one conveyance, being in the nature of one deed. 1 *Mod.* 252.

A lease dated two days before the release is good to support the latter, which refers to a lease as of the day next before the date of the release. 2 *Mau. & Sel. Rep.* 434.

For further information as to the principles in which this form of conveyance originates, and under which it operates, see *Conveyance, Deed, Feoffment, Trusts, Uses, &c.*

LEASING or LESING. See *Gleaning*.

LEASING-MAKING. Slandorous and untrue speeches to the disdain, reproach, and contempt of the king, his council and proceedings, or to the dishonour, hurt or prejudice of the king or his ancestors. *Scotch Acts*, 1584, 1585. By these acts this offence was made capital, but being declared a grievance by the petition of right, the punishment of the offenders is, by the act 1703, c. 4. declared arbitrary.

LEATHER. By the 11 *Geo.* 4. c. 16. all the duties and restrictions on the manufacture of leather were repealed: and § 2. enacts, that nothing therein contained shall be construed to continue so much of the 48 *Geo.* 3. c. 60. as prohibits tanners from carrying on the business of shoemakers, curriers, leather-cutters, &c.

LECCATOR. A debauched person, *lecher*, or whore-master.

LECHERWITE. See *Lairmite*.

LECTISTERNIUM. A bed; sometimes all that belongs to a bed. *Flor. Worc.* p. 631.

LECTRINUM. A pulpit. *Mon. Angl. tom.* 3. p. 243.

LECTURER. [*Praeceptor.*] A reader of lectures. In London, and other cities, there are lecturers who are assistants to the rectors of churches, in preaching, &c. These lecturers are chosen by the vestry, or chief inhabitants of the parish, and are usually the afternoon preachers: the law requires that they should have the consent of those by whom they are employed, and likewise the approbation and admission of the ordinary: and they are, at the time of their admission, to subscribe to the thirty-nine articles of religion, &c. required by the 13 & 14 *Car.* 2. c. 4. They are to be licensed by the bishop, as other ministers, and a man cannot be a lecturer without a licence from a bishop or archbishop; but the power of a bishop, &c. is only as to the qualification and fitness of the person, and not as to the right of the lectureship; for if a bishop determine in favour of a lecturer, a prohibition may be granted to try the right. *Mich.* 18 *W.* 3. *B. R.* If lecturers preach in the week-days, they must read the common prayer for the day when they first preach, and declare their assent to that book; they are likewise to do the same the first lecture-day in every month, so long as they continue lecturers, or they shall be disabled to preach till they conform to the same: and if they preach before such conformity, they may be committed to prison for three months, by warrant of two justices of the peace, granted on the certificate of the ordinary. 13 & 14 *Car.* 2. c. 4.

Where lectures are to be preached or read in any cathedral or collegiate church, if the lecturer openly, at the time aforesaid, declare his assent to all things in the book of Common Prayer, it shall be sufficient, and university sermons of lectures are excepted out of the act concerning lecturers. There are lectures founded by the donations of pious persons, the lecturers whereof are appointed by the founders without any interposition or consent of rectors of churches, &c. though with the leave and approbation of the bishop: such as that of Lady Moier at St. Paul's, &c. But such are not entitled to the pulpit without the consent of the rector or vicar, in whom the freehold of the church is. *Cases.* *B. R.* 420, 433.

The court of *B. R.* will not grant a *mandamus* to a bishop to license a lecturer without the consent of the rector, where the lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent is shown. *R. v. London*, (*Bp.*) 1 *T. R.* 331. Nor will that court grant a *mandamus* to the rector, to certify to the bishop the election of a lecturer chosen by the inhabitants, where no such custom is shown, though the lecturer has been paid out of the poor rates. But such immemorial custom, if in fact it exists, is binding on the rector. 4 *T. R.* 125.

LECTURES on Divinity, Law, Physic, &c. in the universities of Oxford and Cambridge; see *Regius Professor*.

LECTURNIUM, [lectorium.] The desk or reading place in churches. *Stat. Eccl. Paul. Lond. MS. 44.*

LEDGRAVE, or LEDGREVE. See *Lathreve*.

LEDO, [ledona.] The rising water or increase of the sea.

LEET, or COURT-LEET. See *Court-Leet*.

LEETS, or LEITS. Meetings appointed for the nomination or election of officers: often mentioned in Archbishop Spotswood's History of the Church of Scotland.

LEGA, or LACTA. Anciently the allay of money was so called. *Spelm.*

LEGABILIS, signifies what is not entailed as hereditary; but may be bequeathed by legacy, in a last will and testament. *Articula proposita in parlamento coram Rege; anno 1234.*

LEGACY.

[LEGATUM.] A bequest, or gift of goods and chattels by will or testament: the person to whom it is given is styled the legatee: and if the gift is of the residue of an estate after payment of debts and legacies, he is then styled the residuary legatee.

This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor; for if one has a general or pecuniary legacy of 100*l.*, or a specific one of a piece of plate, he cannot in either case take it without the consent of the executor. For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient sum left to pay the debts of the testator. See *Co. Litt. 111; Aley. 39; Bract. l. 2. c. 26.* But if there is a fund to pay the debts, and the executor then refuses his assent to a legacy, he may be compelled to give it, either by the spiritual court, or by a court of equity. *March, Rep. 19.*

In case of a deficiency of assets, all the general legacies must abate proportionably, in order to pay the debts; but a specific legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it. *2 Vern. 111.* Upon the same principle, if the legatees have been paid their legacies, they are afterwards bound to refund a rateable part in case debts come in more than sufficient to exhaust the residue after the legacies paid. *2 Vern. 205.*

If the legatee dies before the testator, the legacy is a lost or lapsed legacy, and shall sink into the residue. And if a contingent legacy be left to any one, as when he attains, or if he attains the age of twenty-one, and he dies before that time, it is a lapsed legacy. *Dy. 59; 1 l. q. Ab. 29.* But a legacy to one to be paid when he attains the age of twenty-one years, is a vested legacy; an interest which commences *in presenti*, although it be *solvendum in futuro*; and if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable in case the legator had lived. This distinction is borrowed from the civil law; and its adoption in our courts is not so much owing to its intrinsic equity, as to its having been before adopted by the Ecclesiastical Courts. For since the Chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in these determinations; and that the subject should have the same measure of justice in whatever court he sued. *1 Eq. Ab. 295.* But if such (contingent) legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir; for, with regard to devises affecting lands, the Ecclesiastical Court hath no concurrent jurisdiction. *2 P. Wms. 601, 610.* And in case of a vested legacy due immediately, and charged on land, or money in the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death; but if charged only on the personal estate,

which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator. *2 P. Wms. 26, 27.*

Besides the formal legacies contained in a man's will and testament, there is also permitted another death-bed disposition of property; which is called a *donatio causæ mortis*; a gift in prospect of death. And that is, when a person in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered, to another the possession of any personal goods, (under which have been included bonds and bills drawn by the deceased upon his banker,) to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executors; yet it shall not prevail against creditors; and is accompanied with this implied trust, that if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death; *mortis causæ. Pre. Ch. 269; 1 P. Wms. 406, 441; 3 P. Wms. 357. See 2 Ves. 431.*

As this donation may be avoided by creditors, so may it by the wife or children of a freeman, if it break in on their customary shares. *2 Vern. 612.* The delivery of receipts for South-Sea annuities does not amount to a gift of the annuities themselves. *Ward v. Turner, 2 Ves. 442.* There may be a *donatio causæ mortis* of bonds, bank notes, and bills payable to bearer, but not of other promissory notes or bills of exchange, those being choses in action which do not pass by delivery. See *2 Ves. 431, Ward v. Turner*; which case collects all the laws on the subject of donations *causæ mortis*, and particularly considers what shall be a sufficient delivery of different kinds of property to give effect to such donations.

One cannot sue in the spiritual court for a *donatio causæ mortis*. *2 Stra. 777.* See further *Donatio causæ mortis*.

Having said thus much on the subject of legacies in general, we may proceed more particularly to inquire,

1. *Who may be legatees; of legacies lapsed, vested or contingent, or conditional.*
2. *Of the payment of legacies; and herein of specific legacies.*
3. *Of interest on legacies.*
4. *Of suits to recover legacies.*
5. *Of devises to creditors, &c. in satisfaction of demands due from the testator.*

Some persons are incapable of taking by legacy, under several statutes, as in *13 Wm. 3. c. 6.* officers, counsellors, lawyers, &c. not taking the oaths, and persons twice denying the Christian religion to be true, or the divine authority of the Scriptures. (*9 & 10 Wm. 3. c. 32.*)

The name of a legatee being very falsely spelled, it was referred to a master in chancery, to examine who was the person intended. *1 P. Wms. 425.*

The general rule is, that if a legatee die before the testator, or before the condition upon which the legacy is given be performed, or before it be vested in interest, the legacy is extinguished. *Treat. Eq. lib. 4. pt. 1. c. 2. § 3.*—Even where a legacy is given to a man and his executors, &c., or to a man and his representatives, if the legatee dies before the testator, though the executors are named, yet the legacy is lost; for the words "executors," &c. are deemed surplusage, inasmuch as those persons would have taken the legacy in succession, and not by way of representation, whether expressly named by the testator or not. *1 P. Wms. 83; 4 Ves. 435; 3 Bro. C. C. 128, 142, 143.* But a bequest may be so specially framed as to prevent the death of the legatee operating as a lapse of the legacy. See *3 Atk. 572, 580.* Neither will the rule extend to a legacy to two or more; for though, by the civil law, there is no survivorship amongst legatees, yet it is settled that a legacy to two or more jointly, is not extinguished by the death of one, but

will vest in the survivor. *Gill. Rep.* 137; 2 *Atk.* 220. But where the legacy is to two or more severally, or to be divided share and share alike, and one dies, his share will lapse. See 1 *P. Wms.* 700; 2 *P. Wms.* 489; 2 *Str.* 820, and the notes there. Where, however, a legacy is given to a class of persons in general terms as tenants in common, as to the children of A., the death of one of them before the testator will not occasion a lapse of any part of the fund, but those of the described class who survive the testator will take the whole. 2 *Cox*, 190; *S. C.* 2 *Bro. C. C.* 658. A further exception, as to the doctrine of lapse in cases of legacies given to tenants in common, occurs in instances where the will contains a limitation over of the legacy to the survivors. 9 *Ves.* 566. Nor will the rule extend to those cases where the legacy is given over after the death of the first legatee; for in such cases the legatee in remainder shall have it immediately. 1 *And.* 33, *pl.* 82; 2 *Vern.* 207; 1 *P. Wms.* 274; 3 *P. Wms.* 113; *Pre. Ch.* 37; *Mosel.* 319; 2 *Vern.* 378. Nor will a legacy lapse by the death of a legatee in the testator's life-time, if he be to take as a trustee. See 1 *Ves.* 140; 1 *Cox*, 1; and 2 *Vern.* 468, in which latter case the point is doubted.

A man devised 200*l.* a piece to the two children of A. B. at the end of ten years after the death of the testator; afterwards the children died within the ten years, and it was held a lapsed legacy; for there is a difference where a devise is to take effect at a future time, and where the payment is to be made at a future time; and whenever the time is annexed to the legacy itself, and not to the payment of it, if the legatee dies before the time happens, it is a lapsed legacy. 2 *Salk.* 415. A bequest of money to one at the age of twenty-one, or day of marriage, without saying to be paid at that time, and the legatee dies before the term, this is a lapsed legacy: and so it is if the devise had been to her when she shall marry, or when a son shall come of age, and they die before. *Godb.* 182; 2 *Vent.* 342.

But a devise of a sum of money, to be paid at the day of marriage, or age of twenty-one years, if the legatee dies before either of these happen, the legatee's administrator shall have it, because the legatee had a present interest, though the time of payment was not yet come; and it is a charge on the personal estate which was in being at the testator's death; and if it were discharged by this accident, then it would be for the benefit of the executor, which was never intended by the testator. 2 *Vent.* 366; 2 *Lev.* 207. A father bequeathed goods to his son, when he should be of the age of twenty-one years, and if he die before that time, then his daughter should have them; afterwards the father died, and then the son died before he was of age; adjudged, that the daughter shall have the goods given in legacy immediately, and not stay till her brother would have been of age, if he had lived. 1 *And.* 33. And where a legacy was devised to an infant, to be paid when he shall come of age, and he died before that time: it was ruled that his administrator should have it presently, and not stay until the infant should have been of age, if he had lived. 1 *Leon.* 278. In a case of this nature, it has been decreed in equity, that although the administrator should have the legacy, yet he must wait for it till such time as the child would have come to twenty-one. 2 *Vern.* 199.

If the legacy be to the legatee payable to him at a certain age, and the legatee die before he attain such age, this is a vested and transmissible interest in the legatee. See 2 *Vent.* 342; 2 *Ch. Ca.* 155; 1 *Vern.* 462; 3 *P. Wms.* 138; 2 *Vern.* 199. Otherwise, if the legacy be to the legatee generally, at or when he attains such age. 2 *Vent.* 342; 2 *Salk.* 415; 1 *Eq. Ab.* 295, 6; and see 1 *Bro. C. R.* 119. If the legacy be made to carry interest, though the words to be paid, or payable, are omitted, it is a vested and transmissible interest. 2 *Vent.* 342; 2 *Ch. Ca.* 155; 2 *Vern.* 673; 2 *Ves.* 263; 3 *Atk.* 645. So if the bequest be to A.

for life, and after the death of A. to B., the bequest to B. is vested upon the death of the testator, and will not lapse by the death of B. in the life-time of A. 2 *Vint.* 347; 1 *P. Wms.* 566; 2 *Vern.* 378; *Ambl.* 167; 1 *Bro. C. R.* 119; and the notes there. 1 *Bro. C. R.* 181.

Where a legacy is to arise out of the real estate, it shall not go to the representative of the legatee, but sink in the inheritance. And yet where 1000*l.* was given by a person out of lands, to his daughter, and interest to be computed from his death, &c. here, though the legatee died before the time appointed for paying the same, it was held, the legacy should be raised notwithstanding; and the lord chancellor said, that this legacy was a vested one. 2 *Vern. Rep.* 617; *Barnardist.* 328, 330. A person by will, &c. gives a portion or legacy to a child, payable at twenty-one years of age, out of a real and personal estate, and the child dies before the legacy becomes payable; in that case so much thereof as the personal estate will pay, shall go to the child's executors and administrators; but so far as the legacy is charged upon the land, it is said shall sink. 2 *Peere Williams*, 613. Also if a legacy be given to one to be paid out of such a fund, and the same fails, it has been resolved that it ought to be paid out of the personal estate, and the failing of the manner appointed for payment shall not defeat the legacy. 1 *P. Wms.* 779.

A testatrix gave a legacy to the sole and separate use of a married daughter for life, with a power of appointment, and in default thereof to her next of kin, as if she were sole and unmarried; the daughter died in testator's life-time; held, that the legacy did not lapse, but that the next of kin took it as purchasers. *Hardwick v. Thurston*, 4 *Russ.* 380.

A conditional legacy is a bequest depending upon the happening or not happening of some uncertain event, by which it is either to take place, or to be defeated.

By the civil law, which has been adopted in our courts of equity, (1 *Eden*, 116,) and which differs from the common law as regards devises of real estates,—when a condition precedent to the vesting of a legacy is impossible, the bequest is discharged of the condition, and the legatee will be entitled as if the legacy were unconditional. *Swinb.* *pt.* 4. c. 6. *pl.* 2, 3; *Com. Rep.* 738.

Where the performance of a condition subsequent is illegal, then, as well at the common law as by the civil law adopted in the courts of equity, the condition is void, and the bequest freed from it. *Co. Lit.* 206 a. b.; 6 *Mad.* 32.

A condition that a legatee shall not dispute the will, is generally considered merely in *terrorem*, and will not operate as a forfeiture, by reason of the legatee having disputed the validity (2 *Vern.* 90; 3 *P. Wms.* 344,) or effect (1 *Atk.* 114,) of the will. But it is otherwise if the legacy or breach of such a condition is given over to another person. 2 *P. Wms.* 528.

It is now settled that conditions which do not import an absolute injunction to celibacy are valid. 2 *Dick.* 721. Thus conditions restraining marriage under twenty-one, or other reasonable age, without consent of executors, guardians, &c. (1 *Bro. C. C.* 303; 3 *Ves.* 18; 1 *Russ.* 325,) or requiring or prohibiting marriage with particular persons, (2 *Dick.* 721; 9 *Lant.* 170,) and the like, are valid.

Where a father makes a provision for a child by his will, and afterwards gives to such child, being a daughter, a portion in marriage, or, being a son, a sum of money to establish him in life, (such portion or sum being in amount equal to, or greater than, the legacy,) it is an implied adoption of the legacy; for the law will not intend that the father designed two portions to one child. 1 *P. Wms.* 680; 2 *Ch. Rep.* 85; 2 *Vern.* 115, 257; 2 *Atk.* 216; *Ambl.* 325; 2 *Bro. C. R.* 307. But this implication will not arise, if the provision by the will be by bequest of the residue. 2 *Atk.* 216; or if the provision in the father's life-time be subject to a contingency, 2 *Atk.* 491,—or be not *ejusdem generis* with the legacy, 1 *Bro. C. R.* 425,—or if the testator be a stranger,

2 *Atk.* 516; 2 *Bro. C. R.* 499. And such implication is always liable to be refuted by evidence. 2 *Atk.* 516; 2 *Bro. C. R.* 165, 519.

2. If a legacy be given generally, without specifying the time of payment, it is due on the day of the death of the testator (*Swinb. pl. 7. s. 23. pl. 1.*) though not payable till the end of a year next after.

If a legacy, when due, be paid to the father of an infant, it is no good payment; and the executor may be obliged in equity to pay it over again; and where any legacy is bequeathed to a feme covert, paying it to her alone is not sufficient, without her husband. 1 *Vern.* 261.

An executor, however, may discharge himself from all responsibility with respect to the payment of legacies due to infants, by paying such legacies into the Bank of England, with the privity of the accountant-general, under the provisions of the 36 *Geo. 3. c. 52. § 32.*

Executors are not bound to pay a legacy, without security to refund. *Chan. Rep.* 149, 257. And if sentence be given for a legacy in the Ecclesiastical Court, a prohibition lies, unless they take security to refund. 2 *Vent.* 8. If an executor pays legacies, and seven years after covenant is broken, for which action is brought against the executor, the court inclined that it was a devastavit, and that the executor ought to have taken security for his indemnity upon payment of the legacies. *Allen*, 38. Though it has been adjudged that a covenant is no duty till broken; and therefore since it is uncertain whether it will be broken or not, it shall be presumed it will not; and the legacies being a present duty, it shall be paid by the executor notwithstanding any covenant not actually broken. *Sty.* 97; 1 *Nels. Abr.* 786. If one binds himself and his executors in an obligation, &c. to perform a certain thing, and in his will gives divers legacies, and dies, leaving goods only sufficient to pay the obligation when forfeited, this obligation shall be no bar to the legacies, because it is uncertain whether the same may ever be forfeited; though the executor may therefore make a delivery upon condition, viz. to return the legacies if the obligation becomes forfeited, and the penalty be recovered. 1 *Roh. Abr.* 928; 2 *Vent.* 358.

The old practice of the Court of Chancery was, that the legatee should in all cases give the executor security to refund, if debts should afterwards appear. 1 *Chan. Cas.* 257. But the court has ceased to require such security, and therefore creditors have in modern times been allowed to follow assets in the hands of legatees, as well as of the executor. By Lord Hardwicke, in *Harg. MSS.*; *Amb.* 804.

The executor is to pay the legacies after the debts; but executors cannot, in equity, pay their own legacies first, where there is not enough to pay all of them, but shall have an equal proportion with the rest of the legatees. *Chan. R.* 314. An executor has election, where any chattel is given to him, to have and take it in one right or the other, viz. as executor or legatee, which is to be made by a special taking or declaration, &c. 10 *Rep.* 17, *Plowd.* 519; *Dyer*, 277.

If there be a specific legacy given of any thing, as a horse, silver cup, &c. it must be delivered before any other legacy, provided there be assets. *Off. Ex.* 317. And if there be enough to pay all the legacies after the debts are satisfied, the legacies shall all be paid; but if there is not sufficient to pay debts or more, the legatees must lose their legacies, or a proportionable part of them. *Plowd.* 526. See 1 *Lil. Ab.* 579.

A specific legacy is, where, by the assent of the executor, the property of the legacy will vest; as there is a benefit one way to a specific legatee, that he shall not contribute (in case of a deficiency to pay all the legacies,) so there is a hazard the other way; for inasmuch, if such specific legacy, being a lease, be evicted; or, being goods, be lost or burnt; or, being a debt, be lost by the insolvency of the debtor; in all those cases such specific legatee shall have no contribution from

the other legatees, and therefore shall pay none toward them. *Hinton v. Pinke*, 1 *P. Wms.* 539.

These consequences attending a specific legacy have raised, in the several cases to be met with in the books, the question whether a legacy was specific or general. A specific legacy (strictly speaking) is said by Lord Hardwicke, in *Purse v. Snaphin*, 1 *Atk.* 417, to be a bequest of a particular chattel, specifically described and distinguished from all other things of the same kind, or, in other words, an individual legacy. Money, therefore, if sufficiently distinguished, may be the subject of a specific bequest, as money in a certain chest, &c. *Lamson v. Stitch*, 1 *Atk.* 508. Or a particular debt, as to the redemption of which latter by payment in the testator's life-time, see *Thomond (Earl) v. Suffolk (Earl)*, 1 *P. Wms.* 461. So of stock, in *Ashton v. Ashton*, *Talb.* 152; *Acelyn v. Ward*, 1 *Ves.* 424; *Drinkwater v. Falconer*, 2 *Ves.* 623. So a bequest of a part of a specific chattel may be equally a specific legacy. 3 *Atk.* 103.

But the legatees of specific parts, though not liable to abatement with general legatees, yet must abate, proportionably among themselves, upon deficiency of the specific thing bequeathed. *Sleech v. Thorington*, 2 *Ves.* 563; or on deficiency of the general assets for payment of debts. *Long v. Short*, 1 *P. Wms.* 403. So specific legacies of distinct chattels shall abate proportionably on a deficiency of general assets. *Devon (Duke) v. Atkins*, 2 *P. Wms.* 382.

On the other hand, a mere bequest of quantity, whether of money or any other chattel, is a general legacy; as of a quantity of stock; *Purse v. Snaphin*, 1 *Atk.* 414; *Sleech v. Thorington*, 2 *Ves.* 562. And where the testator has not such stock at his death, it is a direction to the executor to procure so much stock for the legatee. *Partridge v. Partridge*, *Talb.* 227. So the purpose to which a general legacy is to be applied will not alter its nature, as in the case of *Hinton v. Pinke*, 1 *P. Wms.* 539. Personal annuities given by will, are general legacies. *Hume v. Edwards*, 3 *Atk.* 693; *Lewin v. Lewin*, 2 *Ves.* 417. How far a legacy of money, to be paid out of a certain fund, shall be adeemed by the failure of the fund, see *Savile v. Blackett*, 1 *P. Wms.* 778; 2 *P. Wms.* 380; Mr. Cox's note (1); and see *Treat. Eq. lib. 4. pt. 1. c. 2. § 5. in note.*

The general rule is, that to complete the title to a specific legacy, the thing bequeathed must remain in specie, as described in the will, otherwise the legacy is considered as revoked by ademption: thus if a debt specifically bequeathed be received by the testator, the legacy is adeemed, because the subject is extinguished, and nothing remains to which the words of the will can apply. 3 *Bro. C. C.* 431.

A sum bequeathed out of a debt must be paid, though the debt is recovered by the testator; otherwise of a bequest of the debt itself. 2 *Stra.* 824.

As an executor is not obliged to pay a legacy without security given him by the legatee to refund, if there are debts, because the legacy is not due till the debts are paid, and a man must be just before he is charitable; so in some cases the executor may be compelled to give security to the legatee for the payment of his legacy; as where a testator bequeathed 1000*l.* to a person, to be paid at the age of twenty-one, and made an executor, and died; afterwards the legatee exhibited a bill in equity against the executor, setting forth that he had wasted the estate, and praying that he might give security to pay the legacy when it should become due; and it was ordered accordingly. 1 *Chan. Rep.* 136, 257. See post, 4.

By the Stamp Act, duties *ad valorem* are imposed on receipts given for payment of legacies; and these extend now as well to legacies secured on real as on personal property. For the amount of these stamps the executor is made liable, and it is his duty not to pay a legacy without a receipt duly stamped. The stamp is from 1*l.* up to 10*l.* per cent. (in Great Britain, and from 10*s.* to 5*l.* per cent. in Ireland,) ac-

cording to the propinquity or distance of relationship between the deviser and legatee.

For the amount of the stamp duties in Great Britain, see the act 55 Geo. 3. c. 184. For the regulations by which executors are made liable for the payment of the duty, see 36 Geo. 3. c. 52; 42 Geo. 3. c. 99. And as to Ireland, see 47 Geo. 3. st. 1. c. 50, &c. See further tit. *Executor*.

5. If a legacy is devised, and no certain time of payment, the legatee shall have interest for the legacy from the expiration of one year after the testator's death; for so long the executor shall have, that he may see whether there are any debts. Interest is therefore payable from that time, unless some other period is fixed by the will. 13 Ves. 333, 334. Nor will interest be payable at an earlier date, although the will directs the legacy to be paid "as soon as possible." 8 Ves. 410, 413; 6 Mad. 15.

But after the expiration of a year from the testator's death, the legacy will carry interest, although payment be, from the condition of the estate, impracticable. 13 Ves. 334. And although the assets have been unproductive. See 1 Sch. & Lef. 10.

With respect to interest in general legacies, where the time of payment is fixed by the testator, the general rule is, that they will not carry interest before the arrival of the appointed period; as for instance, when the legatee shall attain twenty-one. 3 Atk. 101. 4 Ves. 1. Nor does it make any difference that the legacy is vested. 3 Atk. 102; 3 Ves. 10.

This rule is, however, subject to an exception where the testator is the parent, (or *in loco parentis*.) 1 P. W. 783; 1 Ves. sen. 308; 3 Ves. & B. 183, of the legatee. For in that case, whether the legacy be vested or contingent, if the legatee be not an adult (1 Swan. 553,) interest in the legacy will be allowed as a maintenance, from the death of the testator, provided there is no other provision for that purpose.

Where the payment of a legacy is postponed until the legatee attains twenty-one, and the will directs that payment shall then be made *with interest*, the legacy will only bear interest from the end of a year after the testator's death. 2 Sim. & Stu. 492.

Where a person gives a legacy charged upon land, which yields rents and profits, and there is no day of payment mentioned, the legacy shall carry interest from the testator's death, because the land yields profit from that time; though were it charged on the personal estate, and the will mentions no time for paying it, there the legacy bears interest only from the end of a year after the death of the testator, which is said to be the settled difference. 2 P. Wms. 26.

4. Legacies being gratuities, and no duties, action will not lie at common law for the recovery of a legacy, but remedy is to be had in the Chancery or Spiritual Court. Allen, 38.

Sometimes the common law takes notice of a legacy, not directly, but in a collateral way; as where the executor promised to pay the money, if the legatee would forbear to sue for the legacy, this was adjudged a good consideration to ground an action, but that it would not lie for a legacy in specie; which would be to divest the Spiritual Court of what properly belonged to their jurisdiction, by turning suits which might be brought there, into actions on the case. Raym. 23.

So if security be given by bond to pay a legacy, in such case an action at law is the proper remedy; by giving the bond, the legacy is, as it were, extinct, and becomes a debt at common law, and the legatee can never afterwards sue for it in the Spiritual Court. Yelv. 39.

It is now positively determined that no action at law lies for a legacy; the Court of Chancery being the proper jurisdiction for that purpose. Deeks v. Strutt, 5 T. R. 690. The reason given in this case seems to contradict the principle of two other cases in Comp. 284, 289, in which

it was held, that if an executor, in consideration of assets in his possession, promises to pay a legacy, an action of assumpsit lies against him in his own right. In the first mentioned of these cases, however, no express promise was proved. But Deeks v. Strutt is considered as an unqualified decision that no action at law will lie for a legacy, whether there is an express promise or not. See per Littledale, J. 7 B. & C. 544. And it has lately been held, that an action at law will not lie against an administrator for a distributive share of an intestate's property. Jones v. Tanner, 7 B. & C. 542.

But the law is different with respect to specific legacies; for an action at law will lie against an executor to recover a specific chattel bequeathed, after his assent to the bequest. 3 East, 120; 3 Atk. 223.

And where executors have ceased to hold the money bequeathed in their representative character, an action at law may be maintained against them. 1 Moore & P. 209. So where, on demurrer to a declaration which was for a legacy that had been retained by the executor for several years, under an agreement by him to pay interest thereon to the legatee, the court was clearly of opinion that the action would lie. Wasney v. Earnshaw, Excheq. T. R. 1834, MS.

Suits for legacies are rarely instituted in the Ecclesiastical Courts, on account of their not possessing adequate jurisdiction to afford complete relief in many cases. 5 Madd. 357. Though recent instances of such proceedings may be found, 2 Phill. R. 335; 1 Hugg. Ecc. R. 535. And cases of bequests to married women and infants, which involve the execution of any trust, are subject to the exclusive cognizance of the Court of Chancery. 2 Roper on Leg. 693; and see 9 B. & C. 489, post.

The Spiritual Court administers redress in the case of subtraction or the withholding or detaining of legacies, as a consequential part of their testamentary jurisdiction; but in this case the Courts of Equity exercise a concurrent jurisdiction, as incident to some other species of relief required; and as it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause when once brought there, receives there also its full determination. See 3 Com. 98. c. 7.

It is without question that the suit for a personal legacy may be brought in Chancery; and if the matter has proceeded to a sentence in the Ecclesiastical Court, it is proper to go into Chancery for the executor's indemnity, where the legatees are to give security to refund, and that court will see money put out for children. On like principles a bill for the distribution of an intestate's personal estate is proper in Chancery, for the Spiritual Court in that case has but an ineffectual jurisdiction. Fonb. Treat. Eq. lib. 4. pt. 1. c. 1 § 2.

An executor being in equity considered as a trustee for the legatee, with respect to his legacy, and as a trustee in certain cases for the next of kin as to the undisposed surplus, is the true ground of equitable jurisdiction in enforcing the payment of a legacy, or distribution of personal estate. See 1 P. Wms. 544, 575.

That the jurisdiction of our Courts of Equity is, in such cases, more effective and protective of the interest of creditors and legatees, is evident in several instances, particularly in compelling executors to give security for a legacy payable at a future day, the executor appearing to have wasted the estate. 1 Cha. Ca. 121. Or to bring the fund into court. 3 Bro. C. C. 365. And there are cases in which a Court of Equity will restrain proceedings in the Ecclesiastical Court for a legacy; as where a husband is suing for a legacy in right of his wife. See 2 Atk. 420; Toth. 111. Pre. Ch. 548.

A testator devised lands to executors, in trust to sell, directing that the money thereby raised should be part of and subject to the dispositions concerning his personal estate; 1

then directed his personal estate should be sold, and bequeathed several legacies: held that these legacies could not be sued for in the Ecclesiastical Court, the money being equitable assets; and a prohibition issued accordingly. *Barker v. May*, 9 B. & C. 489.

It was held in an early decision, that the Statute of Limitations could not be pleaded in bar to a suit for a legacy, although it had been due twenty years. *Anon. Freeman. C. C.* 22. But though the statute could not be pleaded, it was frequently adopted in cases where there was no fraud, and the parties had permitted the assets to be distributed, without claiming the legacy for thirty-five or forty years. 2 *Ves. jun.* 572, 582. And it would seem that a lapse of twenty years from the testator's death, without any demand, would have been sufficient to afford a presumption of the legacy being paid. 1 *Roper on Leg.* 1792; and see 1 *Russ. & Mylne*, 453.

Now, by the recent Statute of Limitations (3 & 4 Wm. 4. c. 27. § 40.) no action or suit or other proceeding shall be brought to recover any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person to whom the same shall be payable, or his agent, to the person entitled, or his agent; and in such case no such action, &c. shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one.

And by § 42. no arrears of interest in respect of any legacy are recoverable but within six years after becoming due, or a similar acknowledgment thereof in writing to that mentioned in the above section. See further *Limitation of Actions*.

5. Where a testator gives his debtor a legacy greater than his debt, it shall be taken in satisfaction for it; though where the legacy is less, it shall not be deemed as any part thereof; but as a legacy is a gift, sometimes the legatee has been decreed both. 1 *Salk.* 155; 2 *Salk.* 508. If a greater legacy is given by a codicil to the same person that was legatee in the will, it shall not be a satisfaction unless so expressed. 1 *P. Wms.* 424.

Although a legacy is to be taken as a gift, yet a man shall be intended to be just before he is kind; so that a bequest of the same sum by the debtor to the creditor shall be applied in satisfaction of the debt. *Pre. Ch.* 394; 2 *P. Wms.* 130; 3 *P. Wms.* 354; 1 *Ves.* 123; *Mosel.* 7. See 2 *P. Wms.* 616. —Yet where there are assets, and the testator intended both, it may be as good equity to construe him both just and kind; and the construction of making a gift a satisfaction, has, in many cases, been carried too far. See 1 *Salk.* 155; 1 *P. Wms.* 410; 2 *P. Wms.* 616.

If a legacy be less than the debt, it was never held to go in satisfaction. 2 *Salk.* 508; *Pre. Ch.* 394; 2 *P. Wms.* 616; 2 *Vern.* 478; *Mosel.* 295.—So if the legacy were upon condition, or upon a contingency; for the will is intended for the legatee's benefit; and therefore it could not be supposed that the testator would give him an uncertain recompense in satisfaction of a certain demand. *Pre. Ch.* 394; *Salk.* 508; 2 *Atk.* 300, 491; 2 *P. Wms.* 555; 2 *Ves.* 519.—So where the legacy is not equally beneficial with the debt in some one particular, although it may be more so in another, as in time of payment. *Pre. Ch.* 236; 2 *Vern.* 478; 2 *Atk.* 300; 3 *Atk.* 96; 1 *Bro. C. R.* 129, 295.—So if the thing were of a different nature, as land, it should not go in satisfaction of money, unless there was a defect of assets. 2 *P. Wms.* 616; *Salk.* 508; 3 *P. Wms.* 345.—And a legacy of a specific chattel, however great its value, will not be a satisfaction of a debt, unless the testator bequeaths it with such condition expressed, and the legatee accepts it by way of satisfaction. 1

Cox, 49.—So if the debt was contracted after the legacy given; as the testator could not have had it in contemplation to satisfy a debt not then in being. 2 *Salk.* 508; 2 *P. Wms.* 342; 1 *P. Wms.* 409; 3 *P. Wms.* 353.—So if the debt was upon an open or running account, so that it might not be known to the testator whether he owed any money to the legatee or not. 1 *P. Wms.* 299.

Cases of this nature therefore depend upon circumstances; and where a legacy has been decreed to go in satisfaction of a debt, it must be grounded upon some evidence, or at least a strong presumption that the testator did so intend it; for a Court of Equity ought not to hinder a man from disposing of his own as he pleases; and therefore the intention of the party is to be the rule; for where he says he gives a legacy, the Court cannot contradict him, and say he pays a debt. See *Treat. Eq. lib. 4. pt. 1. c. 1. § 5*; and the notes there.

It is to be observed, that if the testator expressly bequeaths the debt to his debtor, this being no more than a release by will, operates only as a legacy; and is assets, therefore, subject to the payment of the testator's debts. 2 *P. Wms.* 331, 332; *Toller*, 338. See further on this subject, titles *Executor, Will*.

LEGALIS HOMO. He who stands *rectus in curia*, not outlawed, excommunicated, or infamous; and in this sense are the words *probi & legales homines*; hence also legality is taken for the condition of such a man. *Leg. Ed. Conf. c.* 18.

LEGALIS MONETA ANGLIÆ. Lawful money of England, is gold or silver money coined here by the King's authority, &c. 1 *Inst.* 207. See *Coin*.

LEGAL REVERSION. In the Scotch law, the period, (seven years) within which a proprietor is at liberty to redeem land adjudged from him for debt. *Scotch Dict.*

LEGAMANNUS. See *Lagman*.

LEGATARY [*Legatarius*.] He or she to whom any thing is bequeathed; a legatee. See 27 *Eliz. c. 16. Statute*—man says, it is sometimes used *pro legato vel nuncio*.

LEGATE [*Legatus*.] An ambassador or Pope's nuncio. There are three sorts of Legates,—*Legatus à latere*, *Legatus natus*, and *Legatus datus*. *Legatus à latere* was usually one of the Pope's family vested with the greatest authority in all ecclesiastical affairs over the whole kingdom where he was sent; and during the time of his legation he might determine even those appeals which had been made from thence to Rome. *Legatus natus* had a more limited jurisdiction, but was exempted from the authority of the *Legatus à latere*, and he could exercise his jurisdiction in his own province.

Legati dati, legates given; were such as had authority from the Pope by special commission. *God.* 18, 19, 20, 21.

The Popes of Rome had formerly in England the Archbishops of Canterbury their *Legati nati*; and upon extraordinary occasions sent over *Legati à latere*.

LEGATEE. The person to whom a legacy is bequeathed by a last will.

LEGATUM. In the ecclesiastic sense, was a legacy given to the church, or accustomed mortuary. *Cowell*.

LEGEM FACERE. To make law, on oath; *legem habere*, to be capable of giving evidence upon oath; *minor non habet legem*. *Selden's Notes on Heng.* 133. See *Wager of Law*.

LEGEND [*Legenda*.] Is that book which contained the lessons, whether out of the Scriptures or out of other books, which were to be read throughout the year. *Lind.* 251.

LEGITIMIL [*Legitimus*.] See *Lawrite*.

LEGITIMUS. Litigious, and so subjected to a course of law. *Cowell*.

LEGITIM. In Scotch law; the claim of children out of the free moveable estate of their father, amounting to one half, or one third, (according to circumstances,) of his moveables after paying his debts. *Scotch Dict.*

LEGITIMACY. See *Bastard, Descent*.

LEGITIMATION. The act whereby children born bastards are rendered lawful children; this (in Scotland) may be by the subsequent marriage of the parents. There is also a species of legitimation by letters of legitimation given by the sovereign; these, however, affect only the rights of the crown in regard to the succession to the bastard, but do not give him a legitimation which may enable him to claim as one lawfully born.

LEIPA. A departure from service.—*Si quis à Domino suo sine licentia discedat, ut leipa emendetur & redire cogatur.* *Leg. Hen. 1. c. 43. Blount.*—Rather, an *Eloper*, the person who escapes or departs. See *Spelm. in v.*

LEIRWIT [*Muleta adulteriorum.* *Flota. lib. 1. c. 7.*] Is used for a liberty, whereby a lord challengeth the penalty of one that lieth unlawfully with his bond-woman. *Cowell.*

LENT [From the Germ. *Lentz*, i.e. *Ver.* The Spring Fast.] A time of fasting for forty days, next before Easter; mentioned in 2 & 3 *Edw. 6. c. 19.* First commanded to be observed in England by *Ercombert*, seventh king of Kent, before the year 800. *Baker's Chron. 7.* No meat was formerly to be eaten in Lent, or on Wednesdays or other fish days, but by licence, under certain penalties. And butchers were not to kill flesh in the Lent, unless for victualling ships, &c.

LEP AND LACE [*Leppe & Lasse.*] A custom in the manor of Writtle, in Essex, that every cart which goes over Greenbury, within that manor, (except it be the cart of a nobleman,) shall pay 4d. to the lord. This Greenbury is conceived to have been accidentally a market-place, on which account this privilege was granted. *Blount.*

LEPA. A measure which contained the third part of two bushels; whence we derive a *seed-leap.* *Du Cange.*

LEPORARIUS. A greyhound for the hare. *Mon. Ang. tom. 2. fol. 283.*

LEPORIUM. A place where hares are kept together. *Mon. Ang. tom. 2. fol. 1035.*

LEPROSO AMOVENDO. An ancient writ that lay to remove a Leper or Lazar, who thrust himself into the company of his neighbours in any parish, either in the church, or at other public meetings, to their annoyance. *Reg. Orig. 237.* The writ lay against those lepers that appear outwardly to be such, by sores on their bodies, smell, &c. and not against others; and if a man were a leper, and keep within his house, so as not to converse with his neighbours, he shall not be removed. *New Nat. Br. 521.*

LE ROY LE VEUT. See *Royal Assent, Parliament.*

LE ROY S'AVISERA. By these words to a bill, presented to the King by his houses of parliament, are understood his denial of that bill. By this means the indelicacy of a positive refusal to give the Royal Assent to a bill passed by the Lords and Commons is avoided. See title *Parliament.*

LESCHEWES. Trees fallen by chance, or windfalls. *Broke's Abr. 341.*

LESIA. A leash of greyhounds, now restrained to the number of three, but formerly more. *Spelm.*

LESPEGEND, [*Sax. Le spegen Buro minor.*] *Sint sub quolibet horum quatuor ex mediocribus hominibus quos Angli Lespegend nuncupant, Dani vero young-men vocant, locati, qui curam et onus tum viridis tum veneris suscipiant.*—Hence it appears that this was an inferior officer in forests, to take care of the vert and venison therein, &c.—*Constitut. Canut. de Foresta. Art. 2.* See *Forest, Regarder.*

LESSA. A legacy; from this word also lease is derived. *Mon. Ang. tom. 1. pag. 562.*

LESSOR AND LENSLE. The parties to a lease. The former he who makes the lease, the latter to whom it is made.

LESTAGEFRY. Lestage-free, or exempt from the duty of paying ballast money. *Cowell.*

LESWES, or LELVES. Is a word used in *Domesday*, to

signify pastures, and is still used in many places of England, and often inserted in deeds and conveyances. *Cowell.* Hence the modern term *Leaseowes.*

LETARE JERUSALEM. See *Quadragesimalia.*

LETHERWITE. See *Leirwit.*

LETTER MISSIVE FOR ELECTING OF A BISHOP. A letter from the King to the Dean and Chapter, containing the name of the person whom he would have them elect. See *Bishop.*

LETTER MISSIVE IN CHANCERY. To a peer. See *Chancery.*

LETTERS OF ABSOLUTION [*Litera absolutoria.*] Absolutory letters, were such in former times, when an abbot released any of his brethren *ab omni subjectione & obedientia*, &c. and made them capable of entering into some other order of religion. *Mon. Favershamensi, p. 7.*

Ancient deeds were in the form of letters; and in Scotland, the charter and judicial writs, under the King's signet, bear still the form of letters.

LETTER OF ATTORNEY [*Litera Attornati.*] A writing, authorising another person, who, in such case, is called the attorney of the party appointing him, to do any lawful act in the stead of another; as to give seisin of lands, receive rents, or sue a third person, &c. A letter of attorney is either general or special. The nature of this instrument is to give the attorney the full power and authority of the maker, to accomplish the act intended to be performed; and sometimes these writings are revocable, and sometimes not so; but when they are revocable, it is usually a bare authority only; they are irrevocable when debts, &c. are assigned to another, in which case the word irrevocably is inserted; and the intention of them then is to enable the assignee to receive the debt, &c. to his own use.

In *Walsh v. Whitcomb, 2 Esp. 565*, it was held that where a power of attorney is given as part of a security, it is not revocable.

In cases of letters of attorney it was anciently held that the authority must be strictly pursued; if it be to deliver livery and seisin of lands between certain hours, and the attorney doth it before or after; or in a capital messuage, and he does it in another part of the land, &c. the act of the attorney to execute the estate shall be void. *Plowd. 475.* But notwithstanding the ancient opinions for pursuing authorities with great strictness and exactness, yet in case of livery and seisin they have been always favourably expounded of later times, unless where it hath appeared that the authority was not pursued at all; as if a letter of attorney be made to three, two cannot execute it, because they are not the parties delegated, and they do not agree with the authority. *2 Mod. Rep. 79.* Where the attorney does less than the authority mentions, it is void; it is said if he doth more it may be good, for so much as he has power to do, and void for the rest; yet both these rules have divers exceptions and limitations. See *1 Inst. 258.* Where two attorneys were made jointly and severally to deliver seisin of lands, &c. and one of them delivered seisin of part of the land, and after another attorney, being tenant thereof for years, gave livery of the other part of the land; this was held good, though made at several times. *1 And. 247.* And if a man make a deed of feoffment of lands in divers counties, with such a letter of attorney, the livery must be at several times, otherwise it cannot be made. *Ibid.* See *1 Leon. 192, 260.*

If a mayor and commonalty make a feoffment of lands, and execute a letter of attorney to deliver seisin, the livery and seisin, after the death of the mayor, will be good, by reason the corporation dieth not. *1 Inst. 52.* In other cases, by the death of the party giving it, the power given by letter of attorney generally determines. See further as to letters of attorney, *Com. Dig. tit. Attorney (C.)*. And as to *Regrary* thereof, this Dictionary, under the latter title.

A Letter of Attorney to receive Rents, Debts, and Dividends, and to demise Premises.

KNOW all men by these presents, That I, A. B. of the parish of Christ Church, in the county of Middlesex, spinster, for divers good causes and considerations me hereunto moving, have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint, C. D. of the parish of Christ Church aforesaid, weaver, my true and lawful attorney for me, and in my name, place, and stead, and for my use, to ask, demand, and receive, all and every rent and rents, sum and sums of money now due, or which hereafter shall or may grow due to me from any person and persons whomsoever, who have been, now are, or hereafter shall or may be, tenant or tenants of any messuages or tenements, lands, hereditaments, and premises, or of any part or parts, share or shares, of any messuages or tenements, lands, hereditaments, and premises, in Great Britain, the island of Jamaica, or elsewhere, belonging to me; and of and from all and every other person and persons liable to or empowered to pay the same; and upon receipt thereof, or of any part thereof, acquittances or other sufficient discharges for me, and in my name, or in his own name, to make and give for what he shall so receive, and for non-payment of such rent or rents, or any part thereof, to enter into and upon all or any of the messuages or tenements, lands and premises, liable to the payment thereof, and distrain for the same, and the distress and distresses then and there found to take away, sell, and dispose of according to law; and also for me and in my name, and for my use, to ask, demand, and receive, of and from all and every corporations and companies, all and every sum and sums of money now due, or which hereafter shall or may grow due to me for dividends, interest, or profits of any sum or sums of money, parts, or shares, now belonging, or which shall belong to me therein respectively, and likewise to ask, demand, sue for, recover, and receive all and every debt and debts, sum and sums of money due, or to grow due and payable to me, from any other person or persons, for any other matter, cause, or thing whatsoever, and upon receipt thereof, or of any part thereof in my name, or in his own name, to make and give proper receipts and discharges for the same; and in case any tenant or tenants of any messuages or tenements, lands and premises, wherein I have any right or interest, shall quit or leave the premises by them respectively holden, then and in that case I do hereby give and grant to my said attorney full power and authority to demise, let, and set the same respectively, or any part thereof, to such person or persons, and for such rent and rents, and for such term and time, and under such covenants and agreements, as my said attorney shall think fit, and to expend and apply such part of the rents and profits of the said premises as shall come to his hands, in repairing and improving the same, as my said attorney shall judge proper, and one or more attorney or attorneys under him, for all or any the purposes aforesaid, to make and at pleasure to revoke; Giving and hereby granting to my said attorney full power and authority in the performance of all and singular the premises aforesaid, as fully and amply in every respect as I myself might or could do if personally present; hereby ratifying and confirming all and whatsoever my said attorney shall lawfully do or cause to be done, in and about the said premises, by virtue hereof. In witness whereof I the said A. B. have hereunto set and subscribed my hand and seal, this — day of — in the year of our Lord —.

Sealed and delivered (being first duly stamped) }
in the presence of }

LETTERS CLAUSE [*Litteræ Clausæ.*] Close letters, opposed to letters-patent; being commonly sealed up with the king's signet or privy seal; whereas the letters-patent are left open and sealed with the broad seal.

LETTER OF CREDIT. Is where a merchant or correspondent writes a letter to another, requesting him to credit the bearer with a certain sum of money. *Merch. Dict.* See *Bill of Exchange*.

LETTERS OF EXCHANGE [*Litteræ Cambii.*] *Reg. Orig.* 194. See *Bill of Exchange*.

LETTER OF LICENCE. An instrument or writing made by creditors to a man that hath failed in his trade, allowing him longer time for the payment of his debts, and protecting him from arrests in going about his affairs. These letters of licence give leave to the party to whom granted to resort freely to his creditors, or any others, and to compound debts, &c. And the creditors severally covenant, that if the debtor shall receive any molestation or hindrance from any of them, he shall be acquitted and discharged of his debt against such creditor, &c.

LETTERS OF MARQUE. Commissions for extraordinary reprisals for reparation to merchants taken and despoiled by strangers at sea, grantable by the secretaries of state, with the approbation of the king and council; and usually in time of war, &c. *Lex Mercat.* 173.

The words *marque* and *reprisal* are used as synonymous; and signify, the latter a taking in return, the former the passing the frontiers in order to such taking. *Dufresne*, title *Marca*.

As the delay of making war by the sovereign power of the nation may sometimes be detrimental to individuals who have suffered by depredation from foreign states, the laws of England have, in some respect, armed the subject with powers to impel the prerogative of the crown in this particular, by directing his ministers to issue letters of marque and reprisal upon due demand; the prerogative of granting which is nearly related to, and plainly derived from, that of making war, (see *tit. King*;) this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These letters are grantable by the law of nations, wherever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case, letters of marque and reprisal may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found; and in fact this custom of reprisals seems dictated by nature. The necessity, however, is obvious of calling in the sovereign power to determine when reprisals may be made; else every private sufferer would be a judge in his own cause. In pursuance of which principle it is declared by 4 *Hen. 5. c. 7.* that if any subjects of the realm are oppressed, in the time of truce, by any foreigners, the King will grant marque in due form, to all that feel themselves grieved; which form is thus directed to be observed; the sufferer must first apply to the lord privy seal, and he shall make out letters of request under the privy seal; and if after such request of satisfaction made, the party required do not within convenient time make due satisfaction or restitution to the party grieved, the lord chancellor shall make him out letters of marque under the great seal; and by virtue of these, he may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber and a pirate. See 1 *Comm. c. 7. p. 278, 59.*

It is observable that the above statute of Henry V. is confined to the time of a truce, wherein there is no express mention that all marques and reprisals shall cease. It seems that the manner of granting letters of marque under this statute has been long disused, as it could only be granted to persons actually grieved. But if, during a war, a subject without any commission from the king should take an enemy's ship, the prize would not be the property of the captor, but would be one of the droits of admiralty, and would belong to the king, or his grantee the admiral. *Carrh.* 399. Therefore, to encourage merchants and others to fit out privateers, or armed ships, in time of war, the lord high admiral or the commissioners of the admiralty are, from time to time, empowered by various acts of parliament to grant commissions to the owners of such ships; and the prizes captured are

divided between the owners and the captain and crew of the privateer. But the owners, before the commission is granted, give security to the admiralty, to make compensation for any violation of treaties between those powers with whom the nation is at peace; and that such armed ship shall not be employed in smuggling. These commissions are now upon all occasions, as well as in the statutes, called letters of marque; see 29 Geo. 2. c. 34; 19 Geo. 3. c. 67; 33 Geo. 3. c. 34, 66; 43 Geo. 3. c. 160; 45 Geo. 3. c. 72, &c. (temporary prize-acts passed during war.) Sometimes the lords of the admiralty have this authority by a proclamation from the king in council, as was the case in December, 1780, to empower them to grant letters of marque to seize the ships of the Dutch. See *Christian's Note on 1 Comm. c. 7, ubi sup.*

If a letter of marque wilfully and knowingly take a ship and goods belonging to another nation, not of that state against whom the commission is awarded, but of some other in amity, this amounts to a downright piracy. *Roll. Abr.* 430. See further tit. *Reprisal*.

LETTERS-PATENT [*Litteræ patentis*,] sometimes called letters overt. Are writings of the king sealed with the great seal of England, whereby a person is enabled to do or enjoy that which otherwise he could not; and so called because they are open with the seal affixed, and ready to be shown for confirmation of the authority thereby given. And we read of letters-patent to make denizens, &c. Letters-patent may be granted by common persons, but in such case they are not properly called patentees; yet, for distinction, the king's letters-patent have been called letters-patent royal. See 2 H. 6. c. 10; also tits. *Grants of the King, Patents*.

LETTERS OF SAFE CONDUCT. See *Safe Conduct*.

LEVANT AND COUCHANT. Is a law term for cattle that have been so long in the ground of another, that they have lain down and are risen again to feed; in ancient records *levantes et cubantes*. When the cattle of a stranger are come into another man's ground, and have been there a good space of time, (supposed to be a day and a night,) they are said to be levant and couchant. *Terms de Ley*; 2 *Lil. Abr.* 167. Beasts of a stranger on the lord's ground may be distrained for rent, though they have not been levant and couchant; but it is otherwise if the tenant of the land is in fault in not keeping up his mounds, by reason whereof the beasts escape upon the land. *Wood's Inst.* 190. See tit. *Distress*, I. 2.

LEVANT COMPANY. See *Turkey Company*.

LEVANUM [Lat. *Levare*, to make lighter,] Leavened bread.

LEVARE FENUM. To make hay, or properly to cast it into wind-rows, in order to cock it up. *Paroch. Antiq.* 320. Hence *una levatio feni* was one day's hay-making, a service paid the lord by inferior tenants. *Paroch. Antiq.* 402.

LEVARI FACIAS. A writ of execution directed to the sheriff for levying a sum of money upon a man's lands and tenements, goods and chattels, who has forfeited his recognizance. *Reg. Orig.* 298. This writ was given by the common law, before the statute *West. 2. c. 18.* gave the writ of *elegit*; and it commands the debt to be levied *de castibus et profectis terræ*, &c. Except in the case of outlawry it is now superseded in practice by the writ of *elegit*.

There is a *levari facias damna disseisitoribus* for the levying of damages, wherein the disseisor has formerly been condemned to the disseisee. *Reg. Orig.* 214. Also *levari facias residuum debiti*, to levy the remainder of a debt upon lands and tenements, or chattels of the debtor, where part has been satisfied before. *Reg. Orig.* 299. And a *levari facias quando vicecomes returnavit quod non habuit emptores*, commanding the sheriff to sell the goods of the debtor, which he has taken, and returned that he could not sell. *Reg. Orig.* 300. There is also a *levari facias* for executing the judgment of a county court, but this latter writ ought to be *de bonis et catallis* only, and not *de tenis et catallis*.

2 *Lutw.* 1413. And the goods cannot be sold without a special custom. *Ibid.* See title *Execution*.

LEUCA. A measure of land, consisting of 1500 paces. *Ingulphus* says, it is 2000 paces, p. 910. In the *Monastic*, 1 tom. p. 313, it is 480 perches.

LEUCATA. A space of ground, as much as a mile contains. *Monastic*, 1 tom. p. 768. And so it seems to be used in a charter of William the Conqueror to Battle Abbey. *Comell*.

LEVELLUS. A level, even or upon the level. *Comell*.

LEVITICAL DEGREES. The farthest between uncle and niece. See 1 *Comm.* 435. *Gilb. Rep.* 158.

LEVY [*Levare*,] Is used in the law for to collect or exact, as to levy money, &c. Sometimes it signifies to erect or cast up, as to levy a ditch, &c. To levy a fine of land is the usual term for the completing that conveyance; in ancient time, the word *reva* a fine was made use of. 17 *Hen. 6.* See *Fine*.

LEVYING MONEY WITHOUT CONSENT OF PARLIAMENT. No subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. See 25 *Edw. 1. c. 5, 6*; 34 *Edw. 1. c. 4. c. 1*; 14 *Edw. 3. c. 2. c. 1*; the petition of right, 3 *Car. 1. c. 1*; 1 *W. & M. c. 2. c. 2*; and tits. *Liberties, Taxes*.

LEVYING WAR AGAINST THE KING. See tit. *Treason*.

LEWDNESS. Open and notorious lewdness is an offence against religion and morality, either by frequenting houses of ill fame, which is an indictable offence, *Poph.* 208; or by some grossly scandalous and public indecency, for which the punishment is fine and imprisonment; and in *M. T. 15 Car. 2.* a person was indicted for open lewdness in showing himself naked on a balcony, and other misdemeanors, and was fined 2000 marks, imprisoned for a week, and bound to his good behaviour for three years. 1 *Sid.* 168. In times past, when any man granted a lease of his house, it was usual to insert an express covenant, that the tenant should not entertain any lewd woman, &c.

Many offences of the incontinent kind fall properly under the jurisdiction of the Ecclesiastical Court, and are appropriated to it. But except those appropriated cases, the Court of King's Bench is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores*. 3 *Burr.* 1498. An information has been granted in that court against a number of persons concerned in assigning a young girl as an apprentice to a gentleman under a pretence of learning music, but for the purposes of prostitution. 3 *Burr.* 1498, &c. There is also an instance of an information for a conspiracy, granted against a peer and several others, for enticing away a young lady from her father's house, and procuring her seduction by the peer. 3 *St. Tr.* 519. And all such acts of indecency and immorality are also punishable by indictment in any criminal court, as public misdemeanors. See 4 *Comm. c. 4. p. 64*; and *Bawdy-house, Fornication, Indecency*.

LEX. A law for the government of mankind in society. *Lit. Dict.* It is often taken for *judicium Dei* or ordeal. See *Lada, Law*.

LEX AMISSA, or *legem amittere, vis.* One who is an infamous, perjured, or outlawed person. See *Bracton*, lib. 4. c. 19, par. 2.

LEX APOSTATA, or *LEGEM APOSTATARE.* Is to do a thing contrary to law. See *Leg. II. 1. c. 12.* *Qui legem apostatabit veræ suæ sit reus prima vice.*

LEX BREHONIA. The Brehon or Irish law, overthrown by King John.

LEX BRETOISE. Was the law of the Ancient Britons or Marches of Wales. *Lex Marchiarum.*

LEX DERAISNIA. The proof of a thing which one denies to be done by him, where another affirms it; defeating

the assertion of his adversary, and showing it to be against reason or probability; this was used among the old Romans as well as the Normans. *Grand Coutumier*, c. 126.

LEX JUDICIALIS. Ordeal. *Leg. H. 1.* See *Lada*.

LEX SACRAMENTALIS. *Leg. H. 1. c. 9.* Purgation by oath. See *Wager of Law*.

LEX TALIONIS. Is *juris positivi*; and the *taliones* among the Jews were converted into pecuniary estimates, so that the price of an eye, &c. lost, was allowed to the person injured. 1 *Hale's P. C.* 12.

It does not appear that this is a principle applicable to laws of a civilized state; when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment for such only as preferred malicious accusations against others; it being enacted by 37 *Edw. 3. c. 18.* that such as preferred any suggestions to the king's great council, should put in sureties of taliation; that is, to incur the same pain that the other should have had in case the suggestions were found untrue. But after one year's experience, this punishment of taliation was rejected, and imprisonment adopted in its stead. 38 *Edw. 3. c. 9.* See 4 *Comm. c. 1. p. 12, 14.*

LEX TERRÆ. The law and custom of the land, distinguished by this name from the civil law. See *Selden in Dissertatione ad Metam, c. 9. par. 3.*

LEX WALLENSICA. The British law, or law of Wales. *Statut. Wall.*

LEY, LEYS. Fr. Law, laws.

LEY, LEE, LAY. Whether in the beginning or end of names of places, signifying an open field, or large pastures. From the Saxon, *leag, compus, pascuum*, as *Blechingley*, &c. *Cowell.* Leys in Domesday is used for pasture.

LEY-GAGER. *Wager of Law.* See that title.

LIBEL.

[**LIBELLUS FAMOSUS.**] A contumely or reproach, published to the defamation of the government, of a magistrate, or of a private person. *Com. Dig. tit. Libel (A.)*

It is termed *libellus famosus seu infamatoria scripta*, and from its pernicious tendency has been held a public offence at the common law; for men not being able to bear the having their errors exposed to public view, were found by experience to revenge themselves on those who made sport with their reputations, from whence arose duels and breaches of the peace; and hence written scandal has been held in the greatest detestation, and has received the utmost discouragement in the courts of justice. *Lamb. Sax. Lam. 64; Bract. lib. 3. c. 36; 3 Inst. 174; 5 Co. 125; cited Bac. Abr. tit. Libel ad init.*

It is also defined to be a malicious defamation, expressed either in printing or writing, or by signs, pictures, &c. tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule. 1 *Hawk. P. C. c. 73. § 1; Bac. Abr. tit. Libel; 5 Mod. 165; 5 Co. 121, 25.*

Libels, says *Blackstone*, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency. Considered particularly as offences against the public peace, they are malicious declarations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt or ridicule. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. 4 *Comm. c. 11. p. 150; 3 Comm. c. 8. p. 125.*

From the different modes in which a libel may be conveyed, a distinction has been made between a libel *in scriptis*, and one *sine scriptis*; i. e. in writing, or without writing. 3 *Inst. 174.*

VOL. II.

I. What shall be considered as a libel.

II. What is a publication.

III. When the truth of a libel may be pleaded in justification; and of evidence in mitigation of damages.

IV. Of the trial, punishment, &c. on a criminal prosecution.

I. A libel is the greatest degree of scandal, and does not die like words which may be forgot, an action for which is confined to the person; but the cause of action for scandal in a libel survives. 5 *Rep. 125.*

This species of defamation is usually termed *written scandal*, and thereby receives an aggravation, in that it is presumed to have been entered upon with coolness and deliberation; and to continue longer and propagate wider and farther than any other scandal. 5 *Rep. 125; Bac. Abr. tit. Libel (A.)*.

According to *Hob. C. J.* scandalous matter is not necessary to make a libel; it is enough if the defendant induces an ill opinion to be had of the plaintiff, &c. And if a man speaks scandalous words, unless they are put in writing, he is not guilty of a libel; for the nature of a libel consisteth in putting the infamous matter into writing. 2 *Salk. 417; 3 Salk. 226.*

The important distinction between libels and words spoken was fully established in the case of *Villiers v. Mousley*, 2 *Wils. 403. viz.* That whatever renders a man ridiculous, or lowers him in the esteem and opinion of the world, amounts to a libel; though the same expressions, if spoken, would not have been defamation; as to call a person in writing an *itchy old toad*, was held in that case to be a libel; although as words spoken they would not have been actionable. 4 *Taunt. 555.* And on this ground a young lady of quality, in the year 1793, recovered £4000 damages for reflections upon her chastity, published in a newspaper, although she could have brought no action for the grossest verbal aspersions that could have been uttered against her honour. An action for a libel also differs from an action for words in this particular; that the former may be brought at any time within six years, and any damages will entitle the plaintiff to full costs. *Christian's note on 1 Comm. p. 125, 126.*

All libels are made against private men or magistrates, and public persons; and those against magistrates deserve the greatest punishment: if a libel be made against a private man, it may excite the person libelled, or his friends, to revenge or break the peace; and if against a magistrate, it is not only a breach of the peace, but a scandal to government, and stirs up sedition. 5 *Rep. 121.*

Upon the whole it may be collected, that any writings, pictures or signs, which derogate from the character of an individual, by imputing to him either bad actions, or vicious principles, or which diminish his respectability and abridge his comforts, by exposing him to disgrace and ridicule, are actionable, without proof of special damage; in short, that an action lies for any false, malicious, and personal imputation, effected by such means, and tending to alter the party's situation in society for the worse. 1 *Starkie on Libel, 171.*

Where a writing inveighs against mankind in general, or against a particular order of men, this is no libel; it must descend to particulars and individuals to make it a libel. *Trin. 11 W. 3. B. R.* But a general reflection on the government is a libel, though no particular person is reflected on: and the writing against a known law is held to be criminal. 4 *Stat. Tr. 672. 903.*

So a publication stating that "unarmed and unresisting men had been inhumanly cut down by the dragoons," is a libel on the king's troops, although no particular dragoons or troops were defined by it. 4 *B. & A. 314.* And a criminal information was granted against the editor of a newspaper for a libel reflecting on the clergy of a particular diocese, and generally upon the Church of England, though no individual prosecutor was named, and though the libellous matter was not negatived by affidavit. *Rez v. Williams*, 5 *B. & A. 595.*

A defamatory writing, expressing only one or two letters

of a man's name, if it be in such a manner that from what goes before and follows after it must be understood, by the natural construction of the whole, to signify and point at such a particular person, is as properly a libel as if the whole name was expressed at large. 1 *Hank. P. C. c. 73. § 5.* For, adds *Hankins*, it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions: and it is a ridiculous absurdity to say that a writing which is understood by every the meanest capacity, cannot possibly be understood by a judge and jury. On application for an information for this offence, some friend of the party complaining should in such case state by affidavit the having read the libel, and that he understands and believes it to mean the party. 3 *Bac. Abr. in n.* And in the case of actions for libels by signs or pictures, it seems necessary always to shew, by proper innuendoes and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed, otherwise it cannot appear that such libel by picture was understood to be levelled at the plaintiff, or that it was attended with any actionable consequences. 3 *Comm. c. 8, p. 126.*

So printing or writing may be libellous, though the scandal is not directly charged, but obliquely and ironically; and where a writing, pretending to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are generally famous for, pitches on such qualities only which their enemies charge them with the want of; as by proposing such a one to be imitated for his learning, who is known to be a good soldier, but an illiterate man, &c. this will amount to a libel. 1 *Hank. P. C. c. 73. § 4.*

Though a private person or magistrate be dead at the time of making the libel, yet it is punishable, as it tends to a breach of the peace. *Hob. 215; 5 Co. 125; Hank. P. C. c. 73. § 1; 4 T. R. 126; 129, in n.* But an indictment for publishing libellous matter reflecting on the memory of a dead person, not alleging that it was done with a design to bring contempt on the family of the deceased, and to stir up the hatred of the king's subjects against them, and to excite his relations to a breach of the peace, cannot be supported; and judgment was in this case accordingly arrested. *R. v. Topham, 4 Term Rep. 126. See 4 T. R. 129, in n.*

A private libel for a private matter, as a letter scandalizing a person courting a woman, is indictable and punishable by fine. *Sid. 270.* No writing is esteemed a libel, unless it reflect upon some particular person; and a writing full of obscene ribaldry is not punishable by any prosecution at common law; but the author may be bound to the good behaviour, as a person of evil fame. 1 *Hank. P. C. c. 73. § 9.* It was so agreed in *Read's* case, 1 *Mod. 142*; but in the case of the *K. v. Curl, Mich. 1 Geo. 2.* for publishing an obscene book, the court were unanimous that it is a temporal offence, and that *Read's* case was not law. *Stra. 788, 834.* See also 4 *Burr. 2527.*

To print of any person that he is a swindler, is a libel, and actionable. 1 *T. R. 748.*

Accusing a bishop of the established church with offering money and preferment to a catholic priest, on condition of his becoming a protestant, was held to be a libel. 5 *Bing. 28.*

The petition of the seven bishops in the reign of King James II. against the king's declaration, setting forth, that it was founded on a dispensing power, which had been declared illegal in parliament, &c. was called a seditious libel against the king, and they were committed to the Tower; but after being tried at bar, they were acquitted, 3 *Mod. 312.* See *State Trials.* The printing of a petition to a committee of parliament, (which would be a libel against the party complained of, were it made for any other purpose,) and delivering copies thereof to the members of the committee, is not the publication of a libel, being justified by the order and course of proceedings in parliament. 1 *Hank. P. C. c. 73. § 8.*

Scandalous matter in legal proceedings by bill, petition, &c.

in a court of justice, amounts not to a libel, if the court hath jurisdiction of the cause. *Dyer, 285; 4 Rep. 14.* But he who delivers a paper full of reflections on any person, in nature of a petition to a committee to any other persons, except the members of parliament who have to do with it, may be punished as the publisher of a libel. 1 *Hank. c. 73. § 8.* And by the better opinion, a person cannot justify the printing any papers which import a crime to another to instruct counsel, &c. but it will be a libel. *Sid. 414.*

An order made by a corporation and entered in their books, stating, that A. B. (against whom a jury had found a verdict with large damages, in an action for a malicious prosecution for perjury, which verdict had been confirmed in C. B.) was actuated by motives of public justice in preferring the indictment, is a libel reflecting on the administration of public justice, for which the Court of K. B. will grant an information against the members making the order. 2 *T. R. 199.* But it is no libel to assign on the books of a Quakers' meeting their reasons for expelling a member. 1 *Black. R. 386.*

It has been determined that it is neither the subject of a criminal prosecution, nor of an action, to publish a true account of the proceedings in parliament, or the courts of justice. See *R. v. Wright, 8 T. R. 293; Curry v. Wells, 1 Bos. & Pul. 525.* But a member of the House of Commons was convicted in the Court of King's Bench upon an indictment for a libel, in publishing in a newspaper the report of a speech delivered by him in that house, containing libellous matter; although the publication was proved to be a correct report of such speech, and to be made in consequence of an incorrect publication having appeared in that and other newspapers. *R. v. Creevey, 1 Mau. & Sel. 273.*

As the privilege of publishing judicial proceedings with impunity, notwithstanding the inconvenience and mischief which such publications may occasion to individuals, is founded upon grounds of public policy and convenience, the condition necessarily annexed to immunity is, that the proceeding shall be fairly, impartially, and correctly reported. 1 *Starkie on Libel, 269.*

Therefore it is a libel to publish a highly-coloured account of proceedings in a court of record, mixed with the party's own observations and conclusions upon what passed in court, which contained an insinuation that the plaintiff had committed perjury. 7 *East, 493.*

So a report of a trial, containing the *ex parte* statement of the plaintiff's counsel, and those parts of the judge's address to the jury which were unfavourable to the defendant, and omitting all but a few sentences of the defence, was held not to be a privileged report. *Saunders v. Mills, 6 Bingh. 218.*

So the publishing a counsel's speech in a judicial proceeding, coupled with a general assertion, that his statement was proved by a witness called upon that trial, cannot be justified. 4 *B. & A. 605.* And where, in a recent case, the defendant published a report of the proceedings under a commission of lunacy, which the plaintiff had attended as a witness, and stated "that the object was to set aside a will; that the plaintiff's testimony, being unsupported by that of any other person, failed to have any effect on the jury; and that Mr. J. (the counsel against the commission) commented with cutting severity on the testimony of Mr. D. (the plaintiff)" it was held, that the whole, taken together, was a libel; and that a plea, justifying only the words "Mr. J. commented &c." was bad. 10 *Bing. 519.*

Neither is a reporter privileged in publishing a speech of a counsel containing reflections on the character of an individual, annexed to a short summary of the trial, without stating the evidence. 4 *B. & C. 473.*

But the publication of *ex parte* proceedings, as before magistrates, &c. is not privileged. 5 *Esp. 123; 2 Camp. 268.* So in the case of *Duncan v. Thwaites, 3 B. & C. 17.* it was decided, that the publication of a charge, imputing to the plaintiff indecent conduct to a female child, could not be

justified on the ground that the alleged libel was no more than a correct account of the proceeding which had taken place at a public police office.

Where the writing is a confidential communication, which is reasonably called for by the occasion, it is not considered libellous. Thus a servant cannot maintain an action against his former master for words spoken, or a letter written, by him in giving the character of a servant, unless the latter prove the malice (or unless from the circumstances of the case malice may be inferred by a jury,) as well as the falsehood of the charge; even though the master make specific charges of fraud. See 1 *T. R.* 110; 3 *Dos. & Pul.* 587; 1 *B. & A.* 240; and tit. *Servants*.

II. No one is punishable for writing a libel unless he actually publishes it to the world. 5 *Mod.* 165, 167.

The communication of a libel to any one person is a publication in the eye of the law; *Moor.* 818; and therefore the sending an abusive private letter to a man is as much a libel as if it were openly printed; for it equally tends to a breach of the peace; 2 *Brownl.* 151, 157; 12 *Rep.* 35; *Hob.* 215; *Poph.* 139; 1 *Hawk. P. C. c.* 73. § 11; 4 *Comm. c.* 11. p. 150; *Bac. Abr.* tit. *Libel* (B 2); in which latter book it is stated that this was a matter of doubt; but a case is mentioned where an information was granted under such circumstances; and at all events it is an offence against the king's peace, punishable by indictment; and if copies of it are afterwards dispersed, it aggravates the crime, or rather makes it a new crime, for which the party may have an action. *Poph.* 15; *Hob.* 62. Writing a letter to a man, and abusing him for his public charities, &c. is a libellous act, punishable by indictment. *Hob.* 215. In the case of the seven bishops, the delivery by them to King James II. of a petition, which was termed a libel, was held a publication. See *Phillips's State Trials*, 300, 301.

In the making of libels, if one man dictates, and another writes a libel, both are guilty; for the writing after another shows his approbation of what is contained in the libel; and the first reducing a libel into writing may be said to be the making it, but not the composing; if one repeats, another writes, and a third approves what is written, they are all makers of the libel; because all persons who concur to an unlawful act, are guilty. 5 *Mod.* 167. The making a libel is the genus; and composing and contriving is one species; writing a second species; and procuring to be written, a third; and one may be found guilty of writing only, &c. 2 *Salk.* 419, &c. But observe, a mere writing, without a publication, was not in question in *Salkeld*. It is conceived that for the mere writing of a libel, not published, no action can be maintained, nor prosecution legally supported.

If one writes a copy of a libel, and does not deliver it to others, the writing is no publication: but it has been adjudged, that the copying a libel, without authority, is writing a libel; and he that thus writes it, is a contriver; and that he who hath written a copy of a known libel, if it is found upon him, this shall be evidence of the publication: but if such libel be not publicly known, then the mere having a copy is not a publication. 2 *Salk.* 417; 2 *Nels. Abr.* 1122. When a libel appears under a man's own handwriting, and no author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man. *Ibid.* If one reads a libel, or hears it read, and laughs at it, it is not a publishing; for before he reads or hears it read, he cannot know it to be a libel: though if he afterwards reads or repeats it, or any part thereof, in the hearing of others, it is a publication of it: yet if part of it be repeated in mirth without any malicious purpose of defamation, it is said to be no offence. 9 *Rep.* 59; *Moor.* 862. Every one convicted of publishing a libel ought to be esteemed the contriver or procurer; the procurer and writer

of a libel have been held to be both contrivers; also he who procures another to publish it, and the publisher, are both publishers. *Moor.* 627; 5 *Rep.* 125; 3 *Inst.* 174; 3 *Cro.* 17. See 1 *Hawk. P. C. c.* 73.

When any man finds a libel, if it be against a private person, he ought to burn it, or deliver it to a magistrate; and where it concerns a magistrate, he should deliver it presently to a magistrate. 5 *Rep.* 125. If a libel be found in a house, the master cannot be punished for framing, printing, and publishing it; but it is said he may be indicted for having it, and not delivering it to a magistrate. 2 *Vent.* 31.

The sale of a libel by a servant in a shop is *prima facie* evidence of a publication, in a prosecution against the master; and is sufficient for conviction, unless contradicted by contrary evidence showing that he was not privy, nor in any way assenting to it. 4 *T. R.* 126; 5 *Burr.* 2686, 2687; 1 *Hawk. P. C. c.* 73. § 10. in n.

So the proprietor of a newspaper is liable for whatever libel appears in it, but he may, under special circumstances, rebut such liability. *M. & M.* 433.

Proof that the defendant gave a bond to the stamp-office for the duties on the advertisements in a newspaper, under 29 *Geo. 3. c.* 50. § 10., and had occasionally applied at the stamp-office respecting the duties, is strong evidence to prove that he is the publisher. 4 *T. R.* 126.

A delivery of a newspaper, according to the provisions of 38 *Geo. 3. c.* 78., to the officer of a stamp office, is a sufficient publication, though it is directed by the statute, for the officer has an opportunity of reading it. 4 *B. & C.* 35.

For the regulations respecting the publication of newspapers, pamphlets, &c. see tit. *Newspapers*.

III. It is immaterial, on a criminal prosecution, with respect to the essence of a libel, whether the matter of it be true or false; because it equally tends to a breach of the peace; and the provocation, not the falsity, is the thing to be punished criminally; though doubtless the falsehood of it may aggravate its guilt and enhance its punishment. See 7 *T. R.* 4, that it is not necessary to *allege* the falsity of the libellous matter. In a civil action a libel must appear to be false as well as scandalous; for if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace: and therefore upon a civil action the truth of the accusation may be pleaded in bar of the suit. But in a criminal prosecution the tendency which all libels have to create animosities and to disturb the public peace is the whole that the law considers. And therefore in such prosecutions, the only points to be inquired into are, first, the making or publishing of a book or writing; and, secondly, whether the matter be criminal; and if both these points are against the defendant, the offence against the public is complete. 4 *Comm. c.* 11. p. 150, 151. See *post*, IV., and tit. *Jury*, III. 2. as to the *intent* of the party publishing.

It seems to be clearly agreed, that in an indictment or criminal prosecution for a libel, the party cannot justify that the contents thereof are true, or that the person upon whom it is made had a bad reputation; since the greater appearance there is of truth in any malicious invective, so much the more provoking it is: for as *Lord Coke* observes, in a settled state of government the party grieved ought to complain for every injury done him, in the ordinary course of law, and not by any means to revenge himself by the odious course of libelling or otherwise. *Bac. Abr.* tit. *Libel* (A. 5.) cites 5 *Co.* 125; *Hob.* 253; *Moor.* 627; 1 *Hawk. P. C. c.* 73.

But although it has been held, at least for these two centuries, that the truth of a libel is no justification in a criminal prosecution, yet in many instances it is considered as an extenuation of the offence; and the Court of King's Bench has laid down this general rule, viz. that it will not grant an *information* for a libel, unless the prosecutor who applies for it

makes an affidavit, asserting directly and pointedly that he is innocent of the charge imputed to him. But this rule may be dispensed with, if the person libelled resides abroad; or if the imputations of a libel are general and indefinite; or if it is a charge against the prosecutor for language which he has held in parliament. *Doughl.* 271 (284), 372 (388); 5 B. & A. 595.

Where on application for an information the truth of the libel is not denied, the court (except in the particular instances above mentioned) will leave the injury to be remedied in the ordinary course of justice by action or indictment. *Stra.* 493. See *post*, IV. But the court will not grant this extraordinary remedy by information, nor should a grand jury find an indictment, unless the offence be of such signal enormity, that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community. In such a case the public are justly placed in the character of an offended prosecutor, to vindicate the common right of all, though violated only in the person of an individual; for the malicious publication of even truth itself cannot in policy be suffered to interrupt the tranquillity of any well-ordered society. This is a principle so rational and pure that it cannot be tainted by the vulgar odium which has accompanied the derivation of the doctrine from the tyranny of the star-chamber; the adoption of it by the worst of courts can never weaken its authority; and without it all the comforts of society might with impunity be hourly endangered or destroyed. See *Law of Libels*; 1 *Hawk. P. C. c. 73. § 6. in n.*

The court of K. B. is now in the practice of granting an information for any description of libel. See *Information*.

With regard to libels in general, there are, as in many other cases, two remedies; one by indictment or information, and the other by action. The former for the public offence; for, as has been repeatedly remarked, every libel has a tendency to the breach of the peace, by provoking the person libelled to break it; which offence, we have seen, is the same in point of law, whether the matter contained be true or false, and therefore it is that the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification. But in the remedy by action on the case, which is to repair the party in damages for the injury done him, the defendant may, as for words spoken, justify the truth of the facts, and show that the plaintiff has received no injury at all. The chief excellence, therefore, of a civil action for a libel consists in this, that it not only affords a reparation for the injury sustained, but it is a full vindication of the innocence of the person traduced. See 3 *Comm. c. 8. p. 125, 126, and n.*

It is not competent to a defendant charged with having published a libel, to prove that a paper, similar to that for the publication of which he is prosecuted, was published on a former occasion by other persons who have never been prosecuted for it. 5 *T. R.* 436.

Neither is it a defence to an action for the publication of a libel, that the libellous matter was communicated to the defendant by a third person, and that such defendant's name was published at the same time with the libel; and the court intimated that in *oral slander*, (see *Holt*, 513,) though a man, at the time of speaking the words, names the person who told him what he relates, cannot plead that circumstance to an action against him. *Crespigny v. Wellesley*, 5 *Bing.* 392.

It would seem that a defendant may, under the general issue, give general evidence of the plaintiff's character, but not of particular facts tending to show that he has been guilty of the act imputed to him, in mitigation of damages. See 2 *Camp.* 251; 1 *M. & S.* 251; and 2 *Starkie on Libel*, 87—97.

A libel in a newspaper purported to be a report of proceedings before one of the corporation commissioners. Under the general issue the defendant was allowed to give the accuracy of the report in evidence in mitigation of damages only; and the plaintiff was then allowed to give evidence in reply of the inaccuracy of the report. 6 *C. & P.* 385.

IV. In information and law proceedings there are two ways of describing a libel; by the sense and by the words: the first is *cujus tenor sequitur*, and the second *quæ sequitur in hæc Anglicana verba, &c.* in which the description is by particular words, and whereof every word is a mark; so that if there is any variance, it is fatal; in the other description by the sense, it is not material to be very exact in the words, because the matter is described by the sense of them. 2 *Salk.* 660. See *Indictment, Information, Pleading*.

The declaration for a libel must lay it to be "of and concerning the plaintiff," otherwise there can be no judgment. 2 *Strange*, 934.

It hath been held, that writing a seditious libel is not an actual breach of the peace; and that a member of parliament writing such a libel is entitled to his privilege from being arrested for the same. *Wilkes's case*, 2 *Wils.* 169, 261; but see title *Parliament*, IV. 2. *ad fin.*

The arguments in the case of *Wilkes* (as also in that of the Seven Bishops, *State Trials*, 4 *Jac.* 2.) seem to have assumed that a common person not having privilege of parliament might be legally apprehended on the charge of writing and publishing a seditious libel: and it is now settled that such person may be apprehended by a justice of the peace, and committed for want of bail for writing or publishing a seditious libel against the government, or a libel against a minister of state, or against a judge. The same principle seems also to apply to the case of writing or publishing a malicious libel against any person. See *Bull's case*, 1 *Brot.* & *Bing.* 548.

Previous to the 32 *Geo. 3. c. 60.* it was held, that on the trial of an indictment for a libel, the only questions for the consideration of the jury are the fact of publishing, and the truth of the innuendoes; that is, the truth of the meaning and sense of the passages of the libel, as stated and averred in the record; whether the matter be or be not a libel is a question of law for the consideration of the court. 3 *T. R.* 428. See further *post*.

The following extract from a modern historian, (*Hallam's History of England from Henry VII. to Geo. II. c. 15.*) affords a summary, applicable, as well to this offence itself as to the province of the jury upon the trial of offenders.

For the vigilant superintendence, (of the proceedings of the government by public opinion,) and, indeed, for all that keeps up in us permanently and effectually the spirit of regard to liberty and the public good, we must look to the unshackled and independent energies of the press. In the reign of William III., and through the influence of the popular principles in our constitution, this finally became free. The licensing act, suffered to expire in 1679, was renewed in 1685 for seven years. In 1692 it was continued to the end of the session, which took place in 1693. Several attempts were afterwards made to renew its operation, which the less courtly Whigs combined with the Tories and Jacobites to defeat. Both parties, indeed, employed the press with great diligence in that reign; but, while one degenerated into malignant calumny and misrepresentation, the signal victory of liberal principles is manifestly due to the boldness and eloquence with which they were promulgated. Even during the existence of a censorship, a host of unlicensed publications, by the negligence or connivance of the officers employed to seize them, bore witness to the inefficacy of the restrictions. The bitterest invectives of Jacobitism were circulated in the first four years after the Revolution.

The *Liberty of the Press* consists, in a strict sense, merely in an exemption from the superintendence of a licenser; but it cannot be said to exist in any security, or sufficiently for its principal ends, when discussions of a political or religious nature, whether general or particular, are restrained by too narrow or severe limitations. The *law of libel* has always been indefinite, an evil probably beyond any complete remedy, but which evidently renders the liberty of free discussion

somewhat precarious in its exercise, perhaps more so than might be wished. It appears to have been the received doctrine in Westminster Hall before the Revolution, that no man might publish a writing *reflecting on the government*, nor upon the character or even capacity and fitness of any one employed in it. Nothing having passed to change the law, the law remained as before. Hence, in the case of *Tutchin*, it was laid down, that to possess the people with an ill opinion of the government (that is, the ministry,) was a libel. And the attorney-general, in his speech for the prosecution, urged that there could be no reflection upon those in office under the sovereign, but it must cast some reflection on the sovereign who employed them. Yet in that case the censure upon the administration in the passages selected for prosecution was merely general and without reference to any person; upon which the counsel for Tutchin relied. *State Trials*, (Howell's edit.) xiv. 1103, 1128.

It is manifest, that such a doctrine was irreconcilable with the interests of any party *out of power*; whose best hope to regain it is commonly by possessing the nation with a bad opinion of their adversaries. Nor would it have been possible for any ministry to stop the torrent of a free press, under the secret guidance of a powerful faction, by a few indictments for libel. They found it general'y more expedient, and more agreeable to borrow weapons from the same armoury, and retaliate with unsparing invective and calumny. This was practised with the avowed countenance of government, for the first time by Swift, in the *Examiner*, and some others of his writings. Both parties soon went such lengths in this warfare, that it became tacitly understood, that the *public characters* of statesmen and the measures of administration are the fair topics of pretty severe attack. Less than this, indeed, would not have contented the political temper of the nation, gradually and without intermission becoming more democratical, and more capable as well as more accustomed to judge of its general interests and of those to whom they were intrusted. The just limit between *political* and *private* censure has been far better drawn in these later times, (licentious as we may still justly deem the press,) than in an age when courts of justice had not deigned to acknowledge, as they do at present, its theoretical liberty. No writer, except of the most broken reputation, could venture at this day on the malignant calumnies of the great ministerial writer of that time.

Meanwhile the judges of the courts of law naturally adhered to their established doctrine, and in prosecutions for political libels were very little inclined to favour what they deemed the presumption, if not the licentiousness, of the press. They advanced a little farther than their predecessors, and, contrary to the practice both before and after the Revolution, laid it down as an absolute principle, that *falsehood*, though always alleged in the indictment, *was not essential to the guilt of the libel*; refusing to admit its truth to be pleaded or given in evidence, or even urged by way of mitigation of punishment. (See *State Trials*, xiv. 534; xvii. 639.) But as defendants could only be convicted by verdicts of juries and jurors, both partook of the general sentiment in favour of free discussion, and might, in certain cases, have acquired some prepossessions as to the real truth of the supposed libel, which the court's refusal to enter upon it could not remove, they were often reluctant to find a verdict of *guilty*. And hence arose by degrees a sort of contention, which sometimes showed itself upon trials, and divided both the profession of the law and the general public. The judges and the lawyers, for the most part, maintained, that the province of the jury was only to determine the fact of publication, and also whether the *innuendoes* on the record were correct, that is, whether the libel actually meant that which it was alleged in the indictment that it did mean, not whether such meaning were criminal or innocent—a question of law which the court were exclusively competent to decide. That

the jury might acquit at their pleasure was undeniable; but it was asserted, that they would do so in violation of their oaths and duty if they should reject the opinion of the judge, by whom they were to be guided as to the general law. Others of great name in our jurisprudence and the majority of the public at large, conceiving that this would throw the liberty of the press altogether into the hands of the judges, maintained, that the jury had a strict *right* to take the whole matter into their consideration, and determine the defendants' criminality or innocence, according to the nature and circumstances of the publication. This controversy was put an end to by the act 32 Geo. 3. c. 60. (extended to Ireland by the Irish act 33 Geo. 3. c. 43.) which enacted, that on trials of indictment for libel, the jury might give a general verdict of guilty or not guilty upon the whole matter in issue; and though, perhaps, the act is not drawn in the most intelligible and consistent manner, it was certainly designed or hoped that it would make the defendant's intention as it might be innocent or even laudable, or, on the other hand, seditious or malignant, a matter of fact for the inquiry and discussion of the jury. See more fully on this part of the subject, *Jury*, III. 2.

The punishment of libellers for either making, repeating, printing, or publishing the libel, is fine, and such corporal punishment, as imprisonment, pillory, &c. (now abolished,) as the court in its discretion shall inflict; regarding the quantity of the offence, and the quality of the offender. 1 *Hawk. P. C. c. 73. § ult.*

If a printer print a libel against a private person, he may be indicted and punished for it; and so may he who prints a libel against a magistrate, and much more one who does it against the king and state; nor can a person in such a case excuse himself by saying they were dying speeches, or the words of dying men; for a man may at his death justify his villainy; and he who publishes it is punishable; and it is no excuse for the printing or publishing a libel, to say that he did it in the way of trade, or to maintain his family. 1 *St. Tr.* 982, 986.

Also if booksellers publish or sell libels, though they know not the contents of them, they are punishable. It has been resolved, that where persons write, print, or sell, any pamphlets, scandalizing the public, or any private persons, such libellous books may be seized, and the persons punished by law; and all persons exposing any books to sale, reflecting on the government, may be punished: also writers of news (though not scandalous, seditious, or reflecting on the government, if they write false news,) are indictable. 2 *St. Tr.* 477. See *False News, Scandalum Magnatum*.

One was indicted for a libel in scandalizing the King's witnesses, and reflecting on the justice of the nation, and had judgment of the pillory and fine 3 *St. Tr.* 50. A person for libelling the Lord Chancellor Bacon, affirming that he had done injustice, and other scandalous matter, was sentenced to pay 1000*l.* fine; to ride on a horse with his face to the tail from the Fleet to Westminster, with his fault written on his head; to acknowledge his offence in all the courts at Westminster, stand in the pillory; and that one of his ears should be cut off at Westminster, and the other in Cheapside, and to suffer imprisonment during life. *Poph.* 135. One who exhibited a libel against a Lord Chief Justice, directed to the King, calling the Chief Justice traitor, perjured judge, &c. had judgment to stand in the pillory, was fined 1000 marks, and bound to good behaviour during life. *Cro. Car.* 125.

When a person is brought before the court to receive judgment for a libel, his conduct subsequent to his conviction may be taken into consideration, either by way of aggravation or mitigation of his punishment. 3 *T. R.* 432.

The stat. 60 Geo. 3. c. 8. "for the more effectual prosecution and punishment of blasphemy and seditious libels," enables the court before whom any offender is convicted, or

wherein there is judgment by default, to make an order for seizing the copies of the libel. By § 4. persons on a second conviction might have been banished from the united kingdom and all other parts of the king's dominions; but this punishment of banishment (which at the passing of the act was much opposed,) was repealed by the 11 Geo. 4. and 1 Will. 4. c. 78. § 1. See tit. *Newspapers*.

In all the instances where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels, are punished by the English law, some with a greater, others with a less degree of severity, the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is, indeed, essential to the nature of a free state; but this consists in laying no previous restraints upon publications; and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish, as the law does at present, any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order of government and religion, the only solid foundation of civil liberty. Thus, the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left. The disseminating or making public of bad sentiments, destructive to the ends of society, is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument heretofore used in the restraining of the just freedom of the press, "that it was necessary to prevent the daily abuse of it," will entirely lose its force when it is shown (by a reasonable exertion of the laws,) that the press cannot be abused to any bad purpose without incurring a suitable punishment; whereas it can never be used to any good one, when under the control of an inspector. So true it will be found, that to censure the licentiousness is to maintain the liberty, of the press. 4 Comm. c. 11. ad fin.

The above observations deserve the serious attention of every juryman who wishes well to the constitution and happiness of his country; to them we shall add the remark of another celebrated writer on this subject:—"The danger of such unbounded liberty (of unlicensed printing,) and the danger of bounding it, have produced a problem in the science of government, which human understanding seems hitherto unable to solve. If nothing may be published but what civil authority shall have previously approved, power must always be the standard of truth: if every dreamer of innovations may propagate his projects, there can be no settlement; if every murmur at government may diffuse discontent, there can be no peace; and if every sceptic in theology may teach his follies, there can be no religion. The remedy against these evils is to punish the authors; for it is yet allowed that every society may punish, though not prevent, the publication of opinions which that society shall think pernicious. But this punishment, though it may crush the author, promotes the book; and it seems not more reasonable to leave the right of printing unrestrained, because writers may afterwards be censured, than it would be to sleep with doors unbolted, because by our laws we can hang a thief." Johnson, in vita Milton.

The law of libel has of late been much discussed, and a committee of the House of Commons was appointed in the last session (1833) for the purpose of investigating it, previous to the consideration of the important changes which have been proposed by Mr. O'Connell and other members of parliament.

For further matter connected with libels, see *False News*, *Scandalum Magnatum*, *Treason*, *Words*.

LIBEL, in the Spiritual Court, from *libellus*, a little book: the original declaration of any action in the civil law. See 2 Edw. 6. c. 18.

By the 2 Hen. 5. c. 3. a libel of that which is surmised against any party cited to appear in the Spiritual Court, is to be granted and delivered without any difficulty.

If upon a libel for any ecclesiastical matter, the defendant make a surmise in B. R. to have a prohibition, and such surmise be insufficient, the other party may show it to the court, and the judges will discharge it. 1 Leon. 10, 128. The libel used in ecclesiastical proceedings, consists of three parts. 1. The major proposition, which shows a just cause of the petition. 2. The narration, or minor proposition. 3. The conclusion, or conclusive petition, which conjoins both propositions, &c. 3 Comm. 100.

In the Scotch law, the term libel is used to express the source of complaint, or ground of the charge, on which either a civil action or criminal prosecution takes place.

LIBER NIGER. See *Black Book*.

LIBERA. A livery or delivery of so much grass or corn to a customary tenant, who cut down or prepared the said grass or corn, and received some part or small portion of it as a reward or gratuity. *Conell*.

LIBERA BATELLA. A free boat. Right of fishing. *Plac. in itin. ap. Cestr. 14 H. 7.*

LIBERA CHASEA HABENDA. A judicial writ granted to a person for a free chase belonging to his manor; after proof made by inquiry of a jury, that the same of right belong to him. *Reg. Orig. 36.*

LIBERAM LEGEM, *amittere liberam legem*. Is to become infamous, and not to be accounted *liber et legalis homo*. See *Battle*, *Champion*.

LIBERA PISCARIA. A free fishery, which being granted to one, he hath a property in the fish, &c. 2 Salk. 637. See *Fish*, *Fisheries*, and *Fishing*.

LIBER TAURUS. A free bull. *Norf. 16 Edw. 1.*

LIBERA WARA. See *Wara*.

LIBERATE. A writ that lies for the payment of a yearly pension or other sum of money granted under the great seal, and directed to the treasurer and chamberlains of the Exchequer, &c. for that purpose. In another sense it is a writ to the sheriff of a county for the delivery of possession of lands and goods extended, or taken upon the forfeiture of a recognizance. Also a writ issuing out of the Chancery, directed to a gaoler, for delivery of a prisoner that hath put in bail for his appearance. *F. N. B. 182; 4 Inst. 116.* This writ is most commonly used for delivery of goods, &c. on an extent; and by the extent the conusee of a recognizance hath not any absolute interest in the goods, until the liberate. 2 Lil. 169. It has been adjudged, that where an extent is upon a statute-merchant, there needs no liberate, for the sheriff may deliver all in execution without it; but where an extent is upon a statute-staple, or a recognizance, there must be a return made of such an extent, and then a liberate before there can be a delivery in execution. 3 Salk. 159. See *Extent*, *Execution*.

LIBERATIO. Money, meat, drink, clothes, &c. yearly given and delivered by the lord to his domestic servants. *Blount*.

LIBERTAS ECCLESIASTICA. This is a frequent phrase in our old writers, to signify church liberty, or ecclesiastical immunities; the right of investiture, extorted from our kings by force of papal power, was at first the only thing

challenged by the clergy, as their *libertas ecclesiastica*. but by degrees, under weak princes and prevailing factions, under the title of 'church liberty,' they contended for a freedom of their persons and possessions from all secular power and jurisdiction, as appears by the canons and decrees of the council held by Boniface, Archbishop of Canterbury, at Merton, A. D. 1258, and at London, A. D. 1260, &c. *Corwell*.—See Lord *Littlton's Hist. of Hen. II.* and *Robertson's Hist. of Eng. C. V.*

LIBERATE PROBANDA. An ancient writ which lay for such as, being demanded for vicims, offered to prove themselves free; directed to the sheriff, that he should take security of them for the proving of their freedom before the justices of assize, and that in the meantime they should be un molested. *P. N. B. 77.* See *Tenures, Villein*.

LIBERTATIBUS ALLOCANDIS. A writ lying for a citizen or burgess, impleaded contrary to his liberty, to have his privilege allowed. *Reg. Orig. 262.* And if any claim special liberty to be impleaded within a city or borough, and not elsewhere, there may be a special writ *de libertatibus allocandis*, to permit the burgesses to use their liberties, &c. These writs are of several forms, and may be used by a corporation, or by any single person, as the case shall happen. *New Nat. Br. 509, 513.* The barons of the cinque ports, &c. may sue forth such writs, if they are delayed to have their liberties allowed them. *Ibid.*

LIBERTATIBUS EXIGENDIS IN ITINERE. An ancient writ whereby the king commands the justices in eyre to admit of an attorney for the defence of another man's liberty. *Reg. Orig. 19.*

LIBERTIES or FRANCHISES. These are synonymous terms, and their definition is, a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject. The kinds of them are various, and almost infinite. See *Franchises*.

A LIBERTY. A privilege held by grant or prescription, by which men enjoy some benefit beyond the ordinary subject. *Bract.*

LIBERTY,

In its most general signification, is said to be a power to do as one thinks fit, unless restrained by the law of the land; and it is well observed, that human nature is ever an advocate for this Liberty, it being the gift of God to man in his creation; therefore every thing is desirous of it, as a sort of restitution to its primitive state. *Locke. 96.* It is upon that account the laws of England in all cases favour liberty, and which is accounted very precious, not only in respect of the profit which every one obtains by his liberty, but also in respect of the public. *2 Lib. Abr. 169.*

According to *Montesquieu*, liberty consists principally in not being compelled to do any thing which the law does not require; because we are governed by civil laws, and therefore we are free, living under those laws. *Spirit of Laws, lib. 26, c. 20.*

The absolute *Rights of Man*, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be the most desirable, are usually summed up in one general appellation, and denominated *The Natural Liberty of Mankind*. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endowed him with the faculty of free will. *1 Comm. c. 1.*

But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws which the community has thought proper to establish.

This species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man who considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. See *Mont. Spirit of Laws, lib. 11, c. 3.*

Political or civil liberty, therefore, which is that of a member of society, is no other than natural liberty, so far restrained by human laws, and no farther, as is necessary and expedient for the general advantage of the public. *1 Comm. c. 1, p. 125.*

Hence we may collect, that the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny; nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference without any good end in view, or regulations destructive of liberty; whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance, but supporting that state of society which alone can secure our independence. So that laws, when prudently framed, are by no means subversive, but rather introductive of liberty; for where there is no law there is no freedom. *Locke on Gov. part 2, § 57.* But then, on the other hand, that constitution or form of government, that system of laws is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint. *1 Comm. 125, 6.*

The above definition of the learned commentator is admitted by his latest editor to be clear, distinct, and rational, as far as relates to civil liberty; in the definition of which, however, he adds, it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all; or as much so as the nature of things will admit. *1 Comm. 126, n.*

Political liberty is distinguished by Mr. *Christian* from civil liberty; and he defines it to be, the security with which, from the constitution, form, and nature, of the established government, the subjects enjoy civil liberty. No ideas, continues he, are more distinguishable than those of civil and political liberty; yet they are generally confounded; and the latter cannot yet claim an appropriate name. The learned Judge (*Blackstone*) uses political and civil liberty indiscriminately; but it would perhaps be convenient uniformly to use those terms in the respective senses here suggested, or to have some fixed specific denominations of ideas which, in their natures, are so widely different. The last species of liberty has, probably more than the rest, engaged the attention of mankind, and particularly of the people of England. Civil liberty, which is nothing more than the impartial administration of equal and expedient laws, they have long enjoyed, nearly to as great an extent as can be expected under any human establishment; and under a king who has no power to do wrong, yet all the prerogatives to do good, with the two houses of parliament, the people of England have a firm reliance that this civil liberty is secure, and that they shall retain and transmit its blessings, and those of political liberty also, to the latest posterity. See *1 Comm. 126, n.*

There is another common notion of liberty, which is nothing more than the freedom from confinement. This is a part of civil liberty; but it being the most important part, as a man

in a gaol can have but the exercise and enjoyment of few rights, it is *κατ' εὐχην* called liberty.

The different definitions of the term liberty, here given and commented upon, should not be thought tautologous or uninteresting, since it is a word which it is of the utmost importance to mankind that they should clearly comprehend; for though a genuine spirit of liberty is the noblest principle that can animate the heart of man, yet liberty, in all times, has been the clamour of men of profligate lives and desperate fortunes: *Falso libertatis vocabulum obtendi ab iis, qui, privatim de generis, in publicum extiosi, nihil spei nisi per discordias habeant.* Tac. Ann. 11. c. 17.

The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms; where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owners; the legislature, and of course the laws of England, being particularly adapted to the preservation of this inestimable blessing, even in the meanest subject. 1 Comm. 126, 7.

The absolute rights of every Englishman, (which, taken in a political and extensive sense, are usually called their liberties,) as they are founded on nature and reason, so they are coeval with our form of government, though subject at times to fluctuate and change; their establishment, excellent as it is, being still human. At some times we have seen them depressed by overbearing and tyrannical princes: at others, so luxuriant as even to tend to anarchy, a worse state than tyranny itself; as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments; and as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been, from time to time, asserted in parliament as often as they were thought to be in danger.

First, By the great charter of liberties, which was obtained, sword in hand, from King John; and afterwards, with some alterations, confirmed in parliament by King Henry III., his son; which charter contained very few new grants; but as Sir Edward Coke observes (2 Inst. proēm.) was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards by the statute called *Confirmatio Cartarum*, 25 Edw. 1, whereby the great charter is directed to be allowed as the common law, all judgments contrary to it are declared void; copies of it are ordered to be sent to all the cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those who by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes from Edward I. to Henry IV.; of which the following are the most forcible.

25 Edw. 3. st. 5. c. 4. None shall be taken by petition or suggestion made to the king or his council, unless it be by indictment of lawful people of the neighbourhood, or by process made by writ original at the common law. And none shall be put out of his franchises or freehold, unless he be duly brought to answer, and forejudged by course of law; and if any thing be done to the contrary, it shall be redressed and holden for none.

42 Edw. 3. c. 3. No man shall be put to answer without presentment before justices, or matter of record of due process, or writ original, according to the ancient law of the land. And if any thing be done to the contrary, it shall be void in law, and held for error.

After a long interval these liberties were still further confirmed by the Petition of Right; which was a parliamentary declaration of the liberties of the people, assented to by King Charles I. in the beginning of his reign; and is classed among our statutes as 3 Car. 1. c. 1. By this it was provided that no one should be compelled to make, or yield

any gift, loan, benevolence, tax, or such like charge, without consent by act of parliament; (as to which liberty or privilege, see 25 Edw. 1. cc. 5, 6; 34 Edw. 1. st. 4. c. 1.; & 11 Edw. 3. st. 2. c. 1.) This petition of right was closely followed by the still more ample concessions made by that unhappy prince to his parliament (particularly the dissolution of the Star-chamber, by 16 Car. 1. c. 10,) before the fatal rupture between them; and by the many salutary laws, particularly the Habeas Corpus Act, passed under King Charles II.

To these succeeded the Bill of Rights, or Declaration delivered by the Lords and Commons to the Prince and Princess of Orange, February 13, 1688; and afterwards enacted in parliament, when they became King and Queen; which is as follows:—

Stat. 1 W. & M. st. 2. c. 2. § 1. Whereas the Lords Spiritual and Temporal, and Commons, assembled at Westminster, representing all the estates of the people of this realm, did upon the 13th of February, 1688, present unto their majesties, then Prince and Princess of Orange, a declaration, containing that,

The said Lords Spiritual and Temporal, and Commons, being assembled in a full and free representative of this nation, for vindicating their ancient rights and liberties, DECLARE,

That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal:

That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal:

That the commission for erecting the late Court of Commissioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious:

That levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal:

That it is the right of the subjects to petition the king; and all commitments and prosecutions for such petitioning are illegal:

That the raising or keeping a standing army within the kingdom in the time of peace, unless it be with consent of parliament, is against law:

That the subjects which are protestants may have arms for their defence suitable to their conditions, and as allowed by law:

That elections of members of parliament ought to be free:

That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament:

That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted:

That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason, ought to be freeholders:

That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void:

And for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently:

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings, or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example.

§ 6. All and singular the rights and liberties asserted and claimed in the said declaration are the true, ancient, and indubitable rights and liberties of the people of this kingdom,

and so shall be esteemed, allowed, adjudged, and taken to be; and all the particulars aforesaid shall be firmly holden as they are expressed in the said declaration; and all officers shall serve their majesties according to the same in all times to come.

§ 12. No dispensation by *non obstante* of any statute shall be allowed, except a dispensation be allowed of in such statute; and except in such cases as shall be specially provided for during this session of parliament.

§ 13. No charter granted before the 23d of October, 1689, shall be invalidated by this act, but shall remain of the same force as if this act had never been made.

Lastly. These liberties were again asserted at the commencement of the last century, in the Act of Settlement, 12 & 13 W. 3. c. 2. whereby the Crown was limited to his present majesty's illustrious house; and some new provisions were added at the same fortunate era, for better securing our religion, laws, and liberties, which the statute declares to be "the birthright of the people of England;" according to the ancient doctrine of the common law.

Thus much for the declaration of our rights and liberties. The rights themselves thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges which society hath engaged to provide in lieu of the natural liberties so given up by individuals. These, therefore, were formerly, either by inheritance or purchase, the rights of a mankind; but in most other countries of the world, being now more or less debased or destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England.

These rights may be reduced to three principal or primary articles:—

The right of personal security.

The right of personal liberty.

The right of private property.

As there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense. 1 *Comm.* 129.

The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. The enjoyment of this right is secured to every subject by the various laws made for the punishment of those crimes by which it is any way violated; for a particular detail of which, see titles *Assault*, *Homicide*, *Murder*, *Libel*, *Naisance*, &c.

Life, however, may, by the Divine permission, be frequently forfeited for the breach of those laws of society which are enforced by the sanction of capital punishments. On this subject it is sufficient at present to observe, that whenever the constitution of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical; and that whenever any laws direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may, by prudent caution, provide against it. The statute law of England does therefore very seldom, and the common law does never, inflict punishment extending to life or limb, unless upon the highest necessity; and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. The words of the Great Charter, c. 29, are "*Nemo liber homo capiatur, imprisonetur, vel aliquo modo destruat, nisi per le-*

gale judicium parium suorum aut per legem terræ. No freeman shall be taken, imprisoned, or any way destroyed, unless by the lawful judgment of his peers, or by the law of the land." Which words, *aliquo modo destruat*, according to Coke, include a prohibition not only of killing or maiming, but also of torturing, (to which our laws are strangers,) and of every oppression by colour of an illegal authority. And it is enacted by 5 *Edw. 3. c. 9.* that no man shall be attached by any accusation, nor forejudged of life or limb, nor shall his lands or goods be seized into the king's hands contrary to the Great Charter, and the law of the land. And again by 28 *Edw. 3. c. 3.* that no man shall be put to death without being brought to answer by due process of law. 1 *Comm.* 133.

The right of personal liberty consists in the power of loco-motion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. On this right there is at present no occasion to enlarge. For the provisions made by the laws of England to secure it, see titles *Arrest*, *Bail*, *False Imprisonment*, *Habeas Corpus*, &c. &c.

The absolute right of property, inherent in every Englishman, consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only the laws of the land. The origin of private property is probably founded in nature; but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages in exchange for which every individual has resigned a part of his natural liberty. The laws of England are, therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the Great Charter, c. 29, has declared that no freeman shall be disseised or divested of his freehold, or of his liberties or free customs, (or be outlawed, banished, or otherwise destroyed, nor shall the king pass or send upon him,) but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes it is enacted, that no man's lands or goods shall be seized into the king's hands, against the Great Charter and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed and holden for none. See 5 *Edw. 3. c. 9*; 25 *Edw. 3. st. 5. c. 4*; ante, 28 *Edw. 3. c. 3.*

So great, moreover, is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community. In instances where the property of an individual is necessary to be obtained for the accommodation of the public, as in the case of enlarging or turning highways, all that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power indulged with caution, and which none but the legislature, or those acting under their immediate direction, can perform. See 13 *Geo. 3. c. 78*; and title *Way*.

Another effect of this right of private property is, that no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm, or the support of the government, but such as are imposed by his own consent, or that of his representatives in parliament. By 25 *Edw. 1. c. 5. 6.* it is provided that the king shall not take any aids or tasks, but by the common assent of the realm. And what the common assent is, is more fully explained by the instrument usually called the statute *de Tallagio non concedendo*, usually classed as statute 34 *Edw. 1. st. 4. c. 1*; which enacts that no tallage or aid shall be taken, without the assent of the archbishops, bishops, earls, barons, knights, burgesses,

and other freemen of the land; and again, by 14 *Edw. 3. st. 2. c. 1.* the prelates, earls, barons, and commons, citizens, burgesses, and merchants, shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded, under many preceding princes, by compulsive loans and benevolences, extorted without a real and voluntary consent, it was made an article in the Petition of Right, 3 *Car. 1.* that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And lastly, by the Bill of Rights, 1 *W. & M. st. 2. c. 2.* it is declared, that levying money for or to the use of the crown by pretence of prerogative, without grant of parliament, or for longer time, or in other manner than the same is or shall be granted, is illegal. 1 *Comm.* 140.

The above is a short view of the principal absolute rights which appertain to every Englishman; and the constitution has provided for the security of their actual enjoyment, by establishing certain other auxiliary, subordinate, rights, which serve principally as outworks or barriers to protect and maintain those principal rights inviolate. These are,

The constitution, powers, and privileges of parliament.

The limitation of the king's prerogative.

The right of applying to courts of justice for redress of injuries.

The right of petitioning the king or parliament.

The right of having arms for defence.

This last auxiliary right of the subjects of having arms for their defence, suitable to their condition and degree, and such as are allowed by law, is declared by the Bill of Rights; and it is, indeed, a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanction of society and laws are found insufficient to restrain the violence of oppression. See tit. *Arms*.

As to the first and second of the subordinate rights above mentioned, see titles *King, Parliament*. With respect to the third and fourth, some short information is here subjoined.

Since the law is, in England, the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *Magna Charta, c. 29.* spoken in the person of the king, who, in judgment of law, (says Sir *Edw. Coke*.) is ever present, and repeating them in all his courts, are these: "*Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam.*"—To none will we sell, to none will we deny, or delay, right or justice." And therefore every subject, for injury to him in his goods, his lands, or his person, by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay. 2 *Inst.* 55.

It were endless to enumerate all the affirmative acts of parliament wherein justice is directed to be done according to the law of the land; and what that law is every subject knows, or may know if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament. A few negative statutes may however be mentioned, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. It is ordained by *Magna Charta, c. 29.* that no freeman shall be outlawed, that is, put out of the protection and benefit of the law, but according to the laws of the land. By 2 *Edw. 3. c. 8*; 11 *Ric. 2. c. 10.* it is enacted, "that no commands or letters shall be sent under the great seal, or the little seal, the signet or privy seal, in disturbance of the law; or to disturb or delay common right; and though such commandments should come, the judges shall not cease to do right." This is also made a part of their oath, by 18

Edw. 3. st. 4. And by the Bill of Rights it is declared, that the pretended power of suspending or dispensing with laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

Not only the substantial part, or judicial decisions of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament; for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice, but then they must proceed according to the old established forms of the common law; for which reason it is declared in the 16 *Car. 1. c. 10.* upon the dissolution of the Court of Star Chamber, that neither his majesty nor his privy council have any jurisdiction, power, or authority, by English bill, petition, articles, or libel (which were the course of proceedings in the Star Chamber, borrowed from the civil law,) or by any other arbitrary way whatsoever, to examine or draw into question, or dispose of, the lands or goods of any subjects of this kingdom, but that the same ought to be tried and determined in the ordinary courts of justice, and by course of law. See *Chancery, Courts, Judges, &c.*

The right of petitioning the king, or either house of parliament, for the redress of grievances, appertains to every individual in cases of any uncommon injury or infringement of the rights already particularized, which the ordinary course of law is too defective to reach. The restrictions, for some there are, which are laid upon the right of petitioning in England, while they promote the spirit of peace, are no check upon that of liberty; care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult, as happened in the opening of the memorable parliament in 1640, and to prevent this, it is provided by 15 *Car. 2. st. 1. c. 5.* that no petition to the king or either house of parliament, for any alteration in church and state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury in the county, and in London by the lord mayor, aldermen, and common council; nor shall any petition be presented by more than ten persons at a time: but under these regulations it is declared by the Bill of Rights, that the subject hath a right to petition, and that all commitments and prosecutions for such petitioning are illegal. The sanction of the grand jury may be given either at the assizes or quarter sessions: the punishment for offending against the 15 *Car. 2.* not to exceed a fine of 100*l.* and three months imprisonment. Upon the trial of Lord *George Gordon*, the Court of King's Bench declared that they were clearly of opinion that this statute was not in any degree affected by the Bill of Rights. *Dougl.* 571.

In the several articles above enumerated, consist the *Rights*, or, as they are more frequently termed, the *Liberties of Englishmen*—liberties more generally talked of than thoroughly understood, and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon they are founded, should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other; and all these rights and liberties it is our birth-right to enjoy entire, unless where the laws of the country have laid them under necessary restraints—restraints in themselves so gentle, and so moderate, as will appear on minute inquiry that no man of sense or probity would wish to see them slackened; for all of us have it in our choice to do every thing that a good man would desire to do, and are restrained from nothing but what would be pernicious either to ourselves or our fellow-citizens: so that this review of our situation may fully justify the observation, that the *English is the only nation in the world where political or civil liberty is the direct end of its constitution.* *Montesq. Sp. L.* xi. 5. See 1 *Comm.* c. 1. *ad fin.*

LIBERTY TO HOLD PLEAS. Signifies to have a court of one's own, and to hold it before a mayor, bailiff, &c. See *Franchise*.

LIBLACUM. The manner of bewitching any person; also a barbarous sacrifice. *Leg. Athelstan*, 6.

LIBRÆ, ARSÆ, and PENSATÆ, and AD NUMERUM. A phrase which often occurs in the *Domesday Register* and some other memorials of that and the next age, as "Ailesbury, in Buckinghamshire, the king's manor. *In totis valentis reddit lvi libr. arsas et pensatas, & de thelonio x libr. ad numerum*, i. e. in the whole value it pays fifty-six pounds burnt and weighed, and for toll ten pounds by tale." For they sometimes took their money *ad numerum*, by tale in the current coin upon consent; but sometimes they rejected the common coin by tale, and money coined elsewhere than at the king's mint, by cities, bishops, and noblemen, who had mints, as of too great alloy, and would therefore melt it down to take it by weight when purified from the dross: for which purpose they had in those times always a fire ready in the Exchequer to burn the money and then weigh it. *Concill.* See further, *So H. Ellis's General Introduction to Domesday Book*, vol. 1, p. 121.

LIBRA PENSA. A pound of money in weight. See the preceding article.

LIBRARY. Where a library is erected in any parish, it shall be preserved for the uses directed by the founders; and incumbents and ministers of parishes, &c. are to give security therefore, and make catalogues of the books, &c. None of the books shall be alienable without consent of the bishop, and then only where there is a duplicate of such books; if any book shall be taken away and detained, a justice's warrant may be issued to search for and restore the same; also action of trover may be brought in the name of the proper ordinary, &c. And bishops have power to make rules and orders concerning libraries, appoint persons to view their condition, and inquire of the state of them in their visitation. *7 Ann. c. 14.*

Cotton Library settled in the family for the use of the public, *12 & 13 Wm. 3. c. 5*; vested in the crown, *5 Ann. c. 30*; transferred to the British Museum, *26 Geo. 2. c. 22*; *27 Geo. 2. c. 11. § 3.*

LIBRATA TERRÆ. Four oxgangs of land, every oxgang containing thirteen acres. *Skene, verb. Librata terræ.* So much land, anciently, as was worth twenty shillings a year: for in Henry the Third's time, he that had *quindecim libras terræ*, was to receive the order of knighthood. See *Farding-deal*.

LICENCE [licentia.] A power or authority given to a man to do some lawful act; and is a personal liberty to the party to whom given, which cannot be transferred over; but it may be made to a man, or his assigns, &c. *12 Hen. 7. 25.* There may be a parol licence, as well as by deed in writing; but if it be not for a certain time, it passes no interest. *2 Nels. Abr. 1123.* And if there be no time certain in the licence, as if a man license another to dig clay, &c. in his land, but doth not say for how long, the licence may be countermanded; though if it be until such a time, he cannot. *Poph. 161.* If a lessor license his lessee (who is restrained by covenant from aliening without licence) to alien, and such lessor dies before he aliens, this is no countermand of the licence: so it is if the lessor grants over his estate. *Cro. Jac. 133.* But where a lord of a manor for life granteth a licence to a copyhold tenant to alien, and dieth, the licence is destroyed, and the power of alienation ceaseth. *1 Inst. 52.* Copyhold tenants leasing their copyhold for a longer time than one year, are to have a licence for it, or they incur a forfeiture of their estates. *1 Inst. 63.* If any licence is given to a person, and he abuses it, he shall be adjudged a trespasser *ab initio*. *8 Rep. 146.*

A grants to B. a way over his ground, or licence to go through it to the church; by this none but B. himself may

go in it. But if one give me licence to go over his land with my plough, or to cut down a tree therein, and take it away, by this I may take what help is needful to do the same. So if it be to hunt, and kill, and carry away deer; not if it be to hunt and kill only. *12 Hen. 7. 25*; *13 Hen. 7. 8*; *8 Rep. 146.*

A mere licence to enjoy a privilege in land, may be granted without deed, and even without writing, notwithstanding the Statute of Frauds. *Say. 3*; *Palm. 81*; *8 East, 310*; *7 Bing. 682.* See further *Copyhold, Lights, Trespass, Way, &c.*

By licence a man may practise physic and surgery in London, and do divers other things. Licences are also necessary for the carrying on various trades and professions, on which a duty is laid for the purpose of raising a revenue to government. See *Taxes*.

LICENCE TO ALIEN IN MORTMAIN. Alienations in mortmain to ecclesiastical persons, &c. are restrained by several statutes; but the king may grant licences to any person or bodies politic, &c. to alien or hold lands in mortmain. See *7 & 8 Wm. 3. c. 37*; and *tits. Charitable Uses, Mortmain*.

LICENCE TO ARISE [licentia surgendi.] A liberty or space of time anciently given by the court to a tenant to arise out of his bed, who was essoigned *de malo lecti*, in a real action; and it was also the writ thereupon. *Bracton.* And the law in that case was, that the tenant might not arise or go out of his chamber until he had been viewed by knights thereto appointed, and had a day assigned to him to appear; the reason whereof was, that it might be known whether he caused himself to be essoigned deceitfully or not; and if the demandant could prove that he was seen abroad before the view or licence of the court, he should be taken to be deceitfully essoigned, and to have made default. *Bract. lib. 5*; *Fleta, lib. 6. c. 10.* See *Essoin*.

LICENCE TO FOUND A CHURCH. Granted by the king. See *Church*.

LICENCE TO GO TO ELECTION of bishops, is by *congrê d'elire* directed to the dean and chapter to elect the person named by the king, &c. *Reg. Writs, 294.* *25 Hen. 8. c. 20.* See *Bishops*.

LICENCE OF THE KING to go beyond sea may be revoked before the time expires, because it concerns the public good. *Jenk. Cent.* See *Ne exeat Regnum*.

LICENCE OF MARRIAGE. Bishops have power to grant licences for the marrying of persons; and parsons marrying any person without publishing the bans of matrimony, or without licence, incur a forfeiture of 100*l.* &c. by *7 & 8 Wm. 3. c. 35.* See also *4 Geo. 4. c. 76*; and *tit. Marriage*.

LICENCE TO ERECT A PARK, WARREN, &c. See *Park, Warren*.

LICENSING OF BOOKS. See *Libel, Printing*.

LICENTIA CONCORDANDI. Is that licence for which the king's silver was paid on passing a fine. See *Fine of Lands*.

LICENTIA SURGENDI. See *Licence to arise*.

LICENTIA TRANSFRETANDI. A writ or warrant directed to the keeper of the port of Dover, or other seaport, commanding them to let such persons pass over sea, who have obtained the king's licence thereunto. *Reg. Orig. 193.*

LICKING OF THUMBS. A form by which bargains of importance were amicably completed, and still in use in trifling bargains among the lower orders. *Scotch. Dict.*

LIDFORD LAW. A proverbial speech, intending as much as to hang a man first, and judge him afterwards.

LIEGE [Ligeus.] Is used for liege lord, and sometimes for liege man. Liege lord is he that acknowledgeth no superior; and liege man is he who oweth allegiance to his liege lord. The king's subjects are called liege people, because they owe and are bound to pay allegiance to him.

8 *Hen. 6. c. 10*; 14 *Hen. 8. c. 2*. But in ancient times, private persons, as lords of manors, &c. had their lieges. *Skene* saith, that this word is derived from the Italian *liga*, a bond or league; others derive it from *litis*, which is a man wholly at the command of the lord. *Blount*. See *Allegiance*.

LIEGES and LIEGE PEOPLE [*Ligati*.] See *Liege*.

LIEGE POUSTIE. A state of health, in contradistinction to death-bed. A person possessed of the lawful power (*legitima potestas*) of disposing, is said to be in *liege poustie*.

LIEN [*Fr.*] Is a word used in the law, of two significations; personal lien, such as bond, covenant, or contract; and real lien, a judgment, statute, recognizance, which oblige and affect the land. *Terms de Ley*.

It signifies an obligation, tie, or claim annexed to, or attaching upon, any property; without satisfying which such property cannot be demanded by its owner.

In 2 *East*, 235, Lord *Ellenborough* defined a lien to be a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied.

The possession must be lawful: a creditor cannot tortiously seize upon his debtor's goods, and then claim to retain them by virtue of a lien. 2 *Moore*, 730. See 8 *Price*, 547.

There are two kinds of lien known to the law, viz. particular or general. 3 *B. & P.* 494. A particular lien is a right to retain the thing itself in respect of which the claim arises. 4 *Burr.* 2214, 2223; 7 *East*, 230. A general lien is a right to hold, not only for demands arising out of the thing retained, but for a general balance of accounts relating to dealings of the like character.

The former is recognized and favoured by the common law, with some exceptions. See 1 *Atk.* 228; *Doug.* 100. But the latter is regarded strictly, and is only to be established either by express contract, or by that which is evidence of a contract, (6 *T. R.* 14,) the usage of trade, (7 *East*, 224,) or previous dealings between the same parties wherein such a right has been allowed. 1 *Atk.* 236; 4 *Burr.* 2221.

1. Who have particular liens.
2. Who have general liens.
3. How a lien may be lost or waived.

1. When a person has bestowed labour and skill in the alteration or improvement of any article delivered to him, he has a lien on it for his charge. Thus a tailor, (9 *East*, 433) a miller and shipwright, (1 *Atk.* 235; 4 *B. & A.* 341), have each a lien; so has a farrier for the expense of keeping and training a race-horse, for, by his instruction he has wrought an essential improvement in the animal's character and capabilities. 1 *M. & M.* 256. But the rule does not appear to extend to keepers of livery stables, *R. & M.* 193; 1 *C. & M.* 743; although it does to innkeepers, principally on the ground, it would seem, that the latter are bound by law to entertain travellers, and to take care of their goods and horses. See 3 *B. & A.* 288; and tit. *Innkeepers*, III.

Every one, whether an attorney or not, has by the common law a lien on the specific deed or paper delivered to him to do any specific work or business upon; but not on other papers of the same party, unless he be an attorney. 4 *Taunt.* 807.

The master of a ship has no lien on it for money expended, or debts incurred by him for repairs done to it on the voyage. 9 *East*, 426. 1 *B. & A.* 575.

2. An attorney has a lien for his general balance on papers of his client which come to his hands in the course of his professional employment. 1 *M. & S.* 535. A factor has a lien upon each portion of goods in his possession for his general balance, as well as for the charges upon those particular goods. 6 *T. R.* 262; 2 *East*, 529. So have packers, where they are in the nature of factors. 4 *Burr.* 2214. Bankers also have a lien upon bills deposited with them for

a general account, 5 *T. R.* 488; 1 *B. & P.* 546; 9 *East*, 14; but not on securities pledged with them for a specific sum; 3 *Bro. C. C.* 21; or on muniments casually left in their banking-houses after they have refused to advance money upon them. 7 *Taunt.* 278. Policy brokers have also a general lien. 4 *Campb.* 60, 349. It has likewise been determined that calico-printers, 3 *Esp.* 268; dyers, 4 *Esp.* 53; and wharfingers, 1 *Esp.* 109; 3 *Esp.* 81; have liens for their general balance, but not fullers; 2 *B. Moore*, 547.

A printer has a general lien upon the copies of a work not delivered, for his balance. 3 *M. & S.* 167.

The lien of a common carrier for his general balance, however it may arise in point of law from an implied agreement to be inferred from a general usage of trade, proved by instances sufficiently numerous and general to warrant so extensive a conclusion, affecting the custom of the realm, is not to be favoured; nor can it be supported by a few recent instances of detention of goods by four or five carriers for their general balance. But such a lien may be inferred from evidence of the particular words of dealing between the respective parties. 6 *East*, 519. See also 7 *East*, 224.

3. Goods subject to a lien are in the nature of a pledge, 3 *T. R.* 123; 6 *T. R.* 263; which being personal, cannot be transferred, 5 *T. R.* 606; 1 *East*, 337; so that if they are parted with, the lien in general is lost; 1 *Burr.* 494; 1 *Bla.* 114; 1 *East*, 4.

But where the master of a ship, in obedience to revenue regulations, lands goods at a particular wharf or dock, he does not thereby lose his lien on them for the freight. 1 *M. & S.* 157.

If a party having a lien on goods cause them to be taken in execution at his own suit, and purchase them, he so alters the nature of the possession, that his lien is destroyed, though the goods may never have left his premises. 8 *Taunt.* 149. So if he abuse the goods, as for instance by pledging them, his lien is forfeited. 1 *M. & Rob.* 252; 3 *Tyrr.* 577.

Where a person, when goods are demanded from him, claims to retain them on some other ground, and makes no mention of his lien, he will be considered as having waived it. 1 *Campb.* 410, n.; 6 *B. & C.* 36.

The right of lien may also be lost or waived by the special agreement of the parties. If a factor enter into a contract inconsistent with the exercise of the right (as if he stipulate for a particular mode of payment,) he must be understood as waiving it. 16 *Ves.* 280; 6 *T. R.* 258; 7 *T. R.* 64.

A vendor who takes a promissory note in payment, and negotiates it, loses his lien, nor is it revived by the dishonour of the note outstanding in the hands of an indorsee. 5 *T. R.* 313; 3 *B. & A.* 497; 6 *B. & C.* 373; 1 *N. & M.* 229. See further *Attorney, Factor, &c.*

LIEU. Instead or in place of another thing. And when one thing doth come in the place of another, it shall be of the same nature as that was; as in case of an exchange, &c. 2 *Shep. Abr.* 359. See *Exchange*.

LIEU CONUS. In law proceedings signifies a castle, manor, or other notorious place, well known and generally taken notice of by those that dwell about it. 2 *Lil. Abr.* 641. A *venire facias* for a jury to appear, may be from a *lieu conus*; and a fine or recovery of lands in *lieu conus*, was good; but it is said in a *scire facias* to have execution of such fine, the will or parish must have been named. 2 *Cro.* 574; 2 *Mod.* 48, 49.

LIEUTENANT [*Locum Tenens*.] Is the king's deputy, or he that exercises the king's or any other's place, and represents his person; as the Lieutenant of Ireland. See 4 *Hen. 4. c. 6*; 2 & 3 *Edm. 6. c. 2*. The Lieutenant of the Ordnance. See 39 *Eliz. c. 7*. And the Lieutenant of the Tower, an officer under the Constable, &c. The word lieutenant is also used for a military officer next in command to the captain.

LIFE ESTATES. Estates of freehold, not of inheritance. Of these some are conventional, or expressly created by the act of the parties; others merely legal, or created by construction and operation of law. See *Curtsey, Dower, Estates Tail, Tail after Possibility, &c.*

Expressly for life estates, created by deed or grant, (which alone are properly conventional,) are, where a lease is made of lands or tenements to a man to hold for the term of his own life, or for that of any other person, or for more lives than one; in any of which cases he is styled tenant for life; only when he holds the estate by life of another, he is usually called *tenant pur autre vie* (for another's life.) *Lit. § 56.*

These estates for life are, like inheritance, of a feudal nature; and were for some time the highest estate that any man could have in a feud. See *Tenures*. They are given and conferred by the same feudal rights and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty it demanded, and such conventional rents and services as the lord and lessor and his tenant or lessee have agreed on. *2 Comm. c. 8. p. 120.*

Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As if one grant to A. B. the manor of Dale, this makes him tenant for life. *Co. Lit. 42.* For though, as there are no words of inheritance or heirs mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or grant for term of life generally, shall be construed to be an estate for the life of the grantee, in case the grantor hath authority to make such a grant; for an estate for a man's own life is more beneficial and of a higher nature than for any other life, and the rule of law is, that all grants are to be taken most strongly against the grantor, unless in the case of the king. *Co. Lit. 36, 42.*

Such estates for life will endure, generally speaking, as long as the life for which they are granted; but there are some estates for life which may determine upon future contingencies before the life which they are created express. As if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these and similar cases, whichever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. *Co. Lit. 42; 3 Rep. 20.* Yet while they subsist, they are reckoned estates for life, because the time for which they will endure being uncertain, they may by possibility last for life; if the contingencies upon which they are to determine do not sooner happen.

In case an estate be granted to a man for his life generally, it may also determine by his civil death; for which reasons, in conveyances the grant is usually made for the term of a man's natural life, which can only determine by his natural death. This civil death was formerly held to commence if any man was banished or abjured the realm, by the process of the common law, (see *Abjuration*), or entered into religion, that is, went into a monastery, and became there a monk professed, in which cases he was absolutely dead in law, and his next heir should have his estate; for such banished man was entirely cut off from society; and such monk, upon his profession, renounced solemnly all secular concerns. But even in the times of Popery the laws of England took no cognizance of profession in any foreign country, because the fact could not be tried in our courts. *Co. Lit. 132;* and, therefore, since the Reformation this disability is held to be abolished, *1 Salk. 162;* as is also the disability of banishment consequent upon abjuration, by *21 Jac. 1. c. 28.* One species of civil death may, however, still exist in this country, that is, where a man by act of parliament is attainted of treason or felony, and, saving his life, is banished for ever; this Lord Coke declares to be a civil

death; but he says, a temporary exile is not a civil death. Under this reasoning, where a man receives judgment of death, and afterwards leaves the kingdom for life, upon a conditional pardon, there can be very little doubt but this amounts to a civil death; this practice did not exist in the time of Lord Coke, who says, that a man can only lose his country by authority of parliament. *1 Inst. 133.* See *1 Comm. c. 1. p. 131, 133, and n.*

The incidents to an estate for life are principally the following, which are applicable not only to those species of tenants for life, which are expressly created by deed, but also to those which are created by act and operation of law. See *2 Comm. c. 8.*

First, every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable estovers or botes. *Co. Lit. 41.* For he hath a right to the full enjoyment and use of the land, and all its profits, during his estate therein. See *Common of Estovers*. But he is not permitted to cut down timber, or do other waste upon the premises; for the destruction of such things as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate, but tends to the permanent and lasting loss of the person entitled to the inheritance. *1 Inst. 53.* See *Waste*.

In the second place, Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate; because such a determination is contingent and uncertain. *Co. Lit. 55.* Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the emblements or profits of the crop; for the estate was determined by the hand of God, and it is a maxim in the law, *actus Dei nemini facit injuriam*. The representatives therefore of the tenant for life shall have the emblements to compensate for the labour and expense of tilling, manuring, and sowing the lands, and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. Wherefore by the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord who was entitled to the reversion was also entitled to the profits of the whole year; but if he died between the beginning of March and the end of August, the heirs of the tenant received the whole. From hence our law of emblements seems to have been derived, but with very considerable improvements; and its advantages are particularly extended to the parochial clergy by *25 Hen. 8. c. 11;* for all persons who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of the donation. *1 Comm. c. 8. p. 122, 123.* See title *Emblements*.

A third incident to estates for life relates to the under-tenants or lessees; for they have the same, nay, greater indulgencies than their lessors, the original tenants for life. The same; for the law of estovers and emblements, with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place. *Co. Lit. 55.* Greater, for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate*; her taking a husband is her own act, and therefore deprives her of the emblements; but if she leases her estate to an under-tenant, who sows the lands, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her. *Cro. Eliz. 461; 1 Rol. Abr. 727.* The lessees of tenants for life had also at the common law another most unreasonable advantage; for at the death of their lessors, the tenants for life, these under-tenants might, if they pleased, quit the premises, and pay no rent to any body for the occupation of the land, since the last quarter-day, or other

day assigned for payment of rent. 10 Rep. 127. To remedy which, it was enacted by 11 Geo. 2. c. 19. § 15, that the executors or administrators of tenant for life, on whose death any lease determines, shall recover of the lessee a rateable proportion of rent, from the last day of payment to the death of such lessor.

By the 4 & 5 Wm. 4. c. 22. the provisions of the above act are extended to rents reserved on leases determining on the death of the persons making them, (though not strictly tenants for life,) or on leases of lands held *pur autre vie*.

By § 2. all rents-service, rents-charge, and other rents, annuities, pensions, moduses, compositions, and all other payments due at fixed periods, reserved in leases made, or payable under instruments executed, or (being a will) coming into operation, after the passing of the act, shall be apportioned, and a proportionable part thereof, from the last time of payment to the day of the death of the party interested therein, paid to his or her executors, &c. See further *Rent*.

By 19 Car. 2. c. 6. where persons for whose lives estates are held, shall absent themselves for seven years, they shall be presumed dead. And by 6 Ann. c. 18. persons for whose lives estates are held, shall, on application to the lord chancellor, be produced. The tenant holding after the determination of the life, deemed a trespasser. See *Death*. Posthumous children enabled to take in remainder, where the life estate is determined. 10 & 11 W. 3. c. 16. See *Occupancy*.

LIFE RENT. A rent which a man receives for term of life, or the sustentation of it. *Skena*.

LIGEANCE [*Legeancy, ligentia.*] The true and faithful obedience of a subject to his sovereign; and is also applied to the territory and dominion of the liege lord; as children born out of the ligeance of the king, &c. 25 Edw. 3; *Co. Lit.* 129. See *Allegiance*.

LIGHTING AND WATCHING. By the 11 Geo. 4. c. 27. provision was made for the lighting and watching of parishes in England and Wales. But doubts having arisen as to the construction of some of its clauses, that act was repealed by the 3 & 4 W. 4. c. 90. The latter statute (§ 5.) enacts, that on the application of three rated inhabitants the churchwardens of any parish are to convene a meeting of the rate-payers to determine whether the provisions of the act shall be adopted. By § 8. the majority in favour of the adoption must consist of two-thirds of the votes of the rate-payers.

LIGHTS. A right to the enjoyment of light and air may have its commencement in an express agreement, or in mere occupancy. If I have an ancient window overlooking my neighbour's ground, he may not erect any blind to obstruct the light; but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him than me. 2 Comm. 402. Every man in his own land has a right to all the light and air which will come to him, and he may erect, even on the extremity of his land, buildings, with as many windows as he pleases, without any consent of the owner of the adjoining lands. After he has erected his building, the owner of the adjoining land may within twenty years build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies, from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his own land shall continue to enjoy his light without obstruction so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It does not, indeed, imply that the consent is given by way of grant; for light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant which the law would imply not to inter-

rupt the free use of the light and air. Per *Littledale*, J. 3 B. & Cr. 340. See 2 B. & Cr. 691.

A parol licence given to put out a window, after it has been acted on and expense incurred, cannot be revoked. 8 East, 308.

The enjoyment of lights for twenty years without any obstruction from the party entitled to object, has been long held to be a sufficient foundation for raising the presumption of an agreement not to obstruct them. 2 B. & Cr. 686; *Darwin v. Upton*, cited 3 T. R. 159; 2 Wms. Saund. 175.

Previous, however, to the recent act (2 & 3 W. 4. c. 71.) the acquiescence of lessees or tenants for life in the enjoyment of lights did not bind the landlord or reversioner, unless they had knowledge and acquiesced for twenty years; and a presumption against the owner of lands was not so easily inferred in the case of lights as in cases of rights of way or common, where the tenant suffered an immediate injury. Thus it was held, that an enjoyment of lights for more than twenty years, during the occupation of the opposite premises, by a tenant, did not preclude his landlord, who was ignorant of the fact, from disputing the right to such enjoyment; although he would have been bound by twenty years acquiescence after having known that the windows were opened. 11 East, 370. So where light had been enjoyed for more than twenty years contiguous to land which within that period had been glebe land, but was conveyed to a purchaser under the 55 Geo. 3. c. 147., it was decided that no action would lie against such purchaser for building so as to obstruct the lights; inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed. 4 B. & Ald. 579. See also 2 B. & Cr. 686.

Now by the 2 & 3 W. 4. c. 71. § 3. when the access and use of light to and from any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Under the above clause an absolute right to light may be acquired by an enjoyment without interruption for twenty years, as the eighth section of the act, providing for possession during particular estates, does not extend to lights.

A man cannot derogate from his own grant, and therefore where a person possesses a house, having the actual use of certain lights, and also possesses the adjoining land, and sells the house to another, although the lights be new, neither he nor any one claiming under him can build on the adjoining land, so as to obstruct or interrupt the enjoyment of such lights. 1 Lev. 122; 1 Ventr. 237; 1 Price, 27; 1 R. & M. 24; 1 M. & M. 398; 9 Bing. 804; 2 Cr. & Jerv. 128. Upon the same principle, where several adjoining portions of land, on which the building of houses had been commenced, were sold, and by the conditions of sale were to be finished according to a particular plan within the space of two years, it was held that a purchaser of one of the lots could not, by erecting an additional building at the back of his house, obstruct the light from the windows of another purchaser who had built his house according to the plan. 1 Price, 27. For the lots were sold under an implied condition, that nothing should be done by which the windows for which spaces were then left might be obstructed. *Ibid.* And where the plaintiff purchased a house of A., and the defendant at the same time purchased the adjoining land, upon which an erection of one story high had formerly stood, although in the conveyance to the plaintiff his house was described as bounded by building ground belonging to the defendant; it was held, that the defendant was not entitled to build a greater height than one story, if by so doing he obstructed the plaintiff's lights. 9 Bing. 305.

Shutting up windows with bricks and mortar for above twenty years will destroy the privilege of light. 3 Campb.

514. And the right to the use of light and air, which a party has appropriated to his own use, may be lost by a mere non-user, even for a less period than twenty years, unless an intention of resuming the right in a reasonable time be shown when it ceased to be used. Thus where a person entitled to ancient lights pulled down his house, and erected a blank wall in the place of a wall in which there had been windows, and suffered such blank wall to remain about seventeen years, and the defendant erected a building against it, when the plaintiff opened a window in the same place where there had formerly been a window in the old wall, it was held, in an action for obstructing the light of the new window, that it must at least be shown (which the plaintiff was bound to prove) that at the time of the erection of the blank wall, and the apparent abandonment of the former lights, it was not a perpetual but a temporary abandonment of the enjoyment, with an intention to resume it at a reasonable time. *3 B. & Cr. 536*. And it was said by *Littledale, J.*, that if a man pulls down a house, and does not make any use of the land for two or three years, or converts it into tillage, he may be taken to have abandoned all intention of rebuilding the house; and, consequently, that his right to the light had ceased. But if he builds upon the same site, and places windows in the same spot, or does any thing to show that he did not mean to convert the land to a different purpose, then his right would not cease. *Ibid.* 341.

Stopping lights of a house is a nuisance, but stopping a prospect is not, being only matter of delight, not of necessity; and a person may have either an assize of nuisance against the person erecting any such nuisance, or he may stand on his own ground and abate it. *9 R. p. 53; 1 Mod. 54*.

When a party has acquired a right to the use of light, an action lies on the case for obstructing it. *9 Rep. 59 a; Bury v. Pope, 1 Lum. 108*. In order to sustain such an action, it is not necessary to show a total privation of light. If the plaintiff can prove that by reason of the obstruction he cannot enjoy the light in so free and ample a manner as he did before, it will be sufficient. *4 Esp. 69*. Where an ancient window is closed, the owner of the adjoining land cannot lawfully obstruct the passage of light to any part of the house occupied by the ancient window, although a greater portion of light be admitted by the unobstructed part of the charged window than was anciently enjoyed. *3 Campb. 80*. A building, after having been used for twenty years as a malt-house, is converted into a dwelling-house, it is entitled in its new state only to the same degree of light which it possessed in its former state. *1 Campb. 322*. So where an old house is pulled down and a new one built, the light in the new house must be in the same place, of the same dimensions, and not more in number than in the old house. *2 Lum. 646*. Where one party has the enjoyment of light, and alterations are made in the adjoining buildings, the diminution of light, as a ground of action against the party building, must be such as makes the premises to a sensible degree less fit for the purposes of business or occupation. *5 Cur. & P. 301, 328*. The opening of a window, whereby the plaintiff's privacy is disturbed, is not actionable; the only remedy is to build on the adjoining land, opposite the offensive window. *3 Campb. 80*. See *9 R. p. 186, 4 Esp. N. P. C. 69*. So the building of a wall which merely intercepts the prospect of another window obstructing his lights, is not actionable. *1 Mod. 57, 2 Keb. 111, 612*. See *2 Ves. sen. 453*. In a recent case it was held, that the use of an open space of ground for the purpose of requiring light and air, as a timber yard and saw-pit, for twenty years, did not give a right to preclude the adjoining owner from building on his land so as to obstruct the light and air. *1 Moo. & Rob. 240*. A reversioner may maintain an action for obstructing lights, for if he were prevented from suing for such an injury during the continuance of the lease, he might have great difficulty in proving his right when he came into possession. *1 Mood. & Malk. 350*. See *3 Taunt.*

139. And if the obstruction be continued, a new action may be maintained, notwithstanding the former recovery. *2 B. & Adol. 97*. And the owner of the inheritance of a house may maintain an action against his own lessee for obstructing lights. *Say. R. 215*. See also *Burr. 2141; 3 Leo. 109*. Such an action may be brought not only against the party who first erected the nuisance, but also his lessee or assignee for continuing it. *12 Mod. 635; 2 Salk. 460; 1 Ld. Raym. 713*. See also *Carth. 456; 1 Keb. 194*. But after damages have been recovered from the lessor the right of action against the lessee will be barred, as but one satisfaction will be given, *12 Mod. 640; Carth. 455*; unless a continuance of the nuisance be laid in the declaration. Not only the person who erected the obstruction, and the occupier of the premises where it is erected, but even the workmen who performed, and the clerk who superintended the works, are liable to an action. *6 B. Moore, 47*.

The court of Chancery will grant an injunction to restrain the owner of a house from making any erection or improvements, so as to darken or obstruct the ancient lights or windows of an adjoining house. *2 Russ. 121*.

The foundation of the jurisdiction to interfere by injunction in these cases is such material injury to the comfort of those who dwell in the neighbouring house, as to require the application of a power to prevent as well as remedy an evil, for which damages, more or less, would be given at law; but the court will not interfere upon every degree of darkening ancient lights, nor in every case where an action may be maintained. *16 Ves. 338*. See *Injunction*.

LIGHT-HOUSE. See *Beacon*.

LIGNAGIUM. The right of cutting of fuel in woods; and sometimes it is taken for a tribute or payment due for the same.

LIGNAMINA. Timber fit for building. *Dufresne*.

LIGULA. A copy or transcript of a court-roll or deed mentioned by Sir John Maynard in his *Mem. in Scaccar.* *12 Edm. 1*.

LIGURITOR. A flatterer. *Leg. Canut. 29*. Somner is of opinion that it signifies a glutton, from the Saxon *licera, gulonus*. *Cowell*.

LIMBS. The limbs as well as the life of a man are of such high value, in the estimation of the law of England, that it pardons even homicide, if committed *se defendendo*, or in order to preserve them. *1 Comm. 130*. See *Assault, Homicide, Murther*.

LIMITATION.

[LIMITATIO.] A certain time, assigned by statute, within which an action must be brought. In Scotland it is termed *Prescription*.

I. *The Nature and Origin of Periods of Limitation.*

II. *The various Statutes of Limitation as applicable to—*
1, *Actions relating to Real Property*; 2, *Penal*; and, 3, *Personal Actions*.

III. *Of the Time when the Right of Action accrues so as to be affected by the Statute (21 Jac. 1. c. 16.) and of the Courts bound thereby.*

IV. *The Exceptions in that Statute—*1, *Relating to Infants*; 2, *Merchants' Accounts*; 3, *Persons beyond Sea*; 4, *Executors and Administrators*; 5, *In cases of Defect in Jurisdiction*; 6, *Of suing out a Writ to save the Statute*; 7, *Of reviving a Debt barred by the Statute*; 8, *Of Pleading*.

I. The time of limitation is two-fold; first, in writs by divers acts of parliament; secondly, to make a title to any inheritance, and that is by the common law. *Co. Lit. 114, 115*.

It seems that by the common law there was no stated or fixed time to bring actions; for though it be said by *Bracton*, that *omnes actiones in mundo infra certa tempora limitationem habent*; yet Lord Coke says, that the limitation of actions

was by force of divers acts of parliament; also, says he, this general position of *Bracton's* admitted of several exceptions. *Bract. lib. 2. fol. 228; 2 Inst. 95; Co. Lit. 115; 4 Co. 10, 11.*

But by the ancient law there was a stated time for the heir of the tenant to claim after the death of his ancestor, that is to say, a year and a day after he was fourteen years old, or else he lost his land, according to the feudal text; *Præterea si quis infeudatus major quatuordecim annis sua incuria, vel negligentia per ann. et diem steterit, quod feudi investituram à proprio domino non petierit, transacto hoc spatio, feudum amittit et ad dominum redeat. Spelm. Gloss. 32.*

The fixing upon the period of a year and a day, upon several other occasions, seems to have been deduced from this ancient rule; and on this occasion was pitched upon because the services appointed seem to be annually computed; therefore the feud was ordered to be taken up within such time as such annual services became due, or else it was lost and returned to the lord; and the same time that was appointed to the tenant to claim from the lord was also appointed to make his claim upon any disseisor; and if no such claim was made, the disseisor dying seised cast the right of possession upon the heir; and this was to keep the same uniformity in point of time through the law, as also that the lord might be at a certainty whom he might take for his tenant, and admit upon every descent; and since the heir of the tenant anciently lost the whole land, in case he did not take it up within time, it was fit the tenant should lose the right and possession, in case he did not claim within the same time upon the disseisor; that the heir of the disseisor might be in peace, in case the person that had right did not make his claim upon him, and that from thenceforth the lord might receive him into his feud; and as upon the ancient plan of feudal constitution, if the heir did not take up the feud within a year and a day, a desertion and dereliction was presumed; so also if the disseisee did not claim within the same time, the right of possession was relinquished. *Spelm. Gloss. annus et dies, 32, 33.*

Before the 32 Hen. 8. c. 2. certain remarkable periods were fixed upon within which the titles whereon men designed to be relieved must have accrued; thus in the time of Henry III. by the statute of Merton, 20 Hen. 3. c. 8. at which time the limitation in a writ of right was from the time of King Henry I. it was reduced to the time of King Henry II.; and for assizes of *mort d'ancestor*, they were thereby reduced by the last return of King John out of Ireland, which was 12 *Johannis*; and for assizes of *novel disseisin*, à *prima translatione Regis in Normanniam*, which was 5 Hen. 2. and which before that had been *post ultimum reditum Henrici III. de Britannia*: and this limitation was also afterwards by the statutes *Westm. 1. (3 Edw. 1.) c. 39. and Westm. 2. (3 Edw. 1.) c. 46.* reduced to a narrower compass, the writ of right being limited to the first coronation of Henry III. For these ancient limitations, see *Co. Lit. 14 b, 15 a; 2 Inst. 94, 95; 2 Rol. Abr. 111; Hale's Hist. of the Law, 122; 2 Keb. 45.* This last date of limitation continued so long unaltered, that it became indeed no limitation at all; it being above three hundred years from Henry III.'s coronation to the year 1540, when the Statute of Limitations, 32 Hen. 8. c. 2. was made. This statute, therefore, instead of limiting actions from the date of a particular event, as before, which in process of years grew abused, took another and more direct course, which might endure for ever, by limiting a certain period of time previous to the commencement of every suit. See 3 *Comm. c. 10. p. 189.*

Since the passing of that act, various other statutes of limitation have been enacted, which will be noticed under the next division.

By 21 Jac. 1. c. 2. a time of limitation was extended to the case of the King, viz. sixty years precedent to February 19, 1623; 3 *Inst. 189.* But this becoming ineffectual by efflux of time, the same term of limitation was fixed, by 9 Geo. 3.

c. 16. to commence and be reckoned backwards, from the time of bringing any suit or other process, to recover the thing in question; so that a possession for sixty years is now a bar even against the prerogative, in derogation of the ancient maxim, *nullum tempus occurrit regi.* And the like provision was extended to Ireland by 18 Geo. 3. c. 47. The King is likewise bound by the Prescription Act. (2 & 3 W. 4. c. 71.) and by the Modus Act (2 & 3 W. 4. c. 100.) See tit. King, V. 2.

II. 1. By 32 Hen. 8. c. 2. it is enacted, "That no person shall from thenceforth sue, have, or maintain any writ of right, or make any prescription, title, or claim, to or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments, of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor, which hath been, or now is, or shall be seised of the said manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments, within *threescore* years next before the *teste* of the same writ, or next before the said prescription, title, or claim so hereafter to be sued, commenced, brought, made, or had." See title *Possession.*

Par. 2. "No manner of person shall sue, have, or maintain, any assize of *mort d'ancestor*, *cosenage*, *ayle*, writ of entry upon disseisin, done to any of his ancestors or predecessors, or any manors, lands, tenements, or other hereditaments, of any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his or their ancestor or predecessor, which was, or hereafter shall be seised of the same manors, lands, tenements, or other hereditaments, within *fifty* years next before the *teste* of the original of the same writ hereafter to be brought."

Par. 3. "No person shall sue, have, or maintain any action for any manors, lands, tenements, or other hereditaments, of or upon his or their own seisin or possession therein, above *thirty* years next before the *teste* of the original of the same writ hereafter to be brought."

Par. 4. "No person shall hereafter make any avowry or cognizance for any rent, suit, or service, and allege any seisin of any rent, suit, or service, in the same avowry or cognizance in the possession of any other, whose estates shall pretend or claim to have, above *fifty* years next before the making of the said avowry or cognizance."

Fifty years is the true term of limitation in this instance though *Rastall's*, and some other editions of the statute, make it only forty years; an error adopted by *Coke (2 Inst. 95.)* and other writers. See 3 *Comm. c. 10. p. 189. in n.*

Par. 5. "All *formedons* in reverter, *formedons* in remainder, and *scire facies* upon fines of any manors, lands, tenements, or other hereditaments, at any time hereafter to be sued, shall be sued and taken within *fifty* years next after the title and cause of action fallen, and at no time after the *fifty* years past."

In this statute are contained provisions for suits depending or to be commenced within six years after passing the act, also for parties being at the time of the act under age, covert, or otherwise disabled: but there are no general savings in this act for any such disabilities.

By 1 Mar. st. 2. c. 5. it was enacted that the 32 Hen. 8. c. 2. should not extend to any writ of right of advowson, *quare impedit*, or assize of *darrein presentment*, nor *jus patronatus*, nor to any writ of right of ward, writ of *ravishment* of ward for the wardship of the body, or for the wardship of any castles, honours, manors, lands, tenements, or hereditaments, holden by knight-service; but that such suits might be brought as before the making of the said act.

There was, therefore, no limitation with regard to the time within which any actions touching advowsons were to be brought; at least none later than the times of Richard I. and

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Henry III. previous to the recent act 3 & 4 W. 4. c. 27. See *post*.

By 21 Jac 1. c. 16. which the preamble declares to be for quieting men's estates, and avoiding of suits, it is enacted, § 1. "That all writs of formoden in descender, formoden in remainder, and formoden in reverter, at any time hereafter to be sued or brought of or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session of parliament; and after the said twenty years expired, no person or persons, or any of their heirs, shall have or maintain any such writ of or for any of the said manors, lands, tenements, or hereditaments; and that all writs of formoden in descender, formoden in remainder, formoden in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title, or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; and that no person or persons that now hath any right or title of entry, into any manors, lands, tenements, or hereditaments, now held from him or them, shall ~~enter~~ enter, but within twenty years next after the end of this present session of parliament, or within twenty years next after any other title of entry accrued; and that no person or persons shall at any time hereafter make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same; and in default thereof such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law, &c."

"Provided, that if any person or persons that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be, at the time of the said right or title first descended, accrued, come, or fallen, within the age of one-and-twenty years, feme covert, *non compos mentis*, imprisoned, or beyond the seas; that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act; so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take the benefit of and sue forth the same, and at no time after the said ten years."

By the 3 & 4 W. 4. c. 27., founded upon the first report of the Real Property Commissioners, and entitled "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," a variety of most important changes have been introduced: real actions, with one or two exceptions, have been abolished, and twenty years adopted as the leading period of limitation.

§ 1 Enacts, "That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent," shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or pay-

able out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things, as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male."

§ 2. "That after the 31st December, 1833, no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same."

§ 3. "That in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in the receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such disposition or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will to him, or some person through whom he claims, by a person being in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then

such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken."

This clause introduces an important alteration in the law with respect to landlords and tenants. Under the 21 Jac. 1. c. 16. the mere non-payment of rent by a lessee was not considered as raising an adverse possession in him, which would cause that statute to operate, although the non-payment had extended over a period of more than 20 years. 2 Bos. & P. 542. Now, however, in consequence of the above section declaring that a party's right of entry shall be deemed to have accrued at the last time at which rent was received, it follows that 20 years' possession by a tenant, without payment of rent, or any acknowledgment in writing of the owner's title (see § 14.) will be a complete bar to the landlord.

§ 4. "That when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened."

A remainder-man or reversioner is not bound to take advantage of a forfeiture, but may waive it, and wait until the expiration of the particular estate, before he proceeds to make his entry, or bring his action. 1 Ves. sen. 278. The object, therefore, of the above section is to continue to him his option.

§ 5. "That a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent."

§ 6. "That for the purposes of this act, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration."

The intention of this section is to get rid of a practical inconvenience which resulted from the former state of the law, under which it had been decided that as the property of an intestate only vested in his administrator from the time of the grant of administration (see 5. B. & A. 744,) the Statute of Limitations, as to rights accruing after the death of the deceased, only began to run from the obtaining of such grant. Consequently a right to a term of years might have been kept alive for an indefinite period, notwithstanding adverse possession, by delay or neglect to administer on the part of the next of kin.

§ 7. "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

§ 8. "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)."

§ 9. "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

Previous to this act, if there was a subsisting lease, a right of entry was preserved to the owner until the determination of the term, although no rent had been received by him. *Orwell v. Maddox, Runn, Eject. No. 1*; nor did the adverse receipt of rent by another person for upwards of twenty years, deprive the party of his right of entry at the expiration of the lease. 7 East, 299; and see 2 Sch. & Lef. C. 25.

§ 10. "That no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon."

§ 11. "That no continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action."

§ 12. "That when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them."

This section alters the rule of law that the possession of any one coparcener, joint tenant, or tenant in common, was the possession of the others of them, so as to prevent their being barred by the former statutes of limitation. Possession by one coparcener created a seisin in another, which carried her share by descent to her heirs, although she never actually entered, 7 T. R. 386; and the entry of one coparcener, when not adverse to the rest, enured to the benefit of all. *Co. Lit. 243 b.*; 6 East, 173.

Neither was the receipt of the rents and profits by one held to be as an ouster of the others. *Co. Lit. 243 b. n. (1).* 373 b. 1 *Salk. 285*. Thus the bare receipt of rent for twenty or more years by a tenant in common, without accounting to the other, was considered to be no evidence of ouster. 5 Burr. 2604. But possession for 40 years by one tenant in common, where there was no evidence of any account having been demanded, or any rent paid, or of any claim on the part of the lessors of the plaintiff, or of any acknowledgment of title in them, or in those under whom they claimed, was held sufficient

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ground for the jury to presume an actual ouster. *Comp.* 207. And a claim of the whole, by one tenant in common in possession, who denied possession to the other, was decided to be evidence of an ouster of the latter. *11 East*, 49.

§ 18. "That when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir."

This clause is also an alteration of the law. Where a younger son, on the death of his father, entered by abatement into his lands, and had issue, and died seized thereof, the elder son, or his issue, might enter, notwithstanding the descent, nor did the Statute of Limitation operate; as the law intended that when the younger son abated into the land, he entered claiming as heir to his father, and the elder son, or his issue, claimed by the same title. See *Lit.* 396.

§ 11. "Provided always, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

§ 15. "Provided also, that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this act."

§ 16. "Provided, that if at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened)."

Imprisonment, which was one of the disabilities comprised in the *21 Jac. 1. c. 16.* is omitted in the above section, as well as in the *2 & 3 W. 4. c. 71.* and *2 & 3 W. 4. c. 100.*

§ 17. "Provided nevertheless, that no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such

disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired."

§ 18. "Provided always, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person."

Under the *21 Jac. 1. c. 16.* the time when that statute began to run, might be protracted for an indefinite period by a succession of disabilities in the person having the right of entry, or his heir, provided that no interval between such disabilities to which the statute could attach, occurred; for when once the statute began to run, no subsequent disability, whether voluntary or involuntary, would prevent its operation. *4 T. R.* 310; *4 Taunt.* 826; *6 East*, 80.

§ 19. "That no part of the united kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his majesty) shall be deemed to be beyond seas within the meaning of this act."

§ 20. "That when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after, or in defeasance of such estate or interest in possession."

§ 21. "That when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred."

§ 22. "That when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred, shall make an entry or distress or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action."

These two last clauses effect a great alteration, with respect to persons having remainders in reversion dependant upon estates tail. The *21 Jac. 1. c. 16.* in no case began to operate with respect to any individual, until his title to the possession had accrued; and, therefore, as the right of entry of a remainder-man did not arise until the failure of the

The former statutes of limitation were held not to bar the right but only the remedy. 1 *Saund.* 282, *a. n.*; 2 *B. & Ad.* 418. The present act has wisely put an end to such an absurd distinction.

§ 35. "That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act."

§ 36. "That no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisis, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein-presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation dum fuit non compos mentis, dum fuit infra etatem, dum fuit in prisona, ad communem legem, in causu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejectit infra terminum, or ad terminum qui præterit, or causa matrimonii prælocuti, writ of aiel, besaiei, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei de forceat, writ of covenant real, writ of warrantia chartar, writ of curia claudenda, or writ per quam servitia, and no other action real or mixed (except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment,) and no plant in the nature of any such writ or action (except a plaint for freebench or dower), shall be brought after the 31st December, 1834."

§ 37. "Provided always, that when, on the said 31st December, 1834, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the 1st June, 1835, in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired."

§ 38. "Provided also, that when, on the said 1st June, 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said 1st of June, 1835, but only within the period during which by virtue of the provisions of this act an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away."

§ 39. "That no descent cast, discontinuance, or warranty which may happen or be made after the said 31st December, 1833, shall toll or defeat any right of entry or action for the recovery of land."

§ 40. "That after the said 31st December, 1833, no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled

thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

§ 41. "That after the said 31st December, 1833, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit."

§ 42. "That after the said 31st December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

§ 43. "That after the said 31st December, 1833, no person claiming any tithes, legacy, or other property for the recovery of which he might bring an action or suit at law or in equity shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity."

§ 44. "Provided always, that this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland."

It is to be observed, that in consequence of the abolition of fines by the 3 & 4 Wm. 4. c. 74. a title to lands can no longer be obtained by a fine levied with proclamations, and non-claim for five years under the provisions of the 4 H. 7. c. 24. See tit. *Fine of Lands*.

2. By 31 *Eliz. c. 5. par. 5*, it is enacted, "That all actions, suits, bills, indictments, or informations, which shall be brought for any forfeiture upon any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the queen, &c. shall be brought within two years after the offence: and that all actions, suits, bills, or informations, which shall be brought for any forfeiture upon any penal statute, made or to be made, except the statutes of tillage, the benefit and suit whereof is or shall be by the said statute limited to the queen, her heirs or successors, and to any other that shall prosecute in that behalf, shall be brought by any person that may lawfully sue for the same within one year next after the offence committed; and in default of such pursuit, that then the same shall be brought for the queen's majesty, her heirs or successors, any time within the two years after that year ended. Where a shorter time is limited by any penal statute, the prosecution must be within that time."

Also see 18 *Eliz. c. 5*; 21 *Jac. 1. c. 4*; the former requiring a memorandum of the day of exhibiting an information, the latter an oath from the informer.

In the construction of these statutes it hath been holden. That the 21 *Jac. 1. c. 4*, does not extend to any offence created since that statute; so that prosecutions on subsequent penal statutes are not restrained thereby, but that statute is to them as it were repealed *pro tanto*. 1 *Salk.* 373:

5 Mod. 425. And that the said statute, 21 Jac. 1. only applies to those penal statutes, on which proceedings may be had before the justices of assize, justices of the peace, &c. 3 Term Rep. 362.

That if an offence prohibited by any penal statute be also an offence at common law, the prosecution of it as of an offence at common law, is no way restrained by any of these statutes. Hob. 270; 4 Mod. 144.

That if an information *tam quam* be brought after the year on a penal statute, which gives one moiety to the informer, and the other to the king, it is naught only as to the informer, but good for the king. Cro. Car. 391; Cro. Jac. 386. See Dalis. 60.

That if a suit on a penal statute be brought after the limited time, the defendant need not plead the statute, but may take advantage of it on the general issue. 1 Show. 353.

It seems doubtful whether the suit by a common informer on a penal statute, which first gives an action to the party grieved, and in his default, after a certain time, to any one who will sue, be within the restraint of these statutes. 1 Show. 353, 354.

The party grieved was not within the restraint of these statutes, but might have sued in the same manner as before. Cro. Eliz. 645; Noy, 71; 3 Leon. 237.

But by the 9 & 4 Will. 4. c. 42. § 3. all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, shall be commenced and sued within two years after the cause of such actions or suits, but not after.

It has been held by three judges, that suing out a *latitat* within the year was a sufficient commencement of the suit to save the limitation of time on a penal statute; because the *latitat* is the original in *B. R.* and may be continued on record as an original. But Holt held otherwise, for the action being for a penalty given by a statute, the plaintiff might have brought an action of debt by original in *B. R.* because the statute gives the action; and he held, that there was a difference between a civil action, and an action given by statute; for in the first case, the suing out a *latitat* within the time, and continuing it afterwards, will be sufficient; but in the other case, if the party proceeds by bill, he ought to file his bill within the time, that it may appear so to be on the record itself. Carth. 232, 233 n. 353. But upon a writ of error, all the judges in the Exchequer Chamber held, that a *latitat* is a kind of original in the King's Bench. 2 Ld. Raym. 883. And accordingly, in two subsequent cases, it was holden to be a good commencement of the suit in a penal action. 2 Burr. 950; 3 Burr. 1243; Comp. 454.

See as to limitation of indictments, and informations in criminal cases, *Indictment*, *Information*, *Quo Warranto*, *Treason*, &c.

2. By the 21 Jac. 1. c. 16. § 3. it is enacted, that all actions of trespass *quare clausum fregit*, trespass, detinue, trover, and replevin for taking away of goods and cattle; all actions of account and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants; all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent; and all actions of assault, menace, battery, wounding, and imprisonment of them, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say), the said actions upon the case (other than for slander), and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for

words, within two years next after the words spoken, and not after.

By § 4. where judgment is given for a plaintiff, and reversed by writ of error; or if judgment for a plaintiff be arrested, or if a defendant in an action by original be outlawed, and the outlawry reversed, the plaintiff may commence a new action within twelve months after such reversal or arrest of judgment respectively, though it be beyond the time of limitation directed by the statute.

By § 7. an exception is introduced in favour of persons within the age of twenty-one, *femes covert*, persons *non compos mentis*, imprisoned, or beyond seas, who are at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to, or being of full age, discovery, of sane memory, at large, and return from beyond the seas, as other persons having no such impediment should have done. And see 3 & 4 Wm. 4. c. 42. § 7. *post*, as to what places shall not be deemed to be beyond the seas within this act.

The action of assumpsit is not mentioned *eo nomine* in the statute; but the last proviso extends not only to those actions therein enumerated, but also to an assumpsit and all other actions on the case. *Bac. Abr. Lim. of Act.* [1. 1.] In all cases, therefore, where assumpsit is maintainable, the above statute applies.

Under the head of actions upon the case are included actions for libels, criminal conversation, seduction, and actions for such words as are not actionable without a special damage; and all other actions on the case, being of equal mischief, and plainly within the intention of the legislature. See Cro. Car. 245, 333; 2 Saund. 120; 2 Mod. 71; 1 Sid. 455; 3 Comm. c. 8. p. 307, *in n.* As to actions in the Admiralty for seaman's wages, see *post*, III.

Where the plaintiff complained of a plea of trespass, for that the defendant with force and arms assaulted and seduced the plaintiff's wife, whereby he lost the comfort of her society &c., against the peace &c., to his damage &c.; whether this be trespass or case, (and former authorities have considered it to be case,) at any rate a plea of 'not guilty within six years' is good on a general demurrer, 6 East, 387.

It seems, that if a man brings trespass for beating his servant, *per quod servitium amisit*, this is not such an action as is within the branch of the statute relating to actions of trespass, being founded on the special damage. 1 Salk. 206; 5 Mod. 74.

If to an action of assault, battery, and imprisonment, the defendant pleads, as to the assault and imprisonment, the statute of limitations, without answering particularly to the battery, otherwise than by using the words *transgressio prædicta*, it is sufficient; for these words are an answer to the whole. 1 Lev. 31.

In the construction of the branch of the statute relating to words it hath been holden,

That an action of *scandalum magnatum* is not within the statute. Lit. Rep. 342; 3 Keb. 645.

That it extends not to actions for slander of title; for that is not properly slander, but a cause of damage; and the slander intended by the statute is to the person. Cro. Car. 141.

That if the words are of themselves actionable, without the necessity of alleging special damages, although a loss ensues, yet in this case the statute of limitations is a good bar; but if the words, at the time of the speaking of them, are not actionable, but a subsequent loss ensues, which entitles the plaintiff to his action, in such case the statute is no bar. 1 Sid. 95; Raym. 61; and see 3 Mod. 111.

That if an action for words be founded upon an indictment, or other matter of record, it is not within this statute. 1 Sid. 95.

By 27 Geo. 3. c. 44. suits in ecclesiastical courts for defamatory words must be commenced within six months.

It was adjudged, that an action of debt on 2 & 3 Ed. 6. c. 13. for not setting out tithes, was not within the 21 Jac. 1. c. 16; the action being grounded on an act of parliament, which is the highest record. *Cro. Car.* 513; *Talory v. Jackson*, 1 *Saund.* 38; 2 *Saund.* 66; 1 *Sid.* 305, 415; 1 *Keb.* 95; 2 *Keb.* 462.

But by the 53 Geo. 3. c. 127. § 5. no action shall be brought for recovery of any penalty for not setting out tithes, nor any suit instituted in any Court of Equity, or Ecclesiastical Court, to recover the value of any tithes, unless such action be brought or such suit commenced within six years from the time when such tithes became due.

So it was held an action of debt for rent reserved on a lease by indenture was out of the statute, the lease by indenture being equal to a specialty. *Hutt.* 109; 1 *Saund.* 38.

Also an action of debt for an escape was not within the statute; not only because it is founded in *maleficio*, and arises on a contract in law, which is different from those actions of debt on a lending or contract mentioned in the statute, but also because it is grounded on 1 *Rich.* 2. c. 12. which first gave an action of debt for an escape, there being no remedy for creditors before, but by action on the case. 1 *Saund.* 37; *Jones v. Pope*, 1 *Lev.* 191; 2 *Keb.* 908; 1 *Sid.* 305.

Neither did the statute extend to actions of covenant, nor to any actions of debt in specialties, or other matter of a higher nature. 1 *Saund.* 38. Thus a *scire facias* being founded in matter of record was not within the act.

So this statute could not be pleaded to an action of debt brought against a sheriff for money by him levied on a *feri facias*; because the action is founded in *maleficio*, as also upon the judgment on which the *feri facias* issued, which is a matter of record. 1 *Mod.* 212, 245; 2 *Show.* 79.

And an action of debt on an award under the hand and seal of the arbitrators, though the submission was by parol, was not within the statute. 2 *Saund.* 64; *Sid.* 415; 1 *Lev.* 273; 1 *Keb.* 462, 496, 533.

Nor an action of debt for a fine of a copyholder. 1 *Keb.* 536; 1 *Lev.* 273.

Neither was an action of debt upon bond within the statute, *Comp.* 102; but after a lapse of twenty years, without payment of interest or any acknowledgment of it by the obligor, the law presumed it to be satisfied, 1 *Term Rep.* 270, and in some cases satisfaction was presumed within that period. 1 *Burr.* 131, n. (n); 1 *Term Rep.* 270; 1 *Comp.* 26.

Now by the 3 & 4 Wm. 4. c. 42. with a view of fixing a period of limitation for such actions as had been held not to be within the 21 Jac. 1. c. 16. it is enacted, § 3. "that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *feri facias*, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation herein-after expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for

bringing such action is or shall be by any statute specially limited."

But by § 4. "if any person or persons that is or are or shall be entitled to any such action or suit, or to such *scire facias*, is or are or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after the coming to or being of full age, *discovert*, of sound memory or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and if any person or persons against whom there shall be any such cause of action is or are, or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas."

§ 5. Provided, "that if acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff or plaintiffs in any such action on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute."

§ 6. "If in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

§ 7. No part of the united kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his majesty, shall be deemed to be beyond the seas within the meaning of this act, or of the 21 Jac. 1. c. 16.

For the clause of the above statute permitting actions of trespass, or trespass on the case to be maintained by or against executors or administrators for injuries done to the real estate of the deceased persons in their life-times, or by the latter to the real and personal property of others, provided the cause of action has accrued, and the action is brought within the time prescribed by the act. See tit. *Executor*, VI. 1.

The statute of limitations (21 Jac. 1. c. 16.) bars the remedy, not the debt. Therefore an attorney retains his lien on a judgment for his costs, though his remedy by action is barred. 2 *B. & Ad.* 413.

III. 1. The 21 Jac. 1. c. 16. cannot be a bar unless the six years

are expired, after there hath been complete cause of action; as if a man promise to pay 10*l.* to J. S. when he came from Rome, or when he marries, and ten years after J. S. marries, or comes from Rome, the right of action accrues from the happening of the contingency; from which time the statute shall be a bar, and not from the time of promise. *Godb.* 437.

So in an action on the case wherein the plaintiff declared, that in consideration that he would forbear to sue the defendant for some sheep killed by the defendant's dog, the defendant promised to make him satisfaction upon request, and that at such a time he requested, &c. it was held that the right of action accrued from the request, not from the time of killing the sheep; that therefore the defendant could not plead the statute of limitations, the request being within six years, though the killing the sheep and promise of satisfaction was long before. *Godb.* 437. See also 1 *Lev.* 48; 1 *Sid.* 66; 1 *Keb.* 177.

And where the plaintiff declared that in consideration, he, at the defendant's request, would receive A. and B. into his house as guests and diet them, the defendant promised &c.; it was held that the statute began to run from the time of the dieting, and not from the time of making the promise. 2 *Salk.* 422; *S. C.* 2 *Lord Ray.* 888.

So if a note or bill of exchange is given, payable at a certain time after date, the cause of action does not accrue until after the expiration of the time specified; and if an action is brought within six years after that time, the statute is not a bar. But if the suit is not commenced within six years after that time, the defendant may plead that the cause of action did not accrue within six years, but he must not plead that he did not promise within six years, i. e. if he is the person first liable to the payment, because the promise is made at the time of making the notes, &c. It may be otherwise in the case of an indorser, who is not liable until default made by the drawer of the note, or acceptor of the bill, but in this case *non accret infra sex annos* is a safe and good plea. And see 1 *Vent.* 191; 3 *Keb.* 613; *Cro. Car.* 245, 6, 353; 1 *John.* 52; 3 *Mod.* 110, &c.; *Allen*, 62; 2 *Salk.* 420; *Comb.* 26; 1 *H. Black.* 681.

The statute is no bar to a bill payable at a specified time after sight, unless it has been presented for payment, for debt does not accrue upon such a bill until it is presented. 2 *Taunt.* 323.

And the statute was held no bar to an action on a promissory note, dated about thirteen years before and payable twenty-four months after demand, no demand having been made until within three years before action brought. 1 *R. & M.* 888. But a promissory note payable on demand is payable immediately; and the statute runs from the date of the note. 1 *Selm. N. P.* 137.

Where a demand is necessary to complete the cause of action, the statute only runs from the time of such demand. But in some cases, after a reasonable period has elapsed, a jury may presume that the demand has been made. See 1 *Taunt.* 572.

Where the breach of a contract is attended with special damage, the statute runs from the time of the breach, and not from the time it was discovered or the damage arose. 2 *B. & B.* 78; 3 *B. & A.* 288, 626.

In trover the statute runs from the conversion, 7 *Mod.* 99; 4 *Esp.* 20; and in other actions founded upon tort, from the time when the cause of action is complete.

Where the agreement on the sale of goods was for payment at the end of six months by a bill at two or three months at the option of the purchaser: held, (Park, J. diss.) that this was a credit for nine months, and that the statute did not begin to run till the expiration of that time. 2 *B. & Ad.* 431.

It has been agreed, that the statute of limitations is no plea in the Court of Admiralty or Spiritual Court, where they proceed according to their law, and in a matter in which they have cognizance. 6 *Mod.* 25, 26; 2 *Salk.* 424; 3 *Keb.* 386, 392.

Therefore, for a suit upon a contract *super altum mare*, no prohibition should go upon their refusal of a plea of the statute of limitations. 3 *Mod.* 26.

So it has been held not to be pleadable to a proceeding in the Spiritual Court, *pro violenta manuum injectione in clericum*, because the proceeding is *pro reformatione morum*, not for damages. 2 *Salk.* 424.

It was formerly doubted, whether, to a suit in the Admiralty for mariners' wages, this statute was a good plea; because it was said, that this was a matter properly determinable at common law; and the allowing the Admiralty jurisdiction therein only a matter of indulgence. 2 *Salk.* 424; 6 *Mod.* 25.

But it was enacted by the 4 & 5 *Ann. c.* 16, that all suits and actions in the Court of Admiralty for seamen's wages shall be commenced and sued within six years next after the cause of such suits or actions shall accrue, and not after.

IV. 1. The statute 21 *Jac.* 1. c. 16, being general, infants had been included, had they not been particularly excepted. 1 *Lev.* 3.

It hath been holden, that if an infant, during his infancy, by his guardian, bring an action, the defendant cannot plead the statute of limitations; although the cause of action accrued six years before; and the words of the statute are, that after his coming of age, &c. 2 *Saund.* 121.

It hath been held in Chancery, that if one receives the profits of an infant's estate, and six years after his coming of age he brings a bill for an account, the statute of limitations is as much a bar to such a suit as if he had brought an action of account at common law; for this receipt of the profits of an infant's estate is not such a trust as, being a creature of the court of equity, the statute shall be no bar to; for he might have his action of account against him at law, and therefore no necessity to come into this court for the account; for the reason why the bills for an account are brought here, is from the nature of the demand, and that they may have a discovery of books, papers, and the party's oath, for the more easy taking of the account, which cannot be so well done at law; but if the infant lies by for six years after he comes of age, as he is barred of his action of account at law, so shall he be of his remedy in this court. 1 *Abr. Eg.* 304, c. 10; *Pre. Ch.* 518.

2. It hath been a matter of much controversy, whether the exception relative to a merchant's accounts extends to all actions and accounts relating to merchants and merchandize, or to actions of account open and current only; the words of the statute being, "All actions of trespass, &c. all actions of account and upon the case, other than such actions as concern the trade of merchants;" so that by the words, other than such actions, not being said actions of account, it has been insisted that all actions concerning merchants are excepted. But it is now settled, that accounts open and current only are within the statute; that therefore if an account be stated and settled between merchant and merchant, and a sum certain agreed to be due to one of them, if in such case he to whom the money is due does not bring his action within the limited time, he is barred by the statute. See 1 *Jon.* 401; 2 *Saund.* 124, 125; 1 *Lev.* 287, 298; 2 *Keb.* 622; 1 *Vent.* 90; 1 *Mod.* 270; 2 *Mod.* 312; 2 *Vern.* 456.

So it hath been adjudged, that by the exception in the statute concerning merchants' accounts, no other actions are excepted but actions of accounts. *Carth.* 226. But the law is now held to be, that the exception applies to actions on the case. 2 *Will. Saund.* 127, b. n. (7).

Also it hath been adjudged, that bills of exchange for value received are not such matters of account as are intended by the exception in the statute of limitations. *Carth.* 226.

An open current account, between tradesmen or others, is not within the statute, supposing the last article of the debt in the account was contracted within the last six years; otherwise, in such case, the statute is a bar. *J. M.*

This exception does not extend to a tradesman's account

with his customer; for in this case there are not mutual dealings; and the tradesman is barred by the statute from recovering for more than those articles which have been sold within six years. *Bull. N. P.* 149. See *Rothery v. Munnings*, 1 B. & Adol. 15, *acc.* *Quære*. Whether, in case of a bill for work done (as a proctor's), the right of action accrues *de die in diem*, or whether it is incomplete till the completion of the business in hand? *Ibid.*

3. The clause of the statute, as to persons beyond sea, extends only to such as are actually so. For where to *non assumpsit infra sex annos*, the plaintiff replied, that, when the cause of action accrued, he was resident in foreign parts out of the kingdom of England, viz. Glasgow in Scotland; this was held ill, on demurrer; Scotland not being a foreign part within the meaning of the statute, the express words of which are, beyond the seas. 1 B. 256. Therefore a foreigner, or person resident abroad, shall never be barred from bringing his action, from any length of time while out of the kingdom, for the statute does not begin to run until he has come into it; though any of the persons, who are under the disabilities mentioned in the statute, may nevertheless, during the time such disabilities exist, bring their actions. *Espinasse, N.P.* 149, 150.

If the plaintiff be in England at the time the cause of action accrues, the time of limitation begins to run, so that if he, or (if he dies abroad) his representative, does not sue within six years, he is barred by the statute. 1 *Wils. par.* 1, 134.

If one only of a number of partners lives abroad, if the others be in England, the action must be brought within six years after the cause of action arises. 4 *T. R.* 516.

It seems to have been agreed, that the exception extends only where the creditors or plaintiffs are so absent, and not to debtors or defendants, because the first only are mentioned in the statute; and this construction has the rather prevailed, because it was reputed the creditor's folly that he did not file an original, and outlaw the debtor, which would have prevented the bar of the statute. *Cro. Car.* 245, 333; 1 *Jon.* 252; 1 *Lev.* 143; 3 *Mod.* 311; 2 *Lutw.* 950; 1 *Salk.* 420.

But as the creditor's being beyond sea is saved by 21 *Jac.* 1. c. 16; so now by 4 & 5 *Ann.* c. 16. it is enacted, that if any person or persons, against whom there is or shall be any cause of suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, action *sur trover* or replevin, for taking away goods or chattels, or of action of account, or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding, and imprisonment, or any of them, be, or shall be, at the time of any such cause of suit or action given or accrued, fallen or come, beyond the seas, that then such person or persons, who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person or persons after their return from beyond the seas, within such times as are limited for the bringing of the said actions by 21 *Jac.* 1. c. 16.

If the cause of action accrue in India, and the plaintiff sues the defendant in England within six years after the defendant's return to this country, according to the 4 *Anne*, c. 16. the defendant cannot plead the statute of limitations, although more than six years elapsed in India after the cause of action accrued there. 13 *East*, 439.

See now 3 & 4 *Will.* 4. c. 42. § 7. as to what places shall be deemed not beyond seas within the 21 *Jac.* 1. c. 16, *ante*, II.

A. received money belonging to a person who before died intestate, and to whom B. after such receipt took out administration, and brought an action against A. to which he pleaded the statute of limitations; the plaintiff replied, and shewed that administration was committed to him such a year, which was *infra sex annos*; though six years were expired since the receipt of the money, yet not being so since the administration committed, the action not barred by the statute. 1 *Salk.* 421; *Skin.* 555; 4 *Mod.* 376; *Latch.* 335.

It is said in general, that where one brings an action before the expiration of six years, and dies before judgment, the six years being then expired, this shall not prevent his executor. 2 *Salk.* 424, 425.

But if an executor sues upon a promissory note to the testator, and dies before judgment, and six years from the original cause of action are actually expired, and the executor brings a new action in four years after the first executor's death, the statute of limitations shall be a bar to such action; for though the debt does not become irrecoverable by an abatement of the action after the six years elapsed by the plaintiff's death; yet the executor should make a recent prosecution, to which the clause in the statute, § 4. that provides a year after the reversal of a judgment, &c. may be a good direction, or show that he came as early as he could, because there was a contest about the will, or right of administration for the statute was made for the benefit of the defendants, to free them from actions when their witnesses were dead, or their vouchers lost. 2 *Stra.* 907; *Fitzgib.* 81.

Under the equity of the above-mentioned section, in all cases of executors, if the six years be not elapsed at the time of the testator's death, and the executor takes out proper process within the year, it will save the bar by reason of the limitation, even though the six years, within which the demand accrued, be elapsed before process sued out. *Bull. N. P.* 150; *Caver v. James, Trin.* 15 *Geo.* 2. C. B.

If there be no executor against whom the plaintiff may bring his action, he shall not be prejudiced by the statute of limitations, nor shall any laches in such cases be imputed to him, 2 *Vern.* 695; and so also where a bill of exchange was drawn, payable to the intestate in his life, but was accepted after his death, it was held, that the statute only began to run from the date of the letters of administration, for till that time there was no person capable of suing. 5 B. & A. 204; 8 B. & C. 285.

Where a party brings an action within the six years, and dies before judgment, the six years being then expired, it has been held that his executor or administrator may, within the equity of the fourth section of the 21 *Jac.* 1. c. 16. bring a new action, provided he does so within a reasonable time. 2 *Salk.* 425; 1 *Lutw.* 260. What is a reasonable time has not been expressly decided, although it seems to have been thought the period allowed should not exceed one year. See 1 *Lord Raym.* 484; 2 *Str.* 907; *Fitz.* 170, 289. And the executor ought to bring a new action as soon as he can, and at all events not delay it beyond a year. 2 *Saund.* 63 *h. note*.

5. It seems agreed, that there being no courts, or the courts of justice being shut, is no plea to avoid the bar of the statute of limitations; as where after the civil war a *assumpsit* was brought, and the defendant pleaded the statute of limitations; to which the plaintiff replied, that a civil war had broke out, and that the government was usurped by rebels, which hindered the course of justice, and by which the courts were shut up, and that within six years after the war ended he commenced his action; this replication was held, for the statute being general, must work upon all cases which are not exempted by the exception. 1 *Keb.* 157; *Lev.* 91; *Carth.* 157; 2 *Salk.* 420.

It is clearly agreed, that the defendant's being a member of parliament, and entitled to privilege, will not save a bar of the statute; because the plaintiff might have filed an original without being guilty of any breach of privilege. *Lev.* 31, 111; *Carth.* 136, 137.

It is said, that if a man sues in Chancery, and pending the suit there, the statute of limitations attaches on his demand, and his bill is afterwards dismissed, the matter being properly determinable at common law; in such case the court will preserve the plaintiff's right, and will not suffer the statute to be pleaded in bar to his demand. 1 *Vern.* 73, 74.

If the statute of limitations be pleaded to an action, the plaintiff to save his action may reply, that he had commenced

the suit in an inferior court within the time of limitation, and that it was removed to Westminster by *habeas corpus*, and this shall be allowed by a favourable construction of the statute of limitations; although in strictness the suit is commenced in the court above, when it is removed by *habeas corpus*. 1 Sid. 228; 3 Keb. 263; 1 Lev. 143; also see 2 Salk. 424; 2 Stra. 719; Bull. N. P. 151. See post, 6.

6. It is clearly agreed, that the suing out an original writ save a bar of the statute of limitations, and that thereupon the defendant may be outlawed; and that if beyond sea at the time of the outlawry, though it shall be reversed after his return, yet the plaintiff may bring another original by journey accounts, and thereby take advantage of his first writ. Carth. 156; 1 Salk. 420; 5 Mod. 311.

Also it is agreed, that the suing out a *latitat* is a sufficient commencement of a suit, to save the limitation of time, because the *latitat* is the original in B. R. and may be counted on record as an original writ. 1 Sid. 53, 60; Carth. 233; 1 Salk. 421; see ante, II, 2.

The same is law as to a bill of Middlesex. See Sty. 156, 178; 2 Lord Raym. 880, 1441; 1 Stra. 550; 2 Stra. 736; and 2 Burr. 961.

But if the suing out of a *latitat* be replied to a plea of the statute of limitations, the defendant, in order to maintain that plea, may aver the real time of suing it out in opposition to the *teste*. 2 Burr. 50. — And though the suing out an original, or *latitat*, will be a sufficient commencement of a suit; yet the plaintiff, in order to make it effectual, must show that he hath continued the writ to the time of the action brought. Carth. 144; 2 Salk. 420; 1 Lutw. 101, 254; 5 Mod. 35. The continuances may be entered up at any time before the plaintiff replies. The process sued and filed, and the continuances thereon, must be set forth by the plaintiff in his replication. See 3 T. R. 662; 1 Wils. 167; Esp. N. P. 153.

It is sufficient to prove a writ sued out within time, and a declaration within a year afterwards, without showing such writ returned, 7 T. R. 6; unless where the first writ is continued by subsequent writs sued out after the time of limitation. 6 T. R. 617; and see 2 Bos. & Pul. 157.

It is to be observed, that the above decisions are all prior to the Uniformity of Process Act, 2 Will. 4. c. 39; but the principle they establish will apply to cases where the new writs given by that act have been sued out. It may also be remarked, that by the general rules of H. T. 4 Will. 4. the entry of continuances is abolished.

Where a writ of summons under the 2 Will. 4. c. 39, tested in time to save the statute of limitations, was rescinded in consequence of an alteration in the description of the defendant and of his residence, and was not served till after the expiration of the six years; it was held that the rescinding did not amount to a reissuing of the writ, and that the plaintiff need not show when it took place. 2 C. & M. 408.

7. Assumpsit appears to be the only action in which it has been held that an acknowledgment or promise has the effect of taking the case out of the statute of 21 Jac. 1. c. 16. See 1 B. & A. 92; 3 Bng. 331; 6 B. & C. 605; although from the framing of the 9 Geo. 4. c. 14. hereafter noticed, Lord Tenterden seems to have thought that the doctrine was equally applicable to actions of debt on simple contract. The action of assumpsit must either be a case of guarantee, 1 B. & A. 690; or for a simple contract debt. Thus in 2 Campb. 160, Lord Ellenborough held, that if a cause of action, arising from the breach of contract in not doing an act (other than the payment of money) at a specific time, be once barred, no new acknowledgment or promise can revive it.

Previous to the 9 Geo. 4. c. 14. a parol acknowledgment (Carth. 470) or promise was sufficient to take the case out of the statute, but much inconvenience being found to result from such a state of the law, it was enacted by the above act, commonly called Lord Tenterden's Act, "That in actions of debt or upon the case, grounded upon any simple

contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operations of the said enactments, (of the Eng. Act, 21 Jac. 1. c. 16; and the Irish Act, 10 Car. 1. sess. 2. c. 6.) or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint-contractors, or executors, or administrators, of any contractor, no such joint-contractor, executor, or administrator, shall lose the benefit of the said enactment, or either of them, so as to be chargeable, in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them. Provided always, that nothing herein contained shall alter, or take away, or lessen the effect of payment of any principal or interest made by any person whatsoever: Provided also, that in actions to be commenced against two or more such joint-contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts or this act, as to one or more such joint-contractors, executors, or administrators, shall, nevertheless, be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment, or promise, or otherwise judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

§ 3. "No indorsement or memorandum of any payment, written or made after the time appointed for this act, to take effect upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes."

§ 4. "The said recited acts and this act shall be deemed, and taken to apply to the case of any debt or simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise."

The 9 Geo. 4. c. 14. has made no alteration with respect to the effect of payment of any part of the principal, or of any interest.

In the case of debt due from a single individual, it has been long established, that the payment of either part of the principal, or of interest, is an admission of the debt which would take it out of the statute.

And where there are several debtors, it has been held that a payment by one of them was sufficient to take the case out of the statute. Dougl. 652.

One of two makers of a joint and several promissory note having become a bankrupt, the payee receives a dividend under his commission, on account of the note; this will prevent the other maker from availing himself of the statute of limitations, in an action brought against him for the remainder of the money due on the note; the dividend having been received within six years before the action brought. 2 H. Bl. 340.

A payment by one of two makers of a joint and several note, operates as a promise to the full extent of the promise in the instrument, and consequently takes the note out of the statute, as against the administrator of the other, who died after the payment made. 8 B. & C. 36. which recognizes 2 H. Black. 340; and Dougl. 652. But after the death of one maker of a joint and several note, the joint-contract is severed, and a payment by the executor of the deceased will not take the note out of the statute against the surviving maker. 1 B. & A. 396; and see 2 B. & C. 23.

As to the payment of interest on a note given by parish officers, see 1 Ad. & E. 196; and as to the payment of principal and interest to one of two legatees, see 2 C. & M. 322; 4 Tyr. 94.

8. It seems to be admitted, that the statute of limitations

must be pleaded positively by him that would take advantage thereof; and that the same cannot be given in evidence, especially in an assumpsit, because the statute speaks of a time past, and relates to the time of making the promise. 1 Lev. 111; 1 Sid. 253; and see Cro. Jac. 115. See ante, II. 2.

But, in debt for rent, upon *nil debet* pleaded, the statute of limitations might have been given in evidence. 1 Salk. 278.

The modern practice however has been to plead the statute in debt as well as assumpsit, and it was held by Mr. Justice Bayley, that the statute could not be given in evidence on *nil debet*. *Woodhouse v. Williams*, Bac. Ab. Limitation of Actions, (F.) (7th ed.)

Now by the general rules of H. T. 4 W. 4. the plea of *nil debet* has been abolished, and consequently the statute must in all cases be pleaded.

Where the cause of action is to arise from an executory consideration, as some act to be performed, and a promise to pay in consequence of it, there *non assumpsit infra sex annos* is not the proper plea; for the assumpsit does not arise till the consideration is performed; it should be *actio non accrevit infra sex annos*. *Espinasse*, 156. See 2 Salk. 422.

In replevin the defendant pleaded Not guilty, *De capi' prædict' infra sex annos jam ultimo elapsos*; and though it was urged, that this was the same with pleading *non cepit*, and if he did not take, he could not be guilty of the detainer; and if this way of pleading were not allowed, the statute would be entirely evaded as to this action; yet the plea was held ill, because he ought to have answered to the detainer, as well as to the taking; also a thing may be lawfully distrained, although unlawfully kept; as by being put into a castle, &c. by which means it could not be replevied. 1 Sid. 81; Keb. 279; and see Lord Raym. 86; 1 Lev. 110; 1 Keb. 566.

If a debt be set off by way of plea, the statute of limitations may be replied to it. 2 Stra. 1271.

Evidence of an acknowledgment by the defendant within six years of an old existing debt, of above six years' standing, due to the plaintiff's intestate, but which acknowledgment was made after the intestate's death, will not support a count by the administrator, laying the promise to be made to his intestate, to which the statute of limitations was pleaded. 3 East, 409.

To an action brought by the assignees of an insolvent debtor, to recover money owing to him before his insolvency, in which the plaintiffs declare, that in consideration of the money being due to the insolvent the defendant promised to pay them as assignees, it is a bad plea to say that the cause of action first accrued to the insolvent before the plaintiffs became assignees, and that six years had elapsed before the cause of action accrued to the insolvent, and before the suing out of the writ. 2 H. Blackst. 561.

Assumpsit on a note payable by instalments; plea in bar as to the said several causes of action, except the last instalment, "that the said several causes of action did not nor did any of them accrue within six years;" held on special demurrer, that though some of the instalments might be barred, and the others not, yet, that the introduction to the plea and the body of it were inconsistent. 2 Bos. & Pul. 427.

See further, *Prescription*.

LIMITATION OF THE CROWN. See King, I.

LIMITATION OF ESTATE. A modification or settlement of an estate, determining how long it shall continue; or is rather a qualification of a precedent estate. A limitation by Littleton, a condition in law. Lit. § 980; 1 Inst. 234.—It is generally made by such words as *durante vita*, *quandiu*, *dum*, &c. And if there be not a performance according to the limitation, it shall determine an estate without entry or claim; which a condition doth not. 10 Rep. 41; 1 Inst. 204. See *Condition*, I. 2.

Limitation is also taken for the compass and time of an estate; or where one doth give lands to a man, to hold to him and to his heirs male, and to him and the heirs female,

&c., here the daughters shall not have any thing in it so long as there is a male, for the estate to the heirs male is first limited. Co. Lit. 3, 13.

If a limitation of an estate be uncertain, the limitation is void; and the estate shall remain as if there had been no such limitation. Cro. Eliz. 216. But a thing that is limited in a will by plain words, shall not be afterwards made uncertain by general words which follow. Hil. 23 Car. B. R. Where a devise is to the eldest son, upon condition that he pays such legacies; and if he refuses, the land to remain to such legacies; on his refusal, the legatees may enter by way of limitation. Noy, 51. And in all cases, where, after a condition, an interest is granted to a stranger, it is a limitation. 1 Leon. 269; Cro. Eliz. 204. See *Condition*, I. 2.

As to the origin and progress of the Limitation of Estates, see 1 Inst. 271. b. in n; and see *Conveyance*. See also *Deed*, *Estate*, *Feoffment*, *Gift*, *Grant*, *Lease and Release*, *Powers*, *Remainder*, *Trusts*, *Uses*, &c. From the note above cited has been extracted the following summary with respect to the limitations and modifications of landed property, unknown to the common law, which have been introduced under the statute of uses, 27 H. 8. c. 10.

The principal of these are known by the general appellation of springing or secondary uses. No estate could be limited upon or after a fee, though it were a base or qualified fee; nor could a fee or estate of freehold be made to cease as to one person and to vest in another, by any common law conveyance. But there are instances where even by the common law these secondary estates seem to have been allowed, when limited, or rather when declared by way of use. See *Jenk. Cent.* 8. c. 52. After the statute of uses the judges seem to have long hesitated whether they should receive them. In *Chudleigh's Case*, (1 Rep. 120; *Jenk.* 276; *Poph.* 70; 1 *And.* 309.) it was strongly contended, that it would be wrong to make any estate of freehold an inheritance, lawfully vested, to cease as to one, and to vest in others against the rule of law; and that no estates should be raised by way of use, but those which could be raised by livery of seisin at the common law. The courts, however, admitted them. After they were admitted it was found necessary to circumscribe them within certain bounds: because when an estate in fee-simple is first limited, there is no method by which the first taker can bar or destroy the secondary estate; as it is not affected either by a fine or common recovery.

It is now settled, that when an estate in fee-simple is limited, a subsequent estate may be limited upon it, if the event upon which it is to take place be such, that if it does happen, it must necessarily happen within the compass of one or more life or lives in being, and twenty-one years and some months over; [i. e. as many months as it is possible a child may be legitimately born after the death of its father.] It was long before the courts agreed on this period; which was not arbitrarily prescribed by our courts of justice with respect to these secondary fees, but wisely and reasonably adopted in analogy to the cases of freehold and inheritance, which cannot be limited by way of remainder, so as to postpone a complete bar of the entail by fine or recovery for a longer space. 1 Inst. 20. in n.

But the reason which induced the courts to adopt this analogy, with respect to these estates when limited upon an estate in fee-simple, does not hold when they are limited upon or after an estate in tail; because in this latter case, the tenant in tail, by suffering a common recovery before the event takes place, bars or defeats the secondary estate, and acquires the fee-simple absolutely discharged from it. See *Page v. Haywood*, 2 Salk. 570, and 1 Lev. 35; *Goodman v. Cook*, 2 Sid. 102. Hence, if these secondary estates are limited upon or after an estate in tail, they may be limited generally, without restraining or confining the event or contingency upon which they are to take place to any period. See *Treat. Eq.* ii. 95.

Thus, if an estate be limited to A. and his heirs; and if B. (a person *in esse*) dies without leaving any issue of his body living at the time of his decease; or, having such issue, if all of them die before any of them attain the age of twenty-one years, then to C. and his heirs: here the limitation to C. is limited after a previous limitation in fee-simple, and it is a good limitation; because the event upon which it is to take place must, if it does happen at all, necessarily happen within the period of a life in being, and twenty-one years and a few months. But if the estate were limited to A. and his heirs; and, after the decease of B., and a total failure of heirs, or heirs-male of the body of B., to C. and his heirs; here as the secondary use is limited after a previous limitation in fee-simple, and the event on which the fee limited to C. is to take place, is not such as must necessarily happen within the period prescribed by law, (for B. may have issue, and that issue may not fail for many years after the expiration of twenty-one years after B.'s decease,) the limitation to C. and his heirs is void. But suppose the estates were limited to A. for life, then to trustees and their heirs, during his life, for preserving contingent remainders, then to A.'s first and third sons successively in tail-male, with several remainders over; with a proviso if B. dies, and there should be a total failure of heirs or heirs-male of his body, the uses limited to A. and his sons, and the remainders over, shall determine, and the lands remain and go over to C. and his heirs; here the limitation to C. and his heirs is limited upon or after previous limitations for life or in tail; and the event upon which it is to take effect may possibly not happen till after a period of one or more life or lives in being and twenty-one years: but so far as it is limited on an event which may happen during the continuance either of one or more life or lives in being, it is within the bounds mentioned; and so far as it is limited on an event which may happen during the continuance of the estate of the tenants in tail, or after them, the first tenant in tail in possession, by suffering a recovery before the event happens, may bar the limitations over, and thereby acquire an estate in fee-simple: and therefore the limitation to C. and his heirs is good. See tit. *Executory Devise*.

LIMOGIA. Enamel; *opus de limogia*, or *opus limaceum*, is enamelled work. *Monast. 5 tom. 33.*

LINARIUM. A flax plat, where flax is sown. *Put. 22 Hen. 4. par. 1. m. 35.*

LINCOLN. In attain of a verdict of the city of Lincoln, the jury shall be impanelled of the county of Lincoln. See 13 *Rich. 2. st. 1. c. 18*; 2 *Hen. 5. st. 2. c. 5.*

LINCOLN'S INN FIELDS. To be enclosed by trustees, who may employ artificers, &c. And yearly rates shall be made on all houses there, not exceeding 10. 6d. in the pound: this square and back streets are to be a distinct ward, as to the scavengers' rates and watch; and the persons annoying the fields by filth, to forfeit 20s.; and assembling to use sports, or breaking fences, &c. incur a forfeiture of 20s. levied by the warrant of a justice of the peace. 8 *Geo. 1. c. 26.*

LINDESFERN. A place often mentioned in our ancient histories; being formerly a *Bishop's See*, now *II by Island*.

LINEAL CONSANGUINITY. Is that which subsists between persons, of whom one is descended in a direct line from the other. See tit. *Descent, Kindred*.

LINEAL DESCENT. The descent of estates from ancestor to heir, i. e. from one to another, in a right line. See tit. *Descent*.

LINEAL DESCENT OF THE CROWN. See tit. *King, I.*

LINEAL WARRANTY. Was where the heir derived, or might by possibility have derived his title to land warranted, either from or through the ancestor who made the warranty. See tit. *Warranty*.

LINEN. No person shall put up to sale any piece of dowlas, linen, &c. unless the just length be expressed thereon,

on pain to forfeit the same. 28 *Hen. 8. c. 4.* Using means whereby linen cloth shall be made deceitfully, incurs a forfeiture of the linen, and a month's imprisonment and a fine. 1 *Eliz. c. 12.*

By 15 *Cha. 2. c. 15. § 2.* any person, native or foreigner, may without paying any thing, in any place privileged or unprivileged, corporate or non-corporate, set up and exercise the occupation of breaking, hickling, or dressing of hemp or flax, as also of making or whitening of thread; as also of spinning &c. any cloth made of hemp or flax only; as also the mystery of making twine or nets for fishing, or of stoving of cordage; as also the trade of making tapestry hangings.

§ 3. Foreigners that shall use any of the trades aforesaid three years, shall (taking the oaths of supremacy before two justices near unto their dwellings) enjoy all privileges as natural born subjects.

Linen of all sorts made of flax or hemp, of the manufacture of this kingdom, may be exported duty free. 3 *Geo. 1. c. 7.*—Stealing of linen, &c. from whitening grounds, or drying houses, to the value of 10s., is felony. 4 *Geo. 2. c. 16.*

By the 17 *Geo. 2. c. 30.* affixing on foreign linens any stamp put upon Scotch or Irish linens, or affixing a counterfeit stamp on British or Irish linens, incurs a penalty of 5*l.*

Besides various other premiums and encouragements, bounties were granted on the exportation of linen for a long period down to 1830, when they were withdrawn.

By the 6 *Geo. 4. c. 122.* the former acts for the regulation of the linen and hempen manufactures of Ireland were repealed, and other provisions substituted. That act was repealed by the 9 *Geo. 4. c. 62.* which in its turn has been supplanted by the 2 & 3 *Will. 4. c. 77.* which is to continue in force for two years, from the end of the then session of parliament, and from their expiration to the end of the then next session.

By the 27 *Geo. 3. c. 13.* a sum of 6335*l.* 15*s.* was set apart out of the customs for the encouragement of raising and dressing hemp and flax, but that and all other acts authorizing money to be so appropriated have been repealed by the 4 & 5 *Will. 4. c. 14.*

Linen and other goods are protected whilst in the course of their manufacture by the 7 & 8 *Geo. 4. c. 29. § 16.* which punishes by transportation for life or years, imprisonment and whipping, the stealing of them to the value of ten shillings, whilst placed or exposed during any stage or process of manufacture in any building, field, or other place.

As to the malicious destruction of linen in the course of manufacture, &c. see tits. *Frauds, Malicious Injuries*.

With respect to the copyright of printed linens, see tit. *Literary Property*.

LION. See *Lyon*.

LIQUORICE. Is among the drugs liable to certain duties on importation, under the laws relative to the Customs.

LITERA. [From the *Fr. litiere*, or *litiere*, *Lat. lectum*,] litter: it was anciently used for straw for a bed, even the king's bed. It is now only in use in stables among horses: *tres carcetulus literæ*, three cart-loads of straw, or litter. *Mon. Angl. tom. 2. p. 33.*

LITERATURA. *Ad literaturam ponere*, signifies to put children out to school; which liberty was anciently denied to those parents who were servile tenants, without the consent of the lord: and this prohibition of educating sons to learning, was owing to this reason; for fear the son being bred to letters might enter into orders, and so stop or divert the services which he might otherwise do as heir to his father. *Paroch. Antiq. 401.*

LITERÆ. *Ad faciendum attornatum pro sectâ faciendâ.* *Reg. Orig. 192.* See *Attorney*.

LITERÆ. *Canonici ad exercendum jurisdictionem loco suo.* *Reg. Orig. 305.*

LITERÆ. *Per quas dominus remittit curiam suam Regi.* *Reg. Orig. 4.*

LITERÆ. *De requestu. Reg. Orig.* 129. See these in their proper places.

LITERÆ SOLUTORIÆ. Were magical characters supposed to be of such power, that it was impossible for any one to bind those persons who carried these about them. *Bede, lib. 4. c. 22.*

LITERARY PROPERTY.

The property that the author, or his assignee, hath in the copy of any literary work.

The right which an author may be supposed to have in his own original literary compositions, so that no other person without his leave may publish or make profit of the copies, is classed by *Blackstone* among the species of property acquired by occupancy; being grounded on labour and invention. He expresses, however, some doubt whether it subsists by common law: and this being still, after all the determinations on the subject, in some measure, *versata questio*, the following extracts deserve the attention of the student. See 2 *Comm.* 405.

When a man, by the exertion of his rational powers, has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases; and any attempt to vary the disposition he has made of it, appears to be an invasion of that right. Now the identity of a literary composition consists entirely in the sentiment and the language. The same conceptions, clothed in the same words, must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or to the eye of another, by recital, [see *post*, the case of *Colman v. Watken*,] by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other man, it hath been thought, can have a right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership: it being then a present to the public, like building a church or bridge, or laying out a new highway. But in case the author sells a single book, or totally grants the copyright, it hath been supposed, in the one case, that the buyer hath no more right to multiply the copies of that book for sale, than he hath to imitate for the like purpose the ticket, which is bought for admission to an opera or a concert; and, in the other, that the whole property, with all its exclusive rights, is perpetually transferred to the grantee. On the other hand it is urged, that though the exclusive property of the manuscript, and all which it contains, undoubtedly belongs to the author before it is printed or published; yet from the instant of publication, the exclusive right of an author, or his assigns to the sole communication of his ideas, immediately vanishes and evaporates; as being a right of too subtle and unsubstantial a nature, to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate. 2 *Comm.* 406.

The Roman law adjudged, that if one man wrote any thing on the paper or parchment of another, the writing should belong to the owner of the blank materials, meaning thereby the mechanical operation of writing; for which it directed the scribe to receive a satisfaction: for in works of genius and invention, as in painting on another man's canvas, the same law gave the canvas to the painter. As to any other property in the works of the understanding the law is silent; though the sale of literary copies, for the purposes of recital or multiplication, is certainly as ancient as the times of Terence, Martial, and Statius. 2 *Comm.* 407.

But whatever inherent copyright might have been supposed to subsist by the common law, the 8 *Ann. c. 19*, hath now declared, that the author and his assigns shall have the

sole liberty of printing and reprinting his works for the term of fourteen years, and no longer; [the words of the statute]; and hath protected that property by additional penalties and forfeitures: directing farther, that if at the end of that term the author himself be living, the right shall then return to him for another term of the same duration. A similar privilege is extended to the inventors of prints and engravings, by 8 *Geo. 2. c. 13*; 7 *Geo. 3. c. 38*; 17 *Geo. 3. c. 57*.—The above parliamentary protections appear to have been suggested by the exception in the statute of monopolies, 21 *Jac. 1. c. 3*; which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same: by virtue whereof it is held, that a temporary property therein becomes vested in the king's patentee. 1 *Vern.* 65; 2 *Comm.* 407. See *tit. Patents*.

Whether the productions of the mind could communicate a right of property, or of exclusive enjoyment, in reason and nature; and if such a moral right existed, whether it was recognized and supported by the common law of England, and whether the common law was intended to be restrained by the statute of queen *Anne*, are questions upon which the learning and talents of the highest legal characters in this kingdom have been powerfully and zealously exerted. These questions have, by the supreme court of judicature in the kingdom, been so determined, that an author has no right at present beyond the limits fixed by that statute. See the case of *Donaldson v. Beckett, Bro. P. C.*

As that determination, however, was contrary to the opinion of Lord *Mansfield*, of the learned commentator, and of several other judges, Mr. *Christian* has remarked, that every person may still be permitted to indulge his own opinion upon the propriety of it, without incurring the imputation of arrogance; and he proceeds to deliver his sentiments in the following manner.

Nothing is more erroneous than the common practice of referring the origin of moral rights, and the system of natural equity, to that savage state, which is supposed to have preceded civilized establishments; in which literary composition, and of consequence the right to it, could have no existence. But the true mode of ascertaining a moral right seems to be to inquire whether it is such as the reason, the cultivated reason of mankind, must necessarily assent to. No proposition seems more conformable to that criterion, than that every one should enjoy the reward of his labour, the harvest where he has sown, or the fruit of the tree which he has planted. And if any private right ought to be preserved more sacred and inviolate than another, it is that where the most extensive benefit flows to mankind from the labour by which it is acquired. Literary property, it must be admitted, is very different in its nature from a property in substantial and corporeal objects; and this difference has led some to deny its existence as property; but whether it is *sui generis*, or under whatever denomination of rights it may more properly be classed, it seems founded upon the same principle of general utility to society, which is the basis of all other moral rights and obligations. Thus considered, an author's copyright ought to be esteemed an inviolable right, established in sound reason and abstract morality: no less than eight of the twelve judges were of opinion, that it was a right allowed and perpetuated by the common law of England; but six held, either that it did not exist, or that the enjoyment of it was abridged by the statute of queen *Anne*; and that all remedy for the violation of it was taken away after the expiration of the term specified in the act; and agreeable to that opinion was the final judgment of the House of Lords. 1 *Comm.* 407. *in n.*

For the arguments at length of the judges of the King's Bench, and the opinions of the rest, see the case of *Milner v. Taylor*, 4 *Burr.* 2303; 1 *Blackst. Rep.* 675. In that case the Court of King's Bench determined that an exclusive and

permanent copyright did actually subsist in authors by the common law. But the effect of their opinion was contradicted by the determination of the House of Lords in *Donaldson v. Beckett*, as above stated.

But whatever the common law may be with respect to the copyright of a printed work, it has been decided that, independent of the statute law, an author has an absolute property over his work, whilst it exists in manuscript. 1 *Burr.* 231, 237; 2 *Merr.* 155. And the mere delivery of the manuscript to a printer will not divest his right; for the consent to print must be in writing. 4 *Vin. Ab.* 278. Neither is a person to whom a manuscript has been lent, with liberty to take a copy and make what use of it he thinks fit, empowered to print and publish the work. 2 *Eden*, 329. And it has been decided that the copyright in a piece of music is not lost, although it has been published in manuscript a year before it is printed. 2 *B. & A.* 298.

Injunctions have also been frequently granted to restrain the publication of private letters either by the parties to whom they have been written, or by third persons. 2 *Atk.* 342; *Amb.* 737.

The following is a general abstract of the statutes relative to this interesting subject, and of some points determined on their construction.

The 8 *Ann.* c. 19. and 41 *Geo. 3.* c. 107, enacted, that the author of any book, and his assigns, should have the sole liberty of printing it for fourteen years, and for a further term of fourteen years, if the author were living at the end of the first fourteen.—By 54 *Geo. 3.* c. 156. § 4. this term is extended to twenty-eight years absolute, and to the end of the author's life: and this advantage is given to authors of books published before the act, § 8, 9.

An author whose works had been published more than twenty-eight years before the passing the act 54 *Geo. 3.* is not entitled to the copyright for life. *Brooke v. Clarke*, 1 *B. & A.* 396.

By the acts 41 *Geo. 3.* c. 107. § 1; and 54 *Geo. 3.* c. 156. § 2, booksellers, printers, &c. in any part of the United Kingdom, or in any part of the British European dominions, who shall print, reprint, or import, or publish, or expose to sale any such book, without consent of the proprietor, shall be liable to a special action in the case for damages at the suit of the proprietor, and shall also forfeit all the books to the proprietor; and further 3*d.* per sheet, half to the king, and half to the informer.

No bookseller, printer, or other person, shall be liable to these forfeitures, unless the title to the copy of the book, [the whole book and every volume thereof, 15 *Geo. 3.* c. 53. § 6] shall before such publication be entered in the register book of the Company of Stationers, at their Hall in London, and unless the consent of the proprietor be entered, § 2; nor unless nine copies of each book be delivered to the company's warehouse-keeper before publication, for the use of the royal library, the libraries of the university of Oxford and Cambridge, of the four universities in Scotland, of St. John's College in London, and of the advocates at Edinburgh, § 5, and see 15 *Geo. 3.* c. 53. § 6; and 41 *Geo. 3.* c. 107. § 6, requiring copies to be delivered to Trinity College, and King's Inns, Dublin.

Doubts having been entertained, whether the copies required for the several public libraries were to be delivered if the works were not entered at Stationers' Hall, it is enacted by 54 *Geo. 3.* c. 156, that the provisions of the acts 8 *Ann.* and 41 *Geo. 3.* as to delivering copies of books to public libraries, shall be repealed, and that seven copies of all works whatever, printed or published, shall be delivered to the several universities &c. if demanded within twelve months after the publication,—but not copies of second or subsequent editions without alteration: and that amendments of early editions may be printed separately, and delivered. 54 *Geo. 3.* c. 156. § 1, 2, 3.

A part of a work published separately and before the completion of the whole, is not demandable by the public bodies mentioned in 54 *Geo. 3.* c. 156, under the words "the whole of every book, and every volume thereof." *British Museum v. Payne*, 4 *Bing.* 450.

All books are required to be entered (within one month if published in London, and three months if published elsewhere,) at Stationers' Hall, and one copy on the best paper to be then delivered for the British Museum.—Two shillings to be paid for each entry; penalty for neglect of entry, 5*l.*, and eleven times the price of the book. 54 *Geo. 3.* c. 156. § 5. The warehouse-keeper at Stationers' Hall is to transmit lists of all publications to the librarians of the several libraries entitled to copies: and to demand the copies of the publishers; but who may deliver the books at the several libraries, if they please, § 6, 7.

An action may be brought, or an injunction obtained in a Court of Equity, although the publication be not entered in the register of the Stationers' Company. 1 *Black.* 330. In *Beckford v. Hood*, it was explicitly determined that an author whose work is pirated before the expiration of twenty-eight years, from the first publication of it, may maintain an action on the case for damages against the offending party, although the work was not entered at Stationers' Hall, and although it was first published without the name of the author affixed. 7 *T. R.* 620.

And to remove all doubt it was enacted by the 54 *Geo. 3.* c. 156. § 5, that a failure in making the entry shall not affect the copyright, but only subject the publisher to the penalty imposed.

If the clerk of the Stationers' Company shall neglect to make due entry, or to give a certificate thereof, then notice being given in the Gazette, the proprietor shall have the same benefit as if an entry were actually made: and the clerk shall forfeit 20*l.* 8 *Ann.* c. 19. § 3; 41 *Geo. 3.* U. K. c. 107. § 4, 5.

The above statute 8 *Ann.* c. 19. particularly provided, by § 9, that the right of the universities or any other person, to the printing or reprinting of any book already printed, should not be either prejudiced or confirmed: after the determination of the case of *Donaldson v. Beckett*, the universities were so much alarmed at the decision, that they applied for and obtained an act, 15 *Geo. 3.* c. 53, which secured to the two universities in England, the colleges or houses of learning within the same, the four universities in Scotland, and the colleges of Eton, Westminster, and Winchester, a perpetuity in the copyright of all books given, or devised to, or in trust for them by the authors; which was sanctioned by the same penalties as those contained in the 8 *Ann.* so long as the books or copies belonging to the said universities or colleges are printed only at their own printing-presses, within the universities or colleges, and for their sole benefit. § 8.

A fair and *bond fide* abridgment of any book is considered as a new work: and however it may injure the sale of the original, yet it is not deemed in law to be a piracy, or violation of the author's copyright. 1 *Bro. C. R.* 451; 2 *Atk.* 141.

A translation of a work, either from the ancient classic authors, or of a work written in Latin by an Englishman, 2 *Merr.* 441. n.; or of papers in any of the modern languages, as the French and German, 5 *Fos. & B.* 77, is protected by the 8 *Ann.* c. 19.

Musical compositions have been held to be within the meaning and protection of the statute, *Comp.* 623; and an action is maintainable for pirating a single sheet of music. 11 *East*, 111.

Every distinct and independent part of a work is also a book within the meaning of the statute, as a tale or piece of music, printed and bound up with other tales or pieces of music. *Id.*; 2 *B. & A.* 295.

The author or publisher of a work of a *libellous* or *immoral* tendency can have no legal property in it: and no action can be maintained for printing such work, (the book in question was the *History or Amours of a Courtesan*.) It is no answer to such objection that the defendant is a wrong-doer in publishing the work, and that, therefore, he ought not to act upon it immediately. *Stockdale v. Omphyn*, 7 D. & R. 625; 5 B. & C. 173; 2 C. & P. 163.

And it makes no difference whether the offensive matter be represented in prints, 4 *Esp.* 97, or pictures, 2 *Campb.* 511, or expressed in books.

Assignments of copyright under the 8 *Ann.* must be in writing. 3 *M. & S.* 7.

Evidence that the defendant acted a piece on the stage, of which the plaintiff had bought the copyright, is not evidence of a publication by the defendant, within the meaning of the statute. 5 *T. R.* 245.

And if the author has published a tragedy, it is no piracy to act it abridged at a theatre without his consent. 5 *B. & A.* 657.

But no one has a right to take down a play in short-hand, and to print it before it is published by the author. *Amb.* 694.

And now by the 3 *Will.* 4. c. 15. dramatists have been placed on an equal footing with other authors. See tit. *Dramatic Literary Property*.

Previous to the union there was no statute in Ireland to protect the copyright of authors, but immediately after that event an act was passed (41 *Geo.* 3. c. 10.) enacting similar provisions with respect to that country as those contained in the 8 *Ann.* and 15 *Geo.* 2. The 54 *Geo.* 3. c. 156. extends to the whole of the United Kingdom, as well as the Isles of Man, Jersey, and Guernsey, and all other parts of the British dominions.

The right of printing books given or bequeathed to Trinity College, Dublin, is secured to that college by 41 *Geo.* 3. c. 107. § 3.

No person shall import into any part of the United Kingdom for sale any book first written or printed and published within the United Kingdom, and reprinted elsewhere, on penalty of forfeiture of the books, 10*l.* and double the value of each copy so imported.—Books may be seized by officers of customs and excise, who shall be rewarded by their respective commissioners.—These penalties do not extend to books not having been printed in the United Kingdom within twenty years; nor to books reprinted abroad, and inserted among other books or tracts for the most part foreign. 41 *Geo.* 3. c. 107. § 7.

Whether an author, by publishing a book abroad, makes his work *publici juris*, is not decided; but it is clear he does so, unless he take prompt measures to publish it also in England. And where an author published his work in 1814 in Paris, and soon after sold the right of publishing to the plaintiff here, but without writing, and the plaintiff thereupon published it, and in 1818 the defendant published the work in England, and in 1822, the author, by writing, assigned the right of printing to the plaintiff, it was held, that the publication by the defendant was lawful and not actionable,—for the work has been published in England by the author, nor was the publication in 1814, by his legal assignee, for want of writing, and the author could not, by the valid assignment in 1822, enable the plaintiff to maintain an action for selling a copy after that assignment was executed. 2 *B. & C.* 861.

All actions, indictments, &c. for offences must be commenced within six months after commission of the offence, 41 *Geo.* 3. c. 107. § 8; within twelve months, 54 *Geo.* 3. c. 156. § 10.

It is worthy of remark, that the determination of the House of Lords, in *Donaldson v. Beckett*, which was supposed, at the time, to have given a mortal blow to the property and prosperity of authors and booksellers, has, in fact,

been one great means of increasing both. Few books are now republished without considerable alterations, additions, or annotations, by means of which they become, in fact, new works; and it is not worth any body's while then to pirate them in their original state. And an action lies to recover damages for pirating the new corrections and additions to an old work. 1 *East*, 558, 561, 563, *in n.*

This has proved a spur to the industry of authors, and the liberality of booksellers; and perhaps no period ever produced so many publications of acknowledged utility, as that which has elapsed since the memorable decision above alluded to, which for the moment cast a melancholy gloom over those who now enjoy its beneficial effects.

The following are the principal features and distinctions of the three statutes relative to prints and engravings. The 8 *Geo.* 2. c. 13, gives an exclusive privilege of publishing, to those who invent or design any print, for fourteen years only. The 7 *Geo.* 3. c. 28, extends the term to twenty-eight years absolutely, to all who either invent the design, or make a print from another's design or picture; and those who copy such prints within that time, forfeit all their copies to be destroyed; and 5*s.* for each copy. Maps, charts, or plans, are among the prints enumerated in the above act. The 17 *Geo.* 3. c. 57, gives the proprietor an action on the case to recover damages, and double costs for the injury he has sustained by the violation of his right.

Actions under the two former statutes must be brought within six months, but no limitation is imposed by the 17 *Geo.* 3.

The assignee of a print may maintain an action on this last statute against any person who pirates it; and in such an action it is not necessary to produce the plate itself in evidence; one of the prints taken from the original plate is good evidence. The date must always appear on the print. 5 *T. R.* 41.

The statutes only apply to engravings taken from pirated plates, and not engravings struck off illegally from a lawful plate. Therefore, where Heath was employed by Murray to engrave plates from drawings belonging to Murray, and H. took off proof impressions for his own use, and then became bankrupt, and his assignees sold them, it was held that neither H. nor his assignees were liable to an action on the 17 *Geo.* 3. c. 57. His act was a breach of contract, not a piracy. *Murray v. Heath*, 1 *B. & A.* 804.

The mere seller or publisher of a pirated copy of a print is liable to an action under 17 *Geo.* 3. c. 57, although it be not an exact copy of the original, and though the seller did not know it to be a copy. 1 *D. & R.* 400; 5 *B. & A.* 787.

It is no piracy of one engraving to make another from the original picture. *Berenger v. Wheble*, 2 *Stark.* 548.

In analogy also to the above doctrine of literary property, the 27 *Geo.* 3. c. 38. (which was enacted for one year, and afterwards extended by the 29 *Geo.* 3. c. 19. and made perpetual by the 34 *Geo.* 3. c. 23.) gives to the proprietors of new patterns in printed linens, cottons, muslins, &c. the sole right of printing them for two months, (enlarged to three months by the 29 *Geo.* 3. c. 19.) and gives the proprietor injured his remedy by an action for damages.

The jurisdiction of the Courts of Equity is not excluded by the special remedy given by the 34 *Geo.* 3. c. 23. *Rust.* & *M.* 159.

There is also a kind of prerogative copyright subsisting in certain books, which is held to be vested in the crown upon several reasons. Thus, 1. The king, as the executive magistrate, has the right of promulgating to the people all acts and state of government. This gives him the exclusive privilege of printing at his own press, or that of his grantees, all acts of parliament, proclamations, and orders of council. 2. As supreme head of the church, he hath a right to the publication of all Liturgies and books of Divine service. 3. He is also said to have a right by purchase to the copies

of such law books, grammars, and other compositions, as were compiled or translated at the expense of the crown. And upon these two last principles combined, the exclusive right of printing the translation of the Bible is founded. See 2 Comm. c. 27. p. 410, n.

For the acts giving a property in sculpture, models, &c. see tit. *Sculpture*.

LITH OF PICKERING. In the county of York, viz. the liberty, or a member of Pickering, from the Saxon, *lid*, i. e. *scutellum*.

LITIGIOUS. The litigiousness of a church is where several persons have, or pretend to, several titles to the patronage, and present several clerks to the ordinary; it excuses him from refusing to admit any of them, till a trial of the right by *jure patronatus*, or otherwise. *Jenk. Cent.* 11.

LITTERA. Litter;—*Tres carectas litteræ*, three cart-loads of straw or litter. *Mon. Angl.* 2. par. fol. 33. b.

LITTLETON. Was a famous lawyer in the days of the reign of Edward IV., as appears by *Stamf. Pract.* c. 21. fol. 72. He wrote a book of great account, called *Littleton's Tenures*. See tit. *Lam Books*.

LIVERY [From *livre*, i. e. *in aigne gestamen*; or *livrer*, *tradere*.] Hath three significations. In one sense, it was used for a suit of clothes, cloak, gown, hat, &c. which a nobleman or gentleman gave to his servants or followers, with cognizance or without; mentioned in 1 *Rich.* 2. c. 7. and divers other statutes. Formerly great men gave liveries to several who were not of their family, to engage them in their quarrels for that year; but afterwards it was ordained, that no man of any condition whatsoever should give any livery but to his domestics, his officers, or counsel learned in the law. By 1 *R. A.* 2. it was prohibited on pain of imprisonment; and the 1 *Hen.* 4. c. 7. made the offenders liable to ransom at the king's will, &c. which statute was afterwards confirmed and explained *unus* 2 & 7 *Hen.* 4. and by 3 *Hen.* 8. c. 4; and yet this offence was so deeply rooted that Edward IV. was obliged to confirm the former statutes, and further to extend the meaning of them, adding a penalty of 10*l.* to every one who gave such livery, and the like on every one retained for maintenance, either by writing, oath, or promise, for every month. 8 *Edm.* 4. c. 2. But most of the above statutes are repealed by 3 *Car.* 1. c. 4.

Livery, in the second signification, meant a delivery of possession to those tenants who held of the king *in capite*, or knight's service; as the king by his prerogative hath *primer seisin* of all lands and tenements so holden of him. *Stamf. Prærog.* 12.

In the third sense, livery meant the writ which lay for the heir of age, to obtain the possession of seisin of his lands at the king's hands. *F. N. B.* 155. By the 12 *Car.* 2. c. 24. all wardships, liveries, &c. are taken away. See *Tenures*.

LIVERY i. e. **DELIVERY, OF SEISIN; Liberatio seisinæ.** A delivery of possession of lands, tenements, and hereditaments, unto one that hath a right to the same; being a ceremony in the common law used in the conveyance of lands, &c. where an estate of fee-simple, fee-tail, or other freehold passeth. *Bract. lib.* 2. c. 18. And it is a testimonial of the willing departing of him who makes the livery, from the thing whereof the livery is made; and of willing acceptance of the other party receiving the livery; first invented that the common people might have knowledge of the passing or alienation of estates from man to man, and thereby be better able to try in whom the right of possession of lands and tenements were, if the same should be contested, and they should be impeached on juries, or otherwise have to do concerning the same. *West. Symb. par.* 1. lib. 2.

The common-law conveyance by feoffment is by no means perfected by the mere words of the deed; this ceremony of livery of seisin is very material to be performed, for without this the feoffee has but a mere estate at will. *Lit.* § 66. This

livery of seisin is no other than the pure feudal investiture or delivery of corporeal possession of the land or tenement, which was held absolutely necessary to complete the donation. 2 *Comm.* c. 20. p. 311. See *Conveyance, Deed, Estate, Feoffment, III., Tenures*.

Investitures, in their original rise, were probably intended to demonstrate in conquered countries, the actual possession of the lord, and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of the by-standers, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such as claimed title by other means might know against whom to bring their actions. 2 *Comm.* 311.

In all well-governed nations some notoriety of this kind has ever been held requisite in order to acquire and ascertain the property of lands. And even in ecclesiastical promotions, where the freehold passes to the person promoted, corporeal possession is required at this day to vest the property completely in the new proprietor, who, according to the canonists, acquires the *jus ad rem*, or inchoate and imperfect right by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporeal possession. Therefore in dignities possession is given by instalment; in rectories and vicarages by induction; without which no temporal rights accrue to the minister; though every ecclesiastical power is vested in him by institution. So also even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir had not until recently *plenum dominium*, or full and complete ownership, till he had made an actual corporeal entry into the lands; for if he died before entry made, his heir was not entitled to take the possession, but the heir of the person who was last actually seised. 2 *Comm.* 312. See *Descent*.

The corporeal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed, by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. With our Saxon ancestors the delivery of a turf was a necessary solemnity to establish the conveyance of lands. And to this day the conveyance of our copyhold estates is usually made from the seller to the lord or his steward, by delivery of a rod or verge; and then from the lord to the purchaser, by delivery of the same in the presence of a jury of tenants. 2 *Comm.* 313.

Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten and misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of charging and incumbering estates, and of making them liable to a multitude of conditions and minute designations, for the purposes of raising money without an absolute sale of the land; and sometimes like the proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views, none of which could be effected by a mere simple corporeal transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited dominion. Written deeds were therefore introduced in order to specify and perpetuate the peculiar purposes of the party who conveyed; yet still, for a very long series of years, they were never made use of but in company with the more an-

cient and notorious method of transfer by delivery of corporeal possession. 2 *Comm.* 314.

Livery of Seisin, by the common law, is necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made, for they are not objects of the senses; and in leases for years, or other chattel-interests, it is not necessary; the solemnity being appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro*, because they cannot at the common law be made but by livery of seisin; which livery, being an actual manual tradition of the land, must take effect *in presenti*, or not at all. 2 *Comm.* 314. See *Feoffment*, III., *Limitation of Estate, Remainder*.

On the creation of a freehold remainder at one and the same time with a particular estate for years at the common law, livery must be made to the particular tenant, without which nothing passeth to him in remainder, it being for the benefit of him in remainder, and not the lessee, who hath only a term; and if the lessee entereth, before livery and seisin made to him, the livery shall be void. *Lit.* 60; 1 *Inst.* 49. But if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing; *nam quod semel meum est, amplius meum esse non potest*; but it must be made to the remainder-man by consent of the lessee for years; for without his consent no livery of the possession can be given; partly because such forcible livery would be an ejectment of the tenant from his term, and partly for reasons connected with the doctrine of attainments. 2 *Comm.* 314, 315. See 1 *Inst.* 48, 49.

A man may make a letter of attorney to deliver seisin by force of the deed, which may be contained in the same deed; and a letter of attorney may be likewise made to receive livery and seisin. 5 *Rep.* 91; 1 *Inst.* 49, 52.

This livery of seisin is either in deed or in law; the distinctions between which are stated and explained *ante*, *Feoffment*, III. Anciently this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feudal law, *pares debent interesse investituræ feudi, et non alii*; for which this reason is expressly given; because the peers or vassals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers may be apt to connive at. And though afterwards the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial, in case it was disputed, (like that of all other attestations) was still reserved to the *pares*, or jury of the county; and this is the reason why, if lands conveyed by feoffment lie in several counties, there must be as many liveries of seisin as there are counties. 2 *Comm.* 315, 316. See *Feoffment*, III. In addition to what is there said, the following determinations afford information on the subject.

Where a house and lands are conveyed, the house is the principal, and the lands accessory; and there the livery must be made, and not upon the land. 2 *Rep.* 31; 4 *Leon.* 374.

If a house or lands belong to an office, by grant of the office by deed, the house or land passeth without livery; and by a fine, which is a feoffment of record, by a lease and release, bargain and sale by deed inrolled, exchange, &c. a freehold passeth without livery; and so in a deed of feoffment to uses, by virtue of the statute of uses. 1 *Inst.* 49. So that livery and seisin is not so commonly used as formerly; neither can an estate be created now by livery and seisin only, without writing. 29 *Car.* 2. c. 3. See *Conveyance, Estate*.

If a deed of feoffment be delivered upon the land, "in the name of seisin of all the lands," it will be a good livery and

seisin; but the bare delivery of a deed upon the land, though it may make the deed, it shall not amount to livery and seisin, without those words. 1 *Inst.* 52, 181. If one makes a feoffment to four persons, and seisin is delivered to three of them in the name of all, the estate is vested in all of them. 3 *Rep.* 26.

No person ought to be in the house, or upon the land, when livery is made, but the feoffor and feoffee; all others are to be removed from it; if the lessor, feoffor makes livery and seisin, the lessee being upon the land contradicting it, the livery is void. *Cro. Eliz.* 321; *Dalis. Rep.* 94.

But livery of seisin is not invalidated by omitting to remove from the house a child found there, unless such child be part of the family of a person having an immediate estate or interest in the premises, and has been placed there for the purpose of continuing his possession. 2 *N. & M.* 508.

Form of livery and seisin indorsed on the deed.

MEMORANDUM. That on the day and year within written, full possession and seisin was had and taken of the messuage or tenement, and premises within granted, by A. B. one of the attorneys within named, and by him delivered over unto the within named C. D. To hold to him, his heirs, &c. according to the contents and true meaning of the within written indenture, in the presence of, &c.

LIVERY and OUSTER-LE-MAIN. Where by inquest before the escheator, it was found that nothing was held of the king, then he was immediately commanded by writ to put from his hands the lands taken into the king's hands. 29 *Edm.* 1; 28 *Edm.* 3. c. 4. See *Ouster-le-Main*.

LIVERYMEN OF LONDON. In the companies of London, liverymen are chosen out of the freemen, as assistants to the masters and wardens, in matters of council, and for better government; and if any one of the company refuse to take upon him the office, he may be fined, and an action of debt will lie for the sum. 1 *Mod.* 10. See *London*.

LOAN. A contract by which the use of any thing is given under condition of its being returned to the owner. See *Bailment*. As to loans of money, see *Usury*; and as to public loans, see *National Debt*.

LOBBE. A large kind of North-sea fish. See 31 *Edm.* 3. st. 3. c. 2. And *loich* comprehends lob, ling, and cod.

LOBSTERS. May be imported by natives or foreigners, and in any vessels, notwithstanding 10 & 11 *Wm.* 3. c. 24. 1 *Geo.* 1. st. 2. c. 18. No person shall with trunks, hoop-nets, &c. take any lobsters on the sea-coast of Scotland, from the first of June to the first of September yearly, on pain of 5*l.* to be recovered before two justices. 9 *Geo.* 2. c. 33. See *Fish, Navigation Acts*.

LOCAL [*localis*.] Tied or annexed to a certain place. Real actions are local, and to be brought in the county where the lands lie; but a personal action, as of trespass or battery, &c. is transitory, not local; and it is not material that the action should be tried or laid in the same county where the fact was done; and if the place be set down, it is not needful that the defendant should traverse the place, by saying he did not commit the battery in the place mentioned, &c. *Kitch.* 230. See *Action, Venue*. A thing is local that is fixed to the freehold. *Kitch.* 180.

LOCATION. A contract by which a hire is agreed to be given for the use of any thing, or for the labour of any person. See *Bailment, Master and Servant*.

LOCKMAN. In the Isle of Man the lockman is an officer to execute the order of the governor, much like our undersheriff. *King's Descrip. Isle of Man*, 26.

LOCKS, in navigation. See *Malicious Injuries*.

LOCUS IN QUO. The place where any thing is alleged to be done in pleadings, &c. 1 *Salk.* 94. See *Trespass*.

LOCUS PARTITUS. A division made between two towns or counties, to make trial where the land or place in question lieth. *Flet. lib.* 4. c. 15.

LOCUS PENITENTIAE. A power of drawing back from a bargain before any act has been done to confirm it in law. See *Agreement, Fraud*.

LOCUTORIUM. The monks and other religious in monasteries, after they had dined in their common hall, had a withdrawing room, where they met and talked together among themselves, which room, for that sociable use and conversation, they called *locutorium à loquendo*; as we call such a place in our houses *parlour*, from the French *parler*; and they had another room which was called *locutorium forinsecum*, where they might talk with laymen. *Walsing.* 257.

LODE-MANAGE. The hire of a pilot for conducting a vessel from one place to another. *Conell* The pilot receives a lode-manage of the master for conducting the ship up the river, or into port; but the loadman is he that undertakes to bring a ship through the haven after being brought thither by the pilot, to the quay or place of discharge, and if through his ignorance, negligence, or other fault, the ship or merchandise receive any damage, action lies against him at the common law. *Roughton, fol. 27.*

LODE-MERFGE. Mentioned in the laws of Oleron, is expounded to be the skill or art of navigation. *Conell*. *Quere*, if it is not a corruption of *lode-manage*.

LODE-SHIP. A kind of fishing vessel, mentioned in 31 *Edw. 3. c. 2.*

LODGERS and LODGINGS. As to thefts of furniture by lodgers, see *Larceny*.

LOGATING. An unlawful game, mentioned in 38 *Hen. 8. c. 9.* now disused.

LOGIA. A little house, lodge, or cottage. *Mon. Angl. tom. 1. p. 400.*

LOGWOOD [*lignum nigrum*] Wood used by dyers, brought from foreign parts, prohibited by 23 *Eliz. c. 9*; but allowed to be imported by 14 *Car. 2. c. 11.*

LOITH, or LOYCH FISH. A large North-sea fish, mentioned in 31 *Edw. 3. st. 3. c. 2.* Vide *Lobbe*.

LOLLARDS. Are said to have had their name from one Walter Lollard, a German, who lived about the year 1315. They were termed Heretics, and began to abound in England in the reigns of King Edward III. and Henry V. Wycliffe being the chief of them in this nation. *Stow's Annals* 45. *Spotwood*, in his *History of Scotland*, says, the intent of these Lollards was to subvert the Christian faith, the law of God, the church, and the realm. See 2 *Hen. 5. c. 7.* repealed by 1 *Edw. 6. c. 12.* and tit. *Heresy*. These Lollards were in fact the founders of the Protestant religion. As to the derivation of the term, see *Life of Wycliffe* prefixed to *Baber's edition of Wycliffe's Translation of the New Testament*, p. xxxiii. n. 4to. 1810.

LOLLARDY. The doctrine and opinion of the Lollards. See 1 & 2 *P. & M. c. 6.*

LOMBARDS. The company shall be answerable for their debts. 25 *Edw. 3. st. 5. c. 23.* See *Bills of Exchange*.

LONDON.

The metropolis of this kingdom, formerly called *Augusta*, has been built above three thousand years, and flourished for fifteen hundred years. Its Exchange, where merchants of all nations meet, is not to be equalled, and for stretchiness of buildings, extent of bounds, learning, arts and sciences, traffic and trade, this city gives place to none in the world. *Stow*.

London is a county of itself. 4 *Inst.* 248. See title *Counties Corporate*. So it is a corporation by prescription, known by several names. 2 *Inst.* 330, *quo warranto, passim*.

During two violent proceedings that took place in the latter end of the reign of King Charles II. it was, among other things, thought expedient to new-model most of the corporation towns in the kingdom; for which purpose many of those bodies were persuaded to surrender their charters; and in-

formations in the nature of *quo warranto* were brought against others, upon a supposed, or frequently a real forfeiture of their franchises by neglect or abuse of them; and the consequence was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters, with such alterations as were thought expedient; and during their state of anarchy the crown named all their magistrates. This exertion of power, though perhaps, in *summo jure*, it was for the most part strictly legal, gave a great and just alarm, the new-modelling of all corporations being a very large stride towards establishing arbitrary power; and therefore it was thought necessary, at the Revolution, to bridle this branch of the prerogative, at least so far as regarded the metropolis, by 2 *W. & M. st. 1. c. 8.* which enacts, that the franchises of the city of London shall never hereafter be seized or forejudged for any forfeiture or misdemeanor whatsoever. The *quo warranto* against London issued in Trinity term, 35 *Car. 2.* on which judgment was given in *B. R.* that the charter and franchises of the said city should be seized into the king's hands as forfeited. This judgment was reversed by the above 2 *W. & M.* and all officers and companies restored, &c.; and the act provided, that the mayor, commonalty, and citizens of the city of London should for ever thereafter be, and prescribe to be, a body corporate and politic, &c.; and enjoy all their franchises, &c. See 3 *Comm.* 263, 4. Before this, by *Magna Charta*, c. 9. it was provided, that the city of London should have all their ancient usages, liberties, and customs which they had used to enjoy; which is confirmed by 14 *Edw. 3. st. 1. c. 1.*

It is divided into twenty-six wards, over each of which there is an alderman; and is governed by a lord mayor, who is chosen yearly, and presented to the king, or in his absence to his justices, or the barons of the Exchequer at Westminster. *Chart. K. Hen. 3.*

Before the time of Henry III. the city was divided into twenty-four wards. By parliament, anno 17 *R. 2.* Farringdon-without was severed from Farringdon-within, and made a distinct ward. By charter 1 *Edw. 3.* and patent 4 *Edw. 6.* the king granted to the citizens and their successors, the villa, manor, and borough of Southwark; whereupon, by an order of the Court of Mayor and Aldermen, confirmed by the Common Council, Southwark was made the 26th ward, by the name of the Bridge Ward-without, on the last day of July, 4 *Edw. 6.* See *Com. Dig.* title *London*, (A).

Before and since the Conquest, to the time of Ric. 1. London was governed by a port-reeve, and 1 *R. 1.* by two bailiffs, and afterwards by a mayor appointed by the king; but King John, in the tenth year of his reign, granted them liberty to choose a mayor. 2 *Inst.* 253. See 2 *Stow*, 450; *Com. Dig.* title *London*, (C). The presenting and swearing of the lord mayor at Westminster to be on the 9th of November, new style; 24 *Geo. 2. c. 48. § 11*; to be admitted and sworn at Guildhall, London, the day preceding. 25 *Geo. 2. c. 30. § 4.*

The lord mayor of London for the time being is chief justice of gaol delivery, escheator within the liberties, and bailiff of the river Thames, &c. He is a high officer in the city, having all Courts for distribution of justice under his jurisdiction, viz. The Court of Hustings, Sheriffs' Court, Mayor's Court, Court of Common Council, &c. 2 *Inst.* 330.

King Henry IV. granted to the mayor and commonalty of London the assise of bread, beer, ale, &c. and victuals, and things saleable in the city. In London every day, except Sunday, is a market overt, for the buying and selling of goods and merchandise. 5 *Rep.* 85. But no person, not being a freeman of London, shall keep any shop or other place to put to sale by retail any goods or wares, or use any handicraft trade for hire, gain or sale within the city, upon pain of forfeiting £5. 8 *Rep.* 124; *Chart. Car. 1.*

Persons making ill and unserviceable goods in London, the chief officers of the company to which such persons do or

ought to belong, may seize and carry them to the Guildhall, and have the goods tried by a jury; and if found defective, they may break them, &c. *Trin. 34 Car. 2. B. R.* A person must be a freeman of London to be entitled to carry on merchandise there. *Chart. Car. 1.*

By charter Henry 1. all the men of London, and all their goods, shall be free from scot and lot, dane-gilt and murder; and from all toll, passage and lestage, and all other customs through all England, and the ports of the sea. So by charters 11 *Hen. 3.* and 50 *Hen. 3.* See 4 *Inst. 252.* But he who claims these privileges must not only be a freeman, but an inhabitant of London. 1 *H. Black. 206*; 4 *T. R. 144.*

There are three ways to be a freeman of London: by servitude of an apprenticeship; by birthright, as being the son of a freeman; and by redemption, i.e. by purchase, under an order of the Court of Aldermen. 4 *Mod. 145.*

The child of a freeman, when of age, may, in consideration of a present fortune, bar herself of her customary part. 2 *Strunge, 947.* An agreement on marriage, that the husband shall take up the freedom of London, binds the distribution of his effects. 1 *Strunge, 455.* See tit. *Executor, V. 9.*

The city of London is entitled to a fine, imposed for a misdemeanor committed within the city, though it be adjudged by the Court of King's Bench at Westminster. (Charters of 23 *H. 6*; 20 *H. 7*; 14 *Car. 1*; and 15 *Car. 2.*) 1 *C. M. & R. 1.*

The customs of London are many and various.—They are against the common law, but made good by special usage, and confirmed by act of parliament. 4 *Inst. 249*; 8 *Rep. 126.* In setting forth a custom or usage in the city of London, it must be said *antiqua civitas*, or it will not be good. 2 *Leon. 99.*

There is a custom in London to punish by information in the Mayor's Court, in the name of the common serjeant of the city, assaults on aldermen, and affronting language, &c. 7 *Mod. 28, 29.*

Where a woman exerciseth a trade in London, wherein her husband doth not intermeddle, by the custom she shall have all advantages, and be sued as a feme sole merchant; but if the husband meddle with the trade of the wife, or carry on the same trade, it is otherwise. 1 *Cro. 63*; 3 *Keb 902.* See titles *Bankrupt, Baron and Feme.*

An arrest may be made in London on the plaintiff's entering his plaint in either of the compters, and a serjeant of London need not show his mace when he arrests one; and the liberties of the city extend to the suburbs and Temple Bar. *Jenk. Cent. 291.*

The customs of the city of London shall be tried by the certificates of the mayor and aldermen, certified by the mouth of their recorder, upon a surmise from the party alleging it, that the custom ought to be thus tried; else it must be tried by the county. 1 *Inst. 74*; 4 *Burr. 248*; *Bro. Abr. title Trial, pl. 96.* As the custom of distributing the effects of freemen deceased; (see title *Executor, V. 9.*) of enrolling apprentices; or that he who is free of one trade may use another; if any of these or other similar points come in issue. But this rule admits of an exception where the corporation of London is party, or interested in the suit; as in action brought for a penalty inflicted upon by the custom; for there the reason of the law will not endure so partial a trial; but this custom shall in such case be determined by a jury. *Hob. 86.* In some cases the sheriff of London's certificate shall be the final trial; as if the issue be whether the defendant be a citizen of London or foreigner, in case of privilege pleaded to be sued only in the city Courts. 1 *Inst. 714.* See title *Customs of London.*

Upon the customs of London concerning the payment of the wharfage, &c. by every freeman to the corporation, the trial shall not be by the mouth of the recorder, as customs generally are, but by the country, and a jury from Surrey adjoining. *Moor, c. 129.*

The mayor of London is to cause errors, defaults, and misprisions there to be redressed, under the penalty of 100 marks; and the constable of the Tower shall execute process against the mayor for default, &c. 28 *Edm. 3. c. 10.* See 17 *Ric. 2. c. 12*; 1 *Hen. 4. c. 15.* by which latter the fine is to be at the discretion of the justices.

The several Courts within the city of London (and other cities and corporations throughout the kingdom) held by prescription, charter, or act of parliament, are of a private and limited species. The chief of those in London are the Sheriffs' Court, holden before their steward or judge; from which a writ of error lies to the Court of Hustings, before the mayor, recorder, and sheriffs; and from thence to justices appointed by the king's commission, who used to sit in the church of St. Martin-le-Grand. *F. N. B. 32.* And from the judgment of those justices a writ of error lies immediately to the House of Lords. 3 *Comm. 80, n.* See titles *Courts, Court of Hustings, Inferior Courts, &c.*

The Court of Requests, or Court of Conscience for the recovery of debts not exceeding 40s. was first established in London so early as the reign of Henry VIII. by an act of the Common Council; which was, however, certainly insufficient for that purpose, and illegal, till confirmed by the 3 *Jac. 1. c. 15.* explained and amended by the 14 *Geo. 2. c. 10.* By the 39 & 40 *Geo. 3. c. 104.* further amendments have been made in these statutes, and the jurisdiction of the Court extended to £5. See title *Courts of Conscience.*

The gaol-delivery for the county of Middlesex, as well as that for London, was until recently held at the Old Bailey, in the city of London, eight times in the year; and it was by 3 *Geo. 3. c. 18,* provided, that when such session should have begun before the essoin-day of any term, it might continue to be held, and be concluded notwithstanding the sitting of the Court of King's Bench. And this act, by 32 *Geo. 3. c. 48,* was extended to the Middlesex sessions.

And see the 9 *Geo. 4. c. 9.* providing for the holding of the sessions of the peace at Westminster, notwithstanding the sitting of the King's Bench.

Now by the 4 & 5 *W. 4. c. 36.* after reciting that "it is expedient, for the more effective and uniform administration of justice in criminal cases, that offences committed in the metropolis and certain parts adjoining thereto, should be tried by justices and judges of oyer and terminer and gaol delivery in the city of London," it is enacted,

§ 1. That the lord mayor of London, the lord chancellor the judges of the courts of law and of bankruptcy, and of the admiralty, the dean of the arches, the aldermen, recorder, and common serjeant of London, &c. and such others as his majesty may appoint, shall be judges of a court to be called the "Central Criminal Court," to which his majesty may direct his general commission as after mentioned; and which court shall have jurisdiction to hear, try, and determine all offences as after specified.

§ 2. His majesty may issue commissions of oyer and terminer to inquire of, hear, and determine all treasons, murders, felonies, and misdemeanors committed within the city of London and county of Middlesex, and certain parts of the counties of Essex, Kent, and Surrey; and also commissions of gaol delivery to deliver his majesty's gaol of Newgate of the prisoners therein charged with any of the offences aforesaid, committed within the limits aforesaid; and it shall be lawful for the justices and judges of the Central Criminal Court aforesaid, or any two or more of them, to inquire of, hear, determine, and adjudge all such treasons, murders, felonies, and misdemeanors, and all treasons, murders, felonies, and misdemeanors which might be inquired of, heard and determined under any commission of oyer and terminer of the city of London or county of Middlesex, or commissions of gaol delivery to deliver the gaol of Newgate, or which in case the parts of the counties of Essex, Kent, and Surrey respectively comprised within the limits aforesaid had been

counties of themselves, might have been inquired of, heard, and determined under commissions of oyer and terminer and gaol delivery for such counties, and to deliver the said gaol of Newgate at such times and places in the said city, or the suburbs thereof, as by the said commissions shall be appointed, or as the said justices and judges by virtue and in pursuance thereof, or any two or more of them, shall appoint, and to award and issue all precepts and process, and use and exercise all powers and authorities belonging to justices of oyer and terminer and gaol delivery: provided always, that such court shall have power and jurisdiction to proceed on every such commission so issued as aforesaid, and act under such commission until a new commission shall be issued.

§ 3. The district situated within the limits of the jurisdiction hereinbefore established shall be deemed in all cases tried before the said justices and judges one county, for all purposes of venue, local description, trial, judgment, and execution, not herein specially provided for; and that in all indictments and presentments preferred and tried before the said justices and judges, the venue laid in the margin shall be as follows: "Central Criminal Court to wit;" and all offences which in other indictments would be laid to have been committed in the county where the trial is had, and all material facts which would be in other indictments averred to have taken place in the county where the trial is had, shall, in indictments prepared and tried in the said court, be laid to have been committed, and averred to have taken place "within the jurisdiction of the said court."

§ 4. The sheriffs of the city of London and of the counties of Middlesex, Essex, Kent, and Surrey, respectively, shall execute and obey all precepts and process which the said justices and judges shall award and direct unto them respectively, and shall, whenever required, summon from the said city of London and county of Middlesex, and from the parts of the said counties of Essex, Kent, and Surrey, within the act, a competent number of persons qualified according to law to inquire of, present, and try all offences and other matters cognizable by the said justices and judges; and the persons so returned, whether taken wholly from the city of London or the said counties, or taken indiscriminately from the said city and the said counties, shall have authority to inquire of, present, hear, try, and determine all such offences and other matters, and all issues and all matters of fact arising out of such trials, notwithstanding they are not inhabitants of the city, county, or place where such offences or other matters may be committed or arise.

§ 5. His majesty, by order in council, to appoint the places of confinement for prisoners charged with offences committed within the limits of the act.

But by § 6, the Penitentiary at Milbank is to be one of the prisons under this act.

§ 7. Persons sentenced to imprisonment by any court beyond the limits of this act, may still be removed to the Penitentiary at Milbank.

And § 8. The regulations in all Penitentiary Acts shall apply to prisoners confined there by the authority of the act.

§ 9. The said justices and judges of oyer and terminer and gaol delivery, or any two or more, may commit persons brought before them charged with any offence cognizable under the act, or who shall be convicted or attainted before them, to such gaol, house of correction, or other prison as may be specified in any order of council made by virtue of the act, or if no such order shall have been made, then to the common gaol, house of correction, or other prison of the city, county, or place to which such offender might have been committed if the act had not passed, or to Newgate, there to remain until discharged by due course of law, or in execution of their respective judgments; and in case of such commitment to Newgate, execution of such judgments shall be done upon such persons by the sheriffs of the said city of London.

§ 10. Until his majesty shall order and direct in what gaol, &c. persons charged with or convicted of offences committed within the limits of the act shall be imprisoned, any justice of the peace or coroner for the counties of Essex or Kent, so far as relates to the parishes lying within their respective counties, to commit persons charged with offences aforesaid cognizable by the said justices and judges of oyer and terminer and gaol delivery by virtue of the act to Newgate; and also for any justice of the peace or coroner for the county of Surrey, so far as relates to the several parishes lying within that county, to commit any person charged with any such offences aforesaid to his majesty's gaol of Horsemonger Lane or Newington, in and for the county of Surrey.

§ 11. Every justice or coroner acting within the limits of the act shall specify in the commitment that the persons charged are committed under the authority of the act; and such justice or coroner shall take the like examinations, informations, bailments, and recognizances, and certify the same to the said justices of oyer and terminer and gaol delivery, as required by the 7 Geo. 4. c. 64; and any justice or coroner, in default of so doing, shall be liable to the same fines and penalties to be imposed by the said justices and judges of oyer and terminer and gaol delivery, in the same manner as mentioned in the said act; and when any persons shall be committed to his majesty's gaol for the county of Surrey, for any offence cognizable by virtue of this act, by a commitment specifying that such persons are committed under the act, the sheriff of the said county of Surrey, or the keeper of the gaol for the said county, shall, six days at least before the sitting of the next court of oyer and terminer and gaol delivery appointed under the act, or at such other time as the said justices and judges of oyer, &c. or any two or more, shall from time to time direct, cause such persons, with their commitments and detainers, to be safely removed from the gaol of the said county of Surrey, without the issuing of any writ of habeas corpus or other writ, to the said gaol of Newgate, there to remain until delivered by due course of law.

§ 12. Any two of the said justices and judges of oyer, &c. may order the costs and expenses of prosecutors and witnesses, in all cases where prosecutors and witnesses may be by law entitled thereto, to be paid by the treasurer of the county in which the offence of any person prosecuted would have been tried but for the act; and every such treasurer or some known agent shall attend the said justices and judges during the sitting of the court, to pay all such orders.

§ 13. No bill of indictment for any misdemeanor (other than perjury or subornation of perjury) which can be presented to the grand jury at any sessions of the peace for the city of Westminster and borough of Southwark, and counties of Middlesex, Essex, Kent, and Surrey respectively, in which such misdemeanor was committed, shall be presented to the grand jury summoned under the act, unless the prosecutor or other person presenting such indictment shall have been bound by recognizance to prosecute or give evidence at the sessions to be held under the act against the persons accused of such misdemeanor, or unless such persons accused shall have been detained in custody, or shall be bound by recognizance to appear at the said sessions to be held under the act.

§ 14. The court of the lord mayor and aldermen of London may contract with the justices of Essex, Kent, and Surrey, for the support of their prisoners in Newgate, and if they cannot agree, the judges are to settle the amount.

§ 15. The said justices and judges of oyer, &c. to be appointed under the act, or any two or more, shall hold a session for the said city of London and county of Middlesex, and the parts of the counties of Essex, Kent, and Surrey hereinbefore mentioned, in the said city of London or suburbs thereof, at least twelve times in every year, (and oftener if need be,) such times to be fixed by general orders of the said court, which any eight or more of the said judges

of his majesty's courts of Westminster are hereby empowered to make from time to time.

§ 16. His majesty's Court of King's Bench, or any judge thereof, or any commissioner of oyer and terminer and gaol delivery under the act, being a judge of any of the superior Courts at Westminster, or the chief judge or any other judge of the Court of Bankruptcy, or the recorder for the said city of London for the time being, if such court, judge, or recorder shall think proper, may issue any writ or writs of certiorari, or other process, directed to his majesty's justices of the peace for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, commanding them to certify and return into the said court of oyer and terminer and gaol delivery indictments or presentments found or taken before them, of any offences cognizable by virtue of this act, and the several recognizances, examinations, and depositions relative to such indictments and presentments, so that the same offences may be tried by the said justices and judges of oyer and terminer and gaol delivery; and also for the like purpose, by writ or writs of habeas corpus, to cause any person or persons, who may be in the custody of any gaol or prison charged with any offences cognizable under the act, to be removed into the custody of the keeper of the gaol of Newgate.

§ 17. "The justices of the peace for the said cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, shall not, at their respective general or quarter sessions of the peace, or any adjournment thereof, try any person or persons charged with any capital offence, or with any of the following offences committed or alleged to be committed within the limits of this act; that is to say, house-breaking, stealing above the value of five pounds in a dwelling-house, horse-stealing, sheep-stealing, cattle-stealing, maliciously wounding cattle, bigamy, forgery, perjury, conspiracy, assault with intent to commit any felony, administering or attempting to administer poison with intent to kill or to do some grievous bodily harm, administering drugs or other things, or doing any thing with intent to cause or procure abortion, manslaughter, destroying or damaging ships or vessels, the breaking of shops, warehouses, counting-houses, and buildings within the curtilage of dwelling-houses, killing sheep with intent to steal the carcasses, the uttering of all forged instruments, and the various offences enumerated in the act passed in the first year of the reign of his present majesty, intituled "An act for reducing into one act all such forgeries as shall henceforth be punished by death; and for otherwise amending the laws relative to forgery," forging the assay marks on gold or silver plate, and all the offences relating to coin enumerated in the act passed in the second year of the reign of his present majesty, intituled "An act for consolidating and amending the laws against offences relating to the coin," the abduction of women, bankrupts not surrendering under their commission or concealing their effects, breaking down bridges and banks of rivers, taking rewards for helping to stolen goods, personating any officer, seaman, or other persons, in order to receive any wages, pay, allowance, or prize money due or supposed to be due, or any out-pensioner of Greenwich Hospital, in order to receive any out-pension allowance due or supposed to be due, sending threatening letters and using threats to extort money, larceny on navigable rivers and canals, and stealing and destroying goods in progress of manufacture, and larcenies after a previous conviction, embezzlement, larceny by clerks and servants, and receivers of stolen goods, whether such person or persons shall be charged as principal offenders or as accessories before or after the fact."

§ 18. Every recognizance entered into for the prosecution before his majesty's justices of the peace aforesaid of any

person for any offence cognizable under the act, and any recognizance for the appearance as well of any witness to give evidence upon any bill of indictment or presentment for any such offence as of any person to answer our lord the king concerning any such offence, or to answer generally before such justice of the peace, shall, in case any such writ of certiorari or habeas corpus be issued for removing such indictment or presentment or such person so in custody as aforesaid, be obligatory on the parties bound by such recognizance to prosecute and appear and give evidence and do all other things therein mentioned with reference to the indictment or presentment or the person so removed as aforesaid before the justices and judges of oyer and terminer and gaol delivery acting by virtue of the act; provided that in cases of removal from the jurisdiction of justices of the peace for the cities of London or Westminster, the liberty of the Tower of London, the borough of Southwark, or counties of Middlesex and Surrey, two days' notice, and in case of removal from the jurisdiction of the justices of the peace for the counties of Essex and Kent, one week's notice, shall have been given either personally or by leaving the same at the place of residence as of which the parties bound by such recognizance are therein described, to appear before the court of oyer and terminer and gaol delivery instead of the said other justices. Provided also, that the court, judge, or recorder who shall grant such writ of certiorari or habeas corpus, and it is hereby required that such court, &c. shall cause the party applying for such writ or writs, whether he be the prosecutor or party charged with such offence, to enter into a recognizance in such sum, and with or without sureties, as the court, judge, or recorder may direct, conditioned to give such notice as aforesaid to the parties bound by such recognizance to appear before the said court of oyer and terminer and gaol delivery instead of before the said other justices respectively, and to do such other things as such court, &c. shall direct.

§ 19. The said justices of the peace for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and for the counties of Middlesex, Essex, Kent, and Surrey, if they shall think fit, may certify and deliver to the said justices and judges of oyer and terminer and gaol delivery any indictment or presentment found or taken before them at their said general or quarter sessions of the peace, or at any adjournment thereof, for offences cognizable by virtue of the act, in the same manner as the said justices might do if the said court of oyer and terminer and gaol delivery was holden in the county where such indictments or presentments were found or taken.

§ 20. The said justices and judges of oyer and terminer and gaol delivery, in sessions assembled, are authorized and required to make a table of fees and allowances to be received by the officers of the said court, and from time to time to alter the same; which said table of fees and allowances shall be hung up in the Court of Sessions, and a copy thereof transmitted to the clerks of the peace of the counties of Middlesex, Essex, Kent, and Surrey; or the said justices and judges may settle a salary in lieu of such fees and allowances, to be paid to the said officers or either of them for the performance of their respective duties, and order how and by whom such fees and allowances or salary shall be paid, and also order such portion as they shall think fit of the expense of preparing calendars and sessions papers, and of other expenses incident to the act, to be borne and paid by the treasurer of each of the said counties: Provided that the county of Middlesex shall not be liable to any portion of the expense of preparing calendars or sessions papers, or of any other expenses incident to the act, to which the said county would not have been liable in case the act had not been passed.

§ 21. Provided that nothing herein contained shall pre-

vent the justices of the peace for the said cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the said counties of Middlesex, Essex, Kent, and Surrey, from holding their respective general or quarter sessions of the peace during the sitting of the said court of oyer and terminer and gaol delivery to be held in pursuance of this act; and that neither this act, nor the commissions of oyer and terminer and gaol delivery from time to time issued thereunder, shall supersede or affect any other commission or commissions of oyer and terminer to be at any time issued by his majesty in the said counties of Essex, Kent, and Surrey, or the jurisdiction by virtue thereof, nor prevent the justices of oyer and terminer appointed by any commission to be issued under the authority of this act from holding their respective sessions at one and the same time.

By § 22. After reciting that "it is expedient that persons charged with certain offences committed on the high seas and other places within the jurisdiction of the Admiralty of England, should speedily be brought to trial;" it is enacted that the justices and judges of oyer and terminer and gaol delivery to be appointed by the commissions issued under the act, or any two or more, may inquire of, hear, and determine any offences committed or alleged to have been committed on the high seas, and other places within the jurisdiction of the Admiralty of England, and deliver the gaol of Newgate of any persons detained therein for any offences alleged to have been committed upon the high seas aforesaid, within the jurisdiction of the Admiralty of England; and all indictments found and trials and other proceedings had and taken by and before the said justices and judges, shall be valid and effectual; and any three of the said justices and judges may order the payment of the costs and expenses of such prosecutions in manner prescribed and directed by the before-recited act of the seventh of George the Fourth.

§ 23. Provided always, that nothing in the act contained shall extend to prejudice or affect the rights, interests, privileges, franchises, or authorities of the lord mayor, aldermen, and recorder of the city of London, or their successors, the sheriffs of the city of London and county of Middlesex, for the time being, or to prohibit or diminish any power, authority, or jurisdiction which at the time of making this act the said lord mayor, aldermen, and recorder for the time being of the said city might lawfully use or exercise; and that, notwithstanding any practice or custom of the said city of London to the contrary, it shall be lawful for the Lord Mayor's Court of the City of London to sit on any day on which any session of the peace, oyer and terminer and gaol delivery shall be held within the said city, and that all proceedings of the said Lord Mayor's Court that might have been taken if such sessions were not held, shall be taken, any practice, custom, or law to the contrary notwithstanding.

By § 24. The act is to take effect from and after the 31st October, 1834.

After the fire of London a judicature was enacted for determining differences relating to the houses burnt; and several rules were laid down for rebuilding the city, the streets, lanes, &c. The lord mayor and aldermen were to set out markers; the number of parishes and churches was ascertained, and a duty granted on coals for rebuilding the churches, &c. See 19 Car. 2. c. 2. & 22 Car. 2. c. 11. 14; 25 Car. 2. c. 10.

By the 3 & 4 W. 4. c. 66, the commissioners of the treasury were empowered to purchase out of the consolidated fund the duties of pack, g. s. v. go, ballage, and portage belonging to the corporation of London, with a view to the abolition of those offices. By § 4. the corporation may lay out the money so received in land, or § 5 may invest it in the purchase of the ground rents and reversions of the houses and parcels of ground mentioned in the act.

By the 4 & 5 W. 4. c. 32, the rates of tonnage imposed on ships frequenting the port of London by various former

acts are repealed, and the following reduced scale of charges enacted.

First Class.—For every ship or other vessel trading coastwise between the port of London and any port or place in Great Britain, Ireland, the Orkneys, Shetland, or the Western Islands of Scotland, there shall be paid for every voyage, both in and out of the said port, one halfpenny per ton:

Second Class.—For every ship or other vessel entering inwards or clearing outwards in the said port from or to Denmark, Norway, or Lapland (on this side of the North Cape,) or from Holstein, Hamburg, Bremen, or any other part of Germany bordering or near the Germanic Ocean, or from or to Holland or any other of the united provinces, or Brabant, Antwerp, Flanders, or any other part of the Netherlands, or from or to France (within Ushant), Guernsey, Jersey, Alderney, Sark, or the Isle of Man, there shall be paid for every voyage, both in and out of the said port, one halfpenny per ton:

Third Class.—For every ship or other vessel entering inwards or clearing outwards in the said port from or to Lapland (beyond the North Cape), Finland, Russia (without or within the Baltic sea,) Livonia, Courland, Poland, Prussia, Sweden, or any other country or place within the Baltic sea, there shall be paid for every voyage, both in and out of the said port, one halfpenny per ton:

Fourth Class.—For every ship or other vessel entering inwards or clearing outwards in the said port from or to France (between Ushant and Spain), Portugal, Spain (without the Mediterranean), or any of the Azores, Madeira, or Canary Islands, or any of the United States of America, or of the British Colonies or Provinces in North America or Florida, there shall be paid for every voyage both in and out of the said port, three farthings per ton:

Fifth Class.—For every ship or other vessel entering inwards or clearing outwards in the said port from or to Greenland, Gibraltar, France, or Spain (within the Mediterranean), or any country, island, port, or place, within or bordering on or near the Mediterranean or Adriatic sea, or from the West Indies, Louisiana, Mexico, South America, Africa, East India, China, or any other country, island, port, or place within or bordering on or near the Pacific Ocean, or from any other country, island, port, or place whatsoever to the southward of twenty-five degrees of north latitude, there shall be paid for every voyage both in and out of the said port, three farthings per ton.

By § 4, the said duties shall be under the management of the commissioners of Customs, and recovered in the same manner.

§ 5. Exempts from the above duties his Majesty's ships of war, or any ship or vessel being the property of his Majesty, or of any of the royal family, ships coming to or going coastwise from the port of London or to any part of Great Britain, unless such ships exceed forty-five tons register tonnage, vessels bringing corn coastwise, the principal part of whose cargo shall consist of corn, fishing smacks, lobster and oyster boats, or vessels for passengers, vessels or craft navigating the river Thames above and below London bridge as far as Gravesend only, and vessels entering the port of London inwards, or going from the port of London outwards, when in ballast.

By § 7, the commissioners are empowered after three years to reduce the duties, if they are found to be more than sufficient to defray the expenses of maintaining the mooring chains in the Thames and the salaries of the harbour-masters and their assistants, and the other charges which are by the act to be paid out of such duties.

A great variety of statutes have been passed to regulate various concerns of the city of London besides those already alluded to; the following is a very short abstract of the purport of those most material: and see title *Police*.

By *Civ. London*, 13 E. 1. st. 5, none shall walk the streets armed after curfew, unless noblemen or their servants with

lights; taverns and alehouses shall be shut at *curfew*; fencing schools for buckler shall not be kept in London; none but freemen shall keep inns in the city; none shall be brokers in London but those who are admitted and sworn by the mayor and aldermen, (see *post*, *Brokers*.) the officers of the city shall not be punished for false imprisonment, unless it appear to be of malice.

Proceedings on a foreign voucher and recoveries. *Glouc.* 6 *Ed.* 1. c. 11, 12; *Artic. St. Glouc. correc.* 9 *E.* 1. Damages shall be assessed by the assise in novel disseisin, and amercements shall be offered by the barons of the Exchequer. *Stat. Glouc.* c. 14. Wines sold contrary to the assise shall be presented to the barons. *Stat. Glouc.* c. 15.

The manner of proceeding for arrears of rent and services. *Stat. de Gavelet*, 10 *E.* 2.

All vintners, victuallers, fishmongers, butchers, and poulterers, to be under the rule of the mayor and aldermen. 31 *E.* 3. st. 1. c. 10; 7 *R.* 2. c. 11.

Merchants of London free to pack their cloths. 1 *H.* 4. c. 16.

Freemen of London may carry their goods to any fair or market, notwithstanding their bye-laws. 3 *H.* 7. c. 9.

The 2d of September to be observed annually as a public fast, in commemoration of the dreadful fire 1666. 19 *Car.* 2. c. 3.

See under the several titles following, and the statutes referred to, for further information.

Aldermen; not to be elected yearly, but remain till they are put out for reasonable cause. 17 *R.* 2. c. 11. Their negative in common council established. 11 *Geo.* 1. c. 18. § 15. Repealed by 19 *Geo.* 2. c. 8.

Attaint; proceedings in, regulated. 11 *H.* 7. c. 21. § 2; 37 *H.* 8. c. 5. § 3. (Abolished by the 6 *G.* 4. c. 50. § 60.)

Ballastage; see 6 *Geo.* 2. c. 29; 3 *Geo.* 2. c. 16.

Blackwell-Hall; market for the sale of woollen-cloth, to be held there every Thursday, Friday, and Saturday; and regulations relating thereto. 8 & 9 *W.* 3. c. 9; and see 4 & 5 *P.* & *M.* c. 5. § 26; 39 *Eliz.* c. 20. § 12; 1 *Geo.* 1. c. 15.

Bowyers; see 8 *Eliz.* c. 10.

Bread; see tit. *Bread*.

Bridges; see the acts for rebuilding London Bridge, and improving the approaches thereto; 4 *G.* 4. c. 50; 7 & 8 *G.* 4. c. 30; 10 *G.* 4. c. 136; 1 *W.* 4. c. 3; 2 *W.* 4. c. 23.

Brokers; to pay 40s. *per ann.* on their admission by the Court of Aldermen; 6 *Ann.* c. 16; and to enter in a bond conditioned for honest behaviour, and not to deal on their own account. See the terms *Paley on Principal and Agent* (ed. by Lloyd.) Although a broker contravenes the act by dealing for himself, this does not render the transaction invalid, but only subjects him to the penalty under the act. It seems that a stockbroker is liable to the payment of this fee of 40s. 7 *East*, 292.

Buildings; regulated and divided into seven rates or classes; their height, party-walls, &c. determined. Preventions against fire (see *Fire*), &c. 14 *Geo.* 3. c. 78. See *Police*.

Butchers; not to slay beasts within the walls of the city. 4 *H.* 7. c. 3. See further title *Butchers*.

Carriers; regulation of their charges. 21 *Geo.* 2. c. 28.

Carts; penalty on drivers riding on their carts, 10s. or 20s. if owner of the cart. 1 *Geo.* 1. st. 2. c. 57; 24 *Geo.* 2. c. 43; 30 *Geo.* 2. c. 22. Owner's name and number to be put on them. 18 *Geo.* 2. c. 33; 30 *Geo.* 2. c. 22; 7 *Geo.* 3. c. 44; 24 *Geo.* 3. st. 2. c. 27; which also contain regulations for the behaviour of the drivers. See *Police*.

Cattle; salesmen not to buy cattle on the road. 31 *Geo.* 2. c. 40. Regulations as to driving cattle. 21 *Geo.* 3. c. 67. See *Cattle*, *Police*.

Chimney-Sweepers; see the act regulating chimney-sweepers and their apprentices, and for the safer construction of chimneys and flues. 4 & 5 *W.* 4. c. 35.

Churches; see 1 *Ann.* st. 2. c. 12. Buildings erected on

any part of St. Paul's church-yard (except the chapter-house) to be deemed common nuisances. See also 9 *Ann.* c. 23. 10 *Ann.* c. 11; 1 *G.* 1. c. 23, &c. as to building fifty new churches by a duty on coals.

Coaches and Chairs. See title *Coaches*.

Coals. See title *Coals*.

Coopers' Company; regulated by 23 *H.* 8. c. 4; 31 *Eliz.* c. 8. Corn. See title *Corn*.

Docks, Quays, and Harbours. See 39 *Geo.* 3. c. lxxix, 39 & 40 *Geo.* 3. c. xlvii.; 42 *Geo.* 3. c. cxliii.; and 43 *Geo.* 3. c. cxxvi.; and several other local acts; and the public acts, 44 *Geo.* 3. c. 100; 46 *Geo.* 3. c. 118, &c.; 47 *Geo.* 3. st. 2. c. 60. 47 *Geo.* 3. st. 2. c. xxxi. c. lxxii.; 48 *Geo.* 3. c. viii.; 50 *G.* 3. c. 22; 52 *Geo.* 3. c. 49; 54 *Geo.* 3. c. 45. For the sale and conveyance of quays, &c. the property of the crown, situate between London bridge and the Tower, see 2 & 3 *W.* 4. c. 66. amended by 3 & 4 *W.* 4. c. 8.

Dyers; regulations as to journeymen, servants, and labourers. 17 *Geo.* 3. c. 33. Control of the Dyers' company to prevent frauds in dyeing woollen goods. 23 *Geo.* 3. c. 15.

Elections; of aldermen and common councilmen, are (1 *Geo.* 1. c. 18. s. 7, 8, 9.) to be by freemen householders paying scot and lot, and having houses of the value of 10*l.* a year. Formerly none could vote at the election of members of parliament for the city of London, but liverymen that had been twelve months on the livery, not discharged from payment of taxes, nor having received alms; (see 11 *Geo.* 1. c. 18.); but by the Reform Act, (2 *W.* 4. c. 45.) the privilege has been extended to all householders paying 10*l.* a year rent and complying with the other requisites of the statute. See title *Parliament*.

Fish; for regulating Billingsgate market, see 10 & 11 *W.* 3. c. 24; powers given to the Fishmongers' Company, 9 *Ann.* c. 26. As to the power of the Court of Mayor and Aldermen as conservators of the river Thames, and of their deputy water-bailiff, see 30 *Geo.* 2. c. 21. Forestalling fish, see 29 *Geo.* 2. c. 39; 33 *Geo.* 2. c. 27. (explained and amended by 4 & 5 *W.* 4. c. 20.); 2 *Geo.* 3. c. 15; 42 *Geo.* 3. c. lxxxvii. and see title *Fish*.

Foreign Attachment; see tit. *Attachment*, *Foreign*.

Freemen of London may dispose of their personal estates by will as they think fit, notwithstanding the custom of the city; but which custom remains in force as to intestates, and in case of marriage agreements. 11 *Geo.* 1. c. 18. See titles *Executor*, *V.* 9; *Marriage*.

Hay; regulating the weight and sale of. 2 *W.* & *M.* 2. c. 8; 8 *W.* 3. c. 17; 31 *Geo.* 2. c. 40; 11 *Geo.* 3. c. 15. 36 *Geo.* 3. c. 86; 11 *G.* 4. & 1 *W.* 4. c. 14; 4 & 5 *W.* 4. c. 21.

Horners; see 4 *Edm.* 4. c. 8. repealed by 1 *Jac.* 1. c. 25. but revived in part by 7 *Jac.* 1. c. 14.

Insurance; see title *Insurance*.

Leather; regulations for the sale and manufacture of, see 5 & 6 *E.* 6. c. 15; 1 *Mar.* st. 3. c. 8; 13 & 14 *Car.* 2. c. 2. (under which the market at Leadenhall for leather is held every Tuesday;) 1 *W.* & *M.* st. 1. c. 33.

Livery; see *Elections*.

Militia, embodying and regulating; see 13 & 14 *Car.* 2. c. 3; 26 *Geo.* 3. c. 107; 34 *Geo.* 3. c. 81; 36 *Geo.* 3. c. 94. 39 *Geo.* 3. c. 82. (37 *Geo.* 3. cc. 25. 75. *Tower Hamlets*.) 41 *Geo.* 3. c. 90. § 153; and title *Militia*.

Oath of a freeman, altered by 11 *Geo.* 1. c. 18. § 19.

Oil; under the regulation of the tallow-chandlers' company. 3 *H.* 8. c. 14.

Orphans' Fund; established, regulated, and applied; see 5 & 6 *W.* & *M.* c. 10; 21 *Geo.* 2. c. 29; 7 *Geo.* 3. c. 27. See *Orphans*.

Painters; regulated, stat. 1. *Jac.* 1. c. 20.

Paving; lighting, cleansing, and watching. The provisions of the statutes for these purposes are various and numerous. See 10 *Geo.* 2. c. 22; 11 *Geo.* 3. c. 29. and title *Police*.

As to improvements at Temple-bar and Snow-hill, see 42 Geo. 3. c. lxxiii; 49 Geo. 3. cc. lxx. lxxii; and other local acts.

Penitentiary Houses; building and regulating. 52 Geo. 3. c. 44.

Physicians, apothecaries, and surgeons, subject to the control of the college of physicians in London, and exempted from offices. See 3 H. 8. c. 11; 5 H. 8. c. 6; 14 & 15 H. 8. c. 5; 32 H. 8. c. 40; 34 & 35 H. 8. c. 8; 1 Mary. st. 2. c. 9; 6 Will. 3. c. 4. The companies of barbers and surgeons united, 32 H. 8. c. 42. The union dissolved, and regulations made for the surgeons' company. 18 Geo. 2. c. 15. And see the 2 & 3 W. 4. c. 75. for the formation of anatomical schools.

Poor; guardians of the workhouses appointed, and regulations as to the infant poor. 13 & 14 Car. 2. c. 12; 22 & 23 Car. 2. c. 18; 2 Geo. 3. c. 22.

Sewers, in London, subjected to the commissioners of sewers. 3 Jac. 1. c. 14.

Scavengers. See that title.

Shoemakers, regulated. 9 Geo. 1. c. 27.

SOUTHWARK, regulations as to its market. 28 Geo. 2. cc. 9, 23; 30 Geo. 2. c. 31. As to paving and lighting, &c. 6 Geo. 3. c. 24; 11 Geo. 3. c. 17; 44 Geo. 3. c. 86.

Spices. See tit. *Garblers*.

Streets. Scavengers are to be elected in London, and within the bills of mortality, in each parish, by the constable, churchwardens, &c. to see that the streets be kept clean; and housekeepers are to sweep and cleanse the streets every Wednesday and Saturday under penalties. 2 W. & M. st. 2. c. 1. Further regulations are also made by 8 & 9 W. 3. c. 37; 6 Geo. 1. c. 6. § 1; 18 Geo. 2. c. 33. §§ 2, 3. See tit. *Police*.

Pharmes; rules for the conservation of. 4 H. 7. c. 13, 27 H. 8. c. 18.

Tithes of the parishes in London, settled by 37 H. 8. c. 12. according to a decree of the archbishop, &c.

The tithes of the parishes in London, the churches whereof were burnt, were appointed, none less than 100*l.* per ann. nor above 200*l.* per ann., to be assessed and levied quarterly. 22 & 23 Car. 2. c. 15.

Water-works, to supply the city with water. See 35 H. 8. c. 10; and 3 Jac. 1. c. 18; 4 Jac. 1. c. 12; as to the New River; and 7 Jac. 1. c. 9. as to Chelsea waterworks.

Commissioners appointed for supplying the city of London with water from the river Thames, &c. Casting filth into water-courses incurs 40*s.* penalty. 8 Geo. 1. c. 26.

Watermen. See 7 & 8 Geo. 4. c. 75. whereby all former acts are repealed, and the company of watermen incorporated, and various new provisions enacted for the better regulation of the watermen and lightermen on the river Thames.

Wharfage; regulation of rates of wharfage and crantage, and the situation of wharfs, are settled by 22 Car. 2. c. 11.—See 41 Geo. 3. c. 118. as to purchasing the legal quays by government.

Weights and Measures; inspectors of, appointed in the parish of St. Marylebone. 10 Geo. 3. c. 23. § 81—132.

WESTMINSTER. Several acts have been passed for the internal regulation of this district of the metropolis, viz. a private statute passed in 27 Eliz. continued and confirmed by 18 Car. 1. c. 4. for the nomination and appointment of burgesses and chief burgesses. The 29 Geo. 2. c. 25; 31 Geo. 2. c. 17. as to the appointment of constables and annoyance-justices, and the sealing weights and measures. 31 Geo. 2. c. 25. (never carried into execution) for a free market. As to paving, cleansing, and lighting the streets, squares, lanes, &c. in Westminster, and parts adjacent, see 2 Geo. 3. c. 21; 3 Geo. 3. c. 23; 4 Geo. 3. c. 39. [5 Geo. 3. c. 13; 26 Geo. 3. c. 102. imposing certain street-tolls for those purposes.] 5 Geo. 3. c. 50; 11 Geo. 3. c. 22; 2 & 3 W. 4. c. 56. The 14 Geo. 3. c. 90. was passed for regulating the nightly watch within the same precincts or boundaries.

See also 44 Geo. 3. c. 61. for building a new sessions house; and 46 Geo. 3. c. 89; 48 Geo. 3. c. 137; 50 Geo. 3. c. 119; 54 Geo. 3. c. 154., for improvement of the streets and places near Westminster Hall, and the two houses of parliament; 53 Geo. 3. c. 121; 7 Geo. 4. c. 77; 9 Geo. 4. c. 70; and 1 & 2 W. 4. c. 29. for making various new streets and other improvements in Westminster and London; and 11 Geo. 4. c. 70. for the establishment of a wharf and market at Hungerford-market.

LONDON ASSURANCE. See *Insurance*.

LONGELLUS. A word used in Thorn's Chronicle; it signifies a coverlet. *Cowell*.

LONGITUDE of a place, in geography, is an arch of the equator intercepted between the first meridian, and the meridian passing through the proposed place; which is always equal to the angle at the pole, formed by the first meridian, and the meridian of the place.

The first meridian may be placed at pleasure, passing through any place, as London, Paris, Teneriffe, &c. but with us it is generally fixed at London; and the degrees of longitude counted from it, will be either east or west, according as they lie on the east or west side of that meridian.

In other words, to explain the subject in a familiar manner to those wholly unacquainted with it, as by the latitude we learn the distance north or south, so by knowing the longitude, we know the distance from any given place east or west; allowing for the difference of a degree of longitude at the equator (or middle of the globe) and at the arctic circle, &c.

The longitude is, as before described, in other words, the distance of a place east or west from that imaginary line drawn from north to south, through a place fixed on for that purpose, and called the first meridian, i. e. the meridian or boundary from whence we reckon east or west; so that by ascertaining the latitude and longitude of a place, its situation on the natural or artificial globe, with respect to all other places, is known.

By 12 Ann. st. 2. c. 15; 26 Geo. 2. c. 25; 30 Geo. 3. c. 14. the lord admiral and commissioners of the admiralty were appointed commissioners to receive proposals for the discovery of a method to ascertain the longitude at sea, and were empowered to give rewards accordingly. Under 5 Geo. 3. c. 20; 43 Geo. 3. c. 118; 46 Geo. 3. c. 77. the commissioners may construct and publish nautical almanacks, which none must publish without their licence, under forfeiture of 20*l.* to be sued for by the commissioners' secretary. By 14 Geo. 3. c. 66 (repealing all former acts, except such clauses of them as relate to the authority of the commissioners,) rewards of 5,000*l.* 7,500*l.* and 10,000*l.* are offered to the discoverer of a method to find the longitude; in the first instance if determined within one degree, in the second if within two-thirds, and in the last if within half a degree. By this statute, and 21 Geo. 3. c. 52; 30 Geo. 3. c. 14; 48 Geo. 3. c. 118; 46 Geo. 3. c. 77; 55 Geo. 3. c. 75. the commissioners have been from time to time empowered to grant smaller rewards for less useful discoveries on the same account, not exceeding the sums marked under each statute.

By 16 Geo. 3. c. 6. if any ship discovers a passage between the Atlantic and Pacific oceans beyond the 52d degree of north latitude, the owner or commander, if a king's ship, shall receive 20,000*l.*; and 5,000*l.* shall be given in like manner to the first ship that shall approach within one degree of the North Pole.

LOQUELA. An imparlance; *loquela sine die*, a respite in law to an indefinite time. *Paroch. Antiq.* 210. See tit. *Imparlance*.

LORD, [*dominus*]. A word or title of honour, diversely used, being attributed not only to those who are noble by birth or creation, otherwise called lords of parliament, and peers of the realm, but to such so called by the courtesy of England, as all the sons of a duke, and the eldest son of an

earl, and to persons honourable by office, as the Lord Chief Justice, &c. and sometimes to a private person, that hath the fee of a manor, and consequently the homage of the tenants within his manor; for by his tenants he is called Lord. In this last signification it is most used in our law-books; where it is divided into lord paramount, and lord mesne; and very lord, &c. *Old. Nat. Br.* 79. See titles *Mean, Nobility, Parliament, Peers*.

LORD HIGH ADMIRAL. See *Admiral*.

LORD HIGH STEWARD. A peer specially appointed by the crown to preside at the trial of any peer, or peeress, in the House of Lords, either upon an impeachment, or on an indictment found by a grand jury.

His judicial authority appears to have grown out of that which appertained to the *Chief Justiciar* at the period when that office was abolished: and thus in effect wherever he presides for the trial of peers, the power and jurisdiction of the *curia regis* is revived.

Of the trials of peers which have occurred before the lord high steward upon indictment, found by a grand jury, very few of those antecedent to the revolution of 1688 took place during a session of parliament. Subsequent to the revolution every trial of a peer or peeress which has occurred has taken place during some session of parliament.

Foster and Blackstone represent that there are two separate tribunals for the trials of peers, differing both in their constitution and in their jurisdiction, to which they give the distinguishing appellations of the court of parliament, and the court of the high steward. *Fost.* 141. *4 Comm.* 261. In several cases, both in *Hargrave's* and *Howell's Collection of State Trials*, there is an error in the statement of the court.

It is settled that the office of lord high steward is not essential to the proceeding on impeachments; and on the impeachment of Lord Danby, and the popish lords, the Lords directed that the commission of the high officer, who was then appointed in consequence of an address to the crown, should be altered, by the omission of such expressions as intimated the necessity of his appointment; and the Lords have in several subsequent instances performed various judicial acts previous to his appointment. And in the case of *Lord Ferrers*, convicted of murder, it was decided by the judges that if the day appointed in the judgment for the execution of a peer convicted on an indictment should elapse before execution done, a new time of execution might be appointed, although no high steward were existing.

On trials, as well by indictment as impeachment, the House directs all parties appearing to address the Lords in general, and not the lord high steward in particular. On indictments it is usual for the Lords to address the King for the appointment of a high steward in the same manner as where the proceeding is by impeachment. See *Amos's Dissertation on the Court of the Lord High Steward*, annexed to the second volume of *Phillips's State Trials*, for much curious information on the subject. And see title *Peers of the Realm*, IV.

LORD IN GROSS, F. N. B. fol. 3. Is he that is lord, having no manor, as the King in respect of his crown. *Ibid.* fol. 5. And there is a case wherein a private man is lord in gross, viz. a man makes a gift in tail of all the lands he hath, to hold of him, and dieth; his heir hath but a seignior in gross. *F. N. B.* 8.

LORD OF A MANOR. See *Copyhold*.

LORD AND VASSAL. In the time of the feudal tenures, the grantor of land was called the proprietor, or lord; being the person who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use or possession, according to the term of the grant, was styled the feudatory or vassal, which was only another name for the tenant or holder of the lands; though, on account of the prejudices we have justly conceived against the doctrines which were afterwards grafted on this system, we now use the word

vassal opprobriously as synonymous to slave or bondman. *2 Comm.* 53. See title *Tenures*.

LORDS OF ERECTION. On the Reformation in Scotland, the King, as proprietor of benefices formerly held by abbots and priors, gave them out in temporal lordships to favourites, who were termed *Lords of Erection*. *Scotch Dict.*

LORDS LIEUTENANTS OF COUNTIES. See titles *County, Militia, Soldiers*.

LORDS MARCHERS. See *Wales*.

LORDS OF PARLIAMENT. See *Parliament, Peer*.

LORDS OF REGALITY. Persons to whom rights of regality, or rights of civil and criminal jurisdiction, were given by the crown. *Scotch Dict.*

LORIMERS [*Fr. Lormiers*, from *Lat. lorum*.] One of the companies of London, that make bits for bridles, spurs, and such like small iron ware, mentioned in *st. 1 Rich. 2. c. 12*.

LOSINGA. A flatterer, or sycophant. *Brompt. Chron.* p. 991.

LOT. A contribution or duty. See *Scot*.

LOT, or LOTH. The thirteenth dish of lead in the mines of Derbyshire, which belongs to the King. *Escheat, anno 16 Edw. 1.* See *Copy*.

LOTHERWITE, or LEYERWIT. A liberty or privilege to make amends of him that defileth a bond-woman without licence. *Rastall's Exposition of Words*; so that it is an amends for lying with a bond-woman. *Cowell*. See *Leinwite*.

LOTTERIES. The *4 Geo. 4. c. 60.* was the last act authorizing a public lottery, since which time they have been discontinued. These state lotteries were publicly drawn, by commissioners appointed, according to schemes, which varied almost every year.

It was long a disputed point among politicians whether the benefits of a lottery arising from a large sum voluntarily subscribed to the exigencies of the government, were not more than counterbalanced by the evils through this means introduced, by private lotteries, and by the more pernicious mode of gambling by insurance of numbers. Repeated attempts were made to repress this fatal mischief, and the measure of treating the persons taking money for insurance as rogues and vagabonds, seems to have been attended with the most success.

The following is a short summary of the acts in force on this subject. See titles *Advertisements, Gaming*.

Statutes 10 & 11 *W. 3. c. 17.* declares ALL lotteries public nuisances; and all patents for lotteries void, and against law (the state lotteries were all managed under annual acts of parliament passed for each;) imposes a penalty of 500*l.* on every proprietor of a private lottery, and 20*l.* on each adventurer. And see *stat. 42 Geo. 3. c. 119*.

9 *Ann. c. 6.* commands justices of peace to assist in suppressing private lotteries.

10 *Ann. c. 26.* imposes the like penalty of 500*l.* on persons keeping offices for illegal insurances on marriages, &c. under various pretences.

5 *Geo. 1. c. 9.* puts the sale of Chances on the footing of private lotteries, and imposes a penalty of 100*l.* (above all other penalties,) recoverable by the persons possessed of the ticket, the chance of which was sold; and the offender may also be committed to the county gaol for a year.

8 *Geo. 1. c. 2.* imposes a penalty of 500*l.* on persons keeping offices for the disposal of houses, lands, advowsons, &c. in lottery; and adventurers to forfeit double the sum contributed.

This statute and those of 10 & 11 *W. 3.* and 9 *Ann.* shortly mentioned, are explained and rendered more effectual by 13 *Geo. 2. c. 28.* which imposes 10*l.* penalty on justices neglecting their duty under those acts; and prohibits the games of ace of hearts, pharaoh, basset, and hazard, as lotteries, and imposes 50*l.* penalty on the players; and see 13 *Geo. 3. c. 12.* as to the game of passage, and other games with dice.

9 *Geo. 1. c. 19.* and 6 *Geo. 2. c. 35.* impose a penalty on

200*l.* and a year's imprisonment on persons selling tickets in or publishing schemes of any foreign lottery. Ireland is excepted under 22 *Geo.* 3. c. 47. and 29 *Geo.* 2. c. 7. provided that offences against the English acts against private lotteries, though committed in Ireland, shall be liable to all the penalties imposed, as if they were committed in England.

The statutes 22 *Geo.* 3. c. 47., 27 *Geo.* 3. c. 1., and many subsequent acts, as to lottery-office keepers and the sale of tickets, are rendered invalid by the discontinuance of public state lotteries. As to the taking in payment of outstanding lottery tickets since the discontinuance of lotteries, see 2 *Will.* 4. c. 2.

An act of the 1 & 2 *W.* 4., for the improvement of Glasgow, was inadvertently passed by the legislature, which authorized money to be raised by way of lottery. All future lotteries under that statute have, however, been prohibited by the 4 & 5 *W.* 4. c. 37. See further tit. *Gaming*.

LOVE. Provoking unlawful love was one species of the crime of witchcraft, punishable by 1 *Jac.* 1. c. 12. now repealed.

LOURCURDUS. A ram or bell-wether. *Cowell*.

LOWBELLERS. Such persons as go out in the night-time with a light and a bell, by the sight and noise whereof birds sitting upon the ground become stupified, and so are covered and taken with a net; the word is derived from the Saxon *low*, which signifies a flame of fire. *Antiq. Warwick*, p. 4.

LOWBOTE. A recompence for the death of a man killed in a tumult, or, as we say, by the mob. *Cowell*.

LUCRATIVE SUCCESSION of an heir to his ancestor; that succession which the heir receives by law without paying any value; and which renders him liable to the debts of his ancestor. *Scotch Dict.* See titles *Descent*, *Heir*, *Limitation*.

LUDI DE REGE ET REGINA. Playing at cards, so called, because there are kings and queens in the pack. *Cowell*.

LUMINARE. A lamp or candle, set burning on the altar of any church or chapel; for the maintenance whereof lands and rent-charges were frequently given to parish churches, &c. *Kennet's Gloss*.

LUNATICS. See title *Idiots and Lunatics*.

LUNDA. A weight or measure formerly used here.—*Lunda angustiarum constat de 10 sticis. Flota, lib. 2. cap. 12.*

LUNDRESS. A sterling silver penny, which has its name from being coined only at London, and not at the country mints. *Lownd's Essay on Coin*, p. 17.

LUPANATRIX. A bawd or strumpet; and by the custom of London a constable may enter a house, and arrest a

common strumpet and carry her to prison. 3 *Inst.* 206, &c. *Claus.* 4 *Ed.* 1. p. 1. m. 16.

LUPINUM CAPUT GERERE. Signified to be outlawed and have one's head exposed like a wolf's, with a reward to him that should bring it in. *Plac. Coron.* 4 *John.* Rot. 2. See *Outlawry*.

LUPLICETUM [*Lat.*] A hop-garden, or place where hops grow. 1 *Inst.* 4.

LURGULARY. The casting any corrupt or poisonous thing in the water was styled *lowrgulary*, and felony. *Stat. pro Sartis London, anno 1573.*

LUSHBURGHIS or LUXENBURGHIS. A base sort of foreign coin, made of the likeness of English money, and brought into England in the reign of King Edward III. to deceive the king and his people; on account of which it was made treason for any one wittingly to bring any such money into the realm, knowing it to be false. 25 *Edw.* 3. st. 5. c. 2, 3 *Inst.* 1.

LUSTRINGS. A company was incorporated for making, dressing, and lustrating alamoses and lustrings in England, who were to have the sole benefit thereof confirmed by the following statute; by which no foreign silks known by the name of lustrings or alamoses are to be imported, but at the port of London, &c. 9 & 10 *W.* 3. c. 48. See titles *Navigation Acts*, *Silk*.

LUXURY. There were formerly various laws to restrain excess in apparel, all repealed by 1 *Jac.* 1. c. 25. But as to excess in diet there still remains one ancient statute unrepealed, viz. 10 *Edw.* 3. st. 3. which ordains that no man shall be served at dinner, or supper, with more than two courses, except upon some great holidays there specified, in which he may be served with three. 4 *Comm.* 170, 171.

LYEF-YELD (*i. e.* GELD.) LEF-SILVER. A small fine or pecuniary composition, paid by the customary tenant to the lord, for leave to plow or sow, &c. *Somn. of Gavelkind*.

LYING-IN HOSPITALS. See *Hospitals*.

LYNDEWODE. Was a doctor both of the civil and canon laws, and dean of the arches. He was ambassador for Hen. V. into Portugal, anno 1422, as appeareth by the preface to his Commentary upon the provincials. *Cowell*.

LYNN. An act for regulating worsted weavers and their apprentices in the town of Lynn, &c. See 14 & 15 *H.* 8. c. 3.

LYON, KING OF ARMS. This officer takes his title from the armorial bearing of the Scotch King, the lion rampant. By Scotch acts 1592, c. 127, 1672, c. 21. he is empowered to inspect the arms, &c. of noblemen and gentlemen, and to grant arms, &c. *Scotch Dict.* See title *Herald*.

M.

M Was the letter with which persons convicted of manslaughter were formerly marked on the brawn of the left thumb. This punishment has recently been abrogated.

MACE-GRIEFÉ, or MACE-GREFES [*Machecariu*,] such as willingly buy and sell stolen flesh, knowing the same to be stolen. *Britton*, c. 28; *Crompton's Justice of Peace*, fol. 193. *Vide Leges Innoce*, c. 20.

MACE-CARIA, MACHEKUNA [*Macella*.] The flesh-market or shambles. *Cowell*.

MACER. Mace-bearer; an officer attending the Court of Session.

MACHECARIUS. A butcher. *Cowell. Leg. Ed. Reg.* c. 39. *Stat. Wall.* 12 E. 1.

MACHECOLLARE or MACHECOULARE, from the Fr. [*Mashecoulis*.] To make a warlike device, especially over the gate of a castle, resembling a gate, through which scalding water or offensive things may be thrown on pioneers or assailants. 1 *Inst.* 5 a.

MACHINERY. By the 2 & 3 W. 4. c. 72. the remedy against the hundred given by the 7 & 8 Geo. 4. c. 31. in the cases therein mentioned, was extended to threshing machines damaged or destroyed by riotous or tumultuous assemblies. See tit. *Hundred*.

By the last act for the general regulation of the customs (3 & 4 W. 4. c. 52. § 104.) any machines, utensils, blocks, tools, &c. used in the calico, woollen, cotton, linen, or silk manufactures of this kingdom, are, together with a variety of other kinds of machinery and tools, prohibited to be exported, under the penalty of forfeiture.

For the wilful destruction of machinery, see titles *Frames*, *Malicious Injuries*.

MACIO, a mason. *Cowell*.

MACKAREL, may be sold on Sunday, 10 & 11 W. 3. c. 24. § 29.

MADDER, to be imported unmixed. 13 & 14 Car. 2. c. 30; repealed 15 Car. 2. c. 16. § 3. Tithes of madder settled, 31 Geo. 2. c. 12; 5 Geo. 3. c. 18. See title *Tithes*. See further titles *Gardens*, *Malicious Injuries*.

MADNING MONEY. Old Roman coins, sometimes found about Dunstable, are so called by the country people; they seem to retain this name from *Magintum*, used by the Emperor Antoninus, in his Itinerary, for Dunstable. *Camden*.

MADRIGALS. An old word, signifying country songs. *Cowell*

MAEREMIUM [*Meresne*, from Fr.] Properly signifies any sort of timber, fit for building; *seu quodvis materiamentum*. *Carta de Foresta*; *stat. Claus.* 16 Ed. 2. m. 3.

MAGAZINES. See *Gunpowder*, *Malicious Injuries*.

MAGBOTE or MÆGBOTE, from the Sax. [*Mag. i. e. Cognatus et bote, compensatio*.] A compensation for the slaying or murder of one's kinsman, in ancient times, when corporal punishments for murder, &c. were sometimes commuted into pecuniary fines, if the friends and relations of the party killed were so satisfied. *Leg. Canuti*, c. 2.

MAGIC [*Magia, Necromantia*.] Witchcraft and sorcery. See *Conjuration*.

MAGISTER. This title, often found in old writings, signified that the person to whom attributed had attained some degree of eminency in *scientiâ aliquâ, præsertim literariâ*; and formerly those who are now called *doctors* were termed *magistri*.

MAGISTRATE [*magistratus*.] A ruler; and he is said to be *custos utriusque tabulæ*; the keeper or preserver of both tables of the law. If any magistrate, or minister of justice, is slain in the execution of his office, or keeping of the peace, it is murder for the contempt and disobedience to the King and his laws. 9 Co.

The most universal public relation by which men are connected together is that of government; namely, as governors and governed; or, in other words, as *magistrates* and *people*. Of magistrates some also are *supreme*, in whom the sovereign power of the state resides; others are subordinate, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere. In all tyrannical governments the supreme magistracy, or the right of both *making* and *enforcing* laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate (or magistracy) may enact tyrannical laws, and execute them in a tyrannical manner: since he is possessed, in quality of dispenser of justice, with all the power which as legislator he thinks proper to give himself. But when the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. In England, therefore, this supreme power is divided into two branches; the one *legislative*, to wit, the parliament, consisting of King, Lords, and Commons; the other *executive*, consisting of the King alone.

His Majesty's great officers of state, the *lord treasurer*, *lord chamberlain*, and principal *secretaries*, or the like, are not in the capacity of subordinate magistrates, in any considerable degree the object of our laws; nor have they any very important share of magistracy conferred upon them; except that the *secretaries of state* are allowed the power of commitment in order to bring offenders to trial. 1 *Leon.* 70; 2 *Leon.* 175 *Comb.* 143; 5 *Mod.* 84; *Salk.* 347; *Carth.* 291. See titles *Arrest*, *Commitment*. As to the office and authority of the *lord chancellor* and the other *judges* of the superior courts of justice, see under those titles. The rights and dignities of *mayors* and *aldermen*, or other magistrates of particular corporations, are more private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises. The magistrates and officers whose rights and duties are most generally in use, and have a jurisdiction and authority dispersedly throughout the kingdom, are principal *sheriffs*, *coroners*, *justices of the peace*, *constables*, *surveyors of the highways*, and *overseers of the poor*.

The negligence of public officers entrusted with the administration of justice makes the offender liable to be fined, and in very notorious cases will amount to a forfeiture of the office.

if it be a beneficial one. 4 *Comm.* 140. See further titles *Constable, Justices, King, Office, Parliament, &c.*

MAGNA ASSISA ELIGENDA. A writ directed to the sheriff, to summon four lawful knights before the justices of assize, there upon their oaths to choose twelve knights of the vicinage, &c. to pass upon the great assize, between A. B. plaintiff, and C. D. defendant, &c. *Reg. Orig.* 8. See titles *Assise, Jury.*

MAGNA CARTA.

The GREAT CHARTER OF LIBERTIES granted in the ninth year of King Henry III.—It is so called, either for the excellency of the laws therein contained, or because there was another charter called the Charter of the Forest, established with it, which was the less of the two; or in regard of the great troubles in obtaining it, and the remarkable solemnity in denouncing excommunication and anathemas against the breakers thereof. *Spehman* calls it *Anglistimum Anglicarum Libertatum Diploma, & Sacra Anchora.*

Edward the Confessor granted to the church and state several privileges and liberties by charter; and some were granted by the charter of King Hen. I. Afterwards Stephen and Hen. II. confirmed the charter of Henry I., and Rich. I. took an oath at his coronation to observe all just laws, which was an implicit confirmation of former charters. King John took the like oath. This king, likewise, after a difference between him and the pope, and being imbroiled in wars at home and abroad, granted the charter first specifically known by the name of *Magna Carta de Libertatibus*; bearing date at Runnymede, between Windsor and Staines, on 15th June, in the 17th year of his reign, being A. D. 1215; but soon after broke it, and thereupon the barons took up arms against him, and his reign ended in wars. To him succeeded Hen. III. who in the ninth year of his reign granted the *Magna Carta* now given in our statute books. This he confirmed by a charter granted in the 21st year of his reign. In the 37th year of his reign, after several breaches, and repeated confirmations of this charter, King Henry III. came to Westminster Hall, where, in the presence of the nobility and bishops, with lighted candles in their hands, *Magna Carta* was read; the king all that while laying his hand on his breast, and at last solemnly swearing faithfully and inviolably to preserve all things therein contained, as he was a man, a christian, a soldier, and a king. Then the bishops extinguished the candles, and threw them on the ground; and every one said, "Thus let him be extinguished and stink in hell, who violates this charter." Upon which the bells were set on ringing, and all persons by their rejoicing approved of what was done.

But notwithstanding this very solemn confirmation of this charter, the very next year King Henry invaded the rights of his people, till the barons levied war against him; and after various success, he confirmed this charter, and the Charter of the Forest, in the parliament of Marlbridge, and in the 2d year of his reign. The Charter of the Forest had been first granted in the 2d year, and more fully in the 9th year of King Henry III. His son, Edward I. confirmed both these charters in the 25th year of his reign, made an explanation of the liberties therein granted to the people, and added some which are new, called *Articuli super Cartas*. See the statute book in the 25th and 29th of Edward I. and the collection of charters prefixed to the first volume of the Statutes of the Realm, published under the authority of his Majesty's commissioners of the records. *Magna Carta* was confirmed more than thirty times afterwards. *Co. Lit.* 81.

This excellent charter, or body of law, at that time so beneficial to the subject, and of such great equity, is the most ancient written law of the land. It is divided into thirty-eight chapters; the 1st of which, after the solemn preamble of its being made for the honour of God, the exaltation of the Holy Church, and amendment of the kingdom, &c. ordains,

That the church of England shall be free, and all ecclesiastical persons enjoy their rights and privileges. The 2d is of nobility, knights-service, reliefs, &c. The 3d concerns heirs, and their being in ward. The 4th directs guardians for heirs within age, who are not to commit waste. The 5th relates to the custody of lands, &c. of heirs, and delivery of them up when the heirs are of age. The 6th is concerning the marriage of heirs. The 7th appoints dower to women, after the death of their husbands, a third part of the lands, &c. The 8th relates to sheriffs and their bailiffs, and requires that they shall not seize lands for debts where there are goods, &c., the surety not to be distrained where the principal is sufficient. The 9th grants to London, and all cities and towns, their ancient liberties. The 10th orders, that no distress shall be taken for more rent than is due, &c. By the 11th the court of Common Pleas is to be held in a certain place. The 12th gives assizes for remedy, on distress of lands, &c. The 13th relates to assizes of darrein presentment, brought by ecclesiastics. The 14th enacts, that no freeman shall be amerced for a fault, but in proportion to the offence; and by the oaths of lawful men. The 15th, no town shall be distrained to make bridges, &c. but such as of ancient times have been accustomed. The 16th is for repairing of sea-banks and sewers. The 17th prohibits sheriffs, coroners, &c. from holding pleas of the crown. The 18th enacts, that the king's debtor dying, the king shall be the first paid his debt, &c. The 19th directs the manner of levying purveyance for the king's house. The 20th concerns castleward, where a knight was to be distrained for money for keeping his cattle, on his neglect. The 21st forbids sheriffs, bailiffs, &c. to take the horses or carts of any person to make carriage without paying for it. By the 22d the king is to have lands of felons a year and a day, and afterwards the lord of a fee. The 23d requires weirs to be put down on rivers. The 24th directs the writ *præcipe in capite* for lords against tenants offering wrong, &c. The 25th declares that there shall be but one measure throughout the land. The 26th, inquisition of life and member, to be granted freely. The 27th relates to knight's service, petit serjeanty, and other ancient tenures; (taken away, together with wardship, &c. by stat. 12 *Car. 2. c. 24.* See title *Tenures*.) The 28th directs, that no man shall be put to his law on the bare suggestion of another, but by lawful witnesses. The 29th, no freeman shall be disseised of his freehold, imprisoned and condemned, but by judgment of his peers, or by the law of the land. The 30th requires that merchant strangers be civilly treated, &c. The 31st relates to tenures coming to the king by escheat. By the 32d no freeman shall sell land, but so that the residue may answer the services. The 33d, patrons of abbeyes, &c. shall have the custody of them in the time of vacation. The 34th, a woman to have an appeal for the death of her husband. The 35th directs the keeping of the county-court monthly, and also the times of holding the sheriff's tourn, and view of frankpledge. The 36th makes it unlawful to give lands to religious house in mortmain. The 37th relates to escuage and subsidy, to be taken as usual. And the 38th ratifies and confirms every article of this great charter of liberties.

The following is Blackstone's summary of this celebrated charter, and its occasion and effect.

In King John's time, and that of his son Henry III. the rigours of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories; which at last had this effect, that at first King John, and afterwards his son, consented to the two famous charters of English liberties, *Magna Carta* and *Carta de Foresta*. Of these the latter was well calculated to redress many grievances and encroachments of the crown in the exertion of forest law; and the former confirmed many liberties of the church, and redressed many grievances incident to feudal tenures, of no small moment at

the time; though now, unless considered attentively, and with this retrospect, they seem but of trifling concern.

But besides these feudal provisions, care was also taken by Magna Carta to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses, or other process for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony, prohibited for the future the grants of exclusive fisheries, and the erection of new bridges so as to oppress the neighbourhood. With respect to private rights, it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children. It laid down the law of dower, and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern, it enjoined an uniformity of weights and measures; gave new encouragement to commerce, by the protection of merchant strangers, and forbade the alienation of lands in mortmain. With regard to the administration of justice, besides prohibiting all denials or delays of it, it fixed the Court of Common Pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits. It also corrected some abuses incidental to the trial by wager of law and of battle; directing the regular awarding of inquests, for life or member; prohibiting the king's inferior ministers from holding pleas of the crown, or trial of any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's tourn and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And lastly, (by which alone it would have merited the title that it bears, of the *great charter*;) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land. 4 *Comm. c. 33. p. 423, 4.*

The following are the words of the often quoted 29th chapter of Magna Carta, 9 Hen. III. relating to the personal liberty of Englishmen.

"Nullus liber homo capiatur, vel imprisonetur, aut disreisiatur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exiliatur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terræ.—Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam." See further, title *Liberty*.

MAGNA PRECARIA. A great or general reap-day. And in 21 R. 2. the lord of the manor of Harrow on the Hill, in com. Middlesex, had a custom that by summons of his bailiff on a general reap-day, then called *Magna precaria*, the tenant should do a certain number of days' work for him; every tenant that had a chimney being obliged to send a man. *Phil. Purvey. p. 145.*

MAGNA CENTUM. The great hundred, or six score. *Chart. 20 H. 2.*

MAGNUS PORTUS. The town and port of Portsmouth.

MAIHEMATUS. Maimed or wounded.

MAHOMERIA. The temple of Mahomet; and because the gestures, noise, and songs there, were ridiculous to the christians, therefore they called antic dancing, and any thing of ridicule, a momerie. *Mat. Paris.*

MAIDS. See title *Abduction, Guardian, Marriage, Rape.*

MAIDEN ASSISES. Is when at any assizes no person is condemned to die.

MAIDEN RENTS. A noble paid by every tenant in the manor of Buiith, in com. Radnor, at their marriage; anciently given to the lord for his omitting the custom of *mar-cheta*. (See title *Marchet*.) More probably a fine for a licence to marry a daughter.

MAIGNAGIUM, [Fr. *maignen. i. e. faber ætarius.*] A brazier's shop; though some say it signifies a house. *Lib. Rames. § 265.*

MAIHEM, or **MAYHEM**, [*maiheimium*, from the Fr. *mehaigne, i. e. membri mutilationem.*] A maim, wound, or corporeal hurt, by which a man loseth the use of any member, proper for his defence in fight. As if a man's skull be broke, or any bone broken in any other part of the body; a foot, hand, finger, or joint of a foot, or any member be cut off; if by any wound the sinews be made to shrink; or where any one is castrated; or if any eye be put out, or any fore tooth broke, &c. But the cutting off an ear or nose, the breaking of the hinder teeth, and such like, was held no maihem by the common law; as they were not a weakening of a person's strength, but a disfiguring and deformity of the body. *Glanv. lib. 4. c. 7; Bract. lib. 3. tract. 2; Britton, c. 25. S. P. C. lib. 1. c. 41.*

Maihem is accurately thus defined; the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary. *Brit. lib. 1. c. 25; 1 Hank. P. C. c. 44.*

By the ancient law of England, he that maimed any man, whereby he lost any part of his body, was sentenced to lose the like part, *membrum pro membro*. 3 *Inst. 118; Brit. c. 25.* But this went afterwards out of use; partly because the law of retaliation is at best but an inadequate rule of punishment, and partly because on a repetition of the offence, the punishment could not be repeated; so that by the common law, as it for a long time stood, maihem was only punishable by fine and imprisonment. 1 *Hank. P. C. c. 44. § 3.* Unless perhaps the offence of maihem by castration, which all old writers held to be felony; and this, although the maihem was committed on the highest provocation, such as the party maimed being caught in adultery with the wife of the offender. See *Bract. fo. 144; 3 Inst. 62; S. P. C. 32; H. P. C. 193.*

But subsequent statutes put the crime and punishment of maihem more out of doubt. The stat. 37 H. 8. c. 6. directed that if a man should maliciously and unlawfully cut off the ear of any of the king's subjects, he should not only forfeit treble damages to the party grieved, to be recovered by action of trespass at common law, as a civil satisfaction, but also £10 by way of fine to the king, which was his criminal amercement. But by far the most severe and effectual of these statutes was 22 & 23 C. 2. c. 1. called the *Coventry Act*; being occasioned by an assault on Sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in parliament. By this statute it was enacted, that if any person should, of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person with intent to maim or disfigure him, such person, his counsellors, aiders, and abettors, should be guilty of felony without benefit of clergy; though no attainder of such felony should corrupt the blood, or forfeit the dower of the wife, or lands or goods of the offender.

The above acts, as well as the subsequent one of the 43 Geo. 3. c. 58. commonly called Lord Ellenborough's Act, were repealed by the 7 & 8 Geo. 4. c. 27. and the 9 Geo. 4. c. 81.

By the 11th section of the latter statute it is enacted, that if any person shall unlawfully and maliciously shoot at any person, or by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or unlawfully and maliciously stab, cut, or wound any person with intent, in any such case, to murder such person, the offender, and every person counselling, aiding and abetting

therein, shall suffer death as a felon. By § 12. the like acts are punishable also with death if committed with intent to maim, disfigure, disable, or to do some grievous bodily harm, or to resist or prevent the lawful apprehension and detaining of the party offending, or any accomplice, for any offence for which they are liable to be apprehended or detained. But it is provided, that if it shall appear on the trial, that the offence was committed under such circumstances that if death had ensued, it would not in law have amounted to murder, the person indicted shall be acquitted of felony.

By the 3 & 4 W. 4. c. 53. § 59. maliciously shooting at, maiming, or dangerously wounding any officer of the army, navy, or marines, employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid, is a capital offence in the party offending, and every one aiding, abetting, or assisting therein.

There is a distinction between the provisions of the 22 Car. 2. c. 1. and the 9 Geo. 4. c. 1. The former required a lying in wait of the offender to render the crime complete, and therefore did not apply to a sudden attack. 1 Hawk. c. 55. s. 12; 1 Leach, 187; 1 East, P. C. 308, 399. It is also to be remarked, that the 13 Geo. 3. c. 58. did not extend to the wounding with a blunt instrument, the words being merely *stab or cut*. See R. & R. 404; 1 Russ. 597. But the 9 Geo. 4. c. 31. extends to a wounding with whatever instrument inflicted, provided the offence is properly charged in the indictment. Where an actual cutting is inflicted by an instrument, it will support a charge of cutting in the indictment, whether the instrument is intended for cutting or not, or is ordinarily used for some other purpose. R. & R. 78. Where a man struck a woman in the face with the claw of a hammer and it cut her, it was holden to be a cutting within the statute. R. & R. 104. To be a wound within the statute, the continuity of the skin must be broken. Moo. C. C. 278. But if the skin be broken, the nature of the instrument with which the injury is inflicted is immaterial. Thus, a wound from a kick is within the statute. Moo. C. C. 318; 4 C. & P. 558.

With respect to the intents mentioned in the statute, we have noticed what amounts to a maiming. To disfigure is to do a man some external injury, which detracts from his personal appearance; to disable is to do something creating a permanent disability, and not a mere temporary injury. See R. & R. 24. It is not requisite that a grievous bodily harm, within the meaning of the statute, should be either permanent or dangerous. R. & R. 362.

Maihem may be punished by indictment, or a remedial action of trespass *vi et armis* may be brought to recover damages for the injury.

Upon an appeal of maihem, (which formerly might have been brought by the party injured, but which proceeding in this as well as in all other cases of felony is abolished by the 59 Geo. 3. c. 46.) the issue joined was, whether it was maihem or no maihem, and this was to be decided by the court upon inspection; for which purpose they might call in the assistance of surgeons. 2 Ro. Abr. 578. And by analogy to this it is, that now, in an action of trespass for maihem, the court (upon view of such maihem as the plaintiff has laid in his declaration, or which is certified by the judges who tried the cause, to be the same as was given in evidence to the jury,) may increase the damages at their own discretion. 1 Sid. 108. As may also be the case upon view of an atrocious battery. Hard. 408; see 1 Wils. 5; 1 Barnes, 106.

A person who maims himself, that he may have the more colour to beg, may be indicted and fined. 1 Inst. 127. And by the like reason, a person who disables himself that he may not be impressed for a soldier. *Burn's Justice*.

As to the maiming of cattle, see *Malicious Injuries*.

MAIL INDUCTIO. An ancient custom for the priest and people of country villages to go in procession to some

adjoining wood on a May-day morning, and return with a May-pole, boughs, flowers, garlands, and other tokens of the spring. This May-game, or the rejoicing at the coming of the spring, was for a long time observed, and still is in some parts of England, but it was condemned and prohibited in the diocese of Lincoln, by bishop Groshead.

MAIL, [macula.] A coat of mail, so called from the Fr. *maille*, which signifies a square figure, or the hole of a net; so *maille de haubergeons* was a coat of mail, because the links or joints in it resemble the squares of a net. Mail is likewise used for the leathern bag wherein letters are carried by the post, from *bulga*, a budget.

MAILE. Anciently a kind of money; and silver halfpence were termed *mailes*. 9 Hen. 5. By indenture in the Mint, a pound weight of old sterling silver was to be coined into three hundred and sixty sterlings or pennies, or seven hundred and twenty *mailes* or half-pennies, or one thousand four hundred and forty farthings. *Lownd's Ess. on Coin*, 38. See *Black-mail*.

MAILLS and DUTIES. In Scotch law, the rents of an estate, whether in money or victual; an action for the rents of an estate is therefore termed an action of *mailles and duties*. By act 1669. c. 9. a tenant is not liable to arrears of rent after five years from the time of his removing from the lands.

MAIMING. See *Maihem*.

MAINAD. A false oath, or perjury. *Leg. Incæ*, c. 34.

MAINE-PORT, [In mana portatum.] A small tribute, commonly of loaves of bread, which in some places the parishioners pay to the rector of their church, in recompence for certain tithes. *Cowell*.

This mainport bread was paid to the vicar of Blyth. See *Antiq. of Nottinghamshire*, p. 473.

MAINOVRE, or Mainœuvre, [from the Fr. *main*, i. e. *manus*, and *œuvrer*, *operari*.] Handy-work; some trespass committed by a man's hand. See 7 Rich. 2. c. 4.; *Brit.* 62: and the succeeding article.

MAINOUR, or MANOUR, or MEINOUR; [from the Fr. *manier*, i. e. *manu tractare*.] In a legal sense denotes the thing taken away, found in the hand of the thief who taketh away, or stealth. This is to be taken with the *mainour*, *Pl. Cor. fol.* 179, is to be taken with the thing stolen about him; and again, *fol.* 194, it was presented, that a thief was delivered to the sheriff or viscount, together with the *mainour*; and again, *fol.* 186, if a man be indicted, that he feloniously stole the goods of another, where, in truth, they are his own goods, and the goods be brought into the court as the *mainour*, and it be demanded of him what he saith to the goods, and he disclaim them; though he be acquitted of the felony, he shall lose the goods. *Cowell*.

Thus the court of attachments in the forest may attach all offenders against vert and venison, by their bodies, if taken with the *mainour*, that is, in the very act of killing venison, or stealing wood, or preparing so to do, or by fresh and immediate pursuit after the act is done, else they must be attached by their goods. *Carth.* 79; 4 *Inst.* 289.

One mode of prosecution, by the common law, without any previous finding by a jury, was, when a thief was taken with the *mainour*, that is, with the thing stolen upon him, *in manu*; for he might, when so detected, *flagrante delicto*, be brought into court, arraigned and tried without indictment. But this proceeding was taken away by several statutes in the reign of Edward III., though in Scotland a similar process remains to this day. See 2 *Hal. P. C.* 149; 4 *Comm. c.* 23, p. 307: and tit. *Court-leet*.

MAINPERNABLE. That may let to bail. See (the repealed) stat. *West.* 1. 3 *Edw.* 1. c. 15.; and *Bail, Mainprize*.

MAINPERNORS, [manuceptores.] Are those persons to whom a man is delivered out of custody or prison, on their becoming bound for his appearing, &c. which, if he do not do, they shall forfeit their recognizances; and they are called

manu captores, because they do as it were *manu capere et ducere captivum à custodiâ vel prisonâ*.

MAINPRISE, [*manu captio*, from the Fr. *main*, i. e. *manus et pris, captus*.] The taking or receiving of a person into friendly custody, who otherwise might be committed to prison, upon security given that he shall be forthcoming at a time and place assigned. Thus to let one to mainprise is to commit him to those that undertake he shall appear at the day appointed. *Old Nat. Br.* 42; *F. N. B.* 249.

Manwood makes this difference between mainprise and bail: He that is mainprised is said to be at large, after the day he is set to mainprise, until the day of his appearance; but where a man is let to bail by any judge, &c. until a certain day, there he is always accounted by the law to be in their ward of time; and they may, if they will, keep him in prison, so that he that is so bailed shall not be said to be at large, or at his own liberty. *Manwood*, p. 167.

A man under mainprise is supposed to go at large, under no possibility of being confined by his sureties or mainperners, as in case of bail. *4 Inst.* 179. Mainprise is an undertaking in a certain sum; bail answers the condemnation in civil cases, and in criminal, body for body. *Sed qu.* If this, as to body for body, is now law? If it is, it is never put in force.

Mainprise may be where one is never arrested, or in prison; but no man is bailed but he that is under arrest, or in prison; so that mainprise is more large than bail. *H. P. C.* 96; *Wood's Inst.* 582, 618. Upon a *capias* or exigent awarded against a man, he shall find mainprise for his appearance; and if the defendant make default, his manucaptors are to be amerced, &c. And a bill of mainprise, acknowledged and put into court, is good, though it be not inrolled. *Jenk. Cent.* 129.

There is an ancient writ of mainprise, whereby those who are bailable, and have been refused the benefit of it, may be delivered out of prison. *Reg. Orig.* 269; *F. N. B.* 250.

The writ of mainprise, *manu captio*, is a writ directed to the sheriff, (either generally when any man is imprisoned for a bailable offence, and a bail hath been refused, or especially when the offence or course of punishment is not properly bailable below,) commanding him to take sureties for the prisoner's appearance, usually called *mainperners*, and to set him at large. *F. N. B.* 250; *1 Hal. P. C.* 141; *Co. Bail & M. c.* 10; and see *2 Hawk. P. C. c.* 15, § 30.

Mainperners differ from bail, in that a man's bail may imprison or surrender him up before the stipulated day of appearance; mainperners can do neither, but are barely sureties for his appearance at the day. Bail are only sureties that the party be answerable for the special matter for which they stipulate; mainperners are bound to produce him to answer all charges whatsoever. *3 Comm. c.* 8, p. 128. cites *Co. Bail & M. c.* 3; *4 Inst.* 179.

Of the writ of mainprise little notice is taken in the late books; yet the law relating to it seems to be still in force in many cases; and consequently in such cases those who are bailable, and have been refused the benefit of the bail, may still, by virtue thereof, be delivered out of prison; (upon their finding sureties to the sheriff that they will appear and answer to the crimes alleged against them, before the justices, in the writ mentioned, &c.) as those who are imprisoned for a slight suspicion of felony, or indicted of larceny before the steward of a leet, or of trespass before justices of peace, and many other persons. *2 Hawk. P. C. c.* 15, § 29.

The *3 Edm. 1. c.* 15. directed what prisoners should be mainpernable by the sheriffs, and which not. That statute, together with several subsequent acts, was repealed by the *7 Geo. 4. c.* 64. § 32. which empowers justices in certain cases to admit parties charged with felony or suspicion of felony to bail. See *Bail*, II.

MAINSWORN. See *Male-sworn*.

MAINTAINORS. Are those that maintain or second a cause depending between others, by disbursing money, or

making friends, for either party, &c. not being interested in the suit, or attorneys employed therein. *19 Hen. 7. c.* 14. See *Maintenance*.

MAINTENANCE, [*manutenentia*.] The unlawful taking in hand, or upholding of a cause or person; metaphorically drawn from the succouring of a young child that learns to go by one's hand; and in law is taken in the worst sense. See *32 Hen. 8. c.* 9. Also it is used for the buying or obtaining of pretended rights to lands. *Stat. Ibid.*

Maintenance is an offence that bears a near relation to barratry; being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money, or otherwise, to prosecute or defend it; a practice that was greatly encouraged by the first introduction of uses. *4 Comm. c.* 10, p. 184.

Maintenance is either *ruralis*, in the country; as where one assists another in his pretensions to lands, by taking or holding the possession of them for him; or where one stirs up quarrels or suits in the country; or it is *curialis*, in a court of justice; where one officiously intermeddles in a suit depending in any court, which no way belongs to him, and he had nothing to do with, by assisting the plaintiff or defendant with money or otherwise, in the prosecution or defence of any such suit. *Co. Lit.* 368; *2 Inst.* 213; *2 Rot. Abr.* 115. And he who fears that another will maintain his adversary, may, by way of prevention, have an original writ grounded on the statutes prohibiting him so to do. *1 Hawk. P. C. c.* 83, § 42; *Reg. Orig.* 182.

Who are guilty of Maintenance.—Not only he who lends out his money to assist another in his cause, but he that by his friendship or interest saves him that expense which he might otherwise be put to, is guilty of maintenance. *Bro. Mainten.* 7, 14, 17, &c. And if any person officiously gives evidence, or open the evidence without being called upon to do it; speak in the cause, as if of counsel with the party, retain an attorney for him, &c. or shall give any public countenance to another in relation to the suit; as, where one of great power and interest says that he will spend twenty pounds on one side, &c. or such a person comes to the bar with one of the parties, and stands by him while his cause is tried, to intimidate the jury; if a juror solicits a judge to give judgment according to the verdict, after which he hath nothing more to do, &c.; these are acts of maintenance. *1 Hawk. P. C. c.* 83.

It is said that if a man of great power, not learned in the law, tells another who asks his advice, that he hath a good title, it is maintenance. *1 Hawk. P. C. c.* 83, § 9. In case any person who is no lawyer, and that hath no interest in the cause, shall take upon him to do the part of a lawyer, this will be unlawful maintenance. And after a suit is begun, no man may encourage either of the parties, or yield them any aid or help, by money or the like, but he hath an interest therein. *22 Hen. 6. c.* 6; *19 Edm. 4. c.* 3; *2 Shep. Abr.* 406.

But counsel may speak as *amicus curiæ*. A man cannot be guilty of maintenance, in respect of any money given by him to another, before any suit is actually commenced; nor is it such to give another advice, as to what action is proper to be brought, what method to be taken, or what counsellor or attorney to be employed; or for one neighbour to go with another to his counsel, so as he do not give him any money and money may be lawfully given to a poor man, out of charity, to carry on his suit, and be no maintenance. Attorneys may lay out their money for their clients, to be repaid afterwards, but not at their own expense, on condition of no purchase or no pay, if they carry the cause or lose it. *Fitz. Mainten.* 18. *3 Rot. Abr.* 118; *2 Inst.* 564.

Whether an attorney's laying out money for his client be maintenance, see *Freem.* 71, 81.

If a person hath any interest in the thing in dispute, though in contingency only, he may lawfully maintain it.

action relating to it; as if tenant in tail, or for life, be impleaded, he in reversion or remainder, &c. may maintain the defence of the suit with his own money; and a lessor may lawfully maintain his lessee. 2 *Rol. Abr.* 115. A lord may justly maintain a tenant, in defence of his title; and the tenant may maintain his lord: one bound to warrant lands, may lawfully maintain the tenant impleaded, and a man may maintain those who are enfeoffed of lands in trust for him, concerning those lands, &c. An heir apparent, or the husband of such an heir, may maintain the ancestor in an action concerning the inheritance of the land whereof he is seized in fee; a master may maintain his servant, and assist him with money, but not in a real action, unless he hath some of his wages in his hands; and a servant by a reason of relation may maintain his master in all things, except laying out his own money in the master's suit. 1 *Hawk. P. C. c.* 83; 1 *Inst.* 368.

A landlord may sue in the name of his tenant to try a right, and a mortgagee, not a party in a suit, may, without being guilty of maintenance, advance money to support the title, for maintenance is justifiable from the priority of the parties in the estate. *Bac. Abr. tit. Maintenance (B.)* 3, 7th ed.

And one who has only an equitable interest in lands or goods, as a cestui que trust, or a vendor of lands, or an assignor of a bond for a good consideration, may lawfully maintain another in a suit concerning the thing in which he has such an equity. 4 *T. R.* 430. So where a defendant, at the request of another person, defended an action for the recovery of a sum of money, in which the latter claimed an interest, upon his undertaking to indemnify the defendant from the consequences of the action: this agreement was held not to amount to maintenance. 6 *Bing.* 299.

A father, a son, or an heir apparent to the party, or the husband of an heiress apparent, may lawfully lay out money for the party to prosecute his suit: and whoever is of kin to either of the parties, or related by any kind of affinity still continuing, or the godfather of either, may also lawfully stand by him in court and counsel him, and pay another to be of counsel for him, but cannot lawfully lay out his money in the cause. 1 *Hawk. c.* 83. s. 20.

By stat. *Westm. 1. c. 13* and *1 c. 25* none of the king's officers shall maintain pleas or suits in the king's court for land, &c. under covenant to have part thereof or any profit thereon, and clerks of justices are not to take part in quarrels, nor delay right, on pain of treble damages. By 1 *Ldr. s. st. c. 14* further enforced by 20 *Edw. 3. c. 4*, none of the king's ministers, nor no great man of the realm, by himself nor by any other, by sending of letter or otherwise, nor none other person, great or small, shall take upon them to maintain quarrels, to the let and disturbance of the common law. The king's counsellors, officers, or servants, or any of a person whatsoever, shall not sustain quarrels by any letter, upon pain to lose their offices and services, and of imprisonment and ransom. 1 *Rich. 2. c. 1*. No person, who ever shall unlawfully maintain any suit concerning lands, or recover any person for maintenance, by letters, reference, or promises, under the penalty of 10 *l.* for every offence, to be divided between the king and prosecutor. 32 *Hen. 8. c. 9*.

What rights and titles, &c. are within the purview of the statutes relating to maintenance, *Cro. Eliz.* 549. But maintenance in a court baron is as much within the purview of the 1 *Rich. 2.* as maintenance in a court of record. A pretended right to copyhold lands sold is within the statute 32 *Hen. 8. c. 9*; 4 *Rep.* 26. If A. be owner of land in possession, and another who hath no right granteth the land, &c. the grant upon it be void, yet the grantor and grantee are liable to this statute. 1 *Inst.* 369. So where he hath a pretended right, and none in truth shall get the possession wrongfully, and then sell the land, &c. But a

remainder-man in fee may obtain the pretended title of a stranger. 1 *Inst.* 369; 3 *Inst.* 76, 77. And a person who hath good right and title, at the time of the bargain or lease, will not be within the above statute, although neither he nor his ancestors have been in possession thereof, &c. for a year before. *Plowd.* 47; *Dyer*, 74.

And although the vendor's title rests merely on an agreement for the purchase of the estate, the statute does not apply. *Wood v. Griffiths, Sugd. Vend. & Purch.* 488, 7th ed.

If a person make a lease to try a title in ejectment, unless it be to a great man, it is out of the statute 1 *Inst.* 369; *Dyer*, 374. A lessor having good right to land, but not in possession, made a lease of it, and did not seal it on the land, it was adjudged within the 32 *Hen. 8. c. 9*. 1 *Leon.* 166.

The law will not suffer any thing in action, entry, &c. to be granted over; this is to prevent titles being granted to men of substance, to oppress the meaner sort of people. 1 *Inst.* 214. Where a bond was given for performance of covenants in a lease, and after the covenants being broken, the lessee assigned both the lease and bond to another, and then the assignee put the bond in suit; this was held maintenance; so it would have been if the lessee had assigned the bond and not the lease, and afterwards the covenants were broken, and the bond put in suit. *Godb.* 81; 2 *Nels. Abr.* 1142.

How punishable. By the common law, persons guilty of maintenance may be prosecuted by indictment, and be fined and imprisoned; or be compelled to make satisfaction by action, &c. And a court of record may commit a man for an act of maintenance done in the face of the court. *Hill.* 79; 1 *Inst.* 368.

Prosecutions for maintenance are now rarely instituted; where more than one person is implicated in this offence, the practice is to indict them for a conspiracy.

See further on this subject, 1 *Hawk. P. C. c.* 83; *Vin. Abr. tit. Maintenance*; and *tit. Champerty, Embracery, &c.*

MAJOR. A mayor, doth not come from the Latin major, but from an old English word *maier*, i. e. *potestas*. *Concill.* See *Mayor*. Major is also applied to a person of full age, as distinguished from a minor.

MAJORITY. Sometimes used to distinguish the state of being at full age; more usually referred to the only method of determining the acts of many, by a majority in numbers. The major part of members of parliament enact laws, and the majority of electors choose members of parliament; the act of the major part of any corporation is accounted the act of the corporation; and where the majority is, there, by the law, is the whole. By 33 *Hen. 8. c. 27*, all rules made by founders of colleges, &c. whereby the effect of the assent of the majority is hindered by a minority of negative voices, are declared void.

It is a general rule of law, that where a public trust is to be executed by a definite number of persons, it cannot be executed at any meeting where a majority of the whole number is not present, unless there be a custom to the contrary; therefore where a select vestry of twenty-six were appointed, a rate made at a meeting where fourteen were not present, was declared bad. 9 *B. & C.* 851.

MAISONADA. A family, quasi mansionata.* *Meigne; Mon. Angl.* 2. 219.

MAISON DE DIEU. A monastery, hospital, or almshouse. All hospitals, *maisons de Dieu*, and abiding places, for poor, lame, and impotent persons, erected by the 39 *Edw. c. 5*, or at any time since founded, according to the intent of that statute, shall be incorporated and have perpetual succession, &c. 21 *Jac. 1. c. 1*. See *Corporation, Hospitals*.

MAISURA. A house or mansion; a farm; from the French *maison*. *MS. Antiq.*

MAJUS JUS. Is a writ or law proceeding in some customary manors, in order to a trial of right of land; and the

entry in the old books is thus: *Ad hanc curiam venit A. B. in propriis personis suis et dat Domino, &c. ad vidend. Rotul. Curie. Et petit inquirend. utrum ipse habeat Majus jus in uno messuagio, &c. Et super hoc homag. dicunt, &c. Ex libro MS. Episcop. Heref. temp. Edw. 3.*

MAKE, facere.] To perform or execute; as to make his law, is to perform that law which he hath formerly bound himself to; that is, to clear himself of an action commenced against him, by his oath, and the oaths of his neighbours. *Old Nat. Brev.* 161; *Kitchen*, 192. This ancient law seems to have been borrowed from the Feudists, who call those that came to swear for another in this case *Sacramentales*. See *Hotoman*. The formal words used by him that made his law, were commonly these: *Hear, O ye justices, that I do not owe this sum of money demanded, neither in all nor any part thereof, in manner and form declared. So help me God, and the contents of this book.* Hence, probably, to make oath, is to take oath.

MAKE SERVICES and CUSTOMS. To perform them. *Old Nat. Brev.* 14.

MALA. A male or port-mail; a bag to carry letters, &c. *Old Nat. Brev.* 14.

MALA FIDES. Is opposed to *bona fides*, and applies to the case of a person who possesses a property not his own, and which he knows, or might on reflection know, not to be his own.

MALANDRINUS. A thief or pirate. *Walsing.* 388.

MALBERGE. *Mons placiti.* A hill where the people assembled at a court, like our assizes; which by the Scots and Irish are called *parley hills*. *Du Cange*.

MALECEDITUS. One of bad credit, who is suspected, and not to be trusted. *Fleta, lib. 1. c. 38.*

MALEDICTION, maledictio.] A curse which was anciently annexed to donations of lands made to churches and religious houses, against those who should violate their rights. *Si quis autem (quod non optamus) hanc nostram donationem infringere temptaverit, perpassus sit gelidis glacierum flatibus et malignorum spirituum; terribiles tormentorum cruciatibus evasisse non quiescat, nisi prius in regius penitentiae gemitibus, et puræ emendatione emendaverit.* *Chart. Reg. Athelstani Monast. de Wiltune, anno 933.* And we read in a charter of William de Warren, Earl of Surrey, *Venientibus contra hæc et destruentibus ea, occurrat Deus in gladio iræ et furoris et vindictæ et Maledictionis æternæ: Servantibus autem hæc et defendentibus ea, occurrat Deus in pace, gratiâ et misericordiâ et salute æternâ. Amen, Amen, Amen.*

MALESWORN. More accurately perhaps *Malsworn*; sometimes more corruptly still, *Mainsworn*. In the North signifies forsworn. *Brownl.* 4; *Hob.* 8.

MALETENT. Is interpreted to be a toll for every sack of wool, by statute. Nothing from henceforth shall be taken for sacks of wool, by colour of maletent, &c. *25 Edw. 1. c. 7.*

MALFEASANCE, from the French *malfaire*, i. e. to offend.] Is a doing of evil, or transgressing. *2 Cro.* 266.

MALICE. Is a term of law, importing directly wickedness, and excluding a just cause of excuse: thus Lord Coke, in his comment on the words *per malitiam* says, "if one be appealed of murder, and it is found that he killed the party *æ defendendo*, this shall not be said to be *per malitiam*, because he had a just cause." *2 Inst.* 384.

Amongst the Romans and in the civil law, *malitia* appears to have imported a mixture of fraud and of that which is opposite to simplicity and honesty. Cicero speaks of it in his treatise *de Nat. Deor. lib. 3. sect. 10.*

In its proper or legal sense, this word is different from that sense which it bears in common speech. In common acceptance, it implies a desire of revenge, a settled anger against a particular person; but this is not the legal sense. *Holt, Ch. J.* in considering Lomicide said, "some men have been led into mistakes by not well considering what the passion of malice is; they have construed it to be a rancour of mind

lodged in the person killing, for some considerable time before the commission of the fact, which is a mistake, arising from the not well distinguishing between *hatred* and *malice*; *envy*, *hatred*, and *malice*, are three distinct passions of the mind." *Kel.* 127.

In the stat. *25 H. 8. c. 3.* where mention is made of persons standing mute "of malice or froward mind," the word *malice*, explained by the accompanying words, seems merely to signify a wickedness or frowardness of mind in refusing to submit to the course of justice. Where the question of malice has arisen in cases of homicide, the matter for consideration has been, whether the act was done with or without just cause or excuse, so that it has been suggested (*Chapple, J. MSS. Sum.*) that what is usually called *malice implied*, by the law, would perhaps be expressed more intelligibly to the understanding, if it were called *malice in a legal sense*. See title *Homicide*, 3. VII.

Previous to the *7 & 8 Geo. 4. c. 30.* it was necessary, under several of the statutes against malicious injuries to property, to prove express malice in the offender towards the owner, which frequently rendered it difficult to convict the party. But that statute applies, whether the offence be committed from malice to the owner of the property or not. See post *Malicious Injuries, IX.*

MALICIOUS INJURIES TO PROPERTY. By the *7 & 8 Geo. 4. c. 27.* all the former statutes relative to the subject, with a few exceptions hereinafter mentioned, were repealed, with a view to a consolidation of the law with respect to offences of this description, under the *7 & 8 Geo. 4. c. 30.* Many of the provisions of this act have already been given under separate titles. See *Cattle, Fence, Fish, Gardens, &c.*

The following seems the most convenient arrangement of such of the clauses of the act as are intended to be noticed under the present head:

1. Of injuries to buildings.
2. ——— to manufactures and machinery.
3. ——— to mines.
4. ——— to ships.
5. ——— to sea-banks, canals, bridges, turnpike-gates, fisheries, mill-ponds, &c.
6. ——— to stacks of corn, &c. crops, plantations &c.
7. ——— to hopbinds and trees.
8. ——— to any other property.
9. The general provisions of the statute.

1. Of injuries to buildings.

By § 2. maliciously setting fire to any church or chapel or to any chapel for the religious worship of persons dissenting from the united Church of England and Ireland, not registered or recorded, or to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-corn-barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, is a capital offence.

By § 8. if any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church, &c. (as in the above section) or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine, or other engine for sinking, draining, or working any mine, or any stait, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or truck for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted, shall suffer death.

2. *Of injuries to manufactures and machinery.*

By § 3. if any person shall maliciously cut, break or destroy, or damage with intent to destroy or to render useless any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture; or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles; or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences aforesaid, every such offender shall be guilty of felony, and being convicted shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned not exceeding four years; and if a male, to be whipped, in addition to such imprisonment.

By § 4. if any person shall maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any threshing machine, or any machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace,) every such offender shall be guilty of felony, and being convicted shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned not exceeding two years; and if a male, to be whipped in addition to such imprisonment.

3. *Of injuries to mines.*

By § 5. maliciously setting fire to any mine of coal or cannel coal, is a capital offence.

By § 6. maliciously causing any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct any airway, waterway, drain, pit, level, or shaft of or belonging to any mine, is a felony, and subjects the offender to be transported beyond the seas for seven years, or to be imprisoned not exceeding two years; and if a male, to be whipped, in addition to such imprisonment: provided that this provision shall not extend to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working.

By § 7. maliciously pulling down or destroying, or damaging with intent to destroy or render useless, any steam engine or other engine for sinking, draining, or working any mine, or any stath, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals from any mine, whether such engine, stath, building, erection, bridge, waggonway or trunk be completed or in an unfinished state, is a felony, liable to any of the punishments last mentioned.

And see § 8, *ante*, 1.

4. *Of injuries to ships.*

By § 9. maliciously setting fire to or in anywise destroying any ship or vessel, whether the same be complete or in an unfinished state, or setting fire to, casting away, or in any-

wise destroying any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, is a capital felony.

By § 10. maliciously damaging, otherwise than by fire, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or to render the same useless, is also a felony punishable with transportation for seven years, or imprisoned not exceeding two years; and if the offender be a male, with whipping.

By § 11. if any person shall exhibit any false light or signal, with intent to bring any ship or vessel into danger, or shall unlawfully and maliciously do any thing tending to the immediate loss or destruction of any ship or vessel in distress, or destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, or shall by force prevent or impede any person endeavouring to save his life from such ship or vessel (whether he shall be on board or shall have quitted the same,) every such offender shall be guilty of a capital felony.

And see *post* as to injuries to the king's ships.

5. *Of injuries to sea banks, canals, bridges, turnpike gates, fisheries, mill ponds, &c.*

By § 12. maliciously breaking down or cutting down any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or throwing down, levelling, or otherwise destroying any lock, sluice, floodgate, or other work on any navigable river or canal, is a felony, subjecting the offender to be transported for life, or for not less than seven years, or to be imprisoned not exceeding four years; and, if a male, to be whipped, in addition to such imprisonment; and maliciously cutting off, drawing up, or removing any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, or opening or drawing up any floodgate, or doing any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, is also a felony punishable with seven years transportation, or imprisonment for two years; and if the offender be a male, whipping.

By § 13. maliciously pulling down or in anywise destroying any public bridge, or doing any injury with intent and so as thereby to render such bridge or any part thereof dangerous or impassable, is a felony, subjecting the offender to be transported for life, or for not less than seven years, or to be imprisoned for not exceeding four years; and if a male, to be whipped, in addition to such imprisonment.

By § 14. if any person shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of parliament relating thereto, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, every such offender shall be guilty of a misdemeanor, and being convicted, shall be punished accordingly.

By § 15. maliciously breaking down or otherwise destroying the dam of any fishpond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss

or destruction of any of the fish, or putting any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein, or breaking down or otherwise destroying the dam of any millpond, is a misdemeanor, and punishable with transportation for seven years, or imprisonment for two years; and if the offender be a male, with whipping.

6. *Of injuries to stacks of corn, &c. crops, plantations, &c.*

By § 17. maliciously setting fire to any stack of corn, grain, pulse, straw, hay, or wood, is a capital felony; and maliciously setting fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern, wheresoever the same may be growing, is a felony, subjecting the offender to seven years transportation, or two years imprisonment; and if a male, whipping.

7. *Of injuries to hopbinds and trees.*

By § 18. maliciously cutting or otherwise destroying any hopbinds growing on poles in any plantation of hops, is a felony, punishable with transportation for life or not less than seven years, or imprisonment for four years, and whipping.

By § 19. maliciously cutting, breaking, barking, rooting up, or otherwise destroying or damaging the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the amount of the injury done shall exceed the sum of one pound,) is a felony, subjecting the offender to be transported for seven years, or to be imprisoned for not exceeding two years; and if a male, to be whipped; and maliciously cutting, breaking, barking, rooting up, or otherwise destroying or damaging the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, is also a felony (in case the amount of the injury done shall exceed the sum of five pounds,) liable to any of the punishments hereinbefore last mentioned.

By § 20. if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of one shilling at the least, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the amount of the injury done, not exceeding five pounds; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, he shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for not exceeding twelve calendar months; and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted, shall be liable to any of the punishments which the court may award for the felony hereinbefore last mentioned.

Dwarf apple and pear trees are trees within the statute. *R. & R. 373.*

As to injuries to fruit, &c. see *Gardens.*

8. *Of injuries to any other property.*

By § 24. if any person shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is hereinbefore pro-

vided, every such person, being convicted thereof before a justice of the peace, shall forfeit such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding five pounds; which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence. and in such case, or in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in such manner as every penalty imposed by a justice of the peace under the act is hereinafter directed to be applied; and if such sum of money, together with costs (if ordered,) shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, as the justice shall think fit, for not exceeding two calendar months, unless such sum and costs be sooner paid: provided that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as before the passing of the act.

9. *The general provisions of the statute.*

By § 25. every punishment and forfeiture by the act imposed on any person maliciously committing any offence whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise.

By § 26. in the case of every felony punishable under the act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, shall, on conviction, be liable to be imprisoned for not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender.

By § 27. where any person shall be convicted of any indictable offence punishable under the act, for which imprisonment may be awarded, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also direct that the offender shall be kept in solitary confinement, for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour.

By § 28. for the more effectual apprehension of all offenders against the act, it is enacted, that any person found committing any offence against the act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.

By § 29. the prosecution for every offence punishable on summary conviction under the act, shall be commenced within three calendar months; and the evidence of the party aggrieved shall be admitted in proof of the offence, and also the evidence of any inhabitant of the county, riding, or division in which the offence shall have been committed, notwithstanding any forfeiture incurred by the offence, may be payable to the general rate of such county, &c.

By § 30. where any person shall be charged on the oath of a credible witness, before any justice of the peace, with any such offence, the justice may summon the person charged to appear at a time and place to be named in such summons; and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person, by delivering the same to him personally, or by leaving the same at his usual place of abode,) the justice may either proceed to hear and determine the case *ex parte*, or issue his warrant for apprehending such person and bringing him before himself or some other justice of the peace; or the justice before whom the charge shall be made may (if he shall so think fit) without any previous summons (unless where otherwise specially directed) issue such warrant; and the justice before whom the person charged shall appear or be brought, shall proceed to hear and determine the case.

By § 31. where any offence is by this act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, any person who shall aid, abet, counsel, or procure the commission of such offence, shall, on conviction before a justice of the peace, be liable for every first, second, or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence as a principal offender is by the act made liable.

§ 32. directs the application of forfeitures and penalties upon summary convictions.

By § 33. in every case of a summary conviction, where the sum forfeited for the amount of the injury done, or imposed as a penalty by the justice, shall not be paid, either immediately after the conviction, or within such period as the justice shall, at the time of the conviction, appoint, he may (unless where otherwise specially directed) commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for not exceeding two calendar months, where the amount of the sum forfeited, or of the penalty imposed, or of both as the case may be, together with the costs, shall not exceed five pounds; and for not exceeding four calendar months, where the amount, with costs, shall not exceed ten pounds; and for not exceeding six calendar months in any other case, the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs.

By § 34. where any person shall be summarily convicted before a justice of the peace of any offence against the act, and it shall be a first conviction, the justice may discharge the offender from his conviction, upon his making satisfaction to the party aggrieved for damages and costs.

By § 35. the king may extend his royal mercy to any person imprisoned by virtue of the act, although he shall be imprisoned for non-payment of money to some party other than the crown.

§ 37. gives a general form of conviction.

By § 38. in all cases where the sum adjudged to be paid on any summary conviction shall exceed five pounds, or the imprisonment adjudged shall exceed one calendar month, or the conviction shall take place before one justice only, any person may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of such conviction; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or enter into a recognizance with two sufficient sureties before a justice of the peace, conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into shall

liberate such person if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment.

By § 39. no such conviction or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari or otherwise into any of his majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

By § 40. every justice of the peace, before whom any person shall be convicted of any offence against this act, shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against until the contrary be shown.

By § 41. persons acting in the execution of all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action, and of the verdict obtained thereupon.

By § 42. nothing in the act contained shall extend to Scotland or Ireland.

By § 43. where any felony or misdemeanor punishable under the act shall be committed within the jurisdiction of the admiralty of England, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony or misdemeanor committed within that jurisdiction.

The following statutes were not included among those repealed by the 7 & 8 Geo. 4. c. 27. and are still in force.

By the 12 Geo. 3. c. 24. § 1. if any person shall wilfully and maliciously set on fire or burn, or otherwise destroy, or cause to be so done, or aid, procure, abet, or assist in so doing, any of his majesty's ships or vessels of war, whether on float, or building or repairing in any private yards, or any of his majesty's arsenals, magazines, dock-yards, rope-yards, victualling offices, or any of the buildings erected therein, or belonging thereto, or any timber or materials there placed

for building, repairing, or fitting out of ships or vessels; or any of his majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where the same shall be kept, placed, or deposited, he is guilty of a capital felony.

By § 2. any person who shall commit any of such offences out of the realm may be indicted and tried in any county within the realm.

By the 4 Geo. 3. c. 37. for establishing and incorporating the British Linen Company, it is enacted, § 16, "that if any person shall, by day or night, break into any house, shop, cellar, vault, or other place or building, with intent to steal, cut, or destroy any linen belonging to any manufactory, or the looms, tools, or implements used therein, or shall wilfully or maliciously cut in pieces or destroy any such goods, either when exposed to bleach or dry, every such offender shall be guilty of felony, and shall suffer as in cases of felony without benefit of clergy."

By the 13 Geo. 3. c. 38. § 29. for incorporating the British Plate Glass Company (revived by 33 Geo. 3. c. 17. § 21.) it is enacted, "that if any person or persons shall, by day or night, break into any house, shop, cellar, vault, or other place or building belonging to the said manufactory, or wherein the same shall be then carrying on, with intent to steal, cut, break, or otherwise destroy any glass or plate glass, wrought or unwrought, or any materials, tools, or implements, used in, for, or about the making thereof, or any goods and wares belonging to the said manufactory, or shall steal or wilfully or maliciously cut, break, or otherwise destroy any such glass, materials, tools, or implements, every such offender, being lawfully convicted, shall be guilty of felony, and be transported for not exceeding seven years."

By the 54 Geo. 3. c. 42. the destruction of goods in the course of manufacture, and of the machinery employed therein, are felonies punishable with transportation for life or years. Its provisions seem to be embodied in the 3d section of the 7 & 8 Geo. 4. c. 30. See *ante*, 2.

The enactments of the 7 & 8 Geo. 4. c. 29. with respect to destroying records, wills, title-deeds, and other documents, have already been noticed under tit. *Larceny*, 1.

MALIGNARE. To malign, to slander; it has been interpreted to maim. See *Leg. Hen.* 1. c. 11.

MALIGNUS, *i. e.* *Diabolus*.

MALO GRATO. In spite; unwillingly. Hence the French *malgré*, and the old English, *maugre*. *Libertatem ecclesiarum*, &c. *malo grato stabulierunt*, *i. e.* he being unwilling. *Mat. Paris*, 1245.

MALT. By stat. 12 An. st. 1. c. 2. no malt shall be imported on pain of forfeiting the same and the value thereof.

The intercourse of malt between Great Britain and Ireland is now permitted and regulated under stat. 50 Geo. 3. c. 34. 53.

Malt may be exported from any part of the United Kingdom without duty or bounty, 54 Geo. 3. c. 69.

By the 7 & 8 Geo. 4. c. 52. the laws relative to the making of malt, and the revenue of excise thereon, were consolidated and amended; but many of its provisions have been repealed and others substituted by the 11 Geo. 4. and 1 Will. 4. c. 17.

By the 1 & 2 Will. 4. c. 55. the laws for suppressing the illicit making of malt, and distillation of spirits in Ireland, were consolidated and amended, and a variety of former acts repealed.

By the 2 Will. 4. c. 29. the allowance in spirits made from malt only, in Scotland and Ireland, was reduced.

By the act for the general regulation of the customs, 3 & 4 Will. 4. c. 52. § 58. malt is prohibited to be imported under the penalty of forfeiture, but by § 59. it may be warehoused for exportation.

There was formerly not only a direct heavy duty on malt, but another on beer, which together were equivalent to an

ad valorem tax of from 140 to 175 per cent. The beer duty was however repealed in 1830.

MALT-HOUSE. See *Malicious Injuries*, 1.

MALT MULNA. A quern, or malt-mill. *Mat. Paris*: *Lives of the Abbots of St. Albans*, &c.

MALT-SHOT. *Malt-scot.* Some payment for making malt. *Sonner of Gavelkind*, p. 27.

MALVEILLES, from Fr. *malveillance*.] Is used in our ancient records, for crimes and misdemeanors, or malicious practices. *Record*, 4 Edw. 3.

MALVEISA. A warlike engine to batter and beat down walls. *Mat. Paris*.

MALVEISIN, Fr. *mauvais voisin*, *malus vicinus*.] An ill neighbour.

MALVEIS PROCURORS. Are understood to be such as used to pack juries, by the nomination of either party in a cause, or other practice. *Artic. super Chart.* cap. 10.

MALUM IN SE. Our law books make a distinction between *malum in se* and *malum prohibitum*. *Vaugh.* 312. All offences at common law are generally in *mala in se*; but playing at unlawful games, and frequenting of taverns, &c. are only *mala prohibita* to some persons, and at certain times, and not *mala in se*. 2 *Rol. Abr.* 355. See *Homicide*, II.

MAN, ISLE OF. An island off the coast of Cumberland, Westmoreland, and Lancashire, in the channel that parts Ireland from England.

This island was a distinct territory from England, and out of the power of our chancery, or of original writs which issue from thence. And in the case of the Earl of Derby, it was adjudged, that no man had any inheritance in this island, but the earl and the bishop; and that they are governed by laws of their own, so that no statute made in England did bind there without express words, in the same manner as in Ireland. 1 *Inst.* 9; 4 *Inst.* 284; 7 *Rep.* 21; 2 *And.* 115.

According to Blackstone, it seems that this distinction is still preserved; he states that it is a distinct territory from England, and is not governed by our laws; neither doth any act of parliament extend to it, unless it be particularly named therein; and then an act of parliament is binding there. *Comm.* 105; *Introd.* § 4; cites 4 *Inst.* 284; 2 *And.* 116.

It was formerly a subordinate feudatory kingdom subject to the kings of Norway; then to King John and Henry III of England; afterwards to the kings of Scotland; and then again to the crown of England; and at length we find King Henry IV. claiming the island by right of conquest, and disposing of it to the Earl of Northumberland, upon whose attainder it was granted by the name of the Lordship of Man, to Sir John de Stanley, by letters patent, 7 *Hen.* 4. In his lineal descendants it continued for eight generations, until the death of Ferdinando, Earl of Derby, A. D. 1591, when a controversy arose concerning the inheritance thereof between his daughters and William his surviving brother upon which, and a doubt that was started concerning the validity of the original patent, the island was seized by Queen Elizabeth's hands, and afterwards various grants were made of it by King James I. All which being expired or surrendered, it was granted afresh in 7 *Jac.* 1. to William Earl of Derby and the heirs male of his body, with remainder to his heirs general: and by a private act of that year, chap. 4. confirmed and assured to the right heirs of James Lord Stanley, seventh Earl of Derby, with the restraint of the power of alienation. On the death of James the late Earl of Derby, A. D. 1735, the male line of Earl William failing, the Duke of Athol succeeded to the island, as heir general by a female branch. In the mean time, though the title of King had long been disused, the Earls of Derby, as Lords of Man, had maintained a sort of royal authority therein, by assenting to or dissenting from laws, and exercising an appellate jurisdiction; yet, though no English writ or process from the Courts of Westminster was of any au-

thority in *Man*, an appeal lay from a decree of the Lord of the Island, to the King of Great Britain in council. 1 *P. Wms.* 329. But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue, (it affording a commodious asylum for debtors, outlaws, and smugglers,) authority was given to the treasury, by 12 *Geo. 1. c. 28.* to purchase the interest of the then proprietors for the use of the Crown; which purchase was at length completed in the year 1765, and confirmed by 5 *Geo. 3. c. 26.* called the Vesting Act; whereby, in consideration of the sum of £70,000, the whole island and all its dependencies so granted as aforesaid, (except the landed property of the Athol family, their memorial rights and emoluments, and the patronage of the bishoprick, and other ecclesiastical benefices,) are unalienably vested in the crown, and subjected to the regulations of the British excise and customs. By 45 *Geo. 3. c. 123.* a further compensation was made by paying to the Duke of Athol, and the heirs general of the seventh Earl of Derby, an annuity equal to one fourth of the revenue of the customs at that time arising within the Isle of Man: to be paid annually out of the British Consolidated Fund.

The bishoprick of Man, or Sodor, or Sodor and Man, was formerly within the province of Canterbury, but annexed to that of York by 38 *H. 8. c. 31.*

Stat. 11 Geo. 3. c. 52. (amended by 54 *Geo. 3. c. 148.*) provides for the repairing its harbours.

No acts (except revenue acts) having as yet been passed which interfere with the private laws or general immunities of the Isle of Man, it still remains as commodious an asylum as ever for debtors and outlaws.

By the 6 *G. 1. c. 115.* the laws regulating the trade of the Isle of Man and the duties of customs were consolidated and amended, and that statute was followed by several others, all of which were consolidated into one act by the 3 & 4 *W. 4. c. 60.*

By § 11 of the last mentioned statute, foreign goods are not to be exported from the Isle of Man to any part of the United Kingdom, under the penalty of forfeiture, together with the ships, &c. used therein, &c. § 12.

There are also many clauses in the 3 & 4 *W. 4. c. 52.* (amended by 4 & 5 *W. 4. c. 89.*) for the general regulation of the customs; in the 3 & 4 *W. 4. c. 53.* for the prevention of smuggling; in the 3 & 4 *W. 4. c. 54.* for the encouragement of British shipping and navigation; in the 3 & 4 *W. 4. c. 55.* for the registering of British vessels; in the 3 & 4 *W. 4. c. 57.* for the warehousing of goods; and in the 3 & 4 *W. 4. c. 58.* granting certain bounties of customs; relating to the trade of the Isle of Man, and its intercourse with the United Kingdom.

For further particulars relative to the Isle of Man, see *Com. L.* title *Variations*, (I. 2), and in *Navigatio Actis*.

MANA. An old woman. *Gerv. of Tilb. cap. 95.*

MANAGIUM, from the Fr. *manage* or *manance*, a dwelling or inhabiting.] Is a mansion-house or dwelling-place.—*Concessi capitale managium meum cum pertinentiis, &c. Mon. Angl. tom. 2. p. 82; Blount, Cowell.*

MANBOTE, *Sax.*] A compensation or recompence for homicide; particularly due to the lord for killing his man or vassal. *Spelm. de Conc. vol. 1. p. 662.* See Lambard in his *Explication of Saxon Words, verbo Estimatio*, and Hoveden, in *parte posteriore annal. suor. fol. 344.* and title *Bote*.

MANCA. Was a square piece of gold coin, commonly valued at thirty pence; and mancusa was as much as a mark of silver, having its name from *manu cusa*, being coined with the hand. *Leg. Camut.* But the *mancu* and *mancusa* were not always of that value; for sometimes the former was valued at six shillings, and the latter, as used by the English Saxons, was equal in value to our half-crown. *Manca sex solidi aestimatur. Leg. H. 1. c. 69.* Thorn in his Chronicle says, *Mancusa est pondus duorum solidorum & sex denariorum;*

and with him agrees *Du Cange*, who says that twenty *mancæ* make fifty shillings. *Manca* and *mancusa* are promiscuously used in the old books for the same money. *Spelm.*

MANCH. Is sixty shekels of silver, or seven pounds and ten shillings; and one hundred shekels of gold, or seventy-five pounds. *Merch. Dict.*

MANCHESTER. Its collegiate church, how visitable. 2 *Geo. 2. c. 29.*

MANCIPLE, *manceps.*] A clerk of the kitchen, or caterer; an officer in the Inner Temple was anciently so called, who is now the steward there, of whom Chaucer, our ancient poet, sometime a student in that house, thus writes:

*A Manciple there was within the Temple,
Of which achatours might take ensample, &c.*

This officer still remains in colleges. *Cowell.*

MANDAMUS.

A Prerogative Writ, introduced to prevent disorder from a failure of justice and defect of police; and, therefore, ought to be used on all occasions where the law has established no specific remedy; and where in justice and good government there ought to be one. 3 *Burr.* 1265. See 1 *Black. Rep.* 552; *Comp.* 378.

This writ is granted to prevent failure of justice, and for the execution of the common law, or of a statute, or of the king's charter; but not as a private remedy to the party; unless in case of a member or officer of a corporation, if deprived of his office or franchise without sufficient cause, to whom this remedy by mandamus is given, by 9 *Anne, c. 20.* (see *post.*) *Hardw.* 99.

The general jurisdiction and superintendency of the King's Bench over all inferior courts to restrain them within their bounds, and to compel them to execute their jurisdiction, whether such jurisdiction arises from a modern charter, subsists by custom, or is created by act of parliament, yet, being in *subsidiu justitiæ*, is now exercised in a vast variety of instances. But though these kind of writs are daily awarded to judges of courts to give judgment, or to proceed in the execution of their authority, yet they are never granted to aid a jurisdiction, but only to enforce the execution of it; nor are they ever granted where there is another proper remedy. *Dict.*

This is a writ of right, which the superior court is obliged to issue, in the ordinary form, without imposing any terms on him who demands it. 3 *New Abr.* But though it be a writ of right, yet the court seldom grants it, without giving the party to whom it is prayed a day to show cause why it should not issue; also such matter must be laid before the court, by which it may appear that the party is entitled to it. 3 *New Abr.* And though the Court of King's Bench be entrusted with this jurisdiction of issuing out writs of mandamus, yet they are not obliged to do so in all cases wherein it may seem proper, but herein may exercise a discretionary power, as well in refusing as granting such writ; as where the end of it is merely to try a private right; where the granting it would be attended with manifest hardships and difficulties, &c. So even since the statute 11 *Geo. 1. c. 4.* (see *post.*) for obliging corporations to elect officers, it hath been held, that this court hath a discretionary power of refusing a writ for that purpose, but may first receive information about the election, and, if dissatisfied about the right, may send the parties to try it in an information. 2 *Str.* 1003.

And in the 2 *T. R.* 385, it was said by *Ashurst, J.*, that an application for a mandamus is an application to the discretion of the court, and that a mandamus is a prerogative writ, and is not a writ of right. See also 12 *East*, 336; 1 *B. & C.* 489; 9 *B. & C.* 456.

According to *Blackstone*, a writ of mandamus (considered as a remedy for the refusal or neglect of justice) is in general

a command, issuing in the king's name from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions; requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes to be consonant to right and justice.

It is a high prerogative writ of a most extensive remedial nature, and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office; but it issues in all cases where the party hath a right to have any thing done, and hath no other specific means of compelling its performance. 3 *Comm. c. 7. p. 110.*

Where, however, the party has a complete and specific redress at law, it is conceived that the circumstance of its being a more tedious method will not be sufficient to warrant the court in granting a mandamus. For there must be a specific legal right, as well as the want of a specific legal remedy, in order to found an application for a mandamus. Per Lord Ellenborough, 8 *East*, 219. But where the remedy is inadequate, the writ may issue; thus, where a party refuses to do some act which by law he ought to do, and the nonfeasance of which is injurious to the public, though this be an indictable offence, that will not prevent the issuing of a mandamus, for the indictment will not directly compel the performance of the act; the offender may be fined or imprisoned, but if he be obstinate, the party injured has no complete remedy. 2 *B. & A.* 646. Neither does the instance put by Mr. Justice Blackstone, of an admission to an office, seem to be in point; for though a mandamus will undoubtedly lie for such a purpose, yet it lies specifically, because the party without it would have no legal remedy by action. It is proper also to add another qualification; if the right in dispute be strictly and wholly private, the court will not interfere: a mandamus is properly a writ to compel the performance of public or, at least, official duties; and therefore the court, considering the Bank of England as a mere corporation of private traders, so far as regarded its internal management of its own concerns, refused to issue a mandamus upon the application of a member to compel the directors to produce their accounts in order to make a dividend of all their profits. 2 *B. & A.* 620; 5 *B. & A.* 899. See *Coleridge's Note to 3 Comm. 110.*

I. In what cases a Mandamus will lie.

II. Of the Writ and Return.

I. A mandamus lies to compel the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal, to academical degrees, to the use of a meeting-house, &c. It lies for the production, inspection, or delivery of public books and papers; for the surrender of the regalia of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible to recite minutely. But on this part of the subject it is to be particularly remarked, that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, wherever the same is delayed. For it is the peculiar business of the Court of King's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them; and this not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice. A mandamus may therefore be had to the courts of the city of London to enter up judgment, (*Raym.* 214,) to the spiritual courts to grant an administration, to swear a churchwarden, and the like. 3 *Comm. 110.*

This writ of mandamus is also (as has already been hinted) made, by 9 *Ann. c. 20.* a most full and effectual remedy, in

the first place, for refusal of admission where a person is entitled to an office or place in any corporation; and, secondly, for wrongful renewal when a person is legally possessed. There are injuries for which, though redress for the party interested may be had by assise or other means, yet as the franchises concern the public, and may affect the administration of justice, this prerogative writ also issues from the Court of King's Bench, commanding, upon good cause shown to the court, the party complaining to be admitted or restored to his office. And the statute requires that a return be immediately made to the first writ of mandamus; which return may be pleaded to, or traversed by the prosecutor, and his antagonist may reply, take issue or demur, and the same proceedings may be had as if an action on the case had been brought for making a false return; and after judgment obtained for the prosecutor, he shall have a preremptory writ of mandamus to compel his admission or restitution; which latter, in case of an action, is effected by a writ of restitution. 11 *Rep. 79.* So that now the writ of mandamus, in cases within this statute, is in the nature of an action whereupon the party applying and succeeding may be entitled to costs. 12 *Geo. 3. c. 21.* Also in general a writ of error may be had thereupon. 1 *P. Wms. 351*; 3 *Comm. c. 17. p. 265.*

By 1 *W. 4. c. 21. § 3.* the enactments of the 9 *Ann. c. 20.* relating to returns within that statute, are extended to all other writs of mandamus. See *post*, II.

This writ of mandamus may also be issued in pursuance of 11 *Geo. 1. c. 4.* in case within the regular time no election shall be made of the mayor or other chief officer of any city, borough, or town corporate, or being made it shall afterwards become void, requiring the electors to proceed to election, and proper courts to be held for admitting and swearing the magistrates so respectively chosen. 3 *Comm. 265.*

By the common law the Court of King's Bench had authority to grant a mandamus to fill up the vacancy occasioned by the death of a mayor or other chief officer of a borough or corporation within the year; but where the vacancy arose from an omission or neglect to elect such officer on the day fixed by the charter, or upon the removal of one unduly chosen, the court could not compel an election before the day again came round. Consequently, an omission to make an election on the appointed day, whether arising from fraud, inadvertence, or accident, or the removal of an officer improperly elected, might occasion a forfeiture of the charter and a dissolution of the corporation.

It was to remove these inconveniences that the above statute was passed, and being a remedial act it has been very liberally construed; for though three or four years have elapsed since a regular election, the court will grant a mandamus under it. See *Bull. N. P. 201 a*; *Schw. N. P. 1064*. And a mandamus has been granted where there was a mayor *de facto*, it appearing clearly there was no due election. 2 *Str. 1003. 1157.* And see 3 *Burr. 452*; 4 *Burr. 2006*.

Under the statute a mandamus may be granted to proceed to the election of any annual officer, as well as of the mayor or head officer. 2 *T. R. 732.*

And the statute is not confined to annual officers, but was held to extend to the appointment of burgesses who, under a charter, were elected for life. 8 *East, 270.*

To enumerate, with any degree of particularity, the various offices and situations to which a person may be admitted or restored by this writ, would take up more space than the nature of our work allows. The following, however, as a summary of so general a nature as, with what has already been said, may give an idea of the extensive use and nature of this remedy.

It has been granted to admit and restore a mayor, alderman, jurat, common council-man, recorder, high steward, town clerk, liveryman, member of the court of assistants, burgess, bailiff, serjeant or freeman of a company or a cor-

poration; and it lies where the persons complaining have the right, though they never had the possession: and to admit one in reversion after the death of another. It lies for any ancient office, being a freehold, and for every public officer who has no other remedy to be restored, as steward of a court leet or court baron, attorney of any court, treasurer of a public company, scavenger, clerk of the peace, master or fellow of a college where no visitor is appointed, chaplain, fellow of the College of Physicians, master, under master, or usher of a school, registrar, or deputy-registrar in the Ecclesiastical court, sexton or parish clerk, clerk to commissioners of land tax, ale-taster, director of a chartered company, prebendary, constable, churchwarden, overseer, surveyor of the highways, dissenting minister, teacher and pastor, curate, &c. See *Com. Dig.* tit. *Mandamus*, (A).

A mandamus lies to restore a mayor, alderman, or capital Burgess of a corporation, a recorder, town-clerk, attorney turned out of an inferior court, steward of a court, constable, &c. 11 *Rep.* 59; *Raym.* 155; 1 *Keb.* 549; 2 *Nels.* 1148, 1149.

A mandamus may be had to restore a freeman; and also to admit one to the freedom of the city, having served an apprenticeship. *Sid.* 107. To restore a fellow of the College of Physicians, it lies; though not for a fellow of a college in the universities, if there is a visitor. 1 *Lev.* 19, 23.

Although the cases are so various and numerous in which writs of mandamus have been granted, yet the instances in which they have been refused are almost equal in number; and the cases are sometimes contradictory, particularly as relates to fellows of colleges, and some other contested cases; which, in fact, have frequently been governed by so many private circumstances as scarcely to afford precedents.

One general rule is, that a mandamus does not lie for a private office, as steward of a court baron, proctor in the spiritual court, clerk of a private company in London, on the ground generally of a private jurisdiction over such officers. It does not lie to any of the inns of court to compel them to call a member to the bar; the only appeal in this case being to the twelve judges. See *Inns of Court*. It lies to a visitor of a college only, under special circumstances, as to hear an appeal and give some judgment. It does not lie for an office not known, unless it be specially described. See *Com. Dig.* tit. *Mandamus*, (B).

It hath been resolved, that a mandamus shall not be granted to restore a fellow or member of any college of scholars or physic, because these are private foundations. *Carthens's Rep.* 92. This writ lieth not for the deputy of an office, &c.; yet he who hath power to make such deputy may have it, *Mod. C.* 13; 1 *Lev.* 306; and he may have it to admit his deputy. *Stra.* 803, 895. It lies not, generally, to elect a man into any office; nor for a clerk of a company, which is a private office; or to restore a barrister expelled a society; a proctor, &c. 2 *Lev.* 14, 18; 2 *Nels.* 1150, 1151; nor for a vestry clerk, 5 *T.R.* K. B. 713. But a mandamus may lie to remove persons as well as restore them, by virtue of any particular statute, or breach thereof. 4 *Mod.* 233.

A mandamus lies to justices of the peace in a variety of cases connected with the administration of the poor laws; as to appoint overseers in an extra-parochial place, 1 *Stra.* 512; or in a hamlet where there were not any before, 1 *Wils.* 138; or to nominate them although the time mentioned in the 43 *Eliz.* c. 2. § 1. has expired, 2 *Stra.* 1125. To sign a poor rate, 8 *Mod.* 335; swear an overseer to his accounts, 1 *Wils.* 135; to grant a warrant for levying the balance of an old overseer's accounts, 2 *Stra.* 992; or to receive an appeal against an overseer's accounts, 3 *D. & R.* 299.

So a mandamus lies to justices in sessions; as to receive and determine an appeal at a subsequent sessions, 1 *East*, 183; to hear an appeal which they had dismissed, on the ground that they had no authority to try it for want of a

sufficient notice to the respondents, 10 *East*, 404; and see 7 *B. & C.* 691.

But the court refused to grant a mandamus to the justices at sessions, to rehear an appeal against an order of removal after judgment given by them, and entered by the clerk of the peace, on the ground that the justices were equally divided in opinion, and that the judgment was entered by mistake instead of an adjournment of the appeal. 1 *M. & S.* 442.

Also a mandamus will lie to justices in order to enforce the execution of the duties imposed upon them by the acts relating to highways; as to appoint surveyors, 4 *East*, 142; to swear them, 4 *Burr.* 2452; to make a rate to reimburse them. 1 *Stra.* 211.

But the court will not issue a mandamus to magistrates to do an act subjecting them to an action, the event of which may be doubtful. 3 *N. & M.* 68; and see 1 *B. & C.* 485.

If justices of peace refuse to admit one to take the oaths, to qualify himself for any place, &c. mandamus lies; so to a bishop or archdeacon, to swear a churchwarden; to grant a probate of a will, and to admit an executor to prove a will, or an administrator; to a rector, vicar, or churchwarden, to restore a sexton. *Wood's Inst.* 568. Also a mandamus will lie to the bishop, to grant a license for a parson to preach, where it is denied, and he is in orders for it: and this writ lies to restore a person to university degrees. 2 *Ld. Raym.* 1206, 1334. But after a man is restored on a peremptory mandamus, he may be displaced again for the same matters for which he was before removed, and others. *Ib.* 1283.

A mandamus will be granted to inferior jurisdictions of all kinds, to compel them to do their duty; as to a lord to hold a court baron; to a steward and homage of a manor, to hold courts, to enforce the attendance of tenants of a manor to make a court. See *Com. Dig.* ubi sup. To a corporation to proceed to election. 1 *East*, 79.

A mandamus was granted to the ordinary to permit a person to inspect and take extracts from the book of the register touching a living within the diocese, the next presentation of which was claimed both by the ordinary and the person applying for the writ. 8 *B. & C.* 112, *S. C.*; 2 *M. & R.* 127.

But the court will not grant a mandamus to inspect the documents of a corporation on the application of members merely alleging grounds for believing that its affairs were misconducted. It must be shown that the inspection is necessary for some specific object in which the applicant is interested, and the inspection will be limited to that object. 2 *B. & Ad.* 115.

Where a mayor refused to put a motion moved and seconded with the concurrence of a majority of the burgesses, for the repeal of certain bye laws, the court refused a mandamus to compel him, on the ground that there was no precedent of the court possessing such a power. *Ex parte Garrett v. The Mayor of Newcastle*, 3 *B. & Ad.* 258.

The Court of King's Bench refused to grant a mandamus to chapelwardens of a township within a parish, to make a rate to reimburse churchwardens such sums as they had expended, or might expend, upon the parish church. 12 *East*, 556.

The court refused to grant a mandamus to compel a canal company to proceed to an assessment of the value of land taken for the purposes of the canal, and of the recompense to be made for damages thereby sustained; the parties interested in the land not having made the application within a reasonable time, and there being another remedy by ejectment. 1 *M. & S.* 32.

The court refused a mandamus to the officers of the customs to register a ship transferred by the survivor of two partners; on the ground that the executors of the deceased partner ought to have joined in the transfer. 2 *M. & S.* 223.

It does not lie to restore a person where it is confessed he

was rightly removed, though he had no notice at the time to appear and defend himself. *Comp.* 523. Nor to restore to an office, though the party was irregularly suspended; if it appear by his own showing that there was good ground for the suspension if the proceedings had been regular. 2 *T. R.* 177. See also 8 *T. R.* 352; and 1 *East*, 562.

On application for a mandamus to be restored, the party applying must show that he has complied with all the requisites, to give him a *prima facie* title; because, if properly admitted, he may bring an action for money had and received for the profits. 3 *T. R.* 578.

If an election is doubtful, it should be tried by information in the nature of a quo warranto, not on mandamus. 3 *Burr.* 1452.

Where an action will lie for a complete satisfaction equivalent to a specific relief, a mandamus will not lie. It will not therefore be granted against the Bank to transfer stock, because a special action of assumpsit will lie. *Dougl.* 526, (508); see also 1 *T. R.* 396, and *ante*.

A mandamus will not be granted to a ministerial officer, to do an act for the neglect of which he can be otherwise punished. 5 *T. R.* 364, 546; 6 *T. R.* 168.

With respect to the issuing of writs of mandamus (which may be done by any of the courts of Westminster), for the examination of witnesses, see *Deposition*.

II. This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below; whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made, (except in some general cases where the probable ground is manifest,) directing the party complained of to show cause why a writ of mandamus should not issue; and if he shows no sufficient cause, the writ itself is issued at first in the alternative either to do thus, or signify some reason to the contrary; to which a return or answer must be made at a certain day; and if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a peremptory mandamus to do the thing absolutely, to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person makes no return, or fails in his respect and obedience, he is punishable for his contempt by attachment. But if he at the first returns a sufficient cause, although it should be false in fact, the Court of King's Bench will not try the truth of the fact upon affidavits; but will for the present believe him, and proceed no farther on the mandamus. But then the party injured may have an action against him for his false return; and (if found to be false by the jury) shall recover damages equivalent to the injury sustained; together with a peremptory mandamus to the defendant to do his duty. 3 *Comm.* 111.

The court will not specify to whom the mandamus shall be directed, for this might be prejudging the right of the electors, but he who applies must at his peril have it properly directed. 2 *Burr.* 784. See 1 *W. 4. c. 21. § 4. post*.

A writ of mandamus may not be directed to one person, or to a mayor and alderman, &c. to command another to do any act; it must be directed to those only who are to do the thing required, and obey the writ. 2 *Salk.* 446, 701.

Two writs of mandamus may be granted on the application of different parties for the same election. *Hardm.* 178. But the court will not grant cross or concurrent writs without special reasons. 2 *Burr.* 782.

This writ is not to be tested before granted by the court; and if the corporation to which the mandamus is sent be above forty miles from London, there shall be fifteen days between the day of the teste and the return of the first writ of mandamus, taking both days inclusive; but if but forty miles, or under, eight days only; and the *alias* and *pluries*

may be made returnable immediate: also, at the return of the *pluries*, if no return be made, and there is affidavit of the service, attachment shall go forth for the contempt, without hearing counsel to excuse it. 2 *Salk.* 434; *Str.* 407.

The return must be made by the person to whom the writ is directed. *Skin.* 368.

But a return by the mayor alone to a mandamus directed to the mayor and burgesses is good. *Comb.* 41.

The return to a mandamus should set out all necessary facts precisely, to show the person removed in a legal and proper manner, and for a legal cause: it is not sufficient to set out conclusions only, the facts must be precisely set out, that the court may judge of the matter; so it is the same as to the cause of the motion, which must likewise be set out. 2 *Burr.* 731.

Where a mandamus to a commissary to swear in M. as churchwarden recited that he had been duly elected, and the defendant returned that M. was not duly elected, the return was held sufficient. 8 *B. & C.* 681.

The return to a mandamus may contain any number of concurrent and consistent causes to show why the party should not be admitted or restored. 4 *Burr.* 2044.

After a return has been made to a mandamus, the defendant cannot make any objection to the writ itself. 5 *T. R.* 66.

A case has happened, and others of the like kind may happen, where an action could not be brought, nor the return pleaded to, or traversed under the statute 9 *Ann. c. 20*. In such case it may perhaps be advisable to move the court of King's Bench for an information against the person or persons making a false return, or such a return as will lay the party, who moved for the mandamus, under the dilemma mentioned above. 4 *Burr.* 2452.

If the return consists of several independent matters not inconsistent with each other, but part of them good in law and part bad; the court may quash the return as to such part only as is bad, and put the prosecutor to plead to or traverse the rest. 2 *T. R.* 456, and see 5 *T. R.* 66.

It has been held, that several persons cannot have one mandamus; nor can several join in an action on the case for a false return. 2 *Salk.* 433. But there has been an instance to the contrary, where the circumstances of the case were such, that it required a variety of persons to join in the application, viz. on the highway acts, to compel the justices to nominate a surveyor out of the list returned by the inhabitants. 4 *Burr.* 2452.

Although by 9 *Ann. c. 23. § 2*, the prosecutor of a mandamus, to which there is a return, and issue taken on the facts therein, has an option to try the question in the same county, in which he may bring an action for a false return, yet if all the material facts are alleged in one county, and issue taken thereon there, he cannot issue the *venire facias* into another county, though he might have originally alleged the facts there, and have there brought his action for a false return. 1 *East*, 114.

There is to be judgment upon the return of the writ, before any action on the case can be brought for a false return of a mandamus. 2 *Lev.* 238. Returns upon writs of mandamus must be certain for the court to judge upon. 11 *Rep.* 99. See *Com. Dig.* tit. *Mandamus*, (d).

By the 1 *W. 4. c. 21. § 3*, the enactments contained in the 9 *Ann. c. 20*, relating to the return to writs of mandamus, and the proceedings on such returns, and to the recovery of damages and costs, are extended and made applicable to all other writs of mandamus, and the proceedings thereon, except so far only as the same are varied or altered by the act.

By § 4, after reciting, that "writs of mandamus, other than such as relate to the offices and franchises mentioned in or provided for by the said act made in the ninth year of the reign of Queen Anne, are sometimes issued to officers and other persons, commanding them to admit to offices, or do or perform other matters, in respect whereof the person to whom

such writs are directed claim no right or interest, or whose functions are merely ministerial in relation to such offices or matters, and it may be proper that such officers and persons should in certain cases be protected against the payment of damages or costs to which they may otherwise become liable; it is enacted, that the court to which application may be made for any writ of mandamus (other than such as relate to the said offices and franchises mentioned in or provided for by the said act of the 9 Ann.) may make rules and orders calling, not only upon the person to whom such writ may be required to issue, but also every other person having or claiming any right or interest in or to the matter of such writ, to show cause against the issuing of such writ and payment of costs of the application, and upon the appearance of such other person in compliance with such rules, or in default of appearance after service thereof, to exercise all such powers and authorities, and make all such rules and orders, applicable to the case, as are or may be given by any act (see *post*) passed or to be passed during the then session of parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims: Provided that the return to be made to any such writ, and issues joined in fact or in law upon any traverse thereof, or upon any demurrer, shall be made and found by and in the name of the person to whom such writ shall be directed; but the same may, if the court shall think fit so to direct be expressed to be made and joined on the behalf of such other person as may be mentioned in such rules; and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings at his own expense: and in such case, if any judgment shall be given for or against the party suing such writ, such judgment shall be given against or for the person or persons on whose behalf the return shall be expressed to be made, and who shall have the like remedy for the recovery of costs and enforcing the judgment as the person to whom the writ shall have been directed might and would otherwise have had.

By § 5. In case the return to any such writ shall, in pursuance of the authority given by the act, be expressed to be made on behalf of any other person as aforesaid, the further proceedings on such writ shall not abate or be discontinued by the death or resignation of, or removal from office of, the person having made such return, but the same shall be carried on in the name of such person; and if a peremptory writ shall be awarded, the same shall be directed to any successor in office or right to such person.

§ 6. And in all cases of application for any writ of mandamus whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the court, and it may order by whom and to whom the same shall be paid.

By the Interpleader Act, 1 & 2 Wm. 4. c. 38. § 8. on applications under the above or that statute, the court may exercise all powers, and make such rules applicable to the case, as are given or mentioned in either act. See *Interpleader*.

A motion was made for an attachment, for not returning an alias mandamus; and, by Holt, C. J., in case of a mandamus out of chancery, no attachment lies till the pluries, for that is in nature of an action to recover damages for the delay; but upon a mandamus out of B. R. the first writ ought to be returned, though an attachment is not granted without a peremptory rule to return the writ, and then it goes for the contempt, &c. 2 Salk. 429.

By 7 Geo. 4. c. 21. for the better regulation of proceedings on writs of mandamus in Ireland, (§ 1) a return to any mandamus, where the party can be admitted to office without removal of any other person, he may apply to the court by petition to be admitted forthwith; and the court may make order accordingly. By § 2. the court may direct the payment of costs in cases of refusal of admission after notice to

mayor, &c. under the Irish act, 33 Geo. 3. c. 38. By § 2. orders of court are subject to alteration by the judgment on the mandamus, but are valid until altered.

For further matter on this subject, see *Vin. Abr.* and *Com. Dig.* tit. *Mandamus*; and *post*, *Quo Warranto*.

MANDAMUS was also a writ that lay after the year and day, (where in the meantime the writ, called *diem clausit extremum*, had not been sent out) to the escheator, on the death of the king's tenant in capite, &c. commanding him to inquire of what lands holden by knight's service the tenant died seised. *F. N. B.* 561; *Dy.* 209, pl. 19, 248, pl. 81; *Lamb.* 36.

Mandamus was likewise a writ or charge to the sheriff, to take into the hands of the king all the lands and tenements of the king's widow, that, against her oath formerly given, married without the king's consent. *Reg. fo.* 295.

MANDATORY, *Mandatorius*. He to whom a charge or commandment is given. Also he that obtains a benefice by mandamus.

MANDATE, *Mandatum*.] A commandment judicial of the king or his justices to have any thing done for despatch of justice; whereof there is a great variety in the table of the *Register Judicial*, verbo *Mandatum*. The Bishop of Durham's mandates to the sheriffs are mentioned in 31 *Eliz.* c. 9. *Cowell*, ed. 1727.

Mandate is also a contract by which one employs another to act for him in the management of his affairs, or in some particular department of them, of which employment the person accepts and agrees to act; the person giving the employment is termed the mandant, the person receiving it the mandatary. As to particular cases of this contract, or delivery of goods, see tit. *Bailment*.

MANDATI DIES, *Mundie* or *Maunday Thursday*. The day before Good Friday, when they commemorate and practise the commands of our Saviour in washing the feet of the poor, &c. And our kings of England, to show their humility, long executed the ancient custom on that day, of washing the feet of poor men, in number equal to the years of their reign, and giving them shoes, stockings, and money.

MANDATO, PANES DE. Loaves of bread given to the poor upon Maunday Thursday. *Chartular Glaston. MS.* fol. 29.

MANENTES. Was anciently used for *tenentes* or tenants; *qui in solo alieno manent*; and it was not lawful for them, or their children, to depart without leave of the lord. *Concil. Synodal.* apud *Cloversho.* Anno 822.

MANGANESE. Stealing, from any bed, mine, or vein, is felony by 7 & 8 Geo. 4. c. 29. § 37. and punishable as simple larceny.

MANGEL WURZELL. By the 2 & 3 W. 4. c. 74. licensed distillers may distil spirits from mangel wurzell only, which shall be charged the same duties as spirits made from potatoes.

MANGONARE. To buy in the market. *Leg. Ethelred.* c. 24.

MANGONELLUS. A warlike instrument made to cast small stones against the walls of a castle. *Cowell*.

It differs from a *petrard* as follows, viz.

*Interea grossos petraria mittit ad intus
Assidue lapides mangonellus qui minores.*

Vide *Spelm. Gloss. voc. Manga, Manganum*.
MANIPULUS. An handkerchief which priests always had in their left hands. *Blount*.

MANNER, from the Fr. *manier*, or *mainer*, i. e. *manu tractare*.] To be taken with the manner, is where a thief having stolen any thing, is taken with the same about him as it were in his hands; which is called *flagrante delicto*. *S. P. C.* 179. See *Mamour*.

MANNING, *manopera*.] A day's work of a man; and in ancient deeds there was sometimes reserved so much rent, and so many mannings.

MANNIRE. To cite any one to appear in court, and

stand in judgment there; it is different from *bannire*; for though both of them signify a citation, one is by the adverse party, and the other by the judge. *Leg. H. 1. c. 10. Du Cange*

MANNOPUS, *manopera*.] Goods taken in the hands of an apprehended thief. *Cowell*.

MANNUS. A horse; a pad or saddle horse. In the laws of Alfred, we find *mantheof*, for a horse stealer. *Cowell*. See *Mantheof*.

MANOR, *manerium*.] Seems to be derived of the Fr. *manoir*, *habitation*, or rather from *menendo*, of abiding there, because the lord did usually reside there. It is called *manerium*, *quasi manurium*, because it is laboured by handy work: it is a noble sort of fee, granted partly to tenants for certain services to be performed, and partly reserved to the use of the lord's family, with jurisdiction over his tenants for their farms. That which was granted out to tenants, we call *tenementales*; those reserved to the lord were *dominicales*; the whole fee was termed a lordship, of old a barony; from whence the court, that is always an appendant to the manor, is called The Court-baron. See *Skene de verb. signif.*

Manors, according to *Blackstone*, are in substance as ancient as the Saxon constitution, though perhaps differing a little in some immaterial circumstance from those that exist at this day. *Co. Cop. § 2, 10.*

Dugdale says the reign of Edward the Confessor is the first in which they are mentioned. *Gloss in voce*. A circumstance which is accounted for the fondness of that king for Norman institutions.

Touching the original of manors, it seems that in the beginning there was a circuit of ground, granted by the king to some baron or man of worth, for him and his heirs to dwell upon, and to exercise some jurisdiction more or less within that compass, as he thought good to grant; performing such services, and paying such yearly rent for the same, as he by his grant required; and that afterwards this great man parcelled his land to other meaner men, enjoining such services and rents as he thought good; and so, as he became tenant to the king, the inferiors became tenants to him. See *Perkin's Reservation*, 670; *Horne's Mirror of Justices*, lib. 1. cap. de *Roy Alfred*; *Fulbeck*, fol. 18. And according to this our custom all lands holden in fee throughout France were divided into *feifs* and *arriere feifs*, whereof the former were such as were immediately granted by the king; the second such as the king's *feudataries* did grant to others. *Gregori's Syntagm.* lib. 6. c. 5. num. 3.

In these days, a manor rather signifieth the jurisdiction and royalty incorporeal, than the land or site. For a man may have a manor in gross, (as the law termeth it,) that is, the right and interest of a court-baron, with the perquisites thereunto belonging, and another or others have every foot of the land. *Kitchin*, fol. 4; *Broke*, *hoc titulo per totum*; *Bracton*, lib. 4, cap. 31, n. 3, divideth *manerium* into *capitale* et *non capitale*. See *Fee*.

Aula, *halla*, or *haua*, a hall or chief mansion was the usual appendage of a manor.

A manor may be compounded of divers things, as of a house, arable land, pasture, meadow, wood, rent, advowson, court-baron, and such like; and this ought to be by long continuance of time beyond the memory of man; for at this day a manor cannot be made, because a court-baron cannot now be made; and a manor cannot be without a court-baron, and suitors or freeholders, two at least; for if all the freeholds except one escheat to the lord, or if he purchase all except one, there his manor is gone *causd qud supra*, although in common speech it may be so called. *Cowell*. *Vide Co. Lit.* 58, 108; *Lit.* 73; 2 *Roll. Abr.* 121.

By a grant of the demesnes and services, the manor passeth; and by grant and render of the demesnes only the manor is destroyed, because the services and demesnes are thereby severed by the act of the party; though it is otherwise, if by act of law, as by partition. 6 *Rep.* 63. There

are two coparceners of a manor; the demesnes are assigned to one, and the service to the other; the manor is gone, but if one die without issue, and the manor descends to her who had the services, the manor is revived again, for the severance was by act in law. 1 *Inst.* 122; 8 *Rep.* 79; 3 *Salk.* 25, 40.

A new manor may arise and revive by operation of law 1 *Leon.* 204.

It may contain one or more villages or hamlets, or only great part of a village, &c. And there are capital manors, or honours, which have other manors under them, the lords whereof perform customs and services to the superior lords. 2 *Inst.* 67; 2 *Roll. Abr.* 72. See *Honour*. There may be also customary manors granted by copy of court-roll, and held of other manors. 4 *Rep.* 26; 11 *Rep.* 17. But it cannot be a manor in law, if it wanteth freehold tenants; nor be a customary manor without copyhold tenants. 1 *Inst.* 58; *Lit.* 73; 2 *Roll. Abr.* 121. But it is said, if there be but one freehold tenant, the seignior continues between the lord and that one tenant. 1 *And.* 257; 1 *Nels. Abr.* 524. The custom remains where tenements are divided from the rest of the manor, the tenants paying their services; and he who hath the freehold of them may keep a court of survey, &c. *Cr. Eliz.* 103. See *Copyhold*.

The *tenemental* lands of ancient manors were, from the different modes of tenure, distinguished by different names. First, *book-land*, or *charter-land*, which was held by deed under certain rents and free-services, and in effect differed nothing from free socage lands. *Co. Cop.* § 3. And from hence have arisen most of the freehold tenants who hold of particular manors, and owe suit and service to the same. The other species was called *folk-land*, which was held by no assurance in writing, but distributed among the common folk, or people, at the pleasure of the lord, and resumed at his discretion; being indeed land held in the villenage. See *tit. Villenage*. The residue of the manor being uncultivated, was termed the lord's waste, and served for public roads, and for common of pasture to the lord and his tenants.

Manors were formerly called baronies, as they still are lordships; and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemeanors and nuisances within the manor, and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number of suitors should so fall as not to leave sufficient to make a jury or homage, that is, two tenants at the least, the manor itself is lost.

In the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons, to be holden of themselves, which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors; and his seignior is frequently termed an honour, not a manor, especially if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the crown. See *tit. Honour*. In imitation whereof, these inferior lords began to carve out and grant to others still more minor estates, to be held as of themselves, and were so proceeding downwards in *infinitum*, till the superior lords observed, that by this method of subinfeudation they lost all their feudal profits, of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the terre-tenant, or him who occupied the land; and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned, first, that provision in the 32d cap. of *Magna Carta*, 9 *Hen. 3.* (which is not to be found in the first charter granted by that prince, nor in the great charter of King John); that no man should either give or sell his land, without reserving sufficient to answer the demands of his lord; and afterwards a statute of *Westm.* 3. or *Quia emptores*, 18 *Edm.* 1. c. 1. which

directs that upon all sales or feoffments of lands, the feoffee shall hold the same not of his immediate feoffor, but of the chief lord of the fee of whom such feoffor himself held it. But these provisions not extending to the king's own tenants in capite, the like law concerning them is declared by the statutes of *prerogativa regis*, 17 Edw. 2. c. 6; 34 Edw. 3. c. 15. by which last all subinfeudations, previous to the reign of King Edward I. were confirmed; but all subsequent to that period were left open to the king's prerogative. See *Tenures*. From hence it is clear, that all manors existing at this day, must have existed as early as King Edward I. for it is essential to a manor, that there be tenants who hold of the lord; and by the operation of these statutes, no tenant in capite since the accession of that prince, and no tenant of a common lord since the statute of *Quia emptores*, could create any new tenants to hold of himself. 2 Comm. c. 6. p. 90—92.

If a lord of a manor convey a customary estate to the tenant, he cannot reserve to himself the ancient services; for the tenant by reason of the statute *Quia emptores* must then hold of the superior lord. 4 T. R. 443.

Where the lord of a customary manor by his deed, made since the statute of *Quia emptores*, granted to his customary tenant, who then held by the payment of certain customary rents, and other services, that in consideration of a sixty-one penny fine, (being sixty-one years' rent,) he, the lord, ratified and confirmed to the tenant, and his heirs, all his customary and tenant-right estates, with the appurtenances, &c. and granted that the tenant and his heirs should be thenceforth freed, acquitted, exempted, and discharged from the payment of all rents, fines, heriots, &c. dues, customs, services, and demands, at any time thereafter happening to become due in respect of the tenancy; except one penny yearly rent, and also excepting and reserving suit of court, with the service incident thereto; and saving and reserving all royalties, escheats, and forfeitures, and all other advantages and emoluments belonging to the seignior, so as not to prejudice the immunities thereby granted to the tenant; and also granted liberty to cut timber, and to sell or lease, &c. without license; the Court of King's Bench held, that such confirmation to the tenant, of his customary tenant-right estates, (freed &c. from all rents and services, except, &c.) was tantamount to a release of those rents and services not specifically excepted; and that by virtue thereof the customary tenement became frank-free, or held in free and common socage; and that the old customary estate, which before was not devisable, was extinguished, and became devisable by the statute of wills. Such customary estates, which are peculiar to the north of England, are not freehold, but seem to fall under the same general considerations as copyholds; alienable by bargain and sale, and admittance thereon, and not holden at the will of the lord. 4 East, 271. See *Copyhold*.

MANSE. *mansa*.] An habitation, or farm and land. *Spelm.* See *Mansus*.

In Scotland, the term was originally applied to a portion of ground set apart for the clergyman, but it is now used to designate his house; the ground to which he is entitled being called his glebe, or glebe land.

MANSER. A bastard. *Cowell*.

MANSION. *mansio, a manendi*.] Among the ancient Romans was a place appointed for the lodging of the prince, or soldiers in their journey; and in this sense we read *primam mansionem*, &c. It is with us most commonly used for the lord's chief dwelling-house within his fee; otherwise called the capital messuage, or manor-place. *Skene*.

Some say it is a dwelling of one or more houses without a neighbour, (see *Bract. lib. 5. p. 1*); and mansion-house is taken in law for any house or dwelling of another, in cases of committing burglary, &c. 3 Co. Inst. 64.

The Latin word *mansia*, according to Sir Edward Coke, seems to be a certain quantity of land; *hida vel mansia*, and *mansa*, are mentioned in some old writers and charters.

Fleta, lib. 6. And that which in ancient Latin authors was termed *hida*, was afterwards called *mansus*.

MANS LAUGHTER. See *Homicide*, III.

MAN-STEALING. See *Kidnapping*.

MANSUM CAPITALE. The manor-house or *mense*, or court of the lord. *Kennel's Antiq.* 150.

MANSURA and **MASURA.** Are used in *Domesday* and other ancient records, for *mansiones vel habitacula villicorum*. *Cowell*.

MANSUS. Anciently a farm. *Seld. of Tithes*. 62.

MANSUS PRESBYTERI. The *manse* or house of residence of the parish-priest; being the parsonage or vicarage-house. *Paroch. Antiq.* 431.

MANTHEOF, from the Lat. *mannus*, a nag, and Sax. *thoff*, i. e. th. et.] A horse-stealer. *Leg. Alfred.* See *Mannus*.

MANTILE. A long robe, from the Fr. word *mantea*, mentioned in 24 Hen. 8. c. 13.

MAN-TRAP. See *Engines*.

MANUALIA BENEFICIA. Were the daily distributions of meat and drink to the canons and other members of cathedral churches, for their present subsistence. *Lib. Statutor. Eccles. Sancti Pauli London.* MS.

MANUALIS OBEDIENTIA. Is used for sworn obedience, or submission upon oath.

MANUCAPTIO. A writ that lies for a man taken on suspicion of felony, &c. who cannot be admitted to bail by the sheriff, or others having power to let to mainprise. *F. N. B.* 249. See *Mainprise*.

MANUAL. *manualis*.] Signifies what is employed or used by the hand, and whereof a present profit may be made; as such a thing in the manual occupation of one, in where it is actually used or employed by him. *Staundf. Prerog.* 54.

MANUFACTURES and **MANUFACTURERS.** These are regulated by a vast variety of statutes adapted to the particular nature of each business, to which they are applied, to guard against the frauds and negligence of journeymen and workmen concerned therein. The following contain the most general provisions. For a reference to those relating to particular branches of manufactures, see this Dictionary under the appropriate titles.

By 1 Ann. st. 2. c. 18. made perpetual by 9 Ann. c. 30. if any person employed in the working up the woollen, linen, fustian, cotton, or iron manufactures, shall embezzle or purloin any materials which he shall be intrusted with to work, or if any person shall receive such embezzled materials, the offender shall forfeit double the value to the poor, or be committed to the house of correction, and there whipped and kept to hard labour for fourteen days. This statute was further enforced by 13 Geo. 2. c. 8. which made a second offence liable to a forfeiture of four times the value. These provisions were however found insufficient.

By stats. 22 Geo. 2. c. 27; 17 Geo. 3. c. 56. any person employed in working up any woollen, linen, silk, leather, or iron manufacture, who shall purloin, embezzle, secrete, sell, pawn, exchange, or unlawfully dispose of any of the materials, shall be committed to the house of correction for not less than fourteen days nor more than three months, and whipped; and for a second offence to be committed, for not less than three months, nor more than six, and whipped. The receiver to forfeit from 40*l.* to 20*l.*, or be whipped; and for a second offence from 100*l.* to 50*l.* or be whipped. These statutes also empower justices to grant warrants to search for embezzled materials, and to seize them, giving an opportunity to officers to prove the property, and also to compel workmen entrusted with materials to work up the same within eight days, and to prevent their engaging in more than one service at a time. The said stat. 17 Geo. 3. c. 56. also contains many other provisions against receivers of embezzled manufactures, and prohibits journeymen dyers in particular from receiving goods to dye without the consent of their employers.

By the said stat. 1 *Ann. st. 2. c. 18.* all wool delivered out to be wrought up shall be delivered with the declaration of the true weight; and all wages, demands, and defaults of labourers in the woollen, linen, fustian, cotton, and iron manufactures, shall be heard and determined by two justices of peace, with an appeal to the quarter sessions.

By the 7 & 8 *Geo. 4. c. 29. § 16.* stealing to the value of 10s. goods of silk, woollen, linen, or cotton, or of such materials mixed, laid or exposed during any stage, process, &c. of manufacture, subjects the offender to transportation for life, &c.

As to the exportation of machinery used in manufactures, see *Machinery*.

For the offence of destroying machinery and buildings used in the carrying on of any manufacture, see *Frames, Malicious Injuries*. See further, *Labourers, Servants*.

MANUMISSION, Manumissio. The freeing a vassal or slave out of bondage; which was formerly done several ways some were manumitted by delivery to the sheriff, and proclamation in the county, &c.; others by charter; one way of manumission was for the lord to take the bondman by the head, and say, *I will that this man may be free*, and then shoving him forward out of his hands. And there was a manumission implied, when the lord made an obligation for payment of money to the bondman, or sued him where he might enter without suit, &c. The form of manumitting a person in the time of William I. called the Conqueror, is thus set down: *Si quis velit servum suum liberum facere. tradat eum vicecomiti per manum dextram in pleno comitatu, et quietum illum clamare debet à jugo servitutis suæ per manumissionem, et ostendat ei liberam portas et vias, et tradat illi libera arma, scilicet lanceam et gladium, et deinde liber homo efficitur.* Lamb. Archæi. 126. See title *Villeins*.

MANU OPERA. Stolen goods taken upon a thief, apprehended in the fact. See *Mannopus, Manour*.

MANUOPERA. Cattle or any implements used to work in husbandry. *Mon. Angl. tom. 1. p. 977. Flea.*

MANUPASTUS. A domestic. *Spelm. Leg. Hen. 1. c. 66.*

MANUPES. A foot of full and legal measure. *Cowell.*

TO MANURE, Colo, Melioro. To till, plough, or manure land. *Lit. Dict.*

MANUS. Anciently used for the person taking an oath, as a compurgator. And it often occurs in old records: *tertia, quarta, &c. manu, jurare*, that is, *the party was to bring so many to swear with him, that they believed what he vouched was true*: and in a case of a woman accused of adultery, *mulieri hoc neganti purgatio sexta manu extitit indicta*, i. e. she was to vindicate her reputation upon the testimony of six compurgators. *Reg. Eccl. Christ. Cant.* If a person swore alone, it was *proprâ manu et unâ*. The use of this word came probably from laying the hand upon the New Testament, on taking the oath.

MANUS MEDIÆ ET INFIMÆ HOMINES. Men of a mean condition, of the lowest degree. *Radulphus de Diceto sub annis, 1112, 1138, 1185.*

MANUTENENTIA. The writ used in case of maintenance. *Reg. Orig. fol. 182, 189.* See *Maintenance*.

MAN-WORTH. The price or value of a man's life, or head; for of old every man was rated at a certain price, according to his quality, which price was paid to the lord in satisfaction for killing him. *Cowell.* See *Manbote*.

MAPS and PRINTS. See *Literary Property*.

MARA. A mere, lake, or great pond, that cannot be drawn dry. *Mon. Angl. tom. 1. p. 666; Par. Antiq. 418.*

MARCATUS. The rent of a mark by the year, anciently reserved in leases, &c. *Et unum marcatum redditus de, &c.* *Mon. Angl. tom. 1. p. 341.*

MARCH, EARLDOM OF. Grants of its lands are to be under the great seal. 4 *Hen. 7. c. 14.*

MARCHERS or LORDS MARCHERS. Were those noblemen that lived on the marches of Wales or Scotland;

who in times past (according to *Camden*) had their laws, and *potestatem vitae, &c.* like petty kings, until they were abolished by the 27 *Hen. 8. c. 26.* See also 1 *Edm. 6. c. 10* and tit. *Wales*. In old records, the Lords Marchers of Wales were styled *Marchianes de Marchia Walliæ*.

MARCHES, Marchia, from the German *march*, i. e. *limes*, or from the French *marque signum*: being the notorious distinction between two countries or territories.] The limits between England and Wales or Scotland, when those were considered as enemies' countries; which last are divided into West and Middle Marches. See 4 *Hen. 5. c. 7. 22 Edw. 4. c. 8; 24 Hen. 8. c. 9.* There was formerly a court called the Court of the Marches of Wales, where pleas of debt or damages, not above the value of fifty pounds, were tried and determined; and if the council of the Marches held plea for debts above that sum, &c. a prohibition might be awarded. *Cro. Car. 384.*

In Scotland, the term Marches is applied to the boundaries between private properties; the expense of inclosing which is jointly borne by the parties. See *Scotch Acts, 1661. c. 41. 1685. c. 39; 1669. c. 17.*

MARCIET, Murchetum.] *Consuetudo pecuniarum, in mancipiorum filiabus maritandis.* *Bract. lib. 2. c. 8.* The custom, with some variation, is said to have been observed in some parts of England and Wales, and also in Scotland and the Isle of Guernsey. In the manor of Dinevor, in the county of Carmarthen, every tenant, at the marriage of his daughter, paid ten shillings to the lord, which in the British language is called *Gwabr Merched*, i. e. a maid's fee. The custom for the lord to lie the first night with the bride of his tenant is asserted to have been common in Scotland and the north of England; it was said to be abrogated by Malcolm the Third, at the instance of his queen; and instead thereof a mark was paid to the lord by the bridegroom; from whence it is denominated *mercheta mulierum*. Sir David Dalrymple Lord Hailes, has annexed to his *Annals of Scotland*, a short treatise on this *mercheta mulierum*, to prove that no such custom ever existed in Scotland, nor probably in any other place. He explains the term to mean, 1, a fine paid to the lord by a sokeman or villain, when his unmarried daughter chanced to be debauched. 2, a composition or acknowledgment by the sokeman or villain for the lord's permission to give his daughter in marriage to a stranger or person not subject to the lord's jurisdiction; or the fine for giving her away without such permission. See further, *Borough English, Maiden Rents, Merchet*.

MARESCALL or MARESHAL. See *Marshal*.

MARETUM, French *maret*, a fen or marsh.] *Marshy ground, overflowed by the sea or great rivers.* *Co. Lit. 5.*

MARINARIUS. A mariner or seaman: and *marinarius capitaneus* was the admiral or warden of the ports, which offices were commonly united in the same person: the word admiral not coming into use till the latter end of the reign of King Edward I. before which time the king's letters ran thus—*Rex capitaneo marinariorum et eisdem marinariis salutem.* *Paroch. Antiq. 332.* See *Admiral, Insurance, Navy*. And see further *Impressing, Seamen, &c.*

MARINE FORCES, While on shore, are regulated and subjected to martial law by annual acts. See *Soldiers*.

MARINE SOCIETY. The following account of the origin of this society will be found interesting, and is given from authority.

Lord Harry Pawlet, afterwards Duke of Bolton, in the spring, 1756, then commanding his majesty's ship *Barfleur*, requested John Fielding, esq. afterwards Sir John Fielding the celebrated magistrate, to collect a number of poor boys for the use of his ship, desiring they might be clothed at his lordship's expense. Fowler Walker, esq. of Lincoln's Inn, happening to meet these boys on their journey, and being struck with their appearance, his humanity suggested to him that a greater number of such poor boys might be fitted on

by a subscription. On his arrival in town, he proposed to Mr. Fielding to solicit the public for a subscription for this purpose, himself offering to open it by a small donation. This worthy magistrate, in his written answer, expressed his doubts of the event, but acquiesced with Mr. Walker's design, and happily succeeded so far, that he collected sufficient to clothe three or four hundred boys.

A merchant of London, totally unconnected with the noble lord and both the gentlemen above-mentioned, desired a meeting of the merchants and owners of ships, and proposed to them to form themselves into a society to clothe landmen and boys for the sea service. The first part was eagerly embraced, and the design as speedily carried into execution. Many days had not elapsed, when the design relating to the boys fell into their hands.

A regular society was soon formed, from which much temporary benefit resulted.

From the termination of the war in 1763 to May 1769, the operations of the society were suspended. Mr. Hickes, a merchant of Hamburgh, seeing the great utility of the design, bequeathed to this society a sum of money, producing 300*l.* per annum, for fitting out poor boys in time of war, to serve the officers on board the royal navy, in order to be brought up as seamen. In time of peace one half of the produce to be expended in fitting out poor boys as apprentices to owners and masters of ships, in the merchants' service and coasting vessels, the other half in placing out poor girls to trades, whereby they may earn an honest livelihood.

In the year 1772, the society procured an act of parliament, 12*Geo.* 3. c. 67. The preamble of this act recites that the society had clothed and fitted out 5,451 landmen, to serve as seamen on board his majesty's ships; and also clothed, fitted, and placed out as servants or apprentices to officers in the king's ships, and to the merchants' service at sea, 6,306 boys, who had no visible means of support, and who voluntarily offered themselves for the purpose therefore of enabling them to carry into execution their charitable designs (that is to say,) the fitting out and apprenticing or placing out poor distressed boys, to and for the service of the royal navy, and to and for the service of other ships and vessels, the property of and belonging to subjects of the king of Great Britain; the society was incorporated, their funds secured, and they were empowered from time to time to place out boys as servants to the commissioned or warrant officers of his majesty's navy, and to apprentice out boys in the merchants' service, and to other subjects as they might think proper. By § 6 of the act it is provided that boys serving out such their respective apprenticeships at sea, not being for a less time than four years, shall be entitled to the liberty of setting up and exercising trade or business in any place in Great Britain or Ireland. By § 15, two justices of the peace in their respective counties are authorized and empowered to hear and determine all complaints of hard and ill-usage from the respective masters to their apprentices, and respectively to make such orders therein as they may by law do in other cases between masters and servants, or apprentices.

The estate and property of the trustees of Westminster fish-market (see 22*Geo.* 2. c. 19.) vested in the Marine Society. 30*Geo.* 3. c. 51.

MARISCHAL. An officer in Scotland, who with the lord high constable, possessed a supreme criminal jurisdiction in all crimes committed within a certain space of the court, wherever it might happen to be. See *Maxims*.

MARITAGIO AMISSO PER DEFACTUM. A writ for the termination of frank marriage to recover lands, &c. which he is declared by another. *Reg. fol.* 171.

MARITAGIUM. That portion which is given with a daughter in marriage. See *Glossil*, lib. 2. c. 18. Maritagi-um, as a fruit of tenure, strictly taken, is that right which

the lord of the fee had to dispose of the daughters of his vassals in marriage. In cap. 7 of *Magna Charta*, it seems to designate lands holden by a female in frank-marriage. See *Tenure*, II. 4; and *Marchet, Marriage*.

MARITAGIUM HABERE. To have the free disposal of an heiress in marriage; a favour granted by the kings of England, while they had the custody of all wards or heirs in minority. *Cowell.* See *Tenure*.

MARITIMA ANGLIÆ. The profit and emolument arising to the king from the sea, which anciently was collected by sheriffs; but it was afterwards granted to the lord admiral. *Ricardus de Lucy dicitur habere maritmam Angliæ.* *Pat.* 8*H.* 3. m. 4.

MARK, marca, Saxon meare. Of silver, is now thirteen shillings and four pence; though in the reign of Henry I. it was only six shillings and a penny in weight; and some were coined, and some only cut in small pieces; but those that were coined were worth something more than the others. In former times, money was paid, and things valued oftentimes by the mark. We read of a mark of gold of eight ounces; of 6*l.* in silver; or as others write, 6*l.* 13*s.* 4*d.* *Stow's Annals*, 32; *Rot. Mag. Pipæ*, Ann. 1*Hen.* 2.

The *marka ami* and *marka argenti* are noticed in *Domesday Book*, as well as the half-mark, both of silver and gold. The mark and the half-mark therein mentioned were however only computations of money, the penny being the sole coin known in England till long after the date of that survey. See *Ellis's Introd.* to *Domesday Book*, vol. i. 164.

MARK TO GOODS. Is what ascertains the property or goodness thereof, &c. And if one man shall use the mark of another, to the intent to do him damage, upon injury proved, action upon the case lieth. 2*Cro.* 471. The penalty of counterfeiting the marks on wax, appointed by 23*Eliz.* c. 8. is 5*l.* or pillory (now abolished) and imprisonment.

MARKET, *mercatus*, from *mercando*, buying and selling.] The liberty by grant or prescription, whereby a town is enabled to set up and open shops, &c. at a certain place therein, for buying and selling, and better provision of such victuals as the subject wanteth; it is less than a fair, and usually kept once or twice a week. *Bract. lib.* 2. cap. 24; 1*Inst.* 220.

The establishment of public marts, or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging, is enumerated by *Blackstone* as one of the king's prerogatives. These can only be set up by virtue of the king's grant, or by long and immemorial usage and prescription, which presupposes such a grant. 2*Inst.* 220.

According to *Bracton*, one market ought to be distant from another, *sex leucas, vel miliar, et dimidium, et tertiam partem dimidiæ*. If one hath a market by charter or prescription, and another obtains a market near it, to the nuisance of the former, the owner of the former may avoid it. 1*Inst.* 406; *F. N. B.* 184; 2*Rot. Abr.* 140. But in order to make this out to be a nuisance, it is necessary, 1, that the prosecutor's market or fair be the elder, otherwise the nuisance lies at his own door; 2, that the second market be erected within the third part of twenty miles from the other (i.e. as above expressed, six miles and a half, and one-third of half a mile,) for the *dicta* or reasonable day's journey mentioned by *Bracton* l. 3. c. 16. is constructed by *Hale* to be twenty miles. See 2*Inst.* 367. So that if the new market be not within the distance above-mentioned of the old one, it is no nuisance; as it is held reasonable that every man should have a market within one-third of a day's journey from his own house; that the day being divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there. If such market or fair be on the same day with the old one, it is *primæ facie* a nuisance to that, and there needs no proof of it, but the law will intend it to be so; but if it be on another day, it may be a nuisance, though whether it is so or not cannot be intended or pre-

sumed, but must be proved to a jury. 3 Comm. c. 13. p. 218. Also where a man has a fair or market, and one erects another to his prejudice, an action will lie. Rol. 140; 1 Mod. 69.

The fair or market is taken for the place where kept; and formerly it was customary for fairs and markets to be kept on Sundays; but by 27 Hen. 6. c. 5. no fair or market is to be kept upon any Sunday, or upon the feasts of the Ascension, Corpus Christi, Good Friday, All Saints, &c. except for necessary victuals, and in time of harvest: and they shall not be held in church-yards. Stat. Wynton, 13 Edw. 1. c. 6.

The lord of a manor, to whom the grant of a market is made *infra villam de W.* may hold it any where *infra villam de W.*; and whether *villa* extend to the town of W. or the township or parish of W., the lord has a right to remove the market-place from one situation to another within the precinct of his grant. And though he should have holden it for above twenty years within the township of W., where the grant only gave it him within the town properly so called at the time, yet if he afterwards give notice of the removal to another place in the township, the public have no right to go upon his soil and freehold in the old market-place; and any person going there is liable to an action of trespass by the lord. 3 East, 538.

All fairs are markets; and there may be a market without an owner; though where there is an owner, a butcher cannot prescribe to sell meat in his own house upon a market-day; for the market must be in an open place, where the owner may have the benefit of it. 4 Inst. 272. No market shall be held out of the city of London within seven miles; though all butchers, victuallers, &c. may hire stalls and standings in the markets there, and sell meat and provisions, on four days in a week, &c. Cit. lib. 101.

Every one that hath a market, shall have toll for things sold, which is to be paid by the buyer, and by ancient custom may be paid for standing of things in the market, though nothing be sold, but not otherwise. A prescription for toll in respect of goods sold by sample in a market, and afterwards brought into the city to be delivered, cannot be supported; the mode of sale by sample being of very modern invention. 4 Taunt. 520. A piepowder court is incident as well to a market as a fair (see *Court of Piepowders*); and proprietors of markets ought to have a pillory and tumbrel, &c. to punish offenders. 1 Inst. 281; 2 Inst. 221; 4 Inst. 272. Keeping a fair or market, otherwise than it is granted, as by keeping them upon two days, when only one is granted; or on any other day than appointed; extorting toll or fees where none are due, &c. are causes of forfeiture. Finch. 164. If a person erects stalls in a market, and does not leave room for the people to stand and sell their wares, so that they are thereby forced to hire such stall, the taking money for the use of them, in that case, is extortion. 1 Ld. Raym. 149. And if the grantee of a market, for his own profit, permit part of the space within it to be used for other purposes, so that there is not sufficient space for the public accommodation, he cannot sue an individual for selling articles near his market, and depriving him of toll, even although at that particular time there is room in the market, unless he shows that on the day when the sale takes place he gave notice to the seller that there was room within the market. *Prince v. Lewis*, 5 B. & C. 369.

The lord of an ancient market may by law have a right to prevent other persons from selling goods in their private houses situate within the limits of the market. 7 B. & C. 40. And so in a recent case, it was held that a claim by immemorial custom to exclude others from selling marketable articles on the market days, except in the market place, is valid in law. 4 B. & Ad. 397. Quære if the grantee of a newly created market can, by virtue of such grant, maintain an action for the disturbance of his franchise against a person for selling such articles in his own shop, within the franchise,

but not within the limits of the market-place, on the market day?

Property may in some cases be transferred by sale, though the vendor hath none at all in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must be soon at an end.

The general rule of law, therefore, is, that all sales and contracts of any thing venible in fairs or markets *overt* (that is, open,) shall not only be good between the parties, but also binding on all those that have any right or property therein. 2 Inst. 713. And for this purpose the *Mirror* says tolls were established, viz. to testify the making of contracts for every private contract was discountenanced by law; inasmuch that our Saxon ancestors prohibited the sale of any thing above the value of 20d. unless in open market; and directed every bargain and sale to be made in the presence of credible witnesses. *Mirr. c. 1. § 3; Ll. Ethel. 10, 12; Ll. Eadg. Wilk. 80.* Market *overt* in the country is only held on the special days provided for particular towns by charter or prescription; but in London, every day except Sunday is market-day. *Cro. Jac. 68.* The market-place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market *overt*. *Godb. 14.* But in London, every shop in which goods are exposed publicly to sale, is market *overt* for such things only as the owner professes to trade in. 5 Rep. 83; 12 Mod. 521. Though if the sale be in a warehouse, and not publicly in the shop, the property is not altered. 5 Rep. 83; *Modr. 80.* But if goods are stolen from one, and sold out of market *overt*, the property is not altered, and the owner may take them wherever he finds them. And it is expressly provided by 1 Jac. 1. c. 21. that the sale of any goods wrongfully taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property; for this being usually a clandestine trade, is therefore made an exception to the general rule. And even in market *overt*, if the goods be the property of the king, such sale, though regular in all other respects, will in no case bind him; though it binds infants, femes covert, idiots or lunatics, and persons beyond sea, or in prison. 2 Inst. 713. If the goods be stolen from any common person, and then taken by the king's officer from the felon, and sold in open market, still if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods. *Bac. Use of the Law* 158. So likewise if the buyer knoweth the property not to be in the seller; or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme covert not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours, the owner's property is not bound thereby. 2 Inst. 713, 714; 5 Rep. 83. If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price; unless the property had been previously altered by a former sale. *Perk. § 93.* And notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice. 2 Inst. 713. But the owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from any one who has purchased them, and sold them again, even with notice of the theft before the conviction. 2 T. R. 750. By these regulations the common law has secured the right of the proprietor in personal chattels from being divested, so far as is consistent with that other necessary policy, that purchases *bona fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller. 2 Comm. 449, 450. See *Restitution* by

Persons that dwell in the country, may not sell wares by

MARRIAGE.

retail in a market town, but in open fairs; but countrymen may sell goods in gross there. 1 & 2 P. & M. c. 7.

All contracts for any thing vendible in markets, &c. shall be binding, and sales after the property, if made according to the following rules, viz. 1, the sale is to be in a place that is open, so that any one that passeth by may see it, and be in a proper place for such goods; 2, it must be an actual sale, for a valuable consideration; 3, the buyer is not to know that the seller hath a wrongful possession of the goods sold; 4, the sale must not be fraudulent, betwixt two, to bar a third person of his right; 5, there is to be a sale, and a contract, by persons able to contract; 6, the contract must be originally and wholly in the market overt; 7, toll ought to be paid, where required by statute, &c.; 8, the sale is not to be in the night (or on a Sunday,) but between sun and sun (though if the sale be so made, it may bind the parties.) A sale thus made shall bind the parties, and those that are strangers, who have a right. 5 Rep. 83.

The statutes which ordain that toll takers shall be appointed in markets and fairs, to enter into their books the names of the buyers, sellers, vouchers, and prices of horses sold, and deliver a note thereof to the buyer, &c. secure the property of stolen horses to the owner, although sold in a fair or market, if he repays what was *bond fide* paid for the horse. 2 & 3 P. & M. c. 7; 31 Eliz. c. 12. See *Horses*.

See further, *Clerk of the Market, Fair*.

MARKET TOWNS. See *Market*.

MARKETZELD or MARKETGELD. Toll of the market. *Coul. MS. in Bibl. Cotton.*

MARKPENNY. Was a penny anciently paid at the town of Maldon, by those who had gutters laid or made out of their houses into the streets. H. 15 Edm. 1.

MARLE, *marla*, from the Saxon *margel*, i. e. *medulla*, otherwise called *malva*. A kind of earth or mineral, which in divers counties of this kingdom is used to fertilize land. See 17 Edw. 4. c. 4.

MARLBURG. Statutes made there, 52 Hen. 3.

MARLERUM or MARLETUM. A marle pit. *Chart. Antiq.*

MARQUE, from the Saxon *mearc*, *signum*.] A mark or sign; but in our ancient statutes it signifies reprisals. See *Letters of Marque*.

MARQUESS or MARQUIS, *marchio*.] Is now a title of honour before an earl, and next to a duke; and by the opinion of *Hotoman*, the name is derived from the German *march*, signifying originally *custos limitis* or *comes et protector* *limitis*.

In the reign of King Richard II. came up first the title of *marquis*, when was a governor of the *landes*, and then called commonly lord *marcher*, and not *marquess*, as Judge *Doddridge* has observed in his *Law of Nobility and Peerage*. *Selden's Mare Claus. lib. 2. c. 19.* A *marquis* is created by patent; and anciently by *cincture of sword*, *mantle of state*, &c. See *Lords Murchers, Peers, Nobility*.

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[*MATRIMONIUM*.] A civil and religious contract, whereby a man is joined and united to a woman, for the purposes of civilized society; *matrimonium*, in the feudal law, signified the manner of bestowing a ward or widow in marriage by the lord. *Mag. Chart. c. 6. See Feudal, II. 1.*

Matrimonium is likewise applied to land given in marriage, and is that portion which the husband receives with his wife. *Bract lib. 2. c. 34; Glanv. lib. 7. c. 1.* In this sense there are given *versus de matrimonio*, &c. *Reg. 171.*

There is further a term called *duty of marriage*, signifying an obligation to marry, imposed on women who formerly had lands, charged with personal services, in order to render them by their husbands. *Comell. See Tenure, II. 4.*

Marriage is generally the conjunction of man and woman in a constant society and agreement of living together, until the contract is dissolved by death, or breach of faith, or some

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notorious misbehaviour, destructive of the end for which it was intended. It is one of the rights of human nature, and was instituted in a state of innocence, for preservation thereof; and nothing more is requisite to a complete marriage by the laws of England, than a full, free, and mutual consent between parties, not disabled to enter into that state by their near relation to each other, infancy, pre-contract, or impotency. *Dict.*

As to the solemnization of marriage, this is regulated by the laws and customs of the nation where we reside; and every state allows such privileges to the parties it deems expedient, and denies legal advantages to those who refuse to solemnize their marriage, in the manner the state requires; but they cannot dissolve a marriage celebrated in another manner, marriage being of divine institution, to which only a full and free consent of the parties is necessary. Before the time of Pope Innocent III. there was no solemnization of marriage in the church; but the man came to the house where the woman inhabited, and led her home to his own house, which was all the ceremony then used. See 1 *Roll. Abr.* 359; 1 *Sid.* 64.

Marriages by Romish priests, whose orders are acknowledged by the church of England, are deemed to have the effects of a legal marriage in some instances; but marriages ought to be solemnized according to the rites of the church of England, to entitle the parties to the privileges attending legal marriage, as dower, thirds, &c.

Marriage at common law is either in right or in possession; and marriage *de facto*, or in reputation, as among Quakers, &c. is allowed to be sufficient to give title to a personal estate. 1 *Leon.* 53; *Wood's Inst.* 59. But in the case of a Dissenter, married to a woman by a minister of the congregation who was not in orders, it was held, that when a husband demands a right to himself as husband by the ecclesiastical law, he ought to prove himself a husband by that law, to entitle him to it; and notwithstanding the wife and the children of this marriage may entitle themselves to a temporal right by such marriage, yet the husband shall not, by the reputation of the marriage, unless he hath a substantial right; and this marriage is not a mere nullity, because by the law of nature the contract is binding; for though the positive law of man ordains marriage to be made by a priest, that law only makes this marriage irregular, and not expressly void. 1 *Salk.* 119. See further *Quakers*.

The marriages that are made in an ordinary course, are to be by asking in the church, and other ceremonies appointed by the book of Common Prayer. 2 & 3 *Edw. 6. c. 21.* By the ordinances of the church, when persons are to be married, the banns of matrimony shall be published in the church where they dwell three several Sundays or holidays, in the time of divine service; and if, at the day appointed for their marriage, any man do allege any impediment, as pre-contract, consanguinity, or affinity, want of parent's consent, infancy, &c. why they should not be married, (and become bound with sufficient sureties to prove his allegation,) then the solemnization must be deferred until the truth is tried. *Rubrick.* And no minister shall celebrate matrimony between any persons without a faculty of licence, except the banns of marriage have been first published as directed, according to the book of Common Prayer, on pain of suspension for three years; nor shall any minister, under the like penalty, join any persons in marriage, who are so licensed at any unreasonable times, or in any private place, &c. *Canon, 62.* Also on the granting of licences, oath is made, and bond is to be taken that there are no impediments of pre-contract, consanguinity, &c. nor any suit or controversy depending in any ecclesiastical court, touching any contract of marriage of either of the parties with any other; that neither of them are of better estate than is suggested; and that the marriage be openly solemnized in the parish church where one of the parties dwelleth, or the church mentioned in the licence,

between the hours of eight and twelve in the morning. Licences to the contrary shall be void; and the parties marrying are subject to punishment as for clandestine marriages. *Can. 102.*

But by special licence or dispensation from the Archbishop of Canterbury, marriages, especially of persons of quality, are frequently in their own houses, out of canonical hours, in the evening, and often solemnized by others in other churches than where one of the parties lives, and out of time of divine service, &c.

Marriages are prohibited in Lent, and on fasting days, because the mirth attending them is not suitable to the humiliation and devotion of those times; yet persons may marry with licences in Lent, although the banns of marriage may not then be published. Formerly, during the establishment of the Catholic religion in these kingdoms, priests were restrained from marriage, and their issue accounted bastards, &c. and the 31 *Hen. 8. c. 14.* made such marriages felonious. But on the Reformation, laws were made, declaring that the marriage of priests should be lawful, and their children legitimate; though the preambles to those statutes set forth, that it would be better for priests to live chaste, and separate from the company of women, that they might with more fervency attend the ministry of the Gospel. See 2 & 3 *Edw. 6. c. 21.* But this statute, like all other reforms in the church, was repealed by Queen Mary, and was not revived again till by 1 *Jac. 1. c. 25;* though the thirty-nine articles had passed in convocation in the fifth year of Queen Elizabeth, the thirty-second of which declares, that it is lawful for the bishops, priests, and deacons, as for all other Christian men, to marry at their own discretion. The clerks in chancery, though laymen, were not allowed to marry, till 14 & 15 *Hen. 8. c. 8.* And no lay-doctor of civil law, if he was married, could exercise any ecclesiastical jurisdiction, till 37 *Hen. 8. c. 7.*

Taking marriage in the light of a civil contract, the law treats it as it does all other contracts; allowing it to be good and valid in all cases where the parties at the time of making it were in the first place *willing* to contract; secondly, *able* to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law. 1 *Comm. c. 16. p. 433.*

First, they must be *willing* to contract; "*Consensus non concubitus facit nuptias,*" is the maxim of the civil law in this case; and it is also adopted by the common lawyers. 1 *Inst. 33.*

Secondly, they must be *able* to contract. In general all persons are able to contract themselves in marriage, unless they labour under some particular disabilities and incapacities. What those are we shall therefore inquire.

These disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these in our law only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are pre-contract, consanguinity, or relation by blood; affinity, or relation by marriage; and some particular corporeal infirmities. These canonical disabilities are either grounded upon the express words of the divine laws, or are consequences plainly deducible from thence; it therefore being sinful in the persons who labour under them to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrates' coercion, in order to separate the offenders and inflict penance for the offence, *pro salute animarum.* But such marriages not being void *ab initio*, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For after the death of either of them the courts of common law will not suffer the spiritual court to declare such marriages to have been void; because that declaration cannot now tend to the reformation of the parties. 1 *Inst. 33;* 2 *Inst. 614.* Therefore when a man had married his first wife's sister, and after her death the bishop's court was proceeding to annul the marriage, and

bastardize the issue, the Court of King's Bench granted a prohibition *quod hoc;* but permitted them to proceed to punish the husband for incest. 1 *Salk. 548.*

These canonical disabilities being entirely within the province of the ecclesiastical courts, our books are perfectly silent concerning them. But there are a few statutes which serve as directories to those courts, of which it will be proper to take notice. By 32 *Hen. 8. c. 38.* it is declared that all persons may lawfully marry but such as are prohibited by God's law; and that all marriages contracted by lawful persons in the face of the church, and consummate with bodily knowledge and fruit of children, shall be indissoluble. And (because in the times of popery a great variety of degrees of kindred were made impediments to marriage, which impediments might, however, be bought off for money,) it is declared by the same statute, that nothing, God's law except, shall impeach any marriage, but within the Levitical degrees, the farthest of which is, that between uncle and niece. *6. Rep. 158.*

By the same statute all impediments, arising from pre-contracts to other persons, were abolished, and declared to have no effect, unless they had been consummated with bodily knowledge; in which case the common law holds such contract to be a marriage *de facto.* But this branch of the statute was repealed by 2 & 3 *Edw. 6. c. 23.* A contract *per verba de presenti tempore* used to be considered in the ecclesiastical courts *ipsum matrimonium;* and if either party had afterwards married, this, as a second marriage, would have been annulled in the spiritual courts, and the first contract enforced. See as instance, 4 *Co. 29.* But as this pre-engagement can no longer be carried into effect as a marriage, it seems undoubted that it will never more be an impediment to a subsequent marriage actually solemnized and consummated. *Comm. 435, in n.*

In the above stat. 32 *Hen. 8. c. 38.* the prohibitions by God's law are not specified; but in 25 *Hen. 8. c. 22;* 18 *Hen. 8. c. 7.* the prohibited degrees are particularized. It is doubtful whether these two last statutes are in force. 2 *Hen. Eccl. L. 405.* But so far they seem to be only declaratory of the Levitical law. The former declared null and void the marriage between Henry VIII. and Catherine of Aragon, widow of his eldest brother, Prince Arthur, for which a dispensation had been obtained from the Pope. 1 *Comm. 435, in n.*

The prohibited degrees are all which are under the fourth degree of the civil law, except in the ascending and descending line; and by the course of nature it is scarcely a possible case, that any one should ever marry his issue in the fifth degree; but between collaterals it is universally true, that all who are in the fourth or any higher degree are permitted to marry; as, first cousins are in the fourth degree, and therefore may marry; a nephew and great aunt, or niece and great uncle are also in the fourth degree, and may intermarry; and though a man may not marry his grandmother, it is certainly true he may marry her sister. *Gibb. Cod. 1.* The same degrees by affinity are prohibited. Affinity always arises by the marriage of one of the parties so related as a husband is related by affinity to all the consanguineal of his wife, and vice versa the wife to the husband's consanguineal, for the husband and wife being considered one flesh, those who are related to the one by blood are related to the other by affinity. *Gibb. Cod. 412.* Therefore a man after his wife's death cannot marry her sister, aunt, or niece. But the consanguineal of the husband are not at all related to the consanguineal of the wife. Hence two brothers may marry two sisters, or father and son a mother and daughter. If a brother and sister marry two persons not related, and the brother and sister die, the widow and widower may intermarry; for though I am related to my wife's brother by affinity, I am not so to my wife's brother's wife, whom it circumstances would admit, it would not be unlawful for me to marry. 1 *Comm. 435, in n.* See 1 *Inst. 235, a. in n.*

The son of a father by another wife, and daughter of a mother by another husband, cousins-german, &c. may marry with each other; a man may not marry his brother's wife, or wife's sister, an uncle his niece, an aunt her nephew, &c. But if a man take his sister to wife, they are baron and feme, and the issue are not bastards till a divorce. *Levit. c. 18, 20*; *2 Inst. 683*; *1 Rol. Abr. 340, 357*; *5 Mod. 448*.

A person may not marry his sister's daughter; and a sister's bastard daughter is said to be within the limited law of affinity; it being morally as unlawful to marry a bastard as one born in wedlock, and it is so in nature; and if a bastard doth not fall under the prohibition *ad proximum sanguinis non accedat*, a mother may marry her bastard son. *5 Mod. 168*; *2 Nels. Abr. 1161*.

There are persons within the reason of the prohibition of marriage, though not mentioned, and must be prohibited; as the father from marrying his daughter, the grandson from marrying the grandmother, &c. *Vaugh. 321*.

The other sorts of disabilities are those which are created, or at least enforced by the municipal laws. And though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offence, as on account of the civil inconveniences they draw after them. These civil disabilities make the contract void *ab initio*, and not merely voidable; not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all; they do not put asunder those who are joined together, but they previously hinder the junction. And if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial union. *1 Comm. 436*.

The first of these legal disabilities is *propter aetatem*, or having another husband or wife living, in which case, besides the parties' consent, it is a felony, the second marriage is to all intents and purposes void. *Br. Ab. tit. Bastard, pl. 3*. See *1 Inst. 9*.

The next legal disability is *etate*. If a boy under fifteen or girl under twelve years of age marries, this marriage is only voidable, and not perfect, and when one of them comes to that age, which is for this purpose termed the age of consent, they may disagree and declare the marriage void, without any censure or sentence in the spiritual court. This is founded on the civil law. But the common law pays a greater regard to the constitution than the age of the parties; for if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be. And in law it is so far a marriage, that if, at the age of consent they agree to continue together, they need not be married again. *Co. Lit. 79*. If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion, he may disagree as well as she may; for in contracts the obligation must be mutual, both must be bound or neither; and so it is, *et converso*, when the wife is of years of discretion, and the husband under. *Co. Lit. 79*.

If persons are married before the age of consent, they may at that age disagree and marry again, without any divorce, though if they once give consent when at age, they cannot afterwards disagree, and when they are married before, they need not a new marriage, if they agree at that age. *1 Inst. 93*; *2 Inst. 182*. A woman cannot disagree within her age of twelve years, till which her marriage continues; and before that time her disagreement is void. *1 Danv. 699*. Though if a man marries a woman under that age, and afterwards she, within her age of consent, disagrees to the marriage, and at her age of twelve years marries another; now the first marriage is absolutely dissolved, so that he may take another wife; for although the disagreement within the age of consent was not sufficient, yet her taking another husband at the age of consent and cohabiting with him, affirms the disagreement, and so the first marriage is avoided. *Moor, 764*. If, after disagreement of the parties, at the age

of consent they agree to the marriage, and live together as man and wife, the marriage hath continuance, notwithstanding the former disagreement; but if the disagreement had been before the ordinary, they could not afterwards agree again to make it a good marriage. *1 Danv. Abr. 699*.

If either party be under seven years of age, contracts of marriage are absolutely void; but marriages of princes made by the state in their behalf, at any age, are held good; though many of those contracts have been broken through. *Swind. Matrimon. Contr.* See *Ward's Law of Nations*.

The above proposition "that in contracts the obligation must be mutual," has been censured as too generally expressed; for there are various contracts between a person of full age and a minor, in which the former is bound and the latter is not. The authorities seem decisive, that it is true with regard to the contract of marriage, referred to the ages of fourteen and twelve; but it has also long been clearly settled, that it is not true with regard to contracts of marriage, referred to the minority under twenty-one. For where there are mutual promises to marry between two persons, one of the age of twenty-one, and the other under that age, the first is bound by the contract, and on the side of the minor it is voidable; or for a breach of the promise on the part of the person of full age, the minor may maintain an action, and recover damages; but no action can be maintained for a similar breach of the contract on the side of the minor. *Stra. 937*; *Fitzgib. 175, 275*.

Another incapacity arises from *want of consent of parents and guardians*. By the common law, if the parties themselves were of the age of consent, there wanted no other concurrence to make the marriage valid; and this was agreeable to the canon law; but by several statutes, viz. *6 & 7 Will. 3. c. 6*; *7 & 8 Will. 3. c. 35*, penalties of 100*l.* are laid on every clergyman who marries a couple either without publications of banns (which may give notice to parents or guardians,) or without a licence, to obtain which the consent of parents or guardians must be sworn to; and the man so married forfeits 10*l.*, and the parish clerk, &c. assisting 5*l.* These statutes are confirmed by *10 Ann. c. 19*, and extended to privileged places; so that if a parson so offending be a prisoner in any place, on conviction he shall be removed to the county gaol, there to remain in execution charged with the said penalty of 100*l.*, &c. Before these statutes an information was exhibited against certain persons for combination in procuring a clandestine marriage in the night, without banns or licence, between a maid-servant and a young gentleman who was heir to an estate, the person being in liquor; and they were fined 100 marks, and ordered to be committed till paid; but it doth not appear that the marriage could be made void. *Cro. Car. 557*.

But the evil of clandestine and improper marriages was more fully restrained by the *26 Geo. 2. c. 33*, which enacted that all marriages were to be either in pursuance of banns published, of a licence, or of a special licence; and declared that all marriages by licence, where either of the parties, not being a widower or widow, should be under the age of twenty-one years, which shall be had without the consent of his or her father, if living, or if dead, of his or her guardian, and if no guardian, of his or her mother, if living and unmarried, and if no mother living and unmarried, then of the guardian appointed by the Court of Chancery, should be void. If guardian or mother, or any of them, where consent was made necessary, were *non compos mentis*, beyond sea, or refused to consent, and the Lord Chancellor should declare it to be a proper marriage, that should be effectual as if the guardian or mother had consented.

By the *3 Geo. 4. c. 75*, marriages which had been solemnized by licence obtained without the proper consent, and which were therefore void under the above statute, were rendered valid where the parties had continued to cohabit until the death of one of them, or until the passing of the

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act, or where they had discontinued their cohabitation for the purpose of or during the pendency of any proceedings touching the validity of such marriage; the act excepted cases where the invalidity of the marriage had been declared by any court of competent jurisdiction, or established upon the trial of any issue, or acted upon by any judgments, decrees, or orders of court, or where either of the parties had during the life of the other lawfully intermarried with another person; and it provided that where any property, either real or personal, had been possessed, or any title of honour enjoyed on the ground of the invalidity of any such marriage, the right and interest in such property or title of honour should not be affected. These retrospective provisions did not include marriages by banns; and therefore marriages invalid under the former law, from the banns not having been duly published, are still void. See 1 *Addams*, 93.

The 3 *Geo. 4. c. 75.* also contained provisions with respect to future marriages. These, together with the old marriage act, 26 *Geo. 3. c. 33.* were repealed by the 4 *Geo. 4. c. 76.* which comprises the enactments whereby marriages are now regulated in this country.

The 2d section of this statute prescribes the mode of publishing banns, and of performing the ceremony, nearly in the same terms as the old act. § 3, 4, 5, and 6, enable the bishop of the diocese, with the consent of the patron and incumbent, to authorize the publication of banns and the solemnization of marriage in other chapels; and the laws respecting registers are extended to such chapels. The next two sections are borrowed from the old act: § 7 provides that seven days' notice of the names of the parties, their places of abode, and the time of their residence, shall be given to the minister before publication of banns; and § 8 exempts the minister from punishment for marrying minors without the consent of parents or guardians, unless with notice of their dissent: by § 9. if the marriage be not had within three months after the complete publication of banns, they must be republished in the same manner: by § 10. licences are only to be granted for marrying where one of the parties has resided for fifteen days: by § 11. if a caveat be entered against the grant of a licence, it is not to be granted until the matter has been examined by the judge out of whose office it is to issue: § 12 enacts that parishes not having any church or chapel, and extra-parochial places not having chapels in which banns may be published, shall be deemed to belong to any adjoining parish or chapel: § 13 provides that when a church or chapel is disused, from being under repair, or from being taken down to be rebuilt, the banns may be published in any place within the parish or chapel licensed by the bishop for the performance of divine service, or in the church or chapel of any adjoining parish or chapel where no place is so licensed, the marriage may be solemnized in such adjoining church or chapel; and marriages heretofore solemnized in other places within parishes or chapelries, on account of the church or chapel being under repair, or taken down to be rebuilt, are not on that account to be questioned; see 5 *Geo. 4. c. 32, &c. post.*

§ 14 enacts, that previous to the grant of a licence, one of the parties shall swear to his or her belief that there is no lawful impediment, and to their residence; and also where either of the parties, not being a widow or widower, is under the age of twenty-one, that the consent of the persons whose consent is required by the act has been obtained; but if there shall be no such person or persons having authority to give such consent, then upon oath made to that effect by the party requiring such licence, the licence may be granted notwithstanding the want of any such consent.

By § 15 no bond or other security is to be required on granting licences.

§ 16 declares, that the father, if living, of any minor, not being a widower or widow, or if the father shall be dead, the guardian or guardians of the person of the party law-

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fully appointed, or one of them; and if none, then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them, shall have authority to give consent to the marriage; and such consent is thereby required, unless there shall be no person authorized to give such consent.

§ 17 provides, that where the father is *non compos mentis*, or where the guardian or mother whose consent is requisite, is *non compos mentis*, or beyond the seas, or unreasonably refuses to consent, the Court of Chancery may authorize the marriage. This clause corresponds with that in the old act, but it is extended to the case of the father being lunatic.

§ 18 provides for the oath of office to be taken, and the security to be given by the surrogates deputed to grant licences: by § 19 licences are to be in force for three months only: and by § 20 the power of the Archbishop of Canterbury to grant special licences is preserved.

§ 21 makes it felony, punishable by fourteen years' transportation, knowingly and wilfully to solemnize matrimony in any other place than a church or chapel wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon (unless by special licence,) or without due publication of banns or licence, and the same punishment is enacted for persons falsely pretending to be in holy orders, who shall solemnize matrimony according to the rites of the Church of England; prosecutions on this clause are to be commenced within three years.

§ 22 declares that if any person shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published (unless by special licence,) or shall knowingly and wilfully intermarry without due publication of banns or licence from a person having authority to grant the same, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriage of such person shall be null and void to all intents and purposes whatsoever.

By § 23 it is enacted, that where any valid marriage of a minor, by licence, shall be procured by the false oath of either party, as to the matters required to be sworn to, such party wilfully and knowingly so swearing, or if any valid marriage of a minor by banns shall be procured by a party hereto, knowing that the minor had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published, and having knowingly caused or procured the undue publication of banns, the attorney or solicitor-general may file an information in the Court of Chancery or Exchequer, at the relation of a parent or guardian of the minor whose consent has not been given to such marriage, and who shall be responsible for the costs, to sue for a forfeiture of all estate, right, title, and interest in any property which hath accrued or shall accrue to the party so offending by force of such marriage; and such court shall have power in such suit to declare such forfeiture, and thereupon to order and direct that all such estate, &c. in any property as shall then have accrued, or shall thereafter accrue, to such offending party, by such marriage, shall be secured under the direction of such court, for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the court shall think fit, for the purpose of preventing the offending party from deriving any interest in real or personal estate, or pecuniary benefit from such marriage; and if both the parties so contracting marriage shall, in the judgment of the court, be guilty of any such offence as aforesaid, the court may settle and secure such property, or any part thereof, immediately for the benefit of the issue of the marriage, subject to provisions for the offending parties, by way of maintenance or otherwise, as the said court, under the particular circumstances

of the case, shall think reasonable, regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue of the parties respectively by any future marriage, or of the parties themselves in case either of them should survive the other; before filing such information, affidavit must be made of the circumstances, and that the relator had not discovered the marriage more than three months before his application to the attorney or solicitor-general: by § 24 all agreements, settlements, or deeds, upon such marriages, are made void so far as they may be inconsistent with the directions given by such courts: and by § 25 such information must be filed within a year from the solemnization of the marriage.

By § 26 proof of the residence of the parties is not required after the marriage, and evidence to prove non-residence shall not be received in any suit touching the validity of the marriage: § 27 repeats the clause in the old act, providing that no suit shall be had to compel celebration *in facie ecclesiae*, by reason of any contract, whether *per verba de presenti* or *per verba de futuro*.

§ 28 provides that marriages shall be had in the presence of two witnesses, and the register attested by them and by the minister: and § 29 makes it felony to insert in the register-book any false entry relating to a marriage, or to make, alter, forge, or counterfeit any such entry, or any licence of marriage, or to utter them as true, or to destroy any register-book, or any part thereof, with intent to avoid any marriage, or to subject any person to the penalties of the act.

§ 30 excepts the marriages of the royal family: and § 31 excepts the marriages of Quakers and Jews: by the last section the act is only to extend to England.

The consent required to the marriage of a minor by this act, is the same as under the old Marriage Act, except in cases where the minor is without a legal parent or guardian, and where there is therefore no person having authority to consent. In such cases the ecclesiastical judge, or the surrogate, has power to grant the licence of his own authority. But a guardian may nevertheless still be appointed by the Court of Chancery, for the purpose of consenting; and this has been done in some cases which have occurred since the act.

The guardian "lawfully appointed" is considered to mean only a guardian appointed by the father under the 12 Car. 2. c. 24. (see 1 Hag. 453); and consent to a marriage can therefore not be given by a guardian of any of the other kinds known to the law, excepting a guardian appointed by the Court of Chancery; and although the latter would in general supersede the authority of the mother, yet by the act his power with respect to marriage does not arise so long as the mother is living and unmarried.

The most important alteration in the law by the above statute, is the repeal of the clause in the 26 Geo. 2. c. 33. declaring null and void marriages not solemnized in the mode therein prescribed. By § 22 of the former act, the nullity is confined to marriages where the parties are privy to the irregularity; and it appears, as well by the language of this as of § 23, that in order to render it void, both parties must be afflicted with the fraud. If the marriage, though not conformable to the mode prescribed, be *bona fide* on the part of one or both of the parties, it will be good if solemnized so that it would have been valid before the old Marriage Act. See 1 B. & Ad. 640.

The first cause of nullity is marrying, knowingly and wilfully, in a place not a church or chapel, qualified for the publication of banns.

The law with respect to the place of solemnization has been extended by three subsequent acts. The 5 Geo. 4. c. 3. enacts, that marriages which had been or should be solemnized in any place within the limits of any parish or chapel licensed by the bishop for the performance of divine service during the repair or rebuilding of the church or chapel in which marriages had been usually solemnized; or if no

such place should be licensed, then in a church or chapel of any adjoining parish or chapelry in which banns are usually proclaimed, whether by banns lawfully published in such church or chapel, or by licence lawfully granted, should not on that account be questioned.

The 6 Geo. 4. c. 92. confirms all marriages which had been solemnized in any church or public chapel erected and consecrated since the 26 Geo. 2. c. 33. and enacts, that in future marriages may be solemnized in all churches and chapels erected and consecrated since that time, in which it had been customary and usual, before the passing of the act (July 5th, 1825,) to solemnize marriages.

The 11 Geo. 4. and 1 Wm. 4. c. 18. declares valid all marriages, the banns whereof have been published in any place used for divine service within any parish or chapelry during the repairs or rebuilding of the church or chapel thereof, which marriages have been solemnized either in the place so used, or in the church or chapel of the same or some adjoining parish or chapelry.

§ 2. during the time any church, &c. is under repair, &c. the bishop may direct the banns to be published in any consecrated chapel in the parish.

By § 3 all marriages then or thereafter to be solemnized in churches built in pursuance of the 58 Geo. 3. c. 45. and 59 Geo. 3. c. 134. are declared good.

§ 4 confirms marriages then had in chapels duly consecrated, but wherein banns and marriages cannot legally be published and solemnized. This clause is to have no prospective operation.

By § 5 the validity of marriages is not to be questioned on account of the uncertainty respecting the consecration of the chapels where they take place. This section seems to be retrospective.

A fourth legal incapacity of contracting marriage is *want of reason*, without a competent share of which, as no other, so neither can the matrimonial contract be valid. 1 Rot. Abr. 257. See 15 Geo. 2. c. 30. for preventing the marriage of lunatics, under tit. *Idiots and Lunatics*, V.

A marriage solemnized clandestinely between a person of a weak and deranged mind, and the daughter of his trustee and solicitor (by whom he was treated as of unsound mind,) was declared null and void. 1 Hagg. Ec. Rep. 355.

Lastly. The parties must not only be willing and able to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made *per verba de presenti*, or in words of the present tense, and in case of cohabitation *per verba de futuro* also, between persons able to contract, was, before the marriage acts, deemed a valid marriage to many purposes, and the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiae*. But these verbal contracts are now of no force to compel a future marriage (see 4 Geo. 4. c. 76. § 27, ante.)

It is also essential to a marriage, that it be performed by a person in orders. Salk. 119. See Burr. Ses. Cas. 232; 1 Wils. 74. Though the intervention of a priest to solemnize this contract, is merely *juris positivi*, and not *juris naturalis aut divini*; it being said that the Pope Innocent III. was the first who ordained the celebration of marriage in the church, before which it was totally a civil contract. Moor, 170. And in the times of the grand rebellion, all marriages were performed by the justices of the peace; and those marriages were declared valid without any fresh solemnization, by 12 Car. 2. c. 33; 1 Comm. 440.

But under the 4 Geo. 4. c. 76. § 22. a marriage will be valid although celebrated by a person not in holy orders, provided one or both of the parties believed him to be a clergyman. See also 2 Hagg. 280, 288, from which it would appear that by the law of England, previous to the statutory enactments, a marriage by a person ostensibly in holy orders, and not known to the parties to be otherwise, was considered valid.

No marriage is voidable by the ecclesiastical law after the death of either of the parties, nor during their lives, unless for the canonical impediments of pre-contract (if that indeed still exists,) of consanguinity, and of affinity, or corporeal imbecility subsisting previous to the marriage. 1 *Comm.* 440.

By 4 *Geo.* 4. c. 91. marriages solemnized by any minister of the Church of England in the chapel or house of any British ambassador abroad, or in the chapel of any British factor abroad, or in the house of any British subject resident in such factory, or solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, shall be as valid as if solemnized within his majesty's dominions according to forms of law; but the act is not to affect any other marriages solemnized abroad.

Previous to this act the supposed privilege of ambassadors' chapels was considered to extend only to cases where both parties were subjects of the country of the ambassador. 1 *Hugg.* 136. But the enacting part of the above statute is applicable, whether the parties are or are not British subjects. Marriages in factories and ambassadors' chapels, not performed by clergymen of the Church of England, are left in the same situation as before. See 4 *Geo.* 4. c. 67. as to marriages solemnized at St. Petersburg.

British subjects residing in British settlements abroad, are governed by the laws of England, except where alterations have been introduced by express enactment: consequently their marriages beyond the seas is the same as before the 26 *Geo.* 2. c. 33.

By 58 *Geo.* 3. c. 84. marriages solemnized in the British territories in India, by ministers of the Church of Scotland, are declared equally valid with those solemnized by clergy of the Church of England.

By the 3 & 4 *Wm.* 4. c. 45. marriages of parties, subjects, or one of them a subject of this realm, which have been solemnized at Hamburg since the abolition of the British factory there, by the chaplain appointed by the Bishop of London, or by any ministers of the Church of England officiating instead of such chaplain in the episcopal chapel of the said city, or in any other place, before witnesses, according to the rites of the Church of England, are declared valid. The act is merely retrospective, and contains no provisions for future marriages at that place.

The law regulating marriages in Ireland, with certain exceptions introduced by several statutes hereafter noticed, is the same as that which prevailed in England previous to the passing of the 26 *Geo.* 2. c. 33.

By the 9 *Geo.* 2. c. 11. marriages or matrimonial contracts of minors, entered into without due consent, may be annulled by the ecclesiastical courts in any case where either of the parties is entitled to real estate of 100*l.* per annum, or to personal estate worth 500*l.*; or where the father or mother of the minor is in possession of real estate of 100*l.* per annum, or of personal estate worth 2000*l.*

The 19 *Geo.* 2. c. 13. declares null marriages performed by Popish priests, if the parties, or either of them, be Protestant.

A marriage, however, solemnized by a Roman Catholic priest, is valid in Ireland, if both parties be Roman Catholic. See 2 *Addams*, 471.

By the 58 *Geo.* 3. c. 33. the provision in the 26 *Geo.* 2. c. 33. (repeated in the 4 *Geo.* 4. c. 76.) prohibiting suits in the ecclesiastical courts to compel the celebration of marriages by reason of any contracts, was extended to Ireland.

By the 3 & 4 *Wm.* 4. c. 112. so much of several Irish acts as made it felony for Roman Catholic clergymen to celebrate marriages between Protestants, or between a Protestant and a Roman Catholic, or as subjected them to a penalty of 500*l.* for marrying such parties, unless first married by a Protestant clergyman, was repealed. By § 9. the act is not to give validity to any marriage ceremony in Ireland, not now valid,

or to repeal any enactments in force for preventing the performance of the marriage ceremony by degraded clergymen.

See the Irish statutes 11 *Geo.* 2. c. 10. § 3. and 21 & 22 *Geo.* 3. c. 25. relating to matrimonial contracts by Protestant dissenters, entered into in their own congregations.

In Scotland (although clandestine marriages made without due publication of banns, are punishable by act 1661, c. 34. by banishment of the clergyman, and fine and imprisonment of the parties,) yet consent and *copulatio*, or cohabitation united, constitute a valid marriage without any ceremony. In no case is the consent of parents or guardians required. The evidence of consent admitted is very general, such as an acknowledgment to the clergyman christening a child, or the like. By the act 1503, c. 77. where parties have lived together at bed and board, the reputed wife is entitled to her terce or dower.

The subject of the Scotch law of marriage was fully discussed and investigated in the celebrated case of *Dalrymple v. Dalrymple*, in which the evidence of many learned Scotch lawyers was produced before the court; and Sir William Scott, in a profound and luminous judgment, stated the law on the subject as applicable to the facts of the case. He said that the rule of the Scotch law was, that a contract of marriage *per verba de presenti* did not require consummation in order to become "very matrimony," and therefore that the marriage in that case was good, although personal intercourse was unproved; but that assuming the law to be otherwise, and that the *copula* was necessary to render a contract *per verba de presenti* a marriage, he still thought that fact established by the evidence, and that in this view of the case, according to the current of all legal authorities, the marriage was undoubtedly valid. This judgment was affirmed on appeal by the Court of Delegates. See 2 *Hagg. C. R.* 59.

Scotland being expressly excepted out of the marriage acts, so much of them as is calculated to defeat the marriages of minors without the consent of parents or guardians, has been frequently evaded, by going into Scotland to be married there, and returning to England immediately afterwards. Indeed the validity of such marriages was once questioned; and though, in general, marriages are governed by the laws of the country in which they are celebrated, yet it was doubted whether the *lex loci* ought to be applied to a case, accompanied with circumstances so strongly marking the intent to evade the law of England. See the observations of Lord Mansfield on this subject, 2 *Burr.* 107*v.* But in *Bull. N. P.* 113. there is a short note of a case, wherein this point was afterwards determined, upon an appeal to the Delegates, viz. *Crompton v. Bearcroft*, Dec. 1, 1768. The appellant and respondent, both English subjects, and the appellant being under age, ran away without the consent of her guardian, and were married in Scotland; and on a suit brought in the spiritual court to annul the marriage, it was holden that the marriage was good. See this case stated 2 *Hagg. C. R.* 444. And the same was decided in Chancery on certificates of Scotch law, in *Grierson v. Grierson*, *Lib. Reg.* A. 1780. F. 552; Sir W. Scott's judgment in *Dalrymple v. Dalrymple*, 2 *Hagg. C. R.* 99. If Grana Green marriages were invalid according to English law, and depended for validity solely on the Scotch law, there would seem ground to doubt the soundness of the decisions holding them valid for it is apprehended, that when parties merely pass into Scotland to make the contract of marriage, and immediately return to England, the law of England properly governs the contract, according to Lord Mansfield's observations in *Robinson v. Bland*, *supra*, and according to the rational principle laid down by Huber, *de confl. Legum*, l. 1. tit. 3. §. 10. "Proinde et locus matrimonii contracti non tam is est ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt; ut omni die fit homines in Francia, indigenas; aut incolas ducere uxoris in Hollandia, quas inde

said in a *Frisian* deducant. *Jus Frisicæ in hoc casu est jus loci contractus.*" And see another passage to the same effect, *ibid.* p. 538; and *Co. Lit.* 79 a. note 1; and 2 *Addams R.* 23. But by the law of England, unaffected by the Marriage Act, a marriage in the form used at Gretna Green is a good marriage, and the provisions of the Marriage Act cannot affect such marriage, since they are expressly confined to England; and this according to Sir George Hay, was the ground of decision in *Crompton v. Bearcroft*, in which nothing appears to have been laid before the court to show that the marriage was valid in Scotland. *Vide 2 Hagg. C. R.* 430. Sir W. Wynne, however (2 *Hagg.* 443.) states that the case was determined by the Delegates on the ground that the marriage was good by the law of Scotland. In *Iderton v. Iderton*, 2 *H. Bla.* a marriage celebrated in Scotland was held to entitle the woman to dower in England. This was not the case of a marriage by parties going to Scotland to evade the English law. However, the objection to the validity of marriages celebrated according to the laws of a foreign state, to which parties have resorted to avoid the restrictions existing in their own country, has not prevailed either with respect to marriages in Scotland, or in other places out of England (2 *Hagg.* 443.); and there does not appear to be any exception to the rule "that a foreign marriage valid according to the law of the place where celebrated, is good every where else." 2 *Hagg.* 390.

By the 1 & 2 Wm. 4. c. 38, so much of two acts passed in the parliament of Scotland (1 *Parl. Car.* 2, sess. 1, c. 11, an. 1661, 1 *Parl. Wm.* sess. 7, c. 9, an. 1678) as prohibited the celebration of marriages in Scotland by Roman Catholic priests in Scotland, is repealed.

§ 2 enacts, that persons in Scotland, after due proclamation of banns there, may be married by priests or ministers not of the established church of Scotland.

Of the Effect of Marriage by operation of law, &c.—With respect to the interest which the husband takes in the real and personal estates of the wife, see *Baron and Feme*, IV.

The wife doth partake of the name, so of the nature and condition of the husband by the marriage; for if she be an earl's wife, she is a countess; if a knight's wife, a lady; and if he be an alien and made a denizen, the wife is so likewise. 29 *H.* 6. 45; 4 *H.* 7. 81; *Bro.* 499.

Matrimonial causes, or injuries respecting the rights of marriage, are one branch of the ecclesiastical jurisdiction; though if marriages are considered in the light of a civil contract, they do not seem to be very properly of spiritual cognizance. This, however, was collected by the usurpation of the church under the Catholic system; and causes matrimonial are now so peculiarly ecclesiastical, that the temporal courts will never interfere in controversies of this kind, unless in some particular cases. As, if the spiritual court do proceed to call a marriage in question, after the death of either of the parties; this the courts of common law will prohibit, because it tends to bastardize and disinherit the issue, who cannot so well defend the marriage as the parties themselves, who both of them are living, and have done.

Of matrimonial causes one of the first and principal is *causa pacti latius matrimonii*, where one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue. On this ground the party injured may libel the other in the spiritual court; and unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence on that head; which is the only remedy ecclesiastical courts can give for this injury. Another species of matrimonial causes was when a party, contracted to another, brought a suit in the ecclesiastical court to compel a celebration of the marriage in pursuance of such contract; but this branch of causes is now cut off entirely by the marriage act above stated. The suit for restitution of con-

jugal rights is also another species of matrimonial causes; which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again, if either party be weak enough to desire it contrary to the inclination of the other. See 3 *Comm.* c. 7. p. 93, 94. Divorces and suits for alimony are also subjects of ecclesiastical jurisdiction, as to which see *Baron and Feme*, II.; *Divorce*.

The temporal courts by the 28 *Hen.* 8, c. 7. are to determine what marriages are within or without the Levitical degrees; and prohibit the spiritual courts if they impeach any persons from marrying within these degrees. And it is said, were it not for that statute, we should be under no obligation to observe the Levitical degrees. *Vaugh.* 206; 2 *Vent.* 9.

Although matrimonial causes have been for a long time determinable in the ecclesiastical courts, they were not so from the beginning; for as well causes of matrimony as testamentary were civil causes, and appertained to the jurisdiction of the civil magistrate, until kings allowed the clergy cognizance of them. *Davis's Rep.* 51. If persons married are *infra annos nubiles*, the ecclesiastical judges are to judge as well of the assent, whether sufficient, &c. as of the first contract; and where they have cognizance the common law judges ought to give credit to their sentences, as they do to our judgments. 7 *Rep.* 23. See the *Duchess of Kingston's Ca.* 11 *St. Tr.* 198.

Loyalty or lawfulness of marriage is always to be tried by the bishop's certificate; or inquisition taken before him, on examining of witnesses, &c. *Dyer*, 303. If the right of marriage comes naturally in question, as in dower, &c. the lawfulness of marriage is to be tried by the bishop's certificate; but in a personal action, where the right of marriage is not in question, it is triable by a jury at common law. 1 *Lev.* 41. Whether a woman is married, or she is the wife of such a person, is triable by a jury; and in personal actions it is right to lay the matter upon the fact of the marriage, to make it issuable and triable by a jury, and not upon the right of the marriage, as in real actions and appeals. 1 *Inst.* 112; 3 *Salk.* 64. If the marriage of the husband is in question, marriage in right ought to be, and that shall be tried by certificate. 1 *Leon.* 53. But if on covenant to do such a thing to another upon the marriage of a man's daughter, the party alleges that he did marry her, &c. this shall be tried *per pais*; for the marriage is only in issue, and not whether he was lawfully espoused. *Cro. Car.* 102.

Conditions against marrying generally are void in law; and if a condition is annexed to a legacy, as where money is given to a woman, on condition that she marries with consent of such a person, &c. such a condition is void by the ecclesiastical law, because the marriage ought to be free without coercion; yet it is said it is not so at the common law. 2 *Nels. Abr.* 1162; *Poph.* 58, 59; 2 *Lill.* 192. See *Condition, Legacy*.

There being divers advantages by marriage to the man and the woman; therefore, on promise of marriage, damages may be recovered, if either party refuse to marry; but the promise must be mutual on both sides, to ground the action. 1 *Salk.* 24. And if there be reciprocal promises of marriage, as the woman's promise to the man is a good consideration to make his obligatory; so his promise to her is a sufficient consideration to make hers binding; and though no time for marriage be agreed on, if the plaintiff prove tender, and offer to marry defendant, and refusal by defendant, or if defendant marry another, whereby performance of the promise is, in law, rendered impossible, action lies, and damages are recoverable. *Carthem*, 467. These promises are not affected by the provisions of the Marriage Act, as relate to actions brought for their non-performance.

If a man and a woman make mutual promises of inter-marriage, and the man gives the woman 100*l.* which she accepts in satisfaction of his promise of marriage, it is a good discharge of the contract. *Mod. Cas.* 156. By the Statute of Frauds, 29 *Car. 2. c. 3.* no action shall be brought upon any agreement on consideration of marriage, except it be put in writing, and signed by the party to be charged, &c. And where an agreement relating to marriage must be in writing after a year, and when it need not, *vide Skinn.* 359. Observe the words, they are upon any agreement on consideration of marriage, which is essentially different from mutual promises of the parties to marry each other. And which latter are not within the statute. See *Assumpsit*, II.

An administrator cannot maintain an action for a breach of promise of marriage to the intestate, where no special damage is alleged. 2 *Mau. & Selw.* 408.

An ancient statute, 31 *Hen. 6. c. 9.* still appears on our statute books to invalidate bonds and securities taken from women under duress of imprisonment by threats of forcible marriage, &c.

Contracts and bonds for money to procure marriage between others are usually called marriage-brochage agreements or bonds. Concerning these see the *Treatise of Equity* (8vo.) p. 249—254.

Wherever a parent or guardian insist upon a private gain or security for it, and obtain it of the intended husband, it shall be set aside; for the power of a parent or guardian ought not to be made use of to such purposes. And it is now a settled rule that if the father, on the marriage of his son, takes a bond of the son to pay him so much, &c. it is void, being done by coercion while he is under the awe of his father. Nor will the court only decree a marriage-brochage bond to be delivered up, but also a gratuity actually paid to be refunded (2 *Vern.* 292); for such bond or contract is in no case to be countenanced. A bond to procure marriage, though between persons of equal rank and fortune, is void as being of dangerous consequence. See 3 *Lev.* 41; 1 *Salk.* 156.

From the case of *Grisley v. Lothor*, *Hob.* 10. it should seem that though the procuring of a marriage is not a consideration in equity, it is a sufficient consideration in law, and of that opinion *Holt, C. J.* appears to have been in *Hale v. Potter*, 3 *Lev.* 411; and the circumstance of the bond in that case having been ultimately cancelled by a decree of the House of Lords, does not affect the rule of law; as that decision was upon an appeal from the decree in equity which had declared the bond to be good; as courts of equity do not in such cases interpose for the benefit of the party, so much as on considerations of public policy. See *Law v. Law*, *Forrest.* 142; but query whether the vice of such consideration could not now be pleaded at law. 2 *Wils.* 347, *Collings v. Blantern*.

That equity will relieve against bonds to strangers, for procuring of marriage, see 1 *Chan. Rep.* 47; 3 *Ch. Rep.* 18; 2 *Ch. Ca.* 176; 1 *Vern.* 412; 1 *Vez.* 503; 3 *Atk.* 566; and as these contracts are avoided on reasons of public inconvenience, the Court of Exchequer, in *Shirley v. Martin*, 14 *Nov.* 1779, held that they would not admit of subsequent confirmation by the party. See also *Booth v. Warrington*, (*E.*) *Cases in Parl.* 8vo. *Fraud. Ca.* 6.

An obligation procured from an infant by the father of his intended wife, in fraud of marriage articles agreed to by the infant and his friends, is absolutely void. *Morison v. Arlathnot* (*Ld.*, *Parl. Ca.* 8vo. viii. pa. 247. *Appendix*, II. *Ca.* 1.

If a man before marriage gives bond and judgment to the wife, to leave her worth 1000*l.* at his death, in consideration of a marriage portion, this shall be made good out of the husband's estate, and satisfied before any debts; provided a judgment be not obtained against him with her consent. An intended husband, in consideration of a marriage, covenanted

with the intended wife, that if she would marry him, and she should happen to survive him, he would leave her worth 500*l.* The marriage took effect, and the wife survived, and he did not leave her worth that money; she married a second husband, and he brought an action of debt against the administrator of the first husband for the 500*l.* To which it was objected, that this being a personal action, it was suspended by the marriage, which was a release in law, and so extinct; but the plaintiff had judgment, for the action is not suspended, because during the coverture there was no action; nothing in this case is due whilst the coverture takes place, and the debt arises by the death of the husband. *Palm.* 99; 2 *Sid.* 58.

A bond was given by a man, reciting, he was to marry A. S. and that if the marriage took effect, and he did survive her, then, within three months after her decease, he would pay to the obligee 300*l.* for such uses as the said A. S. by any writing under her hand and seal, subscribed and published in the presence of two witnesses, should direct and appoint; this marriage bond was adjudged good. 3 *Cro.* 376; *Yelv.* 226, 227.

In case articles are entered into before marriage, and afterwards a settlement is made different therefrom, the Court of Chancery will set up the articles against it; but where both are finished before the marriage had, at a time when all parties are at liberty, such settlement will be taken as a new agreement between them; this is the general rule, unless the deed of settlement is expressly mentioned to be made in pursuance of the marriage articles, &c. whereby the intent may still appear to be the same. *Talb.* 20. Articles of marriage were made for settling lands on the husband and wife, and the heirs male and female of the body of the husband by the wife, &c. and a settlement was drawn contrary to these articles, long after which the husband suffered a recovery, and devised the land to others; it was here held to be no bar to the heirs female, who were decreed to have the land. 2 *P. Williams*, 349, 355. Yet it is said, where relief is to be given in equity on a settlement, it must be only to the persons who claim as purchasers, as the first and other sons; and all remainders after to the husband's heirs of his body, or his right heirs, are voluntary, and not to be aided. *Abr. Cas. Eq.* 385.

Though a term to raise daughters' portions, payable at the age of eighteen, or day of marriage, in a marriage settlement is limited in remainder, to commence after the death of the father generally; or if it be in case he die without issue male of his wife, and she dies first without such issue, leaving a daughter, &c. In equity the term is saleable during the lifetime of the father, when the daughter is eighteen years old, or married; because every thing hath happened and is past which is contingent, for it is impossible there should be issue made of the wife when she is dead; and as to the father's death that is not contingent, but certain, by reason all men must die; but if there is a contingency not yet happened, as if the daughters are to be unmarried, or not provided for at the time of the father's death, &c. it is otherwise. 1 *Salk.* 159.

Upon marriages, the settlements generally made of the estate of the husband, &c. are to the husband for life, after his death to the wife for life for her jointure, and to their issue in remainder, with limitations to trustees to support contingent uses, leases to trustees for terms of years, to raise daughters' portions, &c. And they are made several ways by lease and release, covenant to stand seised to uses, &c.

These settlements the law is ever careful to preserve, especially that part of them which relates to the wife, of which she may not be divested, but by her own fine, (but now she must convey by deed properly acknowledged, see *Feme*) and if a woman about to marry, to prevent her husband's disposal of her land, conveys it to friends in trust, and they with the husband, after marriage, make sale of the same.

the Court of Chancery will decree the purchaser to reconvey to her. *Tottil*, 43.

Where a woman on marriage, by the man's consent, makes over her estate, to be at her own disposal, the product or increase thereof she can also dispose of; and if the wife has a separate maintenance settled on her by the husband, she may, by writing in the nature of a will, give away what she saves, if she dies before the husband; and shall have the same herself, in case she outlives him and it shall not be liable to his debts. *Preced. Canc.* 255, 44. But where a settlement is made on the wife, in consideration of her whole fortune and equivalent to it; here the wife's portion, though it be out on bonds, &c. which upon the death of the husband by law survives to the wife, shall in equity be subject to the husband's bond-debts, after his decease, to ease the real estate of the heir. *Ibid.* 63. And it has been likewise held, that if after the wife's death, debts of her's appear, the husband shall be answerable for the debts of the wife, so far as he had any money or estate of hers. *Ibid.* 252.

If a man in mean circumstances marry a woman of fortune, upon suggestion and proof of larceny in the wife by her friends, the court will order her estate to be so settled, that she may not be wrought on by her husband to give it to him from her children, by him or any other husband, &c. *Skinn.* 110.

As to the forcible carrying off and marrying of women for the sake of their fortunes, see *Abduction*. See further *Baron and Feme*, *Chancery*, *Bankrupt*, *Dower*, *Jointure*, &c.

MARROW. Was a lawyer of great account in Henry VIII's days, whose learned readings are extant, but not in print. *Lamb. Eirenarch*, lib. 1. cap. 10.

MARSHAL, *Marescallus*, *Fr. Mareschal*.] It seems to signify as much as *tribunus militum*, with the ancient Romans; it has also been derived from the German *marschalk*, i. e. *equitum magister*, which *Holoman* in his *Feuds*, under *verb. marschaleus*, derives from the old word *march*, which signifies a horse; others make it of the *Sax. mar*, i. e. *equus*, or *scutellus*, *protectus*.

With us there are several officers of this name; the chief whereof is the earl marshal of England, mentioned in 1 Hen. 4. c. 24; 8 Rich. 2. c. 5; 12 Rich. 2. st. 1. c. 2. &c. whose office consists especially in matter of war and arms, as well in this kingdom as in other countries. This office is very ancient, having formerly greater power annexed to it than now; it has been long hereditary in the family of the Duke of Norfolk. *Vide Lupanus de Magistratibus Francie*, lib. 1. c. *Marshallus*; and *Titus*, lib. 2. c. *De Constabili Maris*, &c.; see also *tit. Constable*, *Court of Chivalry*, *Court Martial*.

The next is the marshal of the king's house, otherwise called knight marshal, his authority is exercised to the king's palace, in hearing and determining all pleas of the crown, and suits between those of the king's house and other persons within the verge, and punishing felons committed there, &c. See 28 Edw. 1. st. 3. c. 3. 18 Edw. 1. c. 7. 1 Edw. 3. st. 2. c. 6; 8 Rich. 2. c. 5; 2 Hen. 4. c. 13; *Crompt. Jurisd.* 192. *Fleta* mentions a marshal of the king's court, to whom it belongs, when the tables are prepared, to call out those of the household and strangers, according to their rank and quality, and properly place them. *Fleta*, lib. 1. cap.

There are other inferior officers called marshals, as marshal of the justice in Eyre, anno 13 Edw. 1. c. 10.

MARSHAL OF THE KING'S BENCH. See 5 Edw. 3. cap. 8. who hath the custody of the King's Bench prison in Southwark. This officer gives attendance upon the court, and takes into his custody all prisoners committed by the court; he is fineable for his absence: and non attendance is a forfeiture of his office. *Hil.* 21 & 22 Car. 2. By 8 & 9 Will. 3. c. 27. grants of the King's Bench and Fleet prisons are to be enrolled, and the office of marshal and warden of the King's

Bench and Fleet, is to be executed by those who have the inheritance of those prisons. The power of appointing the marshal of the King's Bench, which had been granted in fee by King James I. was reverted in the crown by 27 Geo. 2. c. 17. and the office subjected to the control of the Court of King's Bench.

There is a deputy marshal of the King's Bench appointed by the marshal, who must reside within the prison or its rules, (4 T. R. 716; 5 T. R. 511); as indeed ought also the marshal by R. M. 2 Geo. 4. and according to the fifth section of the above act and his patent.

There is also a marshal of the Exchequer, to whom that court commits the custody of the king's debtors for securing the debts; he likewise formerly assigned to sheriffs, customers, and collectors, their auditors, before whom they should account. 51 Hen. 3. st. 5.

There is likewise a marshal or provost marshal of the admiralty, whose duty it is to act ministerially, under the orders of the Court of Admiralty in securing prizes, executing warrants for these and other purposes, arresting and attending the execution of criminals, &c. See 45 Geo. 3. c. 72. § 117; and other *Prize Acts*.

MARSHAL AND STEWARD OF THE KING'S HOUSEHOLD AND MARSHALSEA. Of what things they should hold plea. *Art. super Cartas*, 28 Edw. 1. st. 3. c. 3; 8 Rich. 2. c. 5.

MARSHALSEA, *Marescallia*.] The court or seat of the marshal; of whom see *Crompt. Jur.* 120. It is also used for the prison in Southwark; the reason whereof may be, because the marshal of the king's house was wont perhaps to sit there in judgment, or keep his prison. See 9 Rich. 2. c. 5; 2 Hen. 4. c. 23. King Charles the First erected a court by letters patent under the great seal, by the name of *curia hospitii domini regis*, &c. which takes cognizance more at large of all causes than the Marshalsea could; of which the knight marshal or his deputy are judges. *Cowell*. See *Court of Marshalsea*, *King's Bench Prison*.

MART. A great fair for buying and selling goods, holden every year. 2 Inst. 221. See *Fair*, *Market*.

MARTIAL LAW. The law of war, that depends upon the just but arbitrary power and pleasure of the king, or his lieutenant; for though the king doth not make any laws but by common consent in parliament, yet in time of war, by reason of the necessity of it, to guard against dangers that often arise, he useth absolute power, so that his word is a law. *Smith de Repub. Angl.* lib. 2. c. 4. This power, however, is now regulated by act of parliament. See *Court Martial*.

MARTYROLOGY, *Martyrologium*.] A book of martyrs, containing the lives, &c. of those men who died for their religion. Also a calendar or register kept in religious houses, wherein were set down the names and donations of their benefactors, and the days of their death, that upon every anniversary they might commemorate and pray for them: such benefactors usually made it a condition of their benefice to be inserted in the martyrology. *Paroch. Antiq.* 189.

MASAGIUM. Anciently used for *messuagium*, a messuage. *Pat.* 16 Rich. 2.

MASKS. The penalty of selling or keeping visor masks, see the ancient stat. 3 Hen. 3. c. 9.

MASONS. To plot confederacies amongst masons, was, by an obsolete stat. 3 Hen. 6. c. 1. declared felony. *Vide tit. Conspiracy*.

MASS-PRIEST. In former times secular priests, to distinguish them from the regulars, were called mass-priests, and they were to officiate at the mass, or in the ordinary service of the church; hence *messe prest*, in many of our Saxon canons, for the parochial minister; who was likewise sometimes called *messe thegne*, because the dignity of a priest

in many cases was thought equal to that of a *thein*, or lay lord. But afterwards the word mass-priest was restrained to stipendiaries retained in chantries, or at particular altars, to say many masses for the souls of the dead.

MAST, *Glaus Pessona.* The acorns and nuts of the oak, or other large tree.—*Glandi, nomine continentur glans, castanea, fagina, ficus et mices, et alia quæque quæ edi et pasci poterunt præter herbam. Bract. lib. 4. Tempus pessone* often occurs for mast-time, or the season when mast is ripe; which in Norfolk they call shacking-time.—*Quod habeat decem porcos in tempore de pessona in bosco meo. Mon. Angl. ii. 113, 231.*

MASTER, *Magister.* Signifies in general a governor, teacher, &c. and also in many cases an officer. See *Servant*.

MASTER AND SERVANT. The relation between a master and a servant, from the superiority and power which it creates on the one hand, and duty, subjection, and, as it were, allegiance on the other, is in many instances applicable to other relations, which are in a superior and subordinate degree; such as lord and bailiff, principal and attorney, owners and masters of ships, merchants and factors, and all others having authority to enforce obedience to their orders, from those whose duty it is to obey them, and whose acts, being conformable to their duty and office, are esteemed the acts of their principals. See *Apprentice, Labourer, Servant*.

MASTER OF THE ARMORY, *Magister Armorum et Armaturæ Regis.* An officer who hath the care of his majesty's arms and armory, mentioned in the ancient stat. 39 *Eliz. c. 7.*

MASTER OF THE CEREMONIES, *Magister Admissionum.* One who receives and conducts ambassadors and other great persons to audience of the king, &c. This office was instituted by King James I. for the more magnificent reception of ambassadors and strangers of the greatest quality.

MASTER OF, OR IN CHANCERY, *Magister Cancellariæ.* In the chancery there are masters, who are assistants to the lord chancellor or lord keeper, and master of the rolls; of these there are some ordinary, and some extraordinary. The masters in ordinary are twelve in number, of whom the master of the rolls is chief; and some sit in court every day during term, and have referred to them interlocutory orders for stating accounts, computing damages, and the like; they also administer oaths, take affidavits, and acknowledgments of deeds and recognizances; they also examine on reference the propriety of bills in chancery, which if they report to be scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs. The extraordinary masters are appointed to act in the country, in the several counties of England, beyond twenty miles' distance from London, by taking affidavits, recognizances, acknowledgments of deeds, &c. for the ease of the suitors of the court.

The masters in ordinary have also the custody of such title-deeds and original instruments as the court thinks fit to place under their care, for the security and benefit of the parties interested therein.

They attend the lord chancellor and master of the rolls at the sitting of the court, according to an ascertained rotation, take their seats upon the bench and remain there until they are permitted to retire, which is usually soon after the sitting, that they may attend to the business of their respective offices.

In order to provide for the indisposition or unavoidable absence of the chancellor or the master of the rolls, there is a commission addressed to the then puisne judges and the then masters, authorizing any three of them, of whom a judge is to be one, to transact the business of the court. When the business of the court is despatched under the authority of this commission, it has been done by one judge

and two masters, who sit with the judge, join in making the orders, and constitute a necessary part of the court.

Two masters attend the House of Peers every day it sits, and are employed by that House in carrying their messages to the House of Commons, except such as relate to the royal family, which are usually carried by the judges; such masters as are members of the House of Commons do not join in executing this duty. On the trial of a peer, or of any person impeached by the Commons, all the masters attend every day. The masters also attend coronations and processions of state.

By the 13 *Car. 2. st. 1*, in the Appendix, a public office was ordained to be kept near the rolls for the masters in chancery; in which they, or some of them, are constantly to attend for administering oaths, caption of deeds, and despatch of other business; and their fees for taking affidavits, acknowledgment of deeds, exemplifications, reports of certificates, &c. are ascertained by that act; and to take more incurrs disability for such master to execute his office, and a forfeiture of 100*l.* &c.

The practice now is for one master to attend every day at the public office established by the above act. When any person is unable, from sickness or any other cause, to go to the public office, the master waits upon him at any distance not exceeding twenty miles from London.

By the 3 & 4 *Wm. 4. c. 94. § 16.* the appointment of all masters in ordinary of the Court of Chancery, other than the accountant-general, is vested in the crown, and such masters are to be appointed by letters-patent under the great seal, and to take the usual oaths before the lord chancellor in like manner as such oaths have been heretofore administered.

The above act contains various provisions relating to the duties of the masters in chancery.

There are attached to each master's office two clerks one is the chief clerk and the other a copying clerk.

By the 3 & 4 *Wm. 4. c. 94. § 18.* the chief clerk of any master must have been admitted on the roll of solicitors or attorneys in one of the courts of Westminster Hall five years, or have been a junior clerk in a master's office for ten years.

See further *Chancellor, Chancery*.

MASTER OF THE COURT OF WARDS AND LIVERIES. The chief officer of that court, assigned by the king; to whose custody the seal of the court was delivered, &c. as appears by the 33 *Hen. 8. c. 33.* But as this court was abolished by 12 *Car. 2. c. 24.* this office of course dropped with it.

MASTER OF THE FACULTIES, *Magister facultatum.* An officer under the Archbishop of Canterbury, who grants licenses and dispensations, &c.

MASTER OF THE HORSE. He who hath the ordering and government of the king's stables; and of all horses, racers, and breeds of horses belonging to his majesty; he has the charge of all revenues appropriated for defraying the expense of the king's breed of horses, of the stable, litters, sumpter-horses, coaches, &c. and has power over the equerries and pages, grooms, coachmen, farriers, smiths, saddlers, and all other artificers working for the king's stables, to whom he administers an oath to be true and faithful; but the accounts of the stables, of liveries, wages, &c. are kept by the averner; and by him brought to be passed and allowed by the court of green cloth.

The office of master of the horse is of high account, and always bestowed upon some great nobleman; and this officer only has the privilege of making use of any horses, footmen or pages belonging to the king's stables; at any solemn cavalcade he rides next to the king, with a led horse of state. He is the third great officer of the king's household, being next to the lord steward and lord chamberlain, and is mentioned in 39 *Eliz. c. 7.*

MASTER OF THE JEWEL OFFICE. An officer of the king's household, having the charge of all plate used for the king or queen's table, or by any great officer at court; and also of the royal plate remaining in the Tower of London, and of chains and jewels not fixed to any garment. See 39 *Eliz. c. 7.*

MASTER OF THE HOUSEHOLD, *Magister Hospitii Regis.* Otherwise called grand master of the king's household, now styled lord steward of the household, which title this officer hath borne ever since *ann. 32 H. 8.* But under him there is a principal officer still called master of the household, who surveys the accounts, and has great authority.

MASTER OF THE KING'S MUSTERS. A martial officer in the king's armies, to see that the forces are complete, well-armed, and trained; and to prevent frauds, which would otherwise waste the prince's treasure, and weaken the forces, &c.

MASTER OF THE MINT. An officer who receives the silver of the gold-smiths, and pays them for it, and oversees every thing belonging to the mint; he is at this day called warden of the mint. See further *Mint.*

MASTER OF THE ORDNANCE. A great officer to whose care all the king's ordnance and artillery is committed. See 39 *Eliz. c. 7.*

MASTER OF THE POSTS. Was an officer of the king's court, who had the appointing, placing, and displacing of all such through England as provided post-horses for the speedy passing of the king's messages, letters, packets, and other business; and was to see that they kept a certain number of good horses of their own, upon occasion that they provided others for furnishing those persons who had a warrant from him to take and use post-horses, either from or to the seas, or other places within the realm; he likewise paid their wages, settled their allowances, &c. See 2 *Edw. 6. c. 3.*

This office is now superseded by the establishment of a regular Post-office; see that title.

MASTER OF THE REVELS. An officer to regulate the diversions of dancing and masking, used in the palaces of the king, inns of court, &c. and in the king's court, is under the lord chamberlain. His power is very much abridged since the time of Charles II. when patents were granted for public theatres in London, &c.

MASTER OF THE ROLLS, *Magister Rotulorum.* An assistant to the lord chancellor in the high court of chancery, who, in his absence, hears causes there, and also at the chapel of the rolls, and makes orders and decrees. *Crompt. Jurisd. 41.* His title in his patent is, *Clericus parvæ Bagæ, Custos Rotulorum, &c.* And he has the keeping of the rolls of all patents and grants which pass the great seal, and the records of the chancery. He is called clerk of the rolls, 12 *Rich. 2. c. 2.* and in *Fortescue, c. 24;* and nowhere master of the rolls, until the 11 *Hen. 7. c. 18.* In which respect, Sir Thomas Smith says, he may not unfitly be styled *Custos Archivorum.* In his disposition are the offices of the six clerks, and the clerks of the petty bag, examiners of the court, and clerks of the chapel.

The office of the master of the rolls is as ancient as the court itself. 2 *Com. Dig. 208.*

Unlike that of the vice-chancellor it partakes in its nature of a distinct jurisdiction, and the suitor may elect whether he will have his cause heard and decided before the lord chancellor or the master of the rolls.

The master of the rolls hears and makes decrees and orders in all causes and matters belonging to the jurisdiction of the court of chancery, which the suitors think proper to bring before him, with the exception (specified in the 3 *Geo. 2. c. 30.* of "orders and decrees of such nature and kind as according to the course of the said court, ought only to

be made by the lord chancellor, lord keeper, or lords commissioners of the great seal for the time being."

Previous to the 4 & 5 *Wm. 4. c. 94.* the master of the rolls did not hear motions, pleas, or demurrers in his court, and whatever was presented for his decision other than the hearing of causes, was brought before him by petition. Now by § 24 of that statute, he is required "to hear and determine all such motions arising in causes depending in the high court of chancery, as shall be duly made before him according to the usage and practice of making motions in causes before the lord chancellor, and to hear and determine all such pleas and demurrers filed in causes depending in the high court of chancery as shall be duly set down for hearing before him." All orders so made are declared valid, subject nevertheless to be discharged, reversed, or altered by the lord chancellor.

By the 1 *Geo. 4. c. 107.* the rents, issues, and profits of the Rolls' estate (see 12 *Car. 2. c. 26;* 3 *Geo. 2. c. 33.*) are granted to the master of the rolls for the time being, and the dividends of 4031*l.* 4*s.* 4*d.*, (remaining as a fund for repairing the above estate,) are directed to be paid to him by the accountant-general as they accrue, subject nevertheless to any order of the court. See further, *Chancery.*

MASTER OF A SHIP. See *Insurance.*

MASTER OF THE TEMPLE. The founder of the order of knight templars, and his successors, were called *Magni Templi Magistri*; and probably from hence he was the spiritual guide and director of the Temple. The master of the Temple here was summoned to parliament *anno 49 Hen. 3.* The chief minister of the Temple church in London is now called master of the Temple. *Dugd. War. 706.*

MASTER OF THE WARDROBE, *Magister Garderobe.* A considerable officer at court, who has the charge and custody of all former kings' and queens' ancient robes remaining in the Tower of London; and all hangings, bedding, &c. for the king's houses; he hath also the charge and delivery out of all velvet or scarlet cloth allowed for liveries, &c. Of this officer mention is made in 39 *Eliz. c. 7.* The lord chamberlain has the oversight of the officers of the wardrobe.

MASTIVUS. A great dog; a mastiff. *Knight, lib. 2. c. 15.*

MASURA. An old decayed house. *Domesd.*

MASURA TERRÆ, *Fr. mesure de terre.* A quantity of ground, containing about four oxgangs. *Domicilium cum fundo; or fundus cum domicilio competentis.* See *Domesday.*

MATRICULA. A register; as in the ancient church there was *matricula clericorum*, which was a catalogue of the officiating clergy; and *matricula pauperum*, a list of the poor to be relieved; hence to be entered in the register of the universities, is to be matriculated, &c.

MATRIMONIAL CAUSES. Or injuries respecting the rights of marriage, are a branch of the ecclesiastical jurisdiction. See *Marriage.*

MATRIMONIUM. Is sometimes taken for the inheritance descending to a man *ex parti matris.* *Blount.*

MATRIX ECCLESIA. The mother church; and is either a cathedral, in respect of the parochial churches within the same diocese; or a parochial church, with respect to the chapels depending on it, and to which the people resort for sacraments and burials. *Leg. H. 1. c. 19.*

MATRONS, Jury of. When a widow feigns herself with child, in order to exclude the next heir, and a supposition birth is suspected to be intended, then upon the writ *de ventre inspiciendo*, a jury of women is to be impanelled to try the question, whether with child or not. *Cro. Eliz. 566.* So if a woman is convicted of a capital offence, and being condemned to suffer death, pleads in stay of execution, that she is pregnant, a jury of matrons is impanelled to inquire into the truth of the allegation; and if they find it true, the con-

vict is respited until after her delivery. See *Ventre inspiciendo, Execution of Criminals*.

MATTER IN DEED, AND MATTER OF RECORD. Are often mentioned in law proceedings, and differ thus: the first seems to be nothing else but some truth or matter of fact to be proved by some specialty, and not by any record; and the latter is that which may be proved by some record. For example, if a man be sued to an exigent during the time he was abroad in the service of the king, &c. this is matter in deed, and he that will allege it for himself, must come before the *scire facias* for execution be awarded against him; but after that, nothing will serve but matter of record, that is, some error in the process appearing upon the record. There is also a difference between matter of record and matter in deed, and nude matter; the last being a naked allegation of a thing done, to be proved only by witnesses, and not either by record or specialty. *Old. Nat. Br.* 19; *Kitch.* 216.

MAUGRE, from the Fr. *mal* and *gre*, i. e. *animo iniquo*.] Signifies as much as to say with an unwilling mind, or in despite of another; as where it is said, that the wife shall be remitted, *maugre* the husband, that is, whether the husband will or not. *Lit.* § 672; see *Malo Grato*.

MAUM. A soft brittle stone in some parts of Oxfordshire; and in Northumberland they use the word *maum* for soft and mellow. *Plot's Nat. Hist. Oxfordsh.* p. 63.

MAUND. A kind of great basket or hamper, containing eight bales, or two fats; it is commonly a quantity of eight bales of unbound books, each bale having one thousand pounds' weight. *Old Book of Rates*, p. 3.

MAUNDY THURSDAY. The Thursday before Easter. See *Mandati Dies*.

MAUPIGYRNUM. An old sort of broth or pottage. *Comell*.

MAXIMS IN LAW. Positions and theses, being conclusions of reason, and universal propositions, so perfect, that they may not be impugned or disputed. *Comell*; *Co. Lit.* 343.

A maxim in law is said to be a proposition of all men confessed and granted, without argument or discourse. Maxims of the law are holden for law; and all other cases that may be applied to them shall be taken for granted. 1 *Inst.* 11, 67; 4 *Rep.* See 1 *Comm.* c. 68.

A maxim is a sure foundation or ground of art, and a conclusion of reason; so called *quia maxima est ejus dignitas et certissima autoritas, atque quid maximè probetur*, so sure and uncontrollable as that it ought not to be questioned; and what is elsewhere called a principle, and is all one with a rule, a common ground, *postulatum* or *axiom*. *Co. Lit.* 10. b; 11. a.

Maxims are the foundations of the law, and conclusions of reason; therefore ought not be impugned, but always to be admitted; but they may by reason be conferred and compared the one with the other, though they do not vary; or it may be discussed by reason, which thing is nearest the maxim, and the mean between the maxims, and which is not; but the maxims can never be impeached or impugned, but ought always to be observed, and held as firm principles and authorities of themselves. *Plond.* 27. b.

Maxims are principles and authorities, and part of the general customs or common law of the land; and are of the same strength as acts of parliament, when the judges have determined what is a maxim; which belongs to the judges, and not a jury. *Terms de Ley*; *Doct. & Stud. Dial.* 1. c. 8.

The alterations of any of the maxims of the common law are dangerous. 2 *Inst.* 210.

The maxims in our books, which are many and various, are such as the following, viz., it is a maxim, that freehold land shall descend from the father to the eldest son, &c. It is a maxim, that as no estate can be vested in the king with-

out matter of record, so none can be divested out of him but by matter of record; for things are dissolved as they are contracted. *Rep.* 1, *Cholmeys* case. Another, that an obligation, or other matter in writing, cannot be discharged by an agreement by word. *Co. Lit.* 141.

The maxim that allegiance is due more by reason of the crown than of the person of the king, condemned. *Exch. Hug. le Despenser*, 15 *Edm.* 2. st. 3.

It was also a maxim, that if a man have issue two sons by divers venters, and the one of them purchase lands in fee, and die without issue, the other brother shall never be his heir, &c.; but this is now altered. See *Descent*.

MAYHEM. See *Maitem*.

MAYOR, *Præfectus urbis*, anciently *meyr*; comes from the Brit. *miret*, i. e. *custodire*; or from the old English word *maier*, viz. *potestas*; and not from the Lat. *major*.] The chief governor or magistrate of a city or town-corporate, as the mayor of London, the mayor of Southampton, &c. King Richard I. anno 1189, changed the bailiffs of London into a mayor; and from that example king John made the bailiff of King's Lynn a mayor, anno 1204. Though the famous city of Norwich obtained not this title for its chief magistrate, till the seventh year of king Henry V. anno 1419, since when there are few towns of note, but have had a mayor appointed for government. *Spelm. Gloss.*

Mayors of corporations are justices of peace *pro tempore* and they are mentioned in several statutes. By the 13 *Car.* 2. st. 1. c. 1. no person should bear any office of magistracy concerning the government of any town, corporation, &c. who had not received the sacrament according to the church of England within one year before his election, and who should not take the oaths of supremacy, &c. But by the 9 *Geo.* 4. c. 17. a declaration is now to be made in lieu of the sacramental test. See *Dissenters, Oaths*.

If any one intrudes into, and thereupon executes, the office of mayor, a *quo warranto* information may be brought against him; and he shall be ousted and fined, &c. See *Quo Warranto*.

A distinction is made in cases relative to corporations between a mere usurper and an officer *de facto*, though not *de jure*. An usurper is a man who, without any colour of election, gets possession of the office, and acts in it; and the mere circumstance of being sworn into the office makes no difference; but to make an officer *de facto*, at least the form of an election is necessary, though on legal objections it may afterwards be overturned. Notwithstanding this distinction, however, if in point of form, it is doubtful whether there be any in the effect. Some acts, it is admitted, may be good if done by a mayor *de facto*, or under his authority; but it does not appear whether the same acts would be good if done by a mere usurper; some acts are certainly void if done by an usurper; and probably so, if done by a mayor *de facto*. Those acts which are good if done by a mayor *de facto*, or under his authority, are such as he may be compelled to do in favour of a person who has a precedent right to have done them. All voluntary acts not necessary to carry on the business of the corporation seem to be void, whether done by an usurper, or a mayor *de facto*, or under the authority of either; some necessary acts are also void in both cases. See *Andr.* 116, 117, 163, 388; *Hardw.* 147—152; *Lutw.* 514; 2 *Str.* 1090, 1109; 5 *Burr.* 2601, and *Kyd's Law of Corporations*, c. 3. § 7. But the above does not apply to acts in which strangers are interested. See *Kyd*.

Where an infant is actually mayor, or other chief officer of a corporation, this shall not void the acts of the corporation with respect to strangers, because these acts are not the acts of the particular persons, but of the body-corporate. But it seems that where neither the provisions of the charter, nor the usage of the corporation, expressly authorize the election of an infant into this or any other corporate office.

an infant is not capable of being elected; because, as Lord Hardwicke observed, "if an infant is not fit to manage for himself, he is improper to be a mayor for the public." See *Hardw. 8; Comp. 220*.

The powers and duties of a mayor, or other head officer of a corporation, depend in general on the provisions of the charters, or prescriptive usage of the corporation, or the express provisions of an act of parliament. It is commonly one of his duties, as well as of his particular privileges, to preside at the corporate assemblies; but whether in a corporation by charter this be necessarily incident to his office, where no express provision is made for that purpose, has been made a question, but never solemnly decided, and indeed all cases of such nature must chiefly depend on their own particular circumstances. See 3 *Mod. 14*; 2 *Ld. Raym. 1237*; 2 *Burr. 370*. In the case of a corporation by prescription, it is a question can hardly ever arise; because there must necessarily be some usage one way or the other, to show what is the power and duty of the mayor in this respect, in every such particular corporation, independently of any general principle. In every other respect it may be safely asserted, that the mayor as well as the aldermen, and other select bodies, have no other powers, authorities, or privileges, than those which they possess by charter, prescription, or act of parliament.

Where the mayor's presence is necessary at a corporate assembly, his departure before a business regularly begun be concluded, will not invalidate that particular business; but the assembly can proceed to nothing else. 1 *Barnard. 35*. And on the death of the mayor, or during the vacation of the office, the corporation can do no corporate act, but that of electing a new mayor. 1 *Ldbr. 1, 78*.

The office of the mayor or other head officer is annual, and expires on the determination of the year next after the annual charter-day on which he ought to be elected. The effect of which is, that if a mayor be chosen but a few months before the charter-day, his office only endures for that interval; and though where a mayor is improperly removed, he may be restored at any time previous to the next charter-day, yet his office then ceases and is not prolonged by reason of his amotion; and if he be not restored before such day he cannot be reinstated afterwards.

But by the provisions of some charters, the mayor or other chief officer is elected for a year, and till another be chosen; in which case, if no successor be chosen at the end of the year, the mayor of the preceding year is said to hold over. Where, however, a particular day is appointed for the election of a successor, which is generally the case, and a power of holding over is not expressly given, it does not exist by implication. *Str. 394*. And the preamble of the 11 *Geo. 1. c. 4*. (see post,) manifestly shows, that the legislature thought it was not implied; for it proceeds on the supposition, that, for want of a declaration of a new mayor on the charter day, the corporation was dissolved; which could not have been the case, if the mayor of the preceding year had a right of holding over.

Where there was a clause of holding over, it had become a practice with the mayor and other head officers of the corporations to avoid holding an election on the charter-day; by which means they continued in office for several years together. In order to put an end to this practice, the 9 *Ann. c. 20, § 8*. after reciting the inconvenience which had arisen from head officers of corporations, to whom it belonged to preside at the election, and make return of members to serve in parliament, being elected for two years successively, enacted, "that no person or persons who had been, or should be in such annual office for one whole year, should be capable of being chosen into the same office for the year immediately ensuing; and that where any such annual officer or officers was or were to continue for a year, and until some

other person or persons should be chosen and sworn into such office, if any such officer or officers should voluntarily and unlawfully obstruct and prevent the choosing of another person to succeed into such office, at the time appointed for making another choice, he should forfeit 100*l*." See 8 *Mod. 111, 127, 132*.

By the 11 *Geo. 1. c. 4*. if no mayor or other chief officer be elected in a corporation on the day appointed by charter, by the proper officers, or such election being made, it shall afterwards become void; the next in place is to hold a court, and elect one the day following, &c. or, in default thereof, the Court of King's Bench may compel the electors to choose one, &c. by writ of mandamus, requiring the members, who have a right to vote, to assemble themselves on a day prefixed, and proceed to election, or show cause to the contrary; and mayors, &c. voluntarily absenting on the day of election, shall be imprisoned six months, and be disabled to hold any office in the corporation.

By the 3 & 4 *Will. 4. c. 31*. to avoid the profanation of the Lord's day, elections of officers of corporations and other public companies required to be held on that day, shall take place on the Saturday preceding or the Monday following. When the elections are not made on the Saturday, persons in office are to continue until the Monday. By § 2. elections not held on the Saturday or Monday as above prescribed, or becoming void, are declared to be within the provisions of the 11 *Geo. 1*. See further *Mandamus, Quo Warranto*.

The authority of mayors, as to matters not relating to their corporation, extends (among others) to the following particulars:—The 2 *Edw. 3. c. 3*, gives power to mayors to arrest persons carrying offensive weapons in fairs, markets, &c. to make affrays, and the disturbance of the peace.

Mayors, bailiffs, and lords of leets, are to regulate the assise of bread, and examine into the goodness thereof; and if bakers make unlawful bread, they may give it to the poor, and pillory (now abolished) the offenders, &c. 5 *Hen. 3. st. 6*. See *Bread, Beer*.

Head officers and justices of peace in corporations may inquire of forcible entries, commit the offenders, and cause the tenements to be seized, &c. within their franchises, in like manner as justices of peace in the county, 8 *Hen. 6. c. 9*. See *Forcible Entry, II*.

Mayors, &c. shall inquire into unlawful gaming, against the 33 *Hen. 8. c. 9*. They are to search places suspected to be gaming-houses, and levy penalties, &c. and they have power to commit persons playing at unlawful games. See *Gaming*.

Mayors, &c. are empowered to make inquiry into offences committed against 1 *Eliz. c. 2*, which requires that the common prayer be read in churches; and that the churchwardens do their duty in presenting the names of such persons as absent themselves from church on Sunday, &c.

Horses stolen, found in a corporation, may be redeemed by the owner making proof before the head officer of the corporation of the property, &c. 31 *Eliz. c. 12*. See *Horses*.

Mayors may determine whether coin offered in payment be counterfeited or not; and tender an oath to determine any question relating to it. 9 & 10 *Wm. 3. c. 21*.

Under various statutes, mayor and head officers of corporations are to punish drunkenness. See *Drunkenness*.

Mayors, &c. on receipt of precepts from sheriffs, (when writs are issued for elections,) requiring them to choose burgesses or members of parliament, by the citizens, &c. are to proceed to election, and make returns by indenture between them and the electors; and making a false return shall forfeit 40*l*. to the king, and the like sum to the party chosen, not returned, &c. 23 *Hen. 6. c. 14*. See 2 *Geo. 2. c. 24*; and tit. *Parliament*.

In time of sickness, a tax may be laid on inhabitants of

corporations, for relieving such persons as have the plague, by mayors, &c. who are to appoint searchers and buriers of the dead; and if any infected persons shall go abroad with sores upon them, after an head officer hath commanded them to keep at home, it is felony; and if they have no sores about them, they are punishable as vagrants. 1 Jac. 1. c. 31. See *Plague*.

The 43 Eliz. c. 2. which directs that the father, grandfather, mother, grandmother, and children of every poor person shall be assessed towards their relief by justices, and which impowers justices of peace to order a poor's rate or tax, and overseers of the poor, &c. to place forth apprentices, and sets forth the office of overseers, gives the like authority to the head officers in corporate towns, as justices of peace have in their counties; which said justices are not to intermeddle in corporations for the execution of this law. See *Poor, Justices of the Peace*.

Mayors, bailiffs, and other head officers of corporate towns, &c. are to make proclamation for rioters to disperse as follows: *Our sovereign lord the king charges and commands all persons assembled immediately to disperse themselves, and peaceably depart to their habitations, upon pain of imprisonment, &c.* And if the rioters, being twelve in number, do not disperse within an hour after, it is felony without benefit of clergy, &c. 1 Geo. 1. st. 2. c. 5. See *Riots*.

Matters relating to servants and apprentices may be determined by mayors, who have power to compel persons to go to service, &c. 5 Eliz. c. 4. See *Apprentices, Labourers, Servants*. Mayors may arrest soldiers departing without license; and they are to be present at musters; quarter and billet soldiers, &c. See *Soldiers*; 18 Hen. 6. c. 18; 1 Geo. 1. c. 47. &c. Persons using games on a Sunday forfeit three shillings and fourpence to the use of the poor; carriers, &c. travelling on that day twenty shillings; and persons doing any worldly labour thereon five shillings; all leviable by warrant from mayors and head officers of corporations, as well as other justices. See 1 Car. 1. c. 1; 3 Car. 1. c. 2; 29 Car. 2. c. 7; and tit. *Sundays*.

And mayors, &c. are to provide a mark for the sealing of weights and measures, being allowed one penny for sealing every bushel and hundred weight; and a halfpenny for every other measure and half-hundred weight, &c. Mayors and head officers of corporations, &c. shall view all weights and measures once a year, and punish offenders using false weights; and they may break or burn such weights and measures, and inflict penalties, &c. If they permit persons to sell by measures not sealed, they shall forfeit five pounds. Sealing weights not agreeable to the standard, is liable to the same penalty; and refusing to seal weights and measures subjects them to a forfeiture of forty shillings. See 31 Geo. 2. c. 17. § 9; and further tit. *Measure*.

For the various offences which mayors, justices, &c. have jurisdiction to punish, part of which are above enumerated, see the titles of the offences in this Dictionary, *passim*. See also tits. *Corporation, Justices of Peace, Officers, Oaths, Mandamus, Quo Warranto, &c.*

MEAL RENTS. Certain rents heretofore paid in meal by the tenants of the honour of Clun, to make meat for the lord's hounds; they are now payable in money.

MEALS. The shelves of land or banks on the sea coasts of Norfolk, are called the meals and the males. *Cornell*.

MEAN, or MESNE, medius.] The middle between two extremes; and that either in time or dignity. In time it is the interim betwixt one act and another, and is applied to mean profits of lands between a disseisin and recovery, &c. See *Ejectment*. As to dignity, there is a lord mean or mesne, that holds of another lord, and mean tenant, &c. All the land in the kingdom is, by a fiction arising from the feudal origin of the English tenures, supposed to be holden mediately or immediately of the king, who is styled the lord

paramount, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and thus partaking of a middle nature were called mesne, or middle lords. So that if the king granted a manor to A., and he granted a portion of the lands to B., now B. was said to hold of A., and A. of the king; or in other words, B. held his lands immediately of A. and mediately of the king. The king was therefore styled lord paramount. A. was both tenant and lord, or was a mesne lord, and B. was called tenant paravail, or the lowest tenant being he who was supposed to make avail or profit of the land. 1 Inst. 296; 2 Comm. c. 5. p. 39. See *Tenures*.

The writ of mesne was in the nature of a writ of right, and lay when, upon any subinfeudation, the mean or middle lord suffered his under-tenant, or tenant paravail, to be distrained upon by the lord paramount, (whether the king or another.) for the rent due to him from the mesne lord. *Booth*, 136. F. N. B. 135.

In such case the tenant should have judgment to be acquitted or indemnified by the mesne lord; and if he made default therein, or did not appear originally to the tenant's writ, he should be forejudged of his mesnality, and the tenant should hold immediately of the lord paramount himself. 2 Inst. 374.

FORM OF A WRIT OF MESNE.

WILLIAM the Fourth, &c. To the Sheriff of S. Command A. B. that justly, &c. he acquit C. D. of the service which E. F. exacts from him of his freehold that he holds of the said A. B. in W. whereof the said A. who is mesne betwixt the said E. and C. ought to acquit him; and whereupon he complains that for his default he is distrained; and unless, &c.

If a man brought a writ of mesne where he was not distrained, yet it was maintainable, but then he should not have damages; for it was brought only to be acquitted, &c. And tenant for life, where the remainder was over in fee, should have this writ against the mesne. 7 Hen. 4. c. 12; 15 Hen. 6. New Nat. Br. 330. One brought a writ of mesne against a man, because he did not acquit the plaintiff of a rent-charge demanded, &c. when he by his deed bound himself and his heirs to warrant and acquit him, and it was held good; and if a man had judgment to recover in this writ, if he were not afterwards acquitted, he might have had a *distringas ad acquitandum* against the mesne; and *seiri facias* against the lord. *Westm.* 2. 13 Edw. 1. c. 9; 14 Edw. 3.

The writ of mesne is among the real actions abolished by the 3 & 4 Will. 4. c. 27. See *Limitation of Actions*, II. 1.

MEAN PROCESS. See *Mesne Process*.

MEASE, messuagium.] A message or dwelling-house. *Kitchen*, 139; F. N. B. 2; *Stat. Hibernicæ*, 14 Hen. 3. 21 Hen. 8. c. 13. Also a measure of herrings, containing five hundred; the half of a thousand is called *mease* or *meur*. *Merch. Dict.*

MEASON-DUE, in Fr. Maison de Dieu, Domus Dei.] A house of God, a monastery, religious house, or hospital. The word is mentioned in 39 Eliz. c. 5. See *Hospital*.

MEASURE, mensura.] A certain quantity or proportion of any thing sold; and in many parts of England it is synonymous with a bushel.

The regulation of weights and measures, for the advantage of the public, ought to be universally the same throughout the kingdom, as they are the general criterions which reduce all things to the same or an equivalent value. But as weight and measure are things in their nature arbitrary and uncertain, it is expedient that they be reduced to some fixed rule or standard; which standard it is impossible to fix by any written law, or oral proclamation; for no man can by words

only give another an adequate idea of a foot rule or a pound weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which all weights and measures may be reduced to one uniform size; and the prerogative of fixing this standard our ancient law vested in the crown; as in Normandy it belonged to the duke. This standard was originally kept at Winchester; and we find in the laws of King Edgar, c. 8. near a century before the Conquest, an injunction that the one measure, which was kept at Winchester, should be observed throughout the realm. Most nations have regulated the standard of measures of length by comparison with the parts of the human body; as the palm, the hand, the span, the foot, the cubit, the ulna, (or arm ell,) the pace, and the fathom. But as these are of different dimensions in men of different proportions, our ancient historians inform us, that a new standard of longitudinal measure was ascertained by King Henry the First, who commanded that the ulna, or ancient ell, which answers to the modern yard, should be made of the exact length of his own arm. And one standard of measures of length being gained, all others are easily derived from thence; those of greater length by multiplying, those of less by subdividing, that original standard. Thus, by the statute called *compositio ulnarum et perticarum*, five yards and a half made a perch; and the yard was subdivided into three feet, and each foot into twelve inches; each inch being of the length of three grains of barley.

Superficial measures are derived by squaring those of length; and measures of capacity by cubing them. The standard of weights was originally taken from corns of wheat, whence the lowest denomination of weights we have is still called a grain; thirty-two of which were directed, by the statute called *compositio mensurarum*, to compose a pennyweight, whereof twenty make an ounce, twelve ounces a pound, and so upwards. And upon these principles the first standards were formed, which, being originally so fixed by the crown, their subsequent regulations have been generally made by the king in parliament. Thus, under King Richard I., in his parliament holden at Westminster, A. D. 1177, it was ordained that there should be only one weight and one measure throughout the kingdom, and that the custody of the assize or standard of weights and measures should be committed to certain persons in every city and borough, from whence the ancient office of the king's *aubager* seems to have been derived, whose duty it was, for a certain fee, to measure all cloths made for sale, till the office was abolished by the 11 & 12 Will. 3. c. 20.

In King John's time this ordinance of King Richard was frequently dispensed with for money, which occasioned a provision to be made for enforcing it in the great charters of King John and his son. 9 Hen. 3. c. 25. These original standards were called *pondus regis*, and *mensura domini regis*; and were directed by a variety of subsequent statutes to be kept in the Exchequer, and all weights and measures to be conformable thereto. But, as Sir Edward Coke observed, though this had so often by authority of parliament been enacted, yet it could never be effected; so forcible is custom with the multitude. 1 Comm. 274, &c.

Magna Carta, c. 25. ordains, "that there shall be but one measure throughout England, according to the standard in the Exchequer;" which standard was formerly kept in the king's palace, and in all cities, market towns, and villages, it was kept in the churches. 4 Inst. 273.

Selling by false measures, being an offence by the common law, may be punished by fine, &c. upon an indictment at common law, as well as by statute. The easier and more usual way of punishment is, by levying, on a summary conviction by distress and sale, the forfeiture imposed by the several acts of parliament adapted to particular frauds.

By the 5 Geo. 4. c. 74. entitled "An act for ascertaining and establishing uniformity of weights and measures," all

former statutes and ordinances on the subject were repealed, and the various standard weights and measures to be used throughout the united kingdom defined.

By § 1. it is enacted, that from and after the 1st of May, 1825, the straight line or distance between the centres of the two points in the gold studs in the straight brass rod, now in the custody of the clerk of the House of Commons, whereon the words and figures "standard yard, 1760," are engraved, shall be the original and genuine standard of that measure of length or lineal extension called a yard; and the same straight line or distance between the centres of the said two points in the said gold studs in the said brass rod, the brass being at the temperature of sixty-two degrees by Fahrenheit's thermometer, shall be denominated the "imperial standard yard," and shall be the unit or only standard measure of extension, wherefrom or whereby all other measures of extension whatsoever, whether the same be lineal, superficial, or solid, shall be derived, computed, and ascertained; and all measures of length shall be taken in parts or multiples, or certain proportions of the said standard yard; and one-third part of the said standard yard shall be a foot; and the twelfth part of such foot shall be an inch; and the pole or perch in length shall contain five such yards and a half, the furlong two hundred and twenty such yards, and the mile one thousand seven hundred and sixty such yards.

§ 2. That all superficial measures shall be computed and ascertained by the said standard yard, or by certain parts, multiples, or proportions thereof; and the rood of land shall contain one thousand two hundred and ten square yards, according to the said standard yard; and the acre of land shall contain four thousand eight hundred and forty such square yards, being one hundred and sixty square perches, poles, or rods.

§ 3. Provides for the restoration of the yard in case of its being lost or injured.

§ 4. From and after the first of May, 1828, the standard brass weight of one pound troy weight, made in the year 1758, now in the custody of the clerk of the House of Commons, shall be the original and genuine standard measure of weight, and that such brass weight shall be denominated the imperial standard troy pound, and shall be the unit or only standard measure of weight from which all other weights shall be derived, computed, and ascertained; and one-twelfth part of the said troy pound shall be an ounce; and one-twentieth part of such ounce shall be a pennyweight; and one-twenty-fourth part of such pennyweight shall be a grain; so that five thousand seven hundred and sixty such grains shall be a troy pound; and seven thousand such grains shall be and they are hereby declared to be a pound avoirdupois, and one-sixteenth part of the said pound avoirdupois shall be an ounce avoirdupois, and one-sixteenth part of such ounce shall be a dram.

§ 5. The pound, if lost, &c. may be restored in the manner therein mentioned.

§ 6. The standard measure of capacity, as well for liquids as for dry goods not measured by heaped measure, shall be the gallon, containing ten pounds avoirdupois weight of distilled water weighed in air at the temperature of sixty-two degrees of Fahrenheit's thermometer, the barometer being at thirty inches; and a measure shall be forthwith made of brass, of such contents as aforesaid, under the directions of the lord high treasurer, or the commissioners of his majesty's treasury of the united kingdom, or any three or more of them for the time being; and such brass measure shall be the imperial standard gallon, and shall be the unit and only standard measure of capacity, from which all other measures of capacity to be used, as well for wine, beer, ale, spirits, and all sorts of liquids, as for dry goods not measured by heap measure, shall be derived, computed, and ascertained; and all measures shall be taken in parts or multiples, or certain proportions of the said imperial standard gallon; and the

quart shall be the fourth part of such standard gallon, and the pint shall be one-eighth of such standard gallon, and two such gallons shall be a peck, and eight such gallons a bushel, and eight such bushels a quarter of corn or other dry goods, not measured by heaped measure.

§ 7. The standard measure of capacity for coals, culm, lime, fish, potatoes, or fruit, and all other goods and things commonly sold by heaped measure, shall be the aforesaid bushel, containing eighty pounds avoirdupois of water as aforesaid, the same being made round with a plain and even bottom, and being nineteen inches and a half from outside to outside of such standard measure as aforesaid.

§ 8. In making use of such bushel, all coals and other goods and things commonly sold by heaped measure, shall be duly heaped up in such bushel, in the form of a cone, such cone to be of the height of at least six inches, and the outside of the bushel to be the extremity of the base of such cone; and three bushels shall be a sack, and twelve such sacks shall be a chaldron.

§ 9. Contracts, bargains, sales, and dealings, made with respect to any coals, culm, lime, fish, potatoes, or fruit, and all other goods and things commonly sold by heaped measure, sold, delivered, done or agreed for, or to be sold, delivered, done, or agreed for by weight or measure, may be either according to the said standard of weight, or the said standard for heaped measure; but all contracts, &c. made or had for any other goods, wares, or merchandize, or other thing done or agreed for, or to be sold, delivered, done, or agreed for by weight or measure, shall be made and had according to the said standard of weight, or to the said gallon, or the parts, multiples, or proportions thereof; and in using the same the measures shall not be heaped, but shall be stricken with a round stick or roller, straight, and of the same diameter from end to end. But see 6 Geo. 4. c. 12. and 4 & 5 Will. 4. c. 49. § 4. *post*, by which latter act the heaped measure is abolished.

§ 10. Nothing herein contained shall authorize the selling in Ireland, by measure, of any articles, matters, or things which by any law in force in Ireland are required to be sold by weight only.

§ 11. Copies and models of each of the said standard yard, the said standard pound, the said standard gallon, and the said standard for heaped measure, and of such parts and multiples thereof respectively, as the lord high treasurer of the united kingdom of Great Britain and Ireland, or the said commissioners of his majesty's treasury, or any three of them for the time being, shall judge expedient, shall within three calendar months after the passing of the act be made and verified under the direction of the treasury, and be deposited in the office of the chamberlains of the exchequer at Westminster, and copies thereof, verified as aforesaid, shall be sent to the lord mayor of London and the chief magistrate of Edinburgh and Dublin, and of such other cities and places, and to such other places and persons in his majesty's dominions or elsewhere, as the lord high treasurer or commissioners of the treasury may from time to time direct. See 4 & 5 Will. 4. c. 49. *post*.

§ 12. His majesty's justices of the peace in every county, riding, or division in England or Ireland, or shire or stewartry in Scotland, and the magistrate in every city, town, or place (being a county within itself) in England or Ireland, and in every city or royal burgh in Scotland, shall, within six calendar months after the passing of the act, purchase for their respective counties, &c. a model and copy of each of the aforesaid standards of length, weight, measure, and of each of the parts and multiples thereof; which models and copies, when so purchased, shall be compared and verified with the models and copies deposited with the chamberlains of the exchequer as aforesaid, in such manner as aforesaid, and upon payment of such fees as are at present payable to the said chamberlains upon the comparison and verification of weights

and measures with the standards thereof; and such models and copies, when so compared and verified, shall be placed for custody and inspection with such person or persons, and in such place or places, as the said justices and magistrates, in their respective counties, &c. shall appoint, and the same shall be produced by the keeper or keepers thereof upon reasonable notice, at such time or times, and place or places, within each such county, &c. as any person or persons shall by writing under his or their hand or hands require; the person requiring such production paying the reasonable charges of the same.

§ 14. In all cases of dispute respecting the correctness of any measure of capacity, arising in a place where recourse cannot be conveniently had to any of the aforesaid verified copies or models of the standard measures of capacity, parts or multiples of the same, any justice of the peace may ascertain the content of such measure of capacity by direct reference to the weight of pure or rain water which such measure is capable of containing; ten pounds avoirdupois weight of such water, at the temperature of sixty-two degrees Fahrenheit's thermometer, being the standard gallon ascertained by the act, the same being in bulk equal to two hundred and seventy-seven cubic inches, and two hundred and seventy-four one thousandth parts of a cubic inch, and so in proportion for all parts or multiples of a gallon.

§ 15. From and after the first of May, 1825, all contracts, bargains, sales, and dealings, which shall be made or had with any part of the united kingdom of Great Britain and Ireland, for any work to be done, or for any goods, wares, merchandize, or other thing to be sold, delivered, done, or agreed for by weight or measure, where no special agreement shall be made to the contrary, shall be deemed to be made according to the standard weights and measures ascertained by the act, and in all cases where any special agreement shall be made with reference to any weight or measure established by custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures, shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be void. But see now 4 & 5 Will. 4. c. 49. *post*.

§ 16. Persons may buy and sell goods and merchandize by any weights or measures established either by local custom, or founded on special agreement: Provided that in order to the ratio or proportion which all such measures and weights shall bear to the standard weights and measures established by the act, shall be a matter of common notoriety, the ratio or proportion which all such customary measures and weights shall bear to the said standard weights and measures, shall be painted or marked upon all such customary weights and measures respectively; and nothing herein contained shall extend to permit any weight or measure to be made after the 1st May, 1825, except in conformity with the standard weights and measures established under the provisions of the act. But see 4 & 5 Will. 4. c. 49. *post*.

§ 17. For the purpose of ascertaining and fixing the payments to be made in consequence of all existing contracts or rents in England and Ireland, payable in grain or malt, or in any other commodity or thing, and in consequence of any toll or rate heretofore payable according to the weights and measures heretofore in use, enacts, that at the general quarter sessions of the peace to be holden in every county, riding, or division, and in every city, town, or place, (being a county of itself,) in England or Ireland, next after the expiration of six calendar months after the passing of the act, or at any general quarter sessions of the peace to be holden thereafter, an inquisition shall be taken before the justices assembled at such sessions, by the oaths of twelve substantial freeholders of the said respective counties, &c. having lands or tenements to the value of one hundred pounds per annum or upwards, to be summoned by the sheriff or proper officer of every such county, &c. to inquire into and ascertain the

amount, according to the standard of weight or measure by the act established, of all contracts or rents payable in grain or malt, or any other commodity or thing, or with reference to the measure or weight of any such grain, malt, or other commodity or thing, and the amount of any toll or rate heretofore payable according to any weights and measures heretofore in use within such counties, &c. respectively, and such inquisitions, when taken, shall be transmitted by the respective clerks of the peace of the said counties respectively, or by the mayor, bailiff, or other head officer of every such city, town, or place, being a county of itself, into his majesty's Courts of Exchequer at Westminster and Dublin respectively, and shall there be enrolled of record, and shall and may be given in evidence in any action or suit at law or in equity; and the amount so to be ascertained shall be the rule of payment in regard to all such contracts, rents, tolls, or rates, in all time coming.

§ 18. For the purpose of ascertaining and fixing the payments to be made of all stipends, feu duties, rents, tolls, customs, casualties, and other demands whatsoever, payable in grain, malt, or meal, or any other commodity or thing, in that part of the united kingdom called Scotland, or in any place or district of the same; it is enacted, that the sheriff depute or sheriff substitute in each shire, and the steward depute, or steward substitute in each stewartry, within Scotland, shall, as soon as conveniently may be after the expiration of six calendar months from the passing of the act, summon and impanel a jury of the same number, and with the same qualifications required in the jury who strike the fair prices of grain within the same shire or stewartry, which jury shall inquire into and ascertain the amount, according to the standards by the act established, of all such stipends, feu duties, rents, tolls, customs, casualties, and other demands whatsoever, payable in grain, malt, meal, or any other commodity or thing, according to the weights and measures heretofore in use within the same shires or stewartries; and such inquisitions, when taken, shall be transmitted by the respective sheriff clerks or steward clerks of such shires or stewartries, into his majesty's Court of Exchequer at Edinburgh, and there enrolled of record, and may be given in evidence in any action or suit at law or in equity; and the amount so to be ascertained shall, when converted into the standard weights and measures, be the rule of payment in regard to all such stipends, &c. And see 1 & 2 H. 4. c. 19. § 1. *post.*

§ 19. After such inquisitions shall have been made and enrolled in England, Ireland, and Scotland respectively, accurate tables shall be prepared and published under the authority of the said commissioners of his majesty's treasury, showing the proportions between the weights and measures heretofore in use, as mentioned in such inquisitions, and the weights and measures hereby established, with such other conversions of weights or measures as the said commissioners of his majesty's treasury may deem to be necessary; and after the publication of such tables, all future payments to be made shall be regulated according to such tables.

By § 20. Tables are to be constructed for the collection of the customs and excise, &c.

§ 21. The regulations and penalties contained in the 29 Geo. 2. c. 25; 1 Geo. 3. c. 17; 25 Geo. 3. c. 102, and 1 Geo. 4. c. 13, for the ascertaining, examining, seizing, breaking, and destroying of any weights, balances, or measures, shall be applied and put in execution in Great Britain for the ascertaining and examining, and for the seizing, &c. of any weights or measures not conformable to the standard weights and measures ascertained and authorized by the act.

§ 22. The regulations and penalties of the following Irish acts, viz. 4 Ann. (1.); 11 Geo. 2. (1.); 25 Geo. 2. (1.); 27 Geo. 3. (1.); 28 Geo. 3. (1.) shall be applied to the act.

By § 23. All former statutes, ordinances, or acts relating to weights or measures, are repealed.

§ 24. Act not to extend to repeal 31 Geo. 2. c. 17. which empowers the dean and high steward of Westminster, &c. to appoint a proper officer to size and seal weights and measures.

§ 25. Tuns, pipes, or other vessels of wine, oil, honey, and other gaugeable liquors imported into London shall be liable to be gauged as heretofore by the lord mayor or his deputies, but the contents shall be ascertained by the standard measure directed by the act.

§ 26. Act not to affect the privileges of the city of London, as to the office of gauger of wine, &c.

By the 6 Geo. 4. c. 74. the above act is not to take effect before the 1st Jan. 1826.

§ 2. After reciting that by such act the figure of the standard bushel measure for the sale of coals, culm, fish, potatoes, and fruit was fixed, and that it was expedient that the figure of all other measures used for the sale of coals, and all other goods and things commonly sold by heaped measure, should also be determined, enacts, that after the 1st Jan. 1826, all such measures shall be made cylindrical, and the diameter of such measures shall be at least double the depth thereof and the height of the cone or heap shall be equal to three-fourths of the depth of the said measure, the outside of the measure being the extremity or base of such cone.

By the 4 & 5 W. 4. c. 49. so much of the 5 G. 4. c. 74. and 6 G. 4. c. 12. as require that all weights and measure shall be models and copies in shape or form of the standards deposited in the Exchequer, and also so much of the said recited acts as allow the use of weights and measures not in conformity with the imperial standard weights and measures established by the said acts, or allow goods or merchandize to be bought or sold by any weights or measures established by local custom or founded on special agreement, are repealed.

§ 2. All weights and measures which have been verified and stamped at the Exchequer as copies of the standard weights and measures, corresponding in weight and capacity with those established by the said recited acts, shall be deemed and taken to be legal weights and measures, and may be legally used for comparison as copies of the imperial standard weights and measures, although not similar in shape to those required under the provisions of the said recited acts.

§ 3. Superintending officer of Exchequer may verify and stamp weights and measures of other form than those prescribed by the act 5 Geo. 4. c. 74.

§ 4. After reciting that the heaped measure is liable to considerable variation, and the use of weights made of soft materials affords facilities to fraud, enacts, that after the 1st January, 1835, so much of the said recited acts as relate to the heaped measure shall be repealed, and the use of the heaped measure abolished, and all bargains, sales, and contracts made by the heaped measure shall be void, and thereafter no weight made of lead or of pewter shall be stamped or used.

§ 5, 6, 7, 8, 9, 10, and 11, contain additional regulations for providing copies of the standards for counties, &c.

By § 12. After reciting that "by local customs in the markets, towns, and other places throughout the united kingdom, the denomination of the stone weight varies, being in the country generally deemed to contain fourteen pounds avoirdupois, and in London commonly eight of such pounds, or otherwise, as may be," it is enacted, that from and after the 1st January, 1835, the weight denominated a stone shall in all cases consist of fourteen standard pounds avoirdupois, and the weight denominated an hundred weight shall consist of eight such stones, and the weight denominated a ton shall consist of twenty such hundred weight; and all contracts made by any other stone, hundred weight, or ton, shall be void.

§ 13. From and after the 1st January, 1835, all articles sold by weight shall be sold by avoirdupois weight, excepting

gold, silver, platina, diamonds, or other precious stones, and drugs when sold by retail; and that such excepted articles, and none others, may be sold by troy weight.

§ 14. In England and Wales the magistrates at quarter sessions assembled, and in Scotland the justices of the peace at a meeting called by the sheriff, and in Ireland the grand jury of each county and county of a city or town, shall procure for the use of the inspectors good and sufficient stamps for the stamping or sealing all weights and measures used or to be used in such county, which stamp, so procured, shall be taken to be the stamp for such county, and none others shall be considered legal stamps; and all weights and measures used for buying and selling, or for the collecting of any tolls or duties, or for the making of any charges on the conveyance of any goods or merchandize, shall be examined and compared with one of the copies of the imperial standard weights and measures provided under the authority of the act for the purpose of comparison by such inspectors appointed as aforesaid, who shall stamp, in such manner as best to prevent fraud, such weights and measures when so examined and compared as aforesaid, if found to correspond with the said copy, the fees for which examination, comparison, and stamping shall be according to the scale contained in the schedule to the act annexed; and all persons who, after the 1st January, 1835, in England and Wales and in Scotland, or after the 1st July, 1835, in Ireland, shall make any weights or measures other than those authorized by the act, or shall sell, expose to sale, or use any weights or measures which have not been so stamped as aforesaid, or which shall be found light or otherwise unjust, shall on conviction forfeit not exceeding five pounds; and any contract, bargain, or sale made by any such weights or measures shall be wholly void, and all such light or unjust weights and measures so used shall be seized, forfeited, and condemned.

§ 15. In Scotland, after the 1st Jan. 1835, the fair prices of all grain in every county shall be struck by the imperial quarter, and all other returns of the prices of grain shall be set forth by the same, without any reference to any other measure whatsoever; and any sheriff clerk, clerk of a market, or other person, who shall offend against this provision shall forfeit not exceeding five pounds or less than twenty shillings.

§ 16. Inspectors to enter into recognizances for the discharge of their duties.

§ 17. Any two or more magistrates of any county, or of any city or town being a county within itself, or for any sheriff or magistrates of any burgh or town corporate in Scotland, within their respective districts, may enter any shop, store, warehouse, stall, yard, or place whatsoever, wherein goods shall be exposed or kept for sale, or shall be weighed for conveyance or carriage, and examine all weights and measures, beams and scales, or other weighing machines, and compare and try the same with the copies of the imperial standard weights and measures required to be provided under the act, and cause the same to be detained until they shall have been examined by the nearest inspector; and if upon such examination the said weights, &c. are light or otherwise unjust, the same shall be forfeited and destroyed, and the person or persons in whose possession the same were found shall be liable in a penalty not exceeding five pounds: Provided that any person who shall neglect or refuse to produce for the inspection of such magistrates, when thereto required, all weights, &c. in his possession, or shall otherwise obstruct or hinder such magistrates, shall be liable to a like penalty, and also that no such pecuniary penalty shall be incurred if he, she, or they shall prove to the satisfaction of such magistrates that such weights, &c. found in his possession, have not been in use since the passing of the act.

§ 18. If any person or persons shall make, forge, or counterfeit, or cause or procure to be made, &c. or knowingly act or assist in the making, &c. any stamp or mark now used or

which may hereafter from time to time be used for the stamping or marking of any weights or measures, to denote that any such weight or measure has been compared, adjusted, and approved to be of the due weight or measure required by law, he shall for every such offence forfeit not exceeding fifty pounds or less than ten pounds; and if any person shall knowingly sell, utter, dispose of, or expose to sale any weight or measure with such forged or counterfeited stamp or mark thereon, every person so offending shall for every such offence forfeit not exceeding ten pounds or less than forty shillings, to be recovered in a summary way as after provided; and all weights and measures with such forged or counterfeited marks shall be seized, forfeited, and condemned.

§ 19. All copies of the imperial standard weights and measures which may have been worn by time, and mended in consequence of any wear or accident, shall forthwith be sent to the Exchequer for the purpose of being again compared and verified, and shall be stamped as mended copies of the imperial standard weights and measures.

§ 20. Officer at Exchequer to keep a register of copies verified.

§ 22. Gives a form of conviction for offences under the act.

§ 23. Any person convicted of any penalty under this act in England and Wales or in Ireland may appeal to the next general quarter sessions of the peace for the county, or city or town being a county within itself, against such conviction, on giving security in double the amount of such penalty within forty-eight hours after the conviction shall have been made; and the decision thereupon made shall be final.

By § 25 an appeal is given in Scotland to commissioners of judiciary at circuit court.

By § 26, 4 Ann. (Irish act) and 5 Geo. 4. c. 110, relating to Ireland, repealed, except so far as relates to duties, &c. of weigh-masters.

§ 27. Nothing in the act contained shall interfere with the powers of the ward inquests in respect to weights and measures within the city of London and liberties thereof and the borough of Southwark, nor to prohibit, defeat, injure, or lessen the right of the mayor and commonalty and citizens of the city of London, or of the lord mayor of the said city for the time being, with respect to the stamping or sealing weights and measures, or concerning the office of gauger of wines, the honey, and other gaugeable liquors imported and landed within the city of London and liberties thereof.

§ 28. Nothing in the act contained shall extend to prohibit, defeat, injure, or lessen the rights granted by charter to the master, wardens, and commonalty of the mystery of founders of the city of London.

§ 29. In all actions brought against any magistrate for anything he shall do under this act, such magistrate may plead the general issue, and to give the special matter in evidence, and if a verdict shall be given for the defendant therein he shall have double costs.

MEASURER or METER of woollen cloth, and of coals &c. An officer in the city of London: the latter of general account. *Chart. Jac. 1. See Alnage, Coals.*

MEASURING-MONEY. The letters patent, whereby some persons exacted for every cloth made certain money besides alnage, called measuring-money, revoked. *Rot. Pat. 11 Hen. 4.*

MEDERIA. A mead house, or place where mead or metheglin is made. *Cartular. Abb. Glouc. MS. 29.*

MEDFEE. A bribe or reward: and used for a composition where things exchanged are not of equal value. It is said to come from the word *meed*, merit. *Cowell.*

MEDIÆ ET INFIMÆ MANUS HOMINES. Men of a mean and base condition, of the lower sort. *Blount.*

MEDIANUS. Middle size; *medianus homo*, a man of middle fortune.

MEDIATORS OF QUESTIONS. Were six persons authorized by statute, who, upon any question arising among

merchants, relating to unmerchable wares, or undue packing, &c. might before the mayor and officers of the staple upon their oath certify and settle the same; to whose order and determination therein, the parties concerned were to give entire credence, and submit. *Stat. Antiq. 27 Edw. 3. st. 2. c. 2.*

MEDICINES. Various statutes have been passed from time to time subjecting what are generally called patent medicines and other preparations and compositions to certain duties, and requiring a license to be taken out for vending the same. The acts are the 25 Geo. 3. c. 79; 42 Geo. 3. c. 56; 43 Geo. 3. c. 73; 44 Geo. 3. c. 98; and the 52 Geo. 3. c. 150. The articles subjected to such duties are enumerated in the schedule appended to the last-mentioned statute.

MEDIETAS LINGUE. A jury *de medietate lingue*, signifies a jury or inquest impannelled, whereof the one half consists of natives, and the other of foreigners. This manner of trial was first given by the 28 Edw. 3. c. 13; before which it was obtained by the king's grant. *Staundf. P. C. lib. 3. c. 7.*

It was formerly used in pleas wherein the one party was a foreigner, the other a denizen. We read that Solomon de Stafford, a Jew, had a cause tried before the sheriff of Norwich, by a jury which were *sex probes et legales homines, et sex legales Judæos de civitate Norwiche.* *Parsch. Edw. 1.*

In petit treason (now abolished), murder and felony, *medietas lingue* is allowed; but for high treason, an alien shall be tried by the common law, and not *per medietatem lingue*, *H. P. C. 261.* And a grand jury ought not to be *de medietate lingue* in any case. *Wood's Inst. 203.* It was thought necessary to exclude Egyptians expressly by statute from the benefit of this trial. See 22 Hen. 8. c. 10; 1 & 2 P. & M. c. 4 (repealed); and tit. *Egyptians.*

The 8 Geo. 4. c. 50. by which all former acts relating to juries were repealed, and the law consolidated, provides (§ 47), for the trial of aliens by a jury *de medietate lingue*, in cases of felonies or misdemeanors; but it contains no re-enactment of the old statutes, which allowed such a jury in civil cases between an alien and a British subject.

He that will have the advantage of trial *per medietatem lingue* must pray it; for it is said he cannot have the benefit of it by way of challenge. *S. P. C. 158; 3 Inst. 127.*

A jury *de medietate* is also allowed in some other cases, by analogy to this rule *de medietate lingue*. As on a *procuratoris*, the jury must be of six clergymen and six laymen. See that title. So on a criminal trial in the university courts, the jury must be half freeholders of the county, and half matriculated laymen of the university. See 4 Comm. 278. See further, *Jury*, II. So also under the (repealed) statute of the 8 Hen. 6. c. 12. against embezzling records, the jury were to consist of six persons officers of any of the superior courts, and six common jurors. See *Records.*

MEDIO ACQUILITANDO. A judicial writ to restrain a lord for the acquitting of a man, lord from a rent, which he formerly acknowledged in court not to belong to him. *Reg. Jan. 129.* See *Mort.*

MEDITATIO FUGÆ. In Scotland, where arrest for debt does not take place as in England, where there is real ground to apprehend that a debtor means to withdraw himself, the creditor appears before a judge, and swears that he believes his debtor to be in *meditatione fugæ*; on which a warrant for imprisoning the debtor is granted, which is taken off on his finding caution or bail, *judicio sisti.* In practice this is equivalent to the arrest and bail in the English law.

MEDITERRANEAN. Passing through the midst of the earth; applied to the sea which stretcheth itself from West to East, dividing Europe, Asia, and Africa, which is hence called the Mediterranean Sea. The counterfeiting of Mediterranean passes for ships to the coast of Barbary, &c. or the seal of the admiralty office to such passes, is a capital

felony (now punishable with transportation for life, &c.) 4 Geo. 2. c. 18. See *Navigation Acts.*

MEDLEFE, MEDLETA, MEDLETUM, Fr. *Mesler*, to meddle.] A sudden scolding at and beating one another. *Bract. l. 3. c. 35.*

MEDSYPP. A harvest supper or entertainment given to labourers at harvest home. *Plac. 9 Edw. 1. Cov.*

MEDWAY RIVER, called *Vaga* by the Britons; the Saxons added *Med.*] Pilots thereon, how to be licensed, 5 Geo. 2. c. 20. See also 3 Geo. 1. c. 13; and 7 Geo. 1. c. 21.

MEER, merus.] Though an adjective, is used as a substantive to signify Meer right. *Old Nat. Brev. 2.* In these words, "this writ hath but two issues, viz. joining mise upon the meere, and that is to put himself in the great assise of our sovereign lord the king, or to join battle." *Cowell.* See *Misc.*

MEIGNE. See *Maisnada.*

MEINY, French *Mesnie.*] As the king's meiny, the king's family or household servants. See 1 Rich. 2. c. 1.

MELDFEOH, from Saxon *meld*, *indictum delaturæ*; and *feoh*, *premiun pecuniæ.* *Specim.*] Was the recompense due and given to him who made discovery of any breach of penal laws committed by another person, called the promoter's or informer's fee. *Leg. Incæ, c. 20.*

MELIUS INQUIRENDUM, A writ that lieth for a second inquiry, where partial denling is suspected; and particularly of what lands or tenements a man died seised on finding an office for the king. *F. N. B. 255.* It has been held, that where an office is found against the king, and a *melius inquirendum* is awarded, and upon that *melius*, &c. it is found for the king; if the writ be void for repugnancy, or otherwise, a new *melius inquirendum* shall be had; but if upon the first *melius* it had been found against the king, in such case he could not have a new *melius*, &c., for then there would be no end of these writs: and if an office be found for the king, the party grieved may traverse it; and if the traverse be found against him, there is an end of that cause; and if for him, it is conclusive. 8 Rep. 169; 2 Nels. 1008. If there is any defect in the points which are found in an inquiry, there may not be a *melius inquirendum*; but if the inquiry finds some parts well, and nothing is found as to others, that may be supplied by *melius inquirendum.* 2 Salk. 469. A *melius inquirendum* shall be awarded out of B. R., where a coroner is guilty of corrupt practices, directed to special commissioners. 1 Vent. 181. See 15 Vin. Abr. tit. *Melius Inquirendum*; and ante, tit. *Inquest.*

MEMBERS OF PARLIAMENT. The members of the House of Commons are usually so styled, though in fact the peers are, strictly speaking, members of parliament, which consists of lords, and commons. See *Parliament.*

MEMORIES. Some kind of remembrances or obsequies for the dead, mentioned in injunctions to the clergy, anno 1 Edw. 6.

MEMORY, TIME OF. Ascertained by the law to commence from the reign of Richard the First; and until recently any custom might have been destroyed by evidence of its non-existence in any part of the long period from his days to the present. 2 Com. 31, and note.

The law with respect to the commencement of prescriptions and customs has been materially altered by the 2 & 3 Wm. 4. c. 71. for which see *Prescription.*

MENACES. By menaces or force demanding any chattel, money, or valuable security, with intent to steal the same, is felony by the 7 & 8 Geo. 4. c. 29. § 6. and the offender transportable for life, &c.; by § 8. sending or delivering any letter demanding, with menaces, any chattel, &c., or accusing, or threatening to accuse of any crime, is also felony, and punishable in like manner. See further *Threats.*

MENAGIUM. A family. *Trivet's Chronicle, 677; Wal-singham, 66.*

MENDLEFE. Mentioned in *Crompt. Justice of Peace*, 193, is that which *Bracton* calleth *medietum*; quarrels, scuffling, or brawling. *Cowell.* See *Medlefe*.

MENIALS, from *menae*, the walls of a castle, house, or other place.] Household servants who live under their lord or master's roof; mentioned in the ancient stat. 2 *Hen.* 4. c. 21.

MENSA. Comprehends all patrimony, or goods and necessities for livelihood.

MENSALIA. Such parsonages or spiritual livings as were united to the tables of religious houses, and called *mensal benefices* among the Canonists; and in this sense it is taken where mention is made of appropriations *ad mensam suam.* *Blount.*

MENSURA REGALIS. Was the king's standard measure, kept in the Exchequer, according to which all others were to be made. See 16 *Car.* 1. c. 19 (repealed). The standard measure is now in the custody of the clerk of the House of Commons. See *Measure*.

MER or **ERE.** Words which begin or end with those syllables, signify fenny places. *Cowell.* See *Mara* or *Mere*, a lake or great pond.

MERA NOCTIS. Midnight. *Cowell.*

MERCENARIUS. A hireling or servant. *Cartular Abbat. Glaston.* 115.

MERCENLAGE. See *Merchenlage*.

MERCHANT, Mercator.] One who buys and trades in any thing; and as merchandize includes all goods and wares exposed to sale in fairs or markets, so the word merchant formerly extended to all sorts of traders, buyers, and sellers. But every one who buys and sells is not at this day under the denomination of a merchant, only those who traffic in the way of commerce, by importation or exportation, or carry on business by way of emption, vendition, barter, permutation, or exchange, and who make it their living to buy and sell, by a continued assiduity, or frequent negotiation, in the mystery of merchandizing, are esteemed merchants. Those who buy goods, to reduce them by their own art or industry into other forms, and then to sell them, are artificers, not merchants. Bankers and such as deal by exchange, are properly called merchants. *Lex Mercat.* 23.

Merchants were always particularly regarded by the common law; though the municipal laws of England, or indeed of any one realm, are not sufficient for the ordering and determining the affairs of traffic and matters relating to commerce; merchandize being so universal and extensive, that it is impossible; therefore of the law merchant (so called from its universal concern) all nations take special knowledge; and the common and statute laws of this kingdom leave the causes of merchants in many cases to their own peculiar law. *Lex Mercat.* See 1 *Comm.* 75; see *Bill of Exchange, Custom of Merchants, Insurance.*

The custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice; and if any doubt arise about the custom, they may send for merchants to know the custom. *Per Hobart, C. J.; Winch.* 24.

The *lex mercatoria* is allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions; for it is a maxim of law, that "*cuiuslibet in sua arte credendum est.*" See 1 *Comm.* 75.

For various instances in which the custom of merchants has been proved at Nisi Prius, see *Willes*, 559; *Dougl.* 653; 10 *B. & C.* 4.

The law of England, as a commercial country, pays a very particular regard to foreign merchants in innumerable instances. By *Magna Carta*, c. 80, it is provided, that all merchants (unless publicly prohibited beforehand) shall have safe conduct to depart from, to come into, to tarry in, and to go through, England, for the exercise of merchandize, without any unreasonable imposts, except in time of war; and if a war breaks out between us and their country, they

shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and if ours be secure in that land, they shall be secure in ours. This seems to have been a common rule of equity among all the northern nations; but it is somewhat extraordinary, that it should have found a place in *Magna Carta* a mere inter-treaty between the king and his natural born subjects, which occasions the learned *Montesquieu* to remark, with a degree of admiration, "that the English have made the protection of foreign merchants one of the articles of the national liberty." But indeed it well justifies another observation which he has made, that the English know better than any other people upon earth, how to value at the same time these three great advantages, *religion, liberty, and commerce.* 1 *Comm.* 260. See also 2 *Edm.* 3. c. 9; 25 *Edw.* 3. st. 4. c. 2; 27 *Edw.* 3. st. 2. c. 13, 17, 19, 20; 28 *Edw.* 3. c. 13; 36 *Edw.* 3. c. 7; 2 *Rich.* 2. c. 1; 11 *Rich.* 2. c. 7; 14 *Rich.* 2. c. 9; 5 *Hen.* 4. c. 9; 7 *Hen.* 4. c. 9; in all which provisions were contained for the accommodation of merchants strangers, which by long use became the known law of the land, allowing for the variations inevitably introduced by time and commerce. Many of these regulations, however, are now repealed by the 3 *Geo.* 4. c. 41, and other acts.

In the reign of King Edward IV. a merchant stranger made suit before the king's privy council for several bales of silk feloniously taken from him, wherein it was moved that this matter should be determined at common law; but was answered by the Lord Chancellor, that as this suit was brought by a merchant, he was not bound to sue according to the law of the land. 13 *Edw.* 4. In former times it was conceived that those laws that were prohibitory against foreign goods, did not bind a merchant stranger; but it has been a long time since ruled otherwise; for in the leagues that are now established between nation and nation, the laws of all kingdoms are excepted; so that as the English in France or any other foreign country in amity, are subject to the laws of that country where they reside, so must the people of France, or any other kingdom, be subject to the laws of England, when resident here. 19 *Hen.* 7.

English merchants are not restrained to depart the kingdom without license, as all other subjects are; they may depart and live out of the realm, and the king's obedience and the same is no contempt, they being excepted out of the statute 5 *Rich.* 2. st. 2. And by the common law they might pass the seas without license, though not to merchandize. *Dyer*, 206.

If a difference arise between the king and any foreign state, alien merchants are to have forty days' notice or longer time, to sell their effects and leave the kingdom. 27 *Edw.* 3. st. 2. c. 17.

If a person who is otherwise no merchant, being beyond sea, takes up money, and draws a bill upon a merchant, he cannot, in an action brought upon this bill against him as the drawer thereof, plead that he was no merchant; for the very taking up the money and drawing the bill, makes him a merchant to this purpose. *Comb.* 152. See *Bill of Exchange*.

Merchant includes all sorts of traders as well and as properly as merchant adventurers. *Dyer*, 279 b, cites *Spelman Guilda.* A merchant tailor is a common term. *Per Hobart, C. J.*, 2 *Salk.* 445.

There are companies of merchants in London for carrying on considerable joint trades to foreign parts, viz. the Merchant Adventurers (see *Hamburgh Company*); the company established in England for the improvement of commerce, which was erected by patent by King Edward I. merely for the exportation of wool, &c. before we knew the value of that commodity, and at a time when we were in a great measure strangers to trade. The next company was that of the Barbary Merchants, incorporated in the reign of King Henry

VII. A company of merchants trading to the North, called the Muscovy or Russia Company, was established by King Edward VI., and encouraged, with additional privileges, by Queen Mary, Queen Elizabeth, &c. See *Russia Company*. The Barbary Merchants decaying towards the latter end of Queen Elizabeth's reign, out of their ruins arose the Levant or Turkey Company, who, first trading with Venice and then with Turkey, furnished England that way with the East India commodities; this company had very considerable factories at Constantinople, Smyrna, Aleppo, &c. See *Turkey Company*. From the flourishing state of the Levant or Turkey Company, in the reign likewise of Queen Elizabeth, sprung the old East India Company, who having fitted out ships of force, brought from thence, at the best hand, the Indian commodities formerly sold to England by distant Europeans; and they, having obtained many charters and grants from the crown in their favour, were sole masters of that advantageous traffic; until at last a new company was incorporated by King William, anno 9 Hm. 3. on their lending government two millions of money, and both these companies, after the expiration of a certain term, were by articles united. For the recent act, suspending the trading of this important company, see *East India Company*.

In the 21st year of Queen Elizabeth, the Eastland Company of Merchants was erected, and in King Charles the Second's time, that company was confirmed, with full power to trade in Norway, Sweden, Poland, and other Eastland countries. See *Eastland Company*. The Royal African Company had their charter granted to them in the 14th year of King Charles II. And by 9 & 10 Hm. 3. c. 26. they were to maintain all forts, &c.; but by the 1 & 2 Geo. 4. c. 28. the company was abolished, and their forts and possessions vested in the crown. See *African Company*. King Charles II. also, by commission under the great seal of England, constituted his royal highness James Duke of York (afterwards King James II.) Edward Earl of Clarendon, and others, to be a council for the royal fishery of England, and declared himself to be the protector of it; and in the 29th year of his reign he incorporated them into a company. King William III. in the fourth year of his reign, established a Greenland Company. See that title.

By 9 Ann. c. 21. to pay the debts of the army, navy, &c. amounting to near ten millions, the South Sea Company of Merchants was erected, who having advanced that money, the duties upon wines, vinegar, tobacco, &c. were appropriated as a fund for payment of the interest, after the rate of 4l. per cent., &c. The company was granted the sole trade to the South Seas; but by the 47 Geo. 3. st. 1. c. 23. and the 55 Geo. 3. c. 57. § 141. so much of the above act as gave it the exclusive privilege of trading within the limits of its charter was repealed.

This company had their capital stock very much enlarged in the reign of King George I.; and to raise money lent, were empowered to make calls or take in subscriptions, &c. as they thought fit; and on this foundation the South Sea scheme was executed in 1720; but to retrieve credit afterwards, part of the stock of the South Sea Company was ingrafted into the capital stock of the East India Company and the Bank of England; and after that, half the stock was converted into annuities at 4l. per cent., since which, a farther reduction thereof has been made. See *National Debt*, *South Sea Company*.

The West India Dock Company established under the 39 Geo. 3. c. lxxix), and the London Dock Company (under 39 & 40 Geo. 3. c. xlvii), are among the most extensive of the modern associations of this nature.

The short history of some of our companies of merchants, which have ever had many and great privileges, and are at length become of double use to enlarge commerce and supply the necessities of the state, in some measure shows the progress and increase of our trade, and the wealth of the nation, though it must nevertheless be observed that they are a

kind of monopolies erected by law, which, if they become prejudicial, are generally restrained by parliament, as has been the case with many of the companies already specified; and if the power granted them is abused, it becomes of fatal consequence; for which we need only instance the ever memorable year 1720, when the sub-governor and directors of the South Sea Company incurred a forfeiture of their estates by statute, and were disabled to hold any offices, &c. for their vile conduct, which tended to the ruin of the public. Over and above these companies, there are the Dutch Merchants; those who trade to the West Indies; the Canary Merchants; Italian Merchants, who trade to Leghorn, Venice, Sicily, &c.; the French and Spanish Merchants, &c. For the regulations relating to the importation and exportation of commodities by merchants, see *Navigation Acts*.

By the 7 & 8 Geo. 4. c. 29. § 49. merchants, bankers, and other agents, converting to their use money or securities entrusted to them, are guilty of a misdemeanor, and may be transported for fourteen years, &c. See further, *Agent*, *Attorney*, *Banker*, *Broker*, *Factor*.

MERCHENLAGE, *Merciorum Lex*. The law of the ancient kingdom of Mercia. Camden, in his *Britannia*, says, that in the year 1016, this kingdom was divided into three parts, whereof the West Saxons had one, governing it by the laws called West Saxon-lage, which contained Kent, Sussex, Surrey, Berks, Hampshire, Wilts, Somerset, Dorset, and Devon. The Danes had the second, containing York, Derby, Nottingham, Leicester, Lincoln, Northampton, Bedford, Bucks, Hertford, Essex, Middlesex, Norfolk, Suffolk, Cambridge, and Huntingdon, which was governed by the laws called Dane-lage. And the third part was in the possession of the Mercians, whose law was called Merchenlage; and contained Gloucester, Worcester, Hereford, Warwick, Oxford, Chester, Salop, and Stafford; from which three, King William I. chose the best, and with other laws ordained them to be the laws of the kingdom. *Cambd. Brit. 94.* See *Molmutian Laws*.

MERCHET, *merchetum, mercheta, mulierum*.] A fine or composition paid by inferior tenants to the lord, for liberty to dispose of their daughters in marriage. No baron or military tenant could marry his sole daughter and heir, without such leave purchased from the king, *pro meretanda fide*. And many of our servile tenants could neither send their sons to school, nor give their daughters in marriage, without express licence from the superior lord. See *Kennet's Glossary in Marriage* and see *Marchet*, *Borough English*.

MERCIA. Used in the *Monasticon* for amerciamment.

MERCIMONIATUS ANGLIÆ. Was of old time used for the impost of England upon merchandize.

MERCURIES, or vendors of printed books or papers.

MERGER, is where a greater estate and a less coincide and meet in one and the same persons, without any intermediate estate, in which case the less is immediately annihilated, or, in the law phrase, is said to be merged, that is, sunk or drowned in the greater; as, if the fee comes to tenant for years or life, the particular estates are merged in the fee. 2 Rep. 60, 61; 3 Lev. 437.

The two estates must be held in the same right, otherwise there will be no merger.

Thus if a lessor who hath the fee, marries with the lessee for years, this is no merger, because he hath the inheritance in his own, and the lease in right of his wife. 2 Plowd. 418. And where a man hath a term in his own right, and the inheritance descends to his wife, as he hath a freehold in her right, the term is not merged or drowned. Cro. Car. 275. So if tenant for years dies and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in right of the testator, and subject to his debts and legacies. See Plowd. 418; Cro. Jac. 275; Co. Lit. 338.

In these cases the accession of the one estate to the other

is the act of the law; but where the two estates meet in the same party by his own act, merger will take place, even although they are held in different rights.

Therefore where a husband, possessed of a term in right of his wife, purchases the reversion or remainder (*Moor*, 171,) or where an executor having a term in right of his testator, buys the reversion (see 4 *Leon*, 38), there will be a merger.

An estate-tail is an exception to the rule, for a man may have in his own right both an estate-tail and a reversion in fee; and the estate-tail, though a less estate, shall not merge in the fee. 2 *Rep*. 61; 8 *Rep*. 74. For estates-tail are protected and preserved from merger by the operation and construction, though not by the express words of the statute *de donis*; which operation and construction have probably arisen upon this consideration, that in the common cases of merger of estates for life or years, by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate. *Cro. Eliz*. 302. But in an estate-tail the case is otherwise: the tenant for a long time had no power to bar or destroy it, and now can only do so by a certain special mode. It would therefore have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue; and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee. 2 *Comm*. c. 11. p. 178.

When, however, an estate-tail was barred by means of a fine, the base fee thereby created would, previous to the 3 & 4 *Wm*. 4. c. 74. have merged in the reversion, so as to let in the incumbrances charged upon the latter; but by that statute (§ 39) base fees, when united with the immediate reversions, are to be enlarged instead of merged. See further, *Tail*.

There is also another exception to the doctrine of merger, arising out of the saving in the Statute of Uses (27 *Hen*. 8. c. 10.) of the rights of feoffees of uses where they are seised of lands to their own proper use. See 3 *Pres. on Conv*. 368.

The doctrine of merger is not confined to estates of freehold, or to an estate of freehold and one of leasehold; for where two terms for years meet in the same individual, the same right there will be a merger of the older in the more recent term, although the former may be a term for a thousand years, and the latter for a single year.

To effect a merger, there must be no intervening estate; for if there be such an estate, whether for life or years, vested in another party, merger will not take place.

An *interesse termini* is not such an interest as will prevent a merger (4 *Mod*. 1,) for it gives no actual vested estate, as it is not a term, but merely a contract for a term.

When the legal and equitable estate meet in the same person or persons, the trust or equitable estate is merged in the legal estate; as if a wife should have the legal estate, and a husband the equitable, and they have an only child to whom these estates descend, who dies intestate without issue, the two estates having united, the descent will follow the legal estate, and the estate will go to the heir on the part of the mother. *Dougl*. 771.

One of the means adopted by the common law for promoting the simplicity of the different interests existing at the same time in an estate, was the rule of merger, which provides that when an estate in remainder or reversion, and the preceding estate upon which it depends, become vested in the same person, the two interests shall unite without any reference to the wishes of the owner of them. The mode of union is of a singular description, and frequently occasions great injustice. The person entitled to the two estates does

not acquire an interest equal to their aggregate extent, but the preceding estate is supposed to have been surrendered by law, and to be merged or drowned in the remainder or reversion, and consequently all powers and privileges belonging to it are lost. The remainder becomes the estate in possession, in the same manner as if the time of the expiration of the preceding estate had arrived, and the rights of strangers who may have charges upon the remainder or reversion are accelerated and rendered more valuable. Terms of one thousand or more years are frequently created as mere securities, mortgages, or for raising charges upon the estate, and the person entitled to the remainder or reversion remains in possession, and every variety of interest is carved out of the remainder or reversion. The first interest in remainder or reversion is therefore frequently of shorter duration than the term to which it is subject, and yet the larger term will merge in the lesser interest. If a person be entitled for the residue of a term of one thousand years (which not unfrequently happens by the foreclosure of a mortgage), and the first interest in the remainder or reversion, subject to the term, is an estate for life or a term of one year, or even a shorter term, and such life estate or short term become vested in the owner of the longer term, the long term being the preceding estate, is merged, and the owner of it is entitled only to the estate for life or short term. If a tenant for life with valuable powers appendant, acquires the next estate in remainder or reversion, although it might determine before his death, his life estate, and all powers belonging to it, are extinguished. If the owner of a building lease, subject to several under-leases at improved rents, purchases the freehold or the first estate in remainder or reversion, subject to the building lease, or if the owner of such estate in remainder or reversion, acquires the building lease, the building lease is merged, and all the remedies for the improved rents, and the benefit of the covenants in the under-leases, which were carved out of and are dependant upon the estate created by the building lease, are entirely lost.

The rule of extinguishment differs only from that of merger in being applicable to a charge or right instead of a preceding estate, and it is in many cases equally unjust; for instance: if the owner of a rent purchase a small part of the land upon which it is charged, the whole rent is extinguished notwithstanding its value may greatly exceed that of the land included in the purchase. See *Rent*.

The same rules are followed in several cases in equity. If an estate be mortgaged, and the purchaser take his conveyance from both the mortgagee and the person entitled to the equity of redemption, the mortgage is extinguished in the equity of redemption; and if there be a second mortgage of which the purchaser or his agent have notice (and it is difficult to ascertain what slight circumstances may be considered to amount to notice) the purchaser notwithstanding he may have paid the value of the estate to the first mortgagee, may be obliged to give up the estate to the second mortgagee, because the mortgage which he paid off has been extinguished.

The inconveniences occasioned by the principles of merger and extinguishment, are usually prevented upon a parcel by the machinery of a conveyance to a trustee of the estate or charge which would otherwise be destroyed, for the purpose of preserving its existence; but when this precaution is neglected, or the second estate or right is acquired otherwise than by purchase, the law occasions a manifest injustice. There are several exceptions to the rules of merger and extinguishment, and few branches of the law abound with more intricate or technical distinctions. *Tyrrel's Suggestions*, &c.

MERSUM. A lake; from the Saxon *mere*, *lacus*. "Ma-
neria, molendina, mersca, et merisca." *Inglulph*. p. 861.

MERS-WARE, Saxon, *locus paludum*.] The inhabitants of Romney Marsh, in Kent, were anciently so called.
Conell.

MERTLAGE. Seems to be a corruption of or a law French word for martyrlogy. See *Hil. 9 Hen. 7. 14 b.* where it seems to mean a church calendar or rubric. *Cowell.*

MERTON. Statutes made there, *20 Hen. 3.*

MESNALTY, medietas. The right of the mesne, as "the mesnalty is extinct." *Old Nat. Brev. 44.*

MESNE, medius. He who is lord of a manor, and so hath tenants holding of him, yet himself holds of a superior lord. *Cowell.* See *Mean.*

MESNE PROCESS. Such process as issues pending the suit upon some collateral interlocutory matter, as to summon juries, witnesses, and the like, distinguished from original process, which is founded on the writ. *Finch J. 316.*—Mesne process is, however, more commonly put in contradistinction to final process or process of execution; and then it signifies all such process as intervenes between the beginning and end of a suit. *3 Comm. c. 19. p. 279.*

MESNE PROFITS, Action of. See *Ejectment, I.*

MESSARIUS, from messis. The chief servant in husbandry or harvest-time, now called a bailiff in some places. *Mon. Angl. tom. 2. p. 832.* This word is also used for a mower or reaper; one that works harvest-work. *Fleta, lib. 2. c. 75.*

MESSINGER. Is a carrier of messages, particularly employed by the secretaries of state, &c. and to these commitments may be made of state prisoners, for though regularly no one can justify the detaining a person in custody out of the common gaol, unless there be some particular reason for it; as if the party be so dangerously sick that it would hazard his life to send him thither, &c. yet it is the constant practice to make commitments to messengers; but it is said it shall be intended only in order to carrying the offenders to gaol. *1 Salk. 317; 2 Hawk. P. C. c. 16. § 9.* An offender may be committed to a messenger, in order to be examined before he is committed to prison; and though such commitment to a messenger is irregular, it is not void; and a person charged with treason, escaping from the messenger, is guilty of treason, &c. *Skin. 599.* See *Arrest, Bankrupt, Commitment, Treason.*

MESSINGERS OF THE EXCHEQUER. Officers attending that court; they are four in number, and in nature of pursuivants to the lord treasurer.

MESSE THANE. Signifies a priest. The Saxons called every man thane who was above the common rank; so *messe thane* was he who said mass; and *worules thane* was a secular man of quality. *Cowell.*

MESSINA. Reaping time; harvest. *Cowell.*

MESSIS SEMENTEM SEQUITUR. A maxim in Scotch laws; the crop belongs to the sower, is a principle received in regard to *bond fide* possession. See *Emblements, Executor, &c.*

MESSAGE, messagium. Properly a dwelling-house, with some adjacent land assigned to the use thereof. *West. Symb. tit. Fines, § 26; Bract. lib. 5. c. 28.* See *Plowd. 169, 170*, where it is said, that by the name of a message may pass also a curtilage, a garden and orchard, a dove-house, a shop, a mill, a cottage, a toft, a chamber, a cellar, &c. yet they may be demanded by their single names. *Messagium*, in Scotland, signifies the principal place or dwelling house within a barony, which we call a manor-house. *Skene de verborum signif. verb. messagium.* In some places it is called the site of a manor.

MESTILO, mestina, or rather *miscellane*, that is, wheat and rye mingled together. *Pat. 1 Edw. 3. p. 1. m. 6.*

METAL. The exportation of iron, brass, copper, latten, bell, and other metal, was restrained by the ancient statutes *28 Edw. 3. c. 5; 33 Hen. 8. c. 7; 2 & 3 Edw. 6. c. 37*; but was permitted by *5 W. & M. c. 17.*

With respect to the stealing of metal, see *Larceny.*

METECORN. A measure or portion of corn, given out by the lord to customary tenants, as a reward and encour-

agement for their duties of labour. *Stipendia et metecorn ac cetera debita servitia in monasterio predicto solvantur. Ryley's Plac. Parl. 391.*

METEGAVEL, Saxon, cibi gablum, seu vectigal. A tribute or rent paid in victuals, which was a thing usual in this kingdom, as well with the king's tenants as others, till the reign of King Henry I.

METER of coals in London, &c., from *metior*, to mete or measure a thing. See *Measurer.*

METHEGLIN, Brit. Meddiglyn. An old British drink made of honey, &c.; it is mentioned in the *15 Car. 2. c. 9.* See *Mead.*

METTESHEP, METTENSCHEP. Was an acknowledgment paid in a certain measure of corn; or a fine or penalty imposed on tenants, for their defaults in not doing their customary services, of cutting the lord's corn. *Paroch. Ant. 495.*

MEYA. A mey or mow of corn, as anciently used; and in some parts of England they still say *mey* the corn, i. e. put it on an heap in the barn. *Blount. Ten. 130.*

MICEL-GEMOTES, MICEL-SYNODS. The great councils in the Saxon times of king and noblemen, were called *Wittena-gemotes*, and afterwards *Micel-synods* or *Michel-synoth*, and *Micel-gemotes*, i. e. great and general assemblies. *Cowell.* See *1 Comm. 147*; and *tit. Parliament.*

MICHAELMAS HEAD COURT. A meeting of the heritors in Scotland, when the roll of freeholders is revised; anciently the presence of all freeholders was required there under a fine; but by *20 Geo. 2. c. 50*, abolishing heritable jurisdictions, no such fine is incurred, except when the heritor is specially summoned as a juryman, &c.

MIDDLESEX. But one county rate to be made for Middlesex, *12 Geo. 2. c. 29. § 15.* A registry of deeds and wills in that county established. *7 Ann. c. 20.* See *Deeds, Enrolment, Register.*

MILDERNIX. A kind of canvass, of which sailcloths of ships were made. See *1 Jac. c. 11.*

MILE, Miliaire. In the measure of England, is the distance or length of a thousand paces; otherwise described to contain eight furlongs, every furlong being forty poles, and every pole sixteen feet and a half. See *35 Eliz. c. 6*; and *tit. Measure.* It is 1760 yards, or 5280 feet.

MILES. A knight. *Mat. West. p. 118.*

MILITARE, To be knighted, viz. Rex per Angliam fecit proclamari, &c. ut qui haberent unde militarent adessent apud Westmonasterium, &c. *Mat. West. p. 118.*

MILITARY CAUSES. Are, by *18 Rich. 2. c. 2*, declared to be such as relate to contracts touching deeds of arms and of war, as well out of the realm as within it, which cannot be determined or discussed by the common law; together with other usages and customs to the same appertaining.

The only military court known to, and established by, the permanent laws of the land, is the court of chivalry, formerly held before the lord high constable, and earl marshal of England jointly; but since the attainder of Stafford, duke of Buckingham, under Henry VIII. and the consequent extinguishment of the office of lord high constable, it hath usually, with respect to civil matters, been holden before the earl marshal only. See *Court of Chivalry.*

MILITARY EVOLUTIONS AND EXERCISE. The *60 Geo. 3. c. 1.* punishes the unlawful assemblies of persons for the purpose of being trained to, or of practising, military exercise, movements, and evolutions, with transportation for seven years.

MILITARY FEUDS. See *Tenures, I.*

MILITARY OFFENCES. Independent of the annual acts for the punishment of mutiny, &c., desertion from the king's armies in time of war, whether by land or sea, in England, or in parts beyond the seas, by the standing laws of the land, and particularly by *18 Hen. C. 19.* (extended by

5 *Eliz. c. 5. § 27.*) was made felony, but with benefit of clergy. But by the 2 & 3 *Edw. 6. c. 2.*, clergy was taken away from soldiers deserting, and the offence made triable by the justices of every shire. (See also 1 *M. sess. 1. c. 1.* and 4 *P. & M. c. 3. § 9.*) The same statutes punished inferior military offences with fines, imprisonment, and other penalties. See further, *Courts Martial, Soldiers.*

MILITARY POWER OF THE CROWN. See *King, V. 3.*

MILITARY STATE, or Military Force of the Kingdom. Includes the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people, for the safeguard and defence of the realm. See *King, V. 3., Soldiers.*

MILITARY TENURES. See *Tenures, I.*

MILITARY TESTAMENT. By the exception in the statute of frauds 29 *Car. 2. c. 3. § 23.*, and 5 *Wm. 3. c. 21. § 6.*, soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expenses, which the law requires in other cases. See *Wills.*

MILITIA.

The NATIONAL SOLDIERY.

It seems universally agreed by all historians, that king Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominions soldiers; but we are unfortunately left in the dark as to the particulars of this celebrated regulation.

The feudal military tenures were established for the purpose of protection, and sometimes of attack against foreign enemies; (see *Tenures.*) For the further defence in cases of domestic insurrections or foreign invasions, various other plans have been adopted, all of them tending to unite the character of a citizen and soldier in one. First, the assise of arms, enacted 27 *Hen. 2.*, and afterwards the statute of Winchester, 13 *Edw. 1. c. 6.*, obliged every man, according to his state and degree, to provide a certain quantity of such arms as were then in use; and it was part of the duty of constables under the latter statute to see such arms provided. These weapons were changed by 4 & 5 *P. & M. c. 2.*, into more modern ones; but both these provisions were repealed by 1 *Jac. 1. c. 25.* 21 *Jac. 1. c. 28.* While these continued in force, it was usual, from time to time, for our princes to issue commissions of array; and send into every county officers in whom they could confide, to muster and array (or to set in military order) the inhabitants of every district; and the form of the commission of array was settled in parliament, anno 5 *Hen. 4.*, so as to prevent the insertion therein of any new penal clauses. *Rushw. pt. 3. p. 662, 7.* See 8 *Rep. 375.*, &c. But it was also provided by 1 *Edw. 3. st. 2. c. 5, 7.* 25 *Edw. 3. st. 5. c. 8.*, that no man should be compelled to go out of the kingdom at any rate, nor out of his shire, but in cases of urgent necessity; nor should provide soldiers, unless by consent of parliament. About the reign of king Henry VIII., or his children, lieutenants began to be introduced, as standing representatives of the crown, to keep the counties in military order; for we find them mentioned as known officers in the 4 & 5 *P. & M. c. 3.*, though they had then not been long in use, for Camden speaks of them in the time of queen Elizabeth, as extraordinary magistrates constituted only in times of difficulty and danger. But the introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter to fall into disuse.

In this state, things continued till the repeal of the statutes of armour in the reign of king James I.; after which, when king Charles I. had, during his northern expeditions, issued commissions of lieutenancy, and exerted some military powers, which, having been long exercised, were thought to belong to the crown, it became a question in the long parliament, how far the power of the militia did inherently reside in the

king; being now unsupported by any statute, and founded only upon immemorial usage. This question, long agitated with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between the king and his parliament; the two houses not only denying this prerogative of the crown, the legality of which might, perhaps, be somewhat doubtful; but also seizing into their own hands the entire power of the militia; the illegality of which step could never be any doubt at all.

Soon after the restoration of king Charles II., when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognise the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination. And the order in which the militia now stands by law, is principally built upon the 13 *Car. 2. c. 6.* 14 *Car. 2. c. 3.* 15 *Car. 2. c. 4.*, which were then enacted. It is true, the two last of them are apparently repealed; but many of their provisions are re-enacted with the addition of some new regulations by subsequent militia laws; the general scheme of which is to discipline a certain number of the inhabitants of every county chosen by lot formerly for three, but now for five years, (liable to be prolonged by the circumstance of the militia being called out and embodied,) and officered by a lord lieutenant, the deputy lieutenants, and other principal landholders, under a commission from the crown. They are not compellable to march out of their counties unless in case of invasion or actual rebellion within the realm, (or any of majesty's dominions or territories, 16 *Geo. 3. c. 3.*) nor in any case compellable to march out of the kingdom. They are to be exercised at stated times; and their discipline in general is liberal and easy; but when drawn out into actual service, they are subject to the rigours of martial law, as necessary to keep them in order. This is the constitutional security which our laws have provided for the public peace, and for protecting the realm against foreign or domestic violence. See 1 *Comm. 410.*, &c.

The last general acts passed for reducing into one all the laws relating to the militia are, 42 *Geo. 3. c. 90.*, for England, and c. 91 for Scotland; these ascertain the particular militia to be raised in each county and district; but which has from time to time been augmented and altered by subsequent acts. It is provided, that in cases of actual invasion or imminent danger thereof, and in cases of rebellion and insurrection, his majesty may embody and increase the militia; and if parliament is not then sitting, they are to meet by proclamation in fourteen days.

The militia of Ireland is regulated on principles nearly similar, by 49 *Geo. 3. c. 120.*, amended by 53 *Geo. 3. c. 48.* 54 *Geo. 3. c. 179.*, &c.

The interchange of the British and Irish militia, so that each may serve in any part of the united kingdom, is allowed and regulated under 51 *Geo. 3. c. 118.* 128; 54 *Geo. 3. c. 18.* (a temporary act.)

The wives and families of militia men are provided for when requiring parish relief, under the 43 *Geo. 3. c. 47.*, for England; 49 *Geo. 3. c. 89.*, for Scotland; and 51 *Geo. 3. c. 78.* 52 *Geo. 3. c. 28.*, for Ireland.

The pay and clothing of all the militia is provided for in acts which pass annually.

The militia having, under various temporary acts, volunteered into the regular army, from time to time, and at length considered as peculiarly applicable to that purpose, it was found expedient "that a local militia should be established, trained, and permanently maintained, to be called forth and employed in case of invasion in aid of the regular forces for the defence of the realm." This was accordingly effected, first as to England by 48 *Geo. 3. c. 111.*, and afterwards for Scotland by 48 *Geo. 3. c. 150.* These statutes were amended by several subsequent acts; but the system has never been extended to Ireland.

The rank of officers of the corps of Fencibles in Scotland, and of those in the English militia, where serving together, is settled by 38 Geo. 3. c. 36. § 2.

The militia of the city of London is regulated by the 1 Geo. 4. c. 100; and that of the Tower Hamlets, by 37 Geo. 3. c. 25, 75; 42 Geo. 3. c. 90. § 153; 53 Geo. 3. c. 132. See *Trophy-money*.

As to the militia of the cinque ports, see 42 Geo. 3. c. 90. § 155, referring to 13 & 14 Car. 2. c. 3; and 15 Car. 2. c. 4. See also 43 Geo. 3. c. 100. For raising a body of miners in Cornwall and Devon, see 42 Geo. 3. c. 72.

MILL, *Mol utrum.* A house or engine to grind corn, and is either a water-mill, wind-mill, horse-mill, hand-mill, &c. And besides corn and grist-mills, there are paper-mills, fulling or tucking-mills, iron-mills, oil-mills, &c. 2 Inst. 621.

The toll shall be taken according to the strength of the water, *Ordin. pro pistor inest temp.* Prohibition shall not go in suit for title of a new mill. *Art. cler.* 9 Edw. 2. st. 1. c. 5.

With respect to actions against individuals for not grinding their corn at particular mills, &c. see *Sci. ad Modum*. See further *Malicious Injuries and Millers*.

MILL-BANK PENITENTIARY. The acts for the establishment and regulation of this prison are the 52 Geo. 3. c. 44; 56 Geo. 3. c. 69; 59 Geo. 3. c. 136; 4 Geo. 4. c. 82; 5 Geo. 4. c. 19; and 7 & 8 Geo. 4. c. 33.

The 4 & 5 Wm. 4. c. 86. instituting the new central criminal court for the metropolis and the adjacent parts, provides, (§ 6.) that the Penitentiary at Mill-bank shall be one of the prisons under the act.

MILLEATE, or MILL-LEAT. (Mentioned in 7 Jac. 1. c. 19.) A trench to convey water to or from a mill; the word is most peculiar to Devonshire. *Cowell*.

MILLERS. Ought not to be common buyers of any corn, to sell the same again either in corn or meal, but ought only to serve for the grinding of corn that is brought to their mills. *Dalt.* 259.

A miller is indictable for changing corn delivered to him to be ground, and giving bad corn instead of it. 1 Sess. Ca. 217. But the indictment should allege, either that the meal or corn delivered back by the miller was an article for the food of man, or that the miller was the owner or occupier of a soke man, to which the inhabitants of the parish or town were bound to come to have their corn ground. 4 M. & S. 1.

By 31 Geo. 2. c. 29. § 29. On information given on oath to any magistrate, that there is reasonable cause to suspect any miller, or other person who manufactures meal or flour for sale, of mixing up with the same any ingredients, not the genuine produce of the grain such meal or flour shall impure and ought to be, or whereby the purity of any meal or flour shall be in anywise adulated, such magistrate, or any peace officer authorized by a warrant, may at all seasonable times in the day enter into any house, mill, or other place of the party suspected, to search whether the fact be so.

Meal or flour deemed on such search to have been adulterated, and all ingredients used for such adulteration, may be seized; and such as shall be seized by any officer shall be carried to a magistrate. If the magistrate shall adjudge, that ingredients, not the genuine produce of the grain, have been put in such meal or flour, or that the purity of it was thereby adulterated, he may dispose of the same as he thinks proper.

§ 30. Every miller, mealman, or other person, on whose premises any mixture or ingredient shall be found, which shall be adjudged by any magistrate to have been lodged there with intent to adulterate the purity of any meal or flour, shall on conviction before a justice forfeit not exceeding 10*l.*, nor less than 10*s.*, unless he shall make it appear that the mixture was there for some lawful purpose; and the convicting magistrate may, out of the money forfeited, cause

the offender's name, place of abode, and offence to be published in a newspaper.

By § 31. wilfully obstructing or opposing such search, or carrying away the mixture or ingredients, renders the party liable to a penalty not exceeding 5*l.* or less than 20*s.*

§ 32. Prohibits a miller from acting as a magistrate, under the penalty of 50*l.*

§ 34. Provides for the proceeding by summons, warrant, distress, and commitment, and directs all penalties to go to the informer.

By 36 Geo. 3. c. 85. § 1. every miller must have in his mill a true and equal balance with proper weights, under the penalty of 20*s.* And if any weights not according to the legal standard, or any false balance, shall be found in his mill, he is liable to the penalties imposed by the 35 Geo. 3. c. 102.

By § 2. millers must weigh the corn brought to them to grind, both before and after it is ground, if required, under the penalty of 40*s.* And by § 3. they are required to deliver the whole produce of the corn when ground, allowing for waste and toll, under the penalty of 1*s.* per bushel for the deficiency, and treble the value. And see *Measure*.

§ 5. No corn is to be taken for toll, but only money, under the penalty of 5*l.* except where the party has no money. The act does not extend to soke mills where a right to take exists by custom and law.

§ 6. Every miller must put up in some conspicuous part of his mill a table of his prices, or amount of toll, under 20*s.* penalty.

MILLET, *Milium.* A small grain; so termed from its multitude. *Lit. Dict.*

MINA. A corn measure of different quantity, according to the things measured by it; and minage was a toll or duty paid for selling corn by this measure. *Cowell*. According to *Littleton*, it is a measure of ground, containing one hundred and twenty feet in length, and as many in breadth. Also it is taken both for a coin and a weight. *Lit. Dict.*

MINARE. To mine or dig mines. Minator, a miner. *Record*, 10 Edw. 1.

MINATOR CARUCÆ. A ploughman. *Cowell*.

MINE-ADVENTURERS. A company established by 9 Ann. c. 21.

MINERAL. Any thing that grows in mines, and contains metals. *Shep. Epit.* See *Metals, Mines*.

MINERAL COURTS, *Curie minerales.* Are peculiar courts for regulating the concerns of lead mines; as stannary courts are for tin. See *Berghmote*.

MINES, *Minere.* [Quarries or places whereof any thing is dug; this term is likewise applied to hidden treasure dug out of the earth.]

The king by his prerogative hath all mines of gold and silver to make money; and where in mines the gold and silver is of the greater value, they are called royal mines. *Plowd.* 336. But by the 1 W. & M. c. 30, no mine of copper or tin shall be adjudged a royal mine, though silver be extracted. And by the 5 W. & M. c. 6, persons having mines of copper, tin, lead, &c. shall enjoy the same, although claimed to be royal mines; but the king may have the ore, (except in Devon and Cornwall,) paying to the owners of the mines within thirty days after it shall be raised, and before removed, 16*l.* per ton for copper ore washed and made merchantable; for lead ore, 9*l.* per ton (increased to 25*l.* by 55 Geo. 3. c. 134); tin or iron, 40*s.* &c. See 1 Comm. 295.

Alum mines belong of course to the persons in whose grounds they are; and, therefore, no privilege concerning them can be granted but in the king's own ground. 3 Inst. 185; see 21 Jac. 1. c. 3. § 11, 12.

Where the crown has only a bare reservation of royal mines without any right of entry, it cannot by prerogative grant a license to dig up the soil and search for mines; but if the mines are open, it can restrain the owner of the soil

This term may be considered as, and in fact is, a genus, which contains under it a great number of species, almost as various in their nature as human actions. See *Hale's and Hawkins' Pleas of the Crown*; and tit. *Misprision*.

So long as an act rests on bare intention, it is not punishable, but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. *Cald.* 397; 3 *Inst.* 4; *Forst.* 103. Thus an attempt to commit a felony is in many cases a misdemeanor. 2 *East*, 21; 1 *Str.* 196; and see 1 *Hawk. c.* 25. § 3. v. c. 55. And an attempt to commit even a misdemeanor has been decided in many cases to be itself a misdemeanor. 2 *East*, 8; 6 *East*, 464. And it should seem, that an attempt to commit a statutable misdemeanor is as much indictable as an attempt to commit a common law misdemeanor. *Russ. & Ry.* 107. An attempt to suborn a person to commit perjury was by all the judges held to be a misdemeanor. *Anon.* cited in *Cald.* 400; and 2 *East*, 14, 17, 28.

Where a statute makes that felony which before was a misdemeanor only, the misdemeanor is merged, and there can be no prosecution afterwards for the misdemeanor. 3 *B. & A.* 161, 164; 1 *Russ. on Crimes*, 48.

By 60 *Geo.* 3. c. 4. it is enacted, that where any person shall be prosecuted in the Court of King's Bench at Westminster or Dublin, for any misdemeanor, either by information or indictment, found in or removed to such courts, and shall appear in person, in term-time, to answer thereto, such defendant shall not be allowed to imparl till the following term, but shall plead or demur within four days; or, in default thereof, judgment shall be entered against him. Where the defendant appears by attorney, a rule of court shall be made to require such plea or demurrer. The court may, on sufficient cause, allow further time to plead or demur. Persons prosecuted for misdemeanors, by indictment at any sessions of the peace, &c. having been committed or bailed twenty days at least before the sessions, shall plead to such indictment; and the trial shall proceed at such same sessions, unless a certiorari be delivered before the jury is sworn for the trial. Such certiorari may be issued before indictment found as well as after. Persons committed or bailed at any period less than twenty days before any session, or having twenty days' notice of an indictment found against them, at a session subsequent to their being committed or bailed, shall plead, and be tried at such subsequent session. Indictments removed from cities or towns corporate into counties, under 38 *Geo.* 3. c. 52. shall be tried according to this act, with power to the court to extend the time of pleading. In all prosecutions for misdemeanors by the attorney-general, the court, if applied to for that purpose, shall order a copy of the information or indictment to be delivered to the defendant, after his appearance, free of expense; and if any such prosecution shall not be brought to trial within twelve months after the plea of not guilty pleaded on application by the defendant, giving twelve days' notice to the attorney general, the court may, by order, authorize the defendant to bring on his trial; unless a *nolle prosequi* be entered. The act is not to extend to informations of *quo warranto*, or for non-repair of bridges or highways.

By the 9 *Geo.* 4. c. 32. offenders convicted of any misdemeanor, (except perjury and subornation thereof,) enduring the punishment adjudged therefore, shall not, by reason of such conviction, be deemed incompetent witnesses in any court or proceeding civil or criminal.

With respect to the pronouncing of judgment in misdemeanors upon records of the King's Bench, see *Judgments in Criminal Cases*.

MISE, Fr.; Lat. *missum, misa*.] Is a law term signifying expenses, and it is commonly so used in the entries of judgments in personal actions; as when the plaintiff recovers,

the judgment is *quod recuperet damna sua* to such a value, and *pro misis et custagiis*, for costs and charges, so much, &c.

This word hath also another signification in law; which is, where it is taken for a word of art, appropriated to a writ of right, so called because both parties put themselves upon the mere right, to be tried upon the grand assize, so that what in all other actions is called an issue, in a writ of right was termed a mise; but if in the writ of right a collateral point were tried, there it was called an issue. To join the mise upon the mere right was as much as to say, to join the mise upon the clear right, i. e. to join upon the point, which had the more right, the tenant or demandant. 1 *Inst.* 294; 37 *Edw.* 3. c. 16. See 3 *Comm. App.* § 6.

MISES, Taxes or tallages, &c. An honorary gift or customary present, from the people of Wales to every new king and Prince of Wales, anciently given in cattle, wine, and corn, but now in money, being 5000*l.* or more, is denominated a mise; so was the usual tribute or fine of 3000 marks, paid by the inhabitants of the county palatine of Chester, at the change of every owner of the said earldoms, for enjoying their liberties. And at Chester they have a mise-book wherein every town and village in the county is rated what to pay towards the mise. The 27 *Hen.* 8. c. 26. ordains that "lords shall have all such mises and profits of their lands as they had in times past," &c.

Mise is sometimes corruptly used for *mease*, in law French *mees*, a messuage; thus a mise-place in some manors is such a messuage or tenement as answers the lord a heriot, at the death of its owner. 2 *Inst.* 528.

MISELLI, Leprous persons. *Cowell*.

MISE-MONEY. Money given by way of contract or composition to purchase any liberty, &c. *Blount. Ten.* 102.

MISERERE. The name and first word of one of the penitential Psalms, and most commonly that which the ordinary gave to such guilty malefactors as were admitted to the benefit of clergy; being therefore called the *Psalm of Mercy*. See *Clergy, Benefit of*.

MISERICORDIA. An arbitrary or discretionary amerancement. See *Amercement*.

Sometimes misericordia is to be quit and discharged of all manner of amerancements that a man may fall into in the forest. See *Crompt. Jur.* 196. See *Moderata Misericordia*.

MISERICORDIA in cibis et potu. Exceedings, or overcommons, or any gratuitous portion of meat and drink given to the religious above their ordinary allowance. *Mat. Par. Vit. Abb. S. Albani*, 71. In some convents they had a stated allowance of these overcommons upon extraordinary days, which were called *Misericordia regulares*. *Monast. Angl.* 149, b.

MISERICORDIA COMMUNIS. Is when a fine is set on the whole county or hundred. *Mon. Angl.* i. 967.

MISEVENIRE. To succeed ill; as where a man is accused of a crime, and fails in his defence or purgation. *Lex Canut.* 78 *apud Brompton*.

MISFEASANCE. A misdeed or trespass. Jury to inquire of all *purprestures* and misfeasance. *Cro. Car.* 418. It is commonly used as signifying a positive act of tort in contradistinction to nonfeasance. See that title.

MISFEASOR. A trespasser. 2 *Inst.* 200.

MISKENNING, *miskenninga*; from *mis*, and Sax. *cenan* i. e. *citare*, *Leg. H.* 1. c. 12. *Iniqua vel injusta in jus vocatio; inconstanter loqui in curia, vel invariare*. It is mentioned among the privileges granted and confirmed to the monasteries of Ramsey by S. Edward the Confessor. *Mon. Angl.* i. 237. *Et in civitate London in nullo placito miskennagium*. *Chart. H.* 2.

MISNOMER, of the Fr. *mes, amies*; and *nomer, nominare*.] The using one name for another; a misnaming, name, *nomen, est quasi rei notamen*, and was invented to make a distinction between person and person; and where a person is described, so that he may be certainly distinguished and known from other persons, the omission, or, in some cases, the mistake of the name, shall not avoid the grant. 11 *Rep.*

40, 21. A grant to a man by a wrong name may be good, *si constat de personâ*, but the *demonstratio personæ* must appear upon the face of the grant. *Ld. Raym.* 304. Yet a grant to a knight, by the name of esquire, is void. *Tb.* 303. And if the name of a party is mistaken, the judges ought to mould a small mistake therein, to make good a contract, &c. and so as to support the act of the party by the law. *Hob.* 125. But the Christian name ought always to be perfect; and the law is not so precise as to surnames as it is of Christian names. *Poph.* 57; *2 Lit. Abr.* 199. Misprisions of clerks in names are amendable; *Peter and Piers* have been adjudged one and the same name. *Samuel and Alexander* and *Gin et al* and *Gerald* are but one name; but *Randolph* and *Randolph, Isabel* and *Sybil*, &c. are several names, and must be named right. *1 Rob. Abr.* 135; *1 And.* 211.

Where a Christian name is quite mistaken, as *John* for *Thomas*, &c. it may be pleaded that there was no such man in *rerum natura*. *Dyer*, 349. Or he may plead his having been christened by the name of *Thomas*, and always called and known by that name; and traverse his being called or known by the name of *John*. If a person pleads that he never was called by such a name, it is ill; for this may be true, and yet he might be of that name of baptism. *1 Salk.* 6. One whose name is *Edmund* is bound in a bond by the name of *Edward*; though he subscribes his true name, that is no part of the bond. *2 Cro.* 610; *Dyer*, 273. If a person be bound by the name of *W. R.* he may be sued by the name of *W. R. alias dictus W. B.* his true name, not *W. B. alias dictus W. R.* *5 Salk.* 288. If a person be named by two Christian and surnames, it will be quashed, for he cannot have two such names. *1 Ld. Raym.* 362. A lady, wife to a private person, might be named according to the name of her husband, or the writ shall abate, so if the son of an earl, &c. be sued as a lord, and not as a private person by the name of his family. *Dyer*, 70; *2 Salk.* 151.

Misnomer of corporations may be pleaded in abatement. *1 Leon.* 152; *5 Mod.* 327; *2 Salk.* 451. And if there be any mistake in the name of a corporation, that is material in their leases and grants, they will be void. *2 Bridl.* 1; *Anders.* 196. Judgment against a corporation by a wrong name is void. *Ld. Raym.* 119. A defendant may avoid an outlawry by pleading a misnomer of name of baptism or surname; or misnomer as to additions of estate, of the town, &c. See *Outlawry*.

A misnomer must be pleaded by the party himself who is misnamed. *1 Lutw.* 35. Plea of misnomer by attorney may be refused; but it is no cause of demurrer. *Ld. Raym.* 609. If defendant omits to plead a misnomer, he may be taken in execution by the wrong Christian name. *2 Str.* 1218. What words in a plea of misnomer shall be considered as a special imparlance, see *1 Wils.* 261.

If issue is joined on a plea in abatement for a misnomer, in an action upon the case on promises, and found against the defendant, the judgment shall be peremptory, therefore the jury ought to assess the damages. *2 Wils.* 367.

If a defendant after having given bail on his arrest, and been afterwards served with notice of declaration, do not plead misnomer in abatement within the first four days, the court will not afterwards (though before pleading in chief) set aside the proceedings, on the ground that he had been arrested and declared against by a wrong Christian name. *15 East.* 153.

If a person enter into a bond by a wrong Christian name, he must be sued thereon by such name. A declaration against him by his right name, stating that he by the wrong name executed the bond, is bad. *3 Taunt.* 504. See *Lutw.* 894. *Ld. Raym.* 301, 304.—*Note*, names of persons not christened are surnames only. *Ib.* 305.

For the addition or omission of a letter or two, not making any material alteration in the sound, it is not proper to plead

a misnomer. The courts of law discourage (and that justly) dilatory pleas, as much as they can, as tending to the delay of justice.

And now by the 3 & 4 *Will.* 4. c. 42. § 11. "no plea in abatement for a misnomer shall be allowed in any personal action, but that in all cases in which a misnomer would but for this act have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended at the cost of the plaintiff, by inserting the right name upon a judge's summons founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit."

In criminal cases also no indictment can now be abated by a plea of misnomer. See *Indictment*, VI.

MISPLEADING. If, in pleading, any thing be omitted, essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title wholly defective in itself, or if to an action of debt (i. e. on bond, contract, &c.) the defendant pleads *not guilty* instead of *nil debet* (now abolished), these cannot be cured by a verdict for the plaintiff in the first case, or for the defendant in the second. *Salk.* 365; *Cro. Eliz.* 778. When an issue is joined on an immaterial point, or such a point, as, after trial, the court cannot give judgment, the court regularly awards a repleader. See *Pleading*, *Repleader*.

MISPRISION,

[Mispriso, from the Fr. *mespris*, contemptus.] A neglect, oversight, or contempt; as, for example, misprision of treason is a negligence in not revealing treason to the king, his council, or a magistrate, where a person knows it to be committed; so of felony. *Standf. P. C. lib.* 1. c. 19. If a man knoweth of any treason or felony, and conceals the same, it is a misprision. In a larger sense misprision is taken for many great offences, which are neither treason nor felony, or capital, but very near them; and every great misdemeanor, which hath no certain term appointed by the law, is sometimes called misprision. *3 Inst.* 36; *H. P. C.* 127; *Wood*, 406, 408.

Misprisions are, in the acceptance of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon; and it is said that a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision only. *Year B.* 2 *Rich.* 3. 10; *Standf. P. C.* 32, 37; *Kel.* 71; *1 Hal. P. C.* 374; *1 Hawk. P. C.* c. 20. § 1.

Misprisions are generally divided into two sorts: 1. *Negative*, which consists in the concealment of something which ought to be revealed; and, 2. *Positive*, which consists in the commission of something which ought not to be done, *4 Comm.* c. 9.

Of the first or negative kind, is what is called *misprision of treason*; consisting in the bare knowledge and concealment of treason, without any degree of assent thereto; for any assent makes the party a principal traitor; as indeed the concealment, which was construed aiding and abetting, did at the common law. Thus it is laid down, that when one knows another hath committed treason, and doth not reveal it to the king, or his privy council, or some magistrate, that the offender may be secured and brought to justice, it is high treason by the ancient common law; for delay in discovering treason, was deemed an assent to it, and consequently high treason. *Bract.* 118; *S. P. C.* 37; *3 Inst.* 138, 140.

But it is enacted, by the 1 & 2 *P. & M.* c. 10. that a bare concealment of treason shall be only held a misprision. This concealment becomes criminal if the party apprised of the treason does not, as soon as conveniently may be, reveal it to some judge of assize, or justice of the peace. *1 Hal. P. C.* 372. But if there be any probable circumstances of assent, as if a man goes to a treasonable meeting, knowing before-

hand that a conspiracy is intended against the king; or being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of it, but conceals it; this is an implied assent in law, and makes the concealer guilty of actual high treason. 1 *Hawk. P. C. c. 20. § 4.*

A person having notice of a meeting of conspirators against the government, goes into their company and hears their treasonable consultation, and conceals it, this is treason; so where one has been accidentally in such company, and heard such discourse, if he meets such a company a second time; for, in these cases, the concealment is attended with circumstances which show an approbation thereof. *H. P. C. 127; Kel. 17, 21.*

A man who hath knowledge of a treason cannot secure himself by discovering generally that there will be a rising, without disclosing the persons intending to rise; nor can he do it by discovering these to a private person, who is no magistrate. *S. P. C.; H. P. C. 127.* But where one is told in general, that there will be a rising or rebellion, and doth not know the persons concerned in it, or the place where, &c. this uncertain knowledge may be concealed, and it shall not be treason or misprision. *Kel. 22; 1 H. P. C. 36.* If high treason is discovered to a clergyman in confession, he ought to reveal it; but not in case of felony. *2 Inst. 629.* This was law when the Roman Catholic religion was professed here as the religion of the land; the same may be still law. *Dict.*

If a person is indicted of misprision, as for treason; though he be found guilty, the judges shall not give judgment thereon, he not being indicted of the misprision. *Jenk. Cent. 217.* Information will not lie for misprision of treason, &c. but indictment, as for capital crimes. There must be two witnesses upon indictments as well as trials of misprision of treason, by 7 *Will. 3. c. 8.* See *Treason.*

There is a negative misprision of treason, created by act of parliament. By 18 *Eliz. c. 2.* concealers of bulls of absolution from Rome are declared guilty of misprision of treason. A positive misprision of treason was also created by 14 *Eliz. c. 3.* which enacted that those who forged foreign coin, not current in this kingdom, their aiders, abettors, and procurers, should all be guilty of misprision of treason; but that statute was repealed by the 2 *Will. 4. c. 34.*

The punishment of misprision of treason is, loss of the profits of land during life, forfeiture of goods, and imprisonment during life; 1 *Hal. P. C. 374; 3 Inst. 36, 218;* which total forfeiture of the goods was inflicted while the offence amounted to principal treason, and of course included in it a felony by the common law; and therefore is no exception to the general rule, that whenever an offence is punished by such total forfeiture, it is felony at the common law. 4 *Comm. c. 9. 120, 121.*

Misprision of felony is the concealment of a felony which a man knows, but never assented to; for if he assented, this makes him either principal or accessory.

To observe the commission of a felony without giving any alarm, or using any endeavours to apprehend the offender, is a misprision; for a man is bound to apprehend a felon, and to disclose the felony to a magistrate with all possible expedition. 1 *Hawk. c. 59; 3 Inst. 189.*

The punishment of misprision of felony in a public officer, by *Westm. 1. 3 Edw. 1. c. 9.* is imprisonment for a year and a day; in a common person, for a less discretionary time; and in both, fine and ransom at the king's pleasure, as declared by the judges in a court of justice. 1 *Hal. P. C. 375.*

The stats. *Westm. 1. 3 Edw. 1. c. 9; 3 Hen. 7. c. 1.* provide against concealments of felonies by sheriffs, coroners, and bailiffs, &c.

Under this title of misprision, that of *theftbote* may be reduced; which is, where one, knowing of a felony, takes his goods again, or amends for the same. 8 *Inst. 154, 159;*

H. P. C. 130. Though the bare taking goods again which have been stolen is no offence, unless some favour be shown the thief. 1 *Hawk. P. C. c. 59. § 7.*

By the 7 & 8 *Geo. 4. c. 29. § 58.* corruptly to take money or reward under pretence or on account of helping any person to any chattel, money, valuable security, or other property, which by felony or misdemeanor has been stolen, obtained, or converted, is felony, (unless the party cause the offender to be apprehended and brought to trial,) and the offender transportable for life, &c.; and by § 59, publicly to advertise a reward for property stolen or lost, without making inquiry after the party producing the property, or by means of any advertisement offering to return money advanced on such property, or printing or publishing such advertisement, incurs a penalty of 50*l.*

There is also another species of negative misprision, namely, the *concealing of treasure-trove*, which belongs to the king or his grantees by prerogative royal; this concealment was formerly punishable by death, but now only by fine and imprisonment. *Glanv. lib. 1. c. 2; 3 Inst. 133.*

2. Misprisions which are merely positive, are generally denominated contempts or high misdemeanors; of which the first and principal is the mal-administration of such high officers as are in public trust and employment. This is usually punished by the method of parliamentary impeachment, wherein such penalties, short of death, are inflicted, as to the wisdom of the House of Peers shall seem proper, consisting usually of banishment, imprisonment, fines or perpetual disability. Hitherto also may be referred the offence of embezzling the public money, which is not a capital crime, but subjects the offender to a discretionary fine and imprisonment. 4 *Comm. 122.*

Other misprisions are in general such contempts of the executive magistrate, as demonstrate themselves by so much arrogant and undutiful behaviour towards the king and government; these are either against the king's prerogative, the king's person and government; the king's title; his palaces, or courts of justice. With respect to the two first of these, see *Contempt, Government.*

Contempts against the king's title, not amounting to treason or *præmunire*, are, the denial of his right to the crown in common and unadvised discourse; for if it be by advised speaking, it amounts to a *præmunire*; see that title. This heedless species of contempt is punished with fine and imprisonment. Likewise if any person shall in anywise hold, affirm, or maintain, that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; this is a misdemeanor by 13 *Eliz. c. 1.* and punishable with forfeiture of goods and chattels. A contempt may also arise from refusing or neglecting to take the oaths appointed by statute for the better securing the government, and yet acting in a public office, place of trust, or other capacity for which the said oaths are required to be taken, viz. those of allegiance, supremacy, and abjuration which must be taken within six calendar months after admission. The penalties for this contempt, inflicted by 1 *Geo. 1. st. 2. c. 13.* are very little, if any thing, short of those of a *præmunire*; being an incapacity to hold the said offices, or any other; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; or to vote at an election for members of parliament; and after conviction the offender shall forfeit 500*l.* to any that will sue for the same. Members on the foundation of any colleges in the two universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college register within one month after; otherwise, if the electors do not remove him and elect another within twelve months, or after the king may nominate a person to succeed him, by his great seal or sign manual. Besides thus taking the oaths for offices, any two justices of the peace may by the same statute summon and tender the oaths to any person whom they shall

suspect to be disaffected. 4 *Comm.* 124. See further *Dis-senters, Oaths, Præmunire, Roman Catholics.*

Contempts against the king's palaces or courts of justice have been always looked upon as high misprisions; and by the ancient law, before the Conquest, fighting in the king's palace, or before the king's judges, was punished with death. 3 *Inst.* 140; *Ll. Alured.* c. 7, 34. By the 33 *Hen.* 8. c. 12. malicious striking in the king's palace, wherein his royal person resided, whereby blood was drawn, was punishable by perpetual imprisonment, and fine at the king's pleasure; and also with loss of the offender's right hand; the solemn execution of which sentence was prescribed in the statute at length. See *Sir E. Knevett's Ca. in Stone*, 11 *St. Tr.* 16; and the *Earl of Devonshire's*, 11 *St. Tr.* 183.

That act was repealed by the 9 *Geo.* 4. c. 81. which, however, does not notice the penalty attached by the common law to the offence of striking in the royal presence; which, it is conceived, still subjects the offender to the loss of his hand. 1 *Hawk.* c. 21. § 3; 2 *Inst.* 549; 3 *Inst.* 140.

But striking in the king's superior courts of justice in Westminster Hall, or at the assizes, is made still more penal than even in the king's palace; the reason seems to be, that those courts being anciently held in the king's palace, and before the king himself, striking there included the former contempt against the king's palace, and something more, viz. the disturbance of public justice. For this reason, by the ancient common law before the Conquest, striking in the king's courts of justice, or drawing a sword therein, was a capital felony; *Ll. Inæ.* c. 6; *Ll. Canut.* c. 56; *Ll. Alured.* c. 7; and our modern law retains so much of the ancient severity, as only to exchange the loss of life for the loss of the offending limb. Therefore a stroke or blow in such a court of justice, whether blood be drawn or not, or even assaulting a judge sitting in the court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of the offender's lands during life. *Statute.* P. C. 38; 3 *Inst.* 140, 141. A rescue also of a prisoner from any of the said courts, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and the profits of lands during life; *1 Hawk.* P. C. c. 21. § 5; being looked upon as an offence of the same nature with the last; but only as no blow is actually given, the amputation of the hand is excused. For the like reason, an affray or riot near the said courts, but out of their actual view, is punished only with fine and imprisonment. *Cro. Car.* 373.

Not only such as are guilty of any actual violence, but of threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision, and have been punished with large fines, imprisonment, and corporal punishment. *Cro. Car.* 503. And even in the inferior courts of the king, an ill or contemptuous behaviour is punishable with a fine by the judges there sitting; as by the steward in a court of record, or the like. 1 *Hawk.* P. C. c. 21. § 10, 11.

Like case all such as are guilty of any improper treatment to those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment, as if a man assaults or threatens his adversary for suing him a counsellor or attorney for being employed against him, a factor for a verdict, or a gaoler or other ministerial officer, for keeping a man in custody, and properly executing his duty. *1 Inst.* 141, 142.

Lastly, to endeavour to dissuade a witness from giving evidence; to disclose an examination before the privy council, or to advise a prisoner to stand mute (all of which are impediments of justice), are high misprisions, and contempts of the king's courts, and punishable by fine and imprisonment. And anciently it was held, that if one of the grand jury disclosed to any person indicated the evidence that appeared against him, he was thereby made accessory to the

offence, if felony; and in treason a principal. And at this day it is agreed that he is guilty of a high misprision, and liable to be fined and imprisoned. 1 *Hawk.* P. C. c. 21. § 15.

MISPRISIONS OF CLERKS, &c. Relate to their neglects in writing or keeping records; and here misprision signifies a mistaking. See 14 *Edm.* 3. c. 6; and see *Amendment.*

MISRECITAL. Of deeds or conveyances will sometimes hurt a deed, and sometimes not. *Hob.* 18, 19, 129.

If a thing is referred to time, place, and number, and that is mistaken, all is void. *Arg. Pl. C.* 392 b. *Trin.* 18 *Elix.* in the case of the *Earl of Leicester v. Heydon.*

Misrecital in an immaterial point, and where it is only an additional flourish in things circumstantial, shall not avoid a grant; as where the husband has a term in right of his wife, and this term is recited as made to the husband. A misrecital in the beginning of a deed, which goes not to the end of a deed, shall not hurt; but if it goes to the end of a sentence, so that the deed is limited by it, it is vicious. *Carth.* 149. See *Amendment, Deed, Lease.*

MISSA, the Mass. At first used for the dismissal or sending away of the people; and hence it came to signify the whole church service or common prayer, but more particularly the communion service, and the office of the sacrament, after those who did not receive it were dismissed. *Lit. Dict.*

MISSAL, *missale.*] The mass-book, containing all things to be daily said in the mass. *Lindw. Provincial.* l. 3. c. 2.

MISSATICUS. A messenger. *Cowell. Domesday in Chent.*

MISSÆ PRESBYTER. A priest in orders. *Blount.*

MISSURA. Singing the *nunc dimittis*, and performing other ceremonies to recommend and dismiss a dying person. And in the statutes of the church of St. Paul, in London, (collected by *Ralph Baldock*, dean, about the year 1295, in the chapter *de Frateria*, of the fraternity or brotherhood, who were obliged to a mutual communication of all religious offices), it is ordained, *Ut fiat commendatio et missura et sepultura omnibus sociis coadjuvantibus et astantibus.* *Liber Stat. Eccles. Pauline.* MS. fol. 25.

MISSURIUM. A dish for serving up meat to a table. *Thorn's Chron.* p. 1762.

MISTAKE. A negligent error in any deed, record, process, &c. As to which see *Amendment, Deed, &c.*

Ignorance or mistake is classed by *Blackstone* among defects of the will; as when a man intending to do a lawful act does that which is unlawful; for here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. Thus, if a man intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so, this is wilful murder; for a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. 4 *Comm.* c. 2. p. 27. See *Ignorance.*

MISTERIUM for MINISTERIUM. *Mon. Angl.* tom. 3. p. 102.

MIS-TRIAL. A false or erroneous trial, where it is in a wrong county, &c. 3 *Cro.* 284. Consent of parties cannot help such a trial, when past. *Hob.* 5. See *Trial.*

MISUSER. Is an abuse of any liberty or benefit; as "he shall make a fine for his misuser." *Old Nat. Brev.* 149. By misuser, a charter of a corporation may be forfeited; so also an office, &c. See *Condition*, l. 1, *Office.*

MITRED ABBOTS. Were those governors of religious houses who obtained from the pope the privilege of wearing the mitre, ring, gloves, and crosier of a bishop. The mitred abbots, says *Cowell*, were not the same with the conventual prelates, who were summoned to parliament as spiritual

lords, though it hath been commonly so held; for their summons to parliament did not any way depend on their mitres, but on their receiving their temporals from the hands of the king. See *Abbot*.

MITTA, from the Saxon *mitten*, *mensura*.] An ancient Saxon measure; its quantity doth not certainly appear, but it is said to be a measure of ten bushels. *Domesday*, tit. *Wirecscire*, *Mon. Angl.* tom. 2. p. 262. And *mitta* or *mitcha*, besides being a sort of measure for salt and corn, is used for the place where the cauldrons were put to boil salt. *Gale's Hist. Brit.* 767.

MITTENDO MANUSCRIPTUM PEDIS FINIS. Was a judicial writ directed to the treasurer and chamberlains of the Exchequer, to search for and transmit the foot of a fine, acknowledged before justices in eyre, into the Common Pleas, &c. *Reg. Orig.* 14.

MITTIMUS. A writ for removing and transferring of records from one court to another; as out of the King's Bench into the Exchequer, and sometimes by certiorari into the Chancery, and from thence into another court; but the Lord Chancellor may deliver such record with his own hand. *5 Rich. 2. st. 1. c. 15*; *28 & 29 Hen. 8*; *Dyer*, 29, 32.

Mittimus is also a precept in writing, under the hand and seal of a justice of peace, directed to the gaoler, for the receiving and safe keeping of an offender until he is delivered by law. *2 Inst.* 590. See *Commitment*.

MITTRE A LARGE. Is generally to set or put at liberty. *Lam Fr. Dict.* And there is a *mittre le estate* and *de droit* mentioned by Littleton, in case of releases of lands by joint-tenants, &c. which may sometimes pass a fee, without words of inheritance. *1 Inst.* 273, 274. See *Release*.

MIXED ACTIONS. Suits partaking of the nature of real and personal, wherein some real property is demanded, and also personal damages for a wrong sustained. They are now abolished. See further *Action*, *Limitation of Actions*, III.

MIXED or COMPOUND LARCENY. Is such as has all the properties of simple larceny, but is accompanied with one or both of the aggravations of violence to the person, or taking from a house. See *Burglary*, *House*, *Larceny*.

MIXED TITHES. Are those of cheese, milk, and young beasts, &c. *2 Inst.* 649. See *Tithes*.

MIXTILIO. See *Mestilo*.

MIXTUM. This word is often mentioned by our monkish historians; it sometimes signifies a breakfast, but always a certain quantity of bread and wine. *Covell*.

MOBBING. The assembly of a number of people, to the terror of the subject, and disturbance of the public peace. *Scotch Dict.* See *Riot*.

MOCKADOES. Stuffs made in England and other countries; mentioned in *23 Eliz. c. 9*.

MODERATA MISERICORDIA. A writ founded on *Magna Carta*, which lies for him who is amerced in a court not of record, for any transgression beyond the quality or quantity of the offence; it is directed to the lord of the court, or his bailiff, commanding him to take a moderate amercement of the parties. If a man be amerced in a court baron, on presentment by the jury, where he did not any trespass, he shall not have this writ, unless the amercement be excessive and outrageous; and if the steward of the court, of his own head, will amerce any tenant or other person without cause, the party ought not to sue for his writ of *moderata misericordia*, if he be distrained for that amercement; but he shall have action of trespass. *New Nat. Br.* 167. When the amercement which is set on a person is affected by his peers, this writ of *moderata misericordia* doth not lie; for then it is according to the statutes. See *F. N. B.* 76, 4to edit. 176.

MODIATIO. Was a certain duty paid for every tierce of wine. *Mon. Angl.* tom. 2. p. 994.

MODIFICATION. The term used in Scotland to ex-

press the ascertaining, by the commission of teinds (tithes), the amount of the stipend to the minister of the parish.

MODIUS. A measure, usually a bushel; but various according to the customs of several countries.

MODIUS TERRÆ VEL AGRI. This phrase was much used in the ancient charters of the British kings, and probably signified the same quantity of ground as with the Romans, viz. one hundred feet long, and as many broad. *Mon. Angl.* iii. 200.

MODO ET FORMA. Words of art in law pleading, &c. and particularly used in the answer of a defendant, whereby he denies to have done the thing laid to his charge *modo et formâ declaratâ*, in manner and form as declared by the plaintiff. *Kitch.* 232.

Where *modo et formâ* are of the substance of the issue, and where but words of form, this diversity is to be observed, where the issue taken goeth to the point of the writ or action, there *modo et formâ* are but words of form, as in the case of the writ of entry in *casu proviso*. But otherwise it is when a collateral point in pleading is traversed; as if a feoffment be alleged by two, and this is traversed *modo et formâ*, and it is found the feoffment of one, there *modo et formâ* is material. So if a feoffment be pleaded by deed and it is traversed *absque hoc quod feoffavit modo et formâ* upon this collateral issue *modo et formâ* are so essential as the jury cannot find a feoffment without deed. *Co. 1d.* 281 b. See *Br. Labourers*, pl. 46. cites *38 Hen. 6. 22.* In breach of covenant, as for ploughing meadow land, a licence in writing, by several, entitled at the time to the reversion with the appurtenant (or lands *pro tempore*), may be traversed *modo et formâ*, and a licence by parol, or by one or two, &c. and not by all, will not support the issue.

Modo et formâ do not put the day nor place in issue, but only the matter and substance of the plea. *Reg. Plac.* 188 a 5; *Hob.* 72; *1 B. & B.* 536.

Where a traverse is with a *modo et formâ*, &c. that will put the manner as well as the matter in issue, where the matter is material, as the time, the fact, and other circumstances, when they are the effect of the issue. *Reg. Plac.* 189. c. 5.

As to the effect of these words with respect to covering the whole matter of the allegation traversed, see *3 Bng.* 139. See further tit. *Pleading*.

MODUS DECIMANDI. Is when lands, tenements, or some certain annual sum or other profit hath been given time out of mind to a parson and his successors, in full satisfaction and discharge of all tithes in kind in such a place. *2 Rep.* 47; *2 Inst.* 100.

A *modus decimandi*, commonly called by the simple name of a *modus* only, is where there is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation, as 2d. an acre for the tithe of land; sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him; sometimes in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs, and the like. Any means, in short, whereby the law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing. *2 Comm. c. 3. p. 1.*

By the *2 & 3 Wm. 4. c. 100.* the time required for establishing a *modus* or other exemption from the payment of tithes, has been shortened. See further *Tithes*.

MOHAIR YARN. See *Manufactures*, *Silk*.

MOIETY, *medietas*, *Fr. moitié*, i. e. *cœqua vel mediâ pars*.] The half of any thing, and to hold by moieties, mentioned in our books, in case of joint-tenants, &c. *1d.* 125. See *Joint-tenants*.

MOLENDINUM. A mill of divers kinds. See *Mill*

MOLENDUM. Corn sent to a mill; a grist. *Chart. Abbat. de Rading, MS. fol. 116.*

MOLITURA Was commonly taken for the toll or *multure* paid for grinding corn at a mill; sometimes called *molta*, Fr. *moulta*. *Molitura libera*, free grinding or liberty of a mill, without paying toll; a privilege which the lord generally reserved to his own family. *Paroch. Antiq. 236.*

MOLLITER MANUS IMPOSUIT. Several justifications in trespass, i. e. actions of assault, are called by this name, from the words "gently laid his hands upon him," used in the plea; as where the defendant justifies an assault, by showing that the plaintiff was unlawfully in the house of defendant, making a disturbance, and being requested to cease such disturbance and depart, he refused, and continued therein, making such disturbance, he, the defendant, gently laid his hands on the plaintiff, and removed him out of the house. So in various other instances, as separating two persons fighting, in order to preserve the peace; so in the legal excuse of an office, &c. See *Assault, Pleading, Trespass.*

MOLMAN. A man subject to do service: applied to the servants of a monastery. *Prior. Lewes, p. 21. Spelm. Gloss.*

MOLMUTIAN or MOLMUTIN LAWS. The laws of Dunvallo Molmuths, seventh king of the Britons, who began his reign above four hundred years before the birth of our Saviour; these were famous in this land till the time of William the Conqueror. This king was the first who published laws in Britain; and his laws (with those of Queen Mercia) were translated by *Gildas* out of the British into the Latin tongue. *Usher's Primord. 126.*

MOLNEDA, MULNEDA. A mill-pool or pond. *Paroch. Antiq. 135.*

MOLTA. The duty or toll paid to the lord by his vassals, to grind corn at his mill. *Monastic. ii. 97. See Molitura.*

MONARCHY. That form of government where the sovereign power is entrusted in the hands of a single person. See *Government.*

MONASTERIES and ABBEYS. See *Abbot.*

MONETAGIUM. A certain tribute paid by tenants to their lord every third year, that he should not change the money which he had coined, formerly when it was lawful for great men to coin money current in their territories, but not of silver and gold. It was abrogated by the 1 Hen. 1. c. 2. The word *monetarium* is likewise used for a mintage, and the right of coining or minting money. *Jus et artificum conditionum monetas.*

MONEY, moneta.] That metal, be it gold or silver, which receives authority by the prince's impress to be current; for as wax is not a seal without a print, so metal is not money without impression. *Co. Litt. 207.* Money is said to be the common measure of all commerce through the world, and consists principally of three parts; the material whereof it is made, being silver or gold; the denomination or intrinsic value, given by the king, by virtue of his prerogative; and the king's stamp thereon. 1 *Hale's Hist. P. H. 188.*

It belongs to the king only to put a value, as well as the impression, on money, which being done, the money is current for so much as the king hath limited. 2 *Inst. 575.*

Gold and silver coin, &c. was not to be exported without license, on pain of forfeiture. 9 *Edw. 3. st. 2. c. 1.* And never money melted down was to be forfeited, and double value. 13 & 14 *Car. 1. c. 31.* But by old statutes, foreign money might have been melted down. See 27 *Edw. 3. c. 14;* 17 *Rich. 2. c. 1.*

Now, by the 59 *Geo. 3. c. 49. § 10.* the gold and silver coin of the realm may be exported, or melted down, and the bullion produced thereby manufactured or exported. See also *Corn.*

As a distress for rent was at common law only in the nature of a pledge, whatever can not be identified, so as to be returned in specie, can not be taken. Thus loose money cannot

be distrained; but where it is in a bag sealed, it may. *Co. Lit. 47; 1 Lutw. 214.*

Formerly it was not an offence to receive money, knowing it to have been stolen; and the like as to choses in action. The former rule might have obtained by the difficulty which must always have been experienced in following and identifying (when found) the metal: and as to the latter, they were clearly not chattels. These defects have been supplied by a recent statute, 7 & 8 *Geo. 4. c. 29. § 54.* which punishes the receivers of stolen chattels, money, or valuable securities, with transportation, &c. See *Receivers.*

MONEY, LENDING IT ABROAD. By a temporary statute, 3 *Geo. 2. c. 5.* the king by proclamation might, for one year, prohibit all his subjects from lending or advancing money to any foreign prince or state, without license under the great or privy seal; and if any person knowingly offended in the premises, he should forfeit treble the value of the money lent, &c., two-thirds to the king, and the other to the informer: but persons might deal in foreign stocks, or be interested in any bank abroad, established before the issuing of his majesty's proclamation. See *Alien.*

MONEY, PAYMENT OF, INTO COURT. In law proceedings, money demanded is oftentimes brought into court, either by a rule of court, or by pleading a *proferet in curiam* of the money on a tender.

The practice of bringing money into court was first introduced in the time of Kelyng, Ch. J., to avoid the hazard and difficulty of pleading a tender: and until recently it was only allowed in cases where an action was brought upon contract for the recovery of a debt, which was either certain, or capable of being ascertained by mere computation, without leaving any other sort of discretion to be exercised by a jury. 2 *Burr. 1120.*

Thus in assumpsit or covenant for the payment of money, the defendant might have brought money into court; and in covenant to find diet and lodging, or pay 10*l.*, the court allowed a defendant to bring in the 10*l.* In debt for rent, the defendant was formerly allowed to bring money into court, as is done in the Common Pleas and the Exchequer; but the Court of King's Bench refused it, and said they never did it in debt. But there was a distinction between those actions of debt wherein the plaintiff could not recover less than the sum demanded, as on a record, specialty, or statute, giving a sum certain by way of penalty: and those actions wherein the plaintiff might recover less, as in debt for rent, or on a simple contract. In the former the defendant could not bring money into court, though he might have moved to stay the proceedings, on payment of the whole debt and costs; as was the practice in cases of debt on bond, conditioned for payment of a lesser sum than the penalty, previous to *st. 4 & 5 Ann. c. 16.* which allows the defendant, pending an action on such bond, to bring the principal, interest, and costs into court, and declares that such payment shall be a full satisfaction and discharge of the bond. But in the latter, the defendant was allowed to bring money into court, because the plaintiff did not recover according to his demand, but according to the verdict of the jury. By the 19 *Geo. 2. c. 37.* the defendant might bring money into court, in debt, covenant, or other action, on a policy of assurance. See 3 *Burr. 1773.* In an action by an executor or administrator, the plaintiff not being until very recently liable to costs, the defendant was not formerly allowed to bring money into court; but he was afterwards permitted to do so. See 2 *Salk. 596; 2 Stra. 796.*

In trover, the defendant could not bring the goods and costs into court. 1 *Wils. 23.* Nor in an action for the mesne profits after a recovery in ejectment. 2 *Wils. 115.*

And as a tender could not be pleaded, so the defendant could not bring money into court, in an action for general damages upon a contract, or for a tort or trespass. But in action on assumpsit against a carrier, for not delivering goods, the defendant having advertised that he would not be answerable for any goods beyond the value of 20*l.* unless they were

entered and paid for accordingly, the court of King's Bench allowed him to bring the 20*l.* into court. And where, in an action for general damages, the bringing of money into court was irregular, if the plaintiff took it out, he thereby waived the irregularity, and could not afterwards have a verdict, unless he recovered more than the sum brought in.

By 24 Geo. 2. c. 44. § 4. (which seems to be the first statute allowing money to be brought into court in an action for general damages); 20 Geo. 3. c. 70. § 33; 7 & 8 Geo. 4. c. 29. § 75; c. 30. § 41. and several subsequent statutes, in actions against justices of the peace, or officers of the excise or customs, for any thing done in the execution of their offices, the defendants are permitted to tender amends before action brought, or to pay money into court after proceedings have been commenced.

By the 11 Geo. 4. and 1 Wm. 4. c. 68. § 10. in all actions brought against any mail contractor, stage-coach proprietor, or other common carrier for hire, for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, the defendant may pay money into court in the same manner and with the same effect as money may be paid into court in any other action.

And now by the 3 & 4 Wm. 4. c. 42. § 21. the defendant in all personal actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant,) by leave of the superior courts where such action is pending, or of a judge of any of the said courts, may pay into court a sum of money, by way of compensation or amends, in such manner and under such regulations, as to the payment of costs and the form of pleading, as the said judges or eight or more of them shall, by any rules or orders by them to be from time to time made, order and direct.

Under the old practice, the motion for leave to bring money into court was a motion of course, and should regularly be made before plea pleaded; but it was frequently made, and in some cases expressly authorized by statute, after plea, on obtaining a judge's order for that purpose. And if there had been no delay, the court would give the defendant leave to withdraw the general issue, in order to bring money into court, and plead it on payment of costs. *Tidd's Pract.*

By the rules of H. T. 2 Wm. 4. r. 55. it was ordered that "in all cases in which money may be paid into court, leave to pay it in may be obtained by a side bar rule."

By r. 56, "on payment of money into court the defendant shall undertake by the rule to pay the costs; and in case of non-payment, to suffer the plaintiff either to move for an attachment on a proper demand and service of the rule, or to sign final judgment for nominal damages."

And by r. 104, "where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one, and fails, he shall be entitled to costs on the others up to the time of paying money into court."

Now by the rules of H. T. 4 Wm. 4. r. 17. when money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the form therein given.

By r. 18, no rule or judge's order shall be necessary, except under the 3 & 4 Wm. 4. c. 42. § 21, (see ante); but the money shall be paid to the proper officer of the court, who shall give a receipt for the amount in the margin of the plea; and the said sum shall be paid out to the plaintiff on demand.

And by r. 19. "the plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit; and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply, 'that he has sustained damages (or 'that the defendant is indebted to him,' as the case may be,) to a greater amount than the said sum;' and in the event of an issue thereon being found for

the defendant, the defendant shall be entitled to judgment and his costs of suit."

The court will not order money, paid into court through a mistake, to be repaid to the defendant; but perhaps they would in case of fraud. 2 B. & P. 392; and see 3 B. & P. 536.

With respect to the payment of money into court under a plea of tender, see that title.

MONGER. A little sea vessel which fishermen used. See 13 Eliz. c. 11.

When a word ends in *monger*, as *ironmonger*, &c. it signifies merchant, from the Sax. *manger*, i. e. *mercator*.

MONIERS or MONEYERS, *monetarii*.] Are ministers of the mint, who make and coin the king's money. *Reg. Orig.* 262; 1 Edw. 6. 15; see *Mint*. It appears in ancient authors that the kings of England had mints in several counties, and those who had the conduct of them appear to have been called *monetarii*, moniers. In the tract in the Exchequer written by Oakham, it is said, that whereas sheriffs were usually obliged to pay into the king's exchequer the king's sterling money for such debts as they were to answer; those of Cumberland and Northumberland were admitted to pay in any sort of money, so it were silver: and the reason there given is, because those two shires *monetarios de antiqua institutione non habent; quod abbas et monachi predicti habent unum monetarium et unum cuneum apud Rading ad monetandum ibidem, tam ad obolos et sterlingos quam ad sterlingos prolemoris est fabricand' et faciend'*. *Memorand. Stat. de Anno* 20 Edw. 3. *inter record. de Trin. Rot.* Of later days the title of moniers hath been given to bankers, that is, such as make it their trade to deal in monies upon returns. *Cowell. Brit. Mint.*

MONK, *monachus*, from the Gr. *Monac*, *solus quia soli, &c. separati ab aliorum consortio vivant*, because the first Monks lived alone in the wilderness.] They were after divided into three ranks; *Cenobitarium*, i. e. a society living in common in a monastery, &c. under the government of a single person, and these were under certain rules, and afterwards called *Regulars*; *Anachoretæ*, or *Eremitæ*, those Monks who lived in the wilderness on bread and water; and *Sarabiteæ*, Monks living under no rule, that wandered in the world.

The several orders of regular monks in England and Wales were the *Benedictines*; the *Cluniacs*, and the *Grandmontians*, both branches of the former; the *Carthusians*, who followed the rule of St. Benedict, but with the addition of many austerities; the *Cistercians*, also a branch of the Benedictines, who were called white monks from the colour of their habits; and the *Savignians*, or *Fratres Grisei*, so termed from their grey dress, another shoot from the Benedictine tree. The *Premonstranses*, who were reformed Benedictines, had no house in England, but possessed an abbey in Wales. The above were all the orders in England and Wales except the *Culdees*, or *Cultores Dei*, who were Scotch monks, and of the same rule with the Irish, and who were only to be met with at St. Peter's in York. See 2 Burn's *Eccl. Law*, 517.

MONKERY. The profession of a Monk, mentioned in *Black's reading upon st. 21 Hen. 8. c. 13.*

MONKS' CLOTHES. Made of a certain kind of coarse cloth. See 20 Hen. 6.

MONOPOLY, from *Monoc*, *solus*, and *πωλεω*, *vendo*.] A license or privilege allowed by the king, by his grant, commission, or otherwise, to any person or persons, for the sole buying, selling, making, working, or using of any thing, in which other persons are restrained of any freedom or liberty that they had before, or hindered in their lawful trade. 3 Inst. 181; 4 Comm. 159. It is defined to be where the power of selling any thing is in one man alone, or when one shall ingross and get into his hands such a merchandise, &c. as none may sell or gain by them but himself. 11 Rep. 50.

A monopoly, it is said, hath three incidents mischievous to the public: 1. The raising of the price. 2. The impoverishing of artificers. 11 Rep. 86.

All monopolies are against the ancient and fundamental laws of the realm. A bye-law, which makes a monopoly, is void; so is a prescription for a sole trade to any one person or persons, exclusive of all others. *Moor*, 591. Monopolies by the common law are void, as being against the freedom of trade, and discouraging labour and industry, and putting it in the power of particular persons to set what prices they please on a commodity. 1 *Hawk*. P. C.

Upon this ground it hath been held, that the king's grant to any corporation of the sole importation of any merchandise, is void. 2 *Rot. Abr.* 214; 3 *Inst.* 182. The grant of the sole making, importing, and selling of playing-cards, was adjudged void. 11 *Rep.* 84; *Moor*, 671. And the king's grant of the sole making and writing of bills, pleas, and writs in a court of law, to any particular person, hath been resolved to be void. 1 *Jones*, 281; 3 *Mod.* 75.

As to the king's prerogative copyright in the holy scriptures, &c. see *Literary Property*.

All matters of this nature ought to be tried by the common law, and not at the council-table, or any other court of that kind; and the making use of or procuring any unlawful monopoly, is punishable by fine and imprisonment at common law. 3 *Inst.* 181, 182.

These monopolies had been carried to an enormous height during the reign of Queen Elizabeth; but were in a great measure remedied by the 21 *Jac.* 1. c. 8. by which all monopolies, grants, letters-patent, and licenses, for the sole buying, selling, and making of goods and manufactures, are declared void, except in some particular cases; and persons grieved by putting them in use, shall recover treble damages and double costs, by action on the statute; and delaying such action before judgment, by colour of any order, warrant, &c. or delaying execution after, incurs a *premunire*; but this does not extend to any grant or privilege granted by act of parliament; or to any grant or charter to corporations or cities, &c.; or to grants to companies or societies of merchants, for enlargement of trade; or to inventors of new manufactures, who have patents for the term of fourteen years; grants or privileges for printing; or making gunpowder, casting ordnance, &c.

As to inventors of new manufactures, &c. it has been adjudged on this statute, that a manufacture must be substantially new, and not barely an additional improvement of any old one, to be within the statute; it must be such as none other used at the granting of the letters-patent; and an old manufacture in use before, cannot be prohibited in any grant of the sole use of any such new invention. 3 *Inst.* 184. Yet a grant of monopoly may be to the first inventor, by the 21 *Jac.* 1. c. 8; notwithstanding the same thing was practised before beyond sea; because the statute mentions new manufactures within the realm, and intended to encourage new devices useful here; and it is the same thing, whether acquired by experience or travel abroad, or by study at home. 2 *Salk.* 447. It is said, a new invention to do as much work in a day by an engine, as formerly used to employ in any hands, is contrary to the statute; by reason it is inconvenient, in turning so many men into idleness. 3 *Inst.* 184. But experience seems in favour of such inventions, as they tend to lessen the price of manufactures, and enable us to undersell foreigners, both at home and abroad.

The statute of *Jamas* is only declaratory of the common law. The monopoly which can be created by the crown arises from the grant conferring on an individual the privilege of the sole making and selling of some article or thing. It can only be made when thereby no other person is restrained in what he had before, or prevented from following his lawful trade. 1 *Hawk.* 470. And therefore such a grant, at the present day, is confined to a new invention. When it is contemplated to constitute a new monopoly, recourse must be had to parliament. See *Patent*.

Monopolies among the people consist of forestalling, en-

grossing, and regrating, which were punishable by several statutes now repealed, but they are still offences at common law. See *Forestalling*.

MONSTER. One who hath not human shape, and yet is born in lawful wedlock; and such may not purchase or retain lands; but a person may be an heir to his ancestor's lands, though he be deformed in some part of his body. *Co. Lit.* 7.

Showing a monster for money is a misdemeanor. See *Indecency*.

MONSTRANS DE DROIT, a showing a right.] A writ out of Chancery to be restored to lands and tenements that are a man's, in right, though by some office found to be in the possession of one lately dead; by which office the king would be entitled to the said lands, &c. *Staundf.* P. C. c. 21; 4 *Rep.* 54.

The common-law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By *petition de droit*, or petition of right, which is said to owe its original to King Edward I. 2. By *monstrans de droit*, manifestation or plea of right; both which may be preferred or prosecuted either in the Chancery or Exchequer. *Skin.* 609.

The former is of use where the king is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself; in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate. *Each.* 1. 256. And then, upon this answer being indorsed or underwritten by the king, "*non droit fait al partie*—let right be done to the party;" a commission shall issue to inquire the truth of this suggestion: after the return of which the king's attorney is at liberty to plead in bar, and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. *Skin.* 608; *Rast.* *Entr.* 461. Thus if a disseisor of lands which were holden of the crown died seized without any heir, whereby the king was *primâ facie* entitled to the lands, and the possession was cast on him either by inquest of office, or by act of law without any office found; the disseisee should have remedy by petition of right, suggesting the title of the crown, and his own superior right before the disseisin made. *Bro. Ab. Petition*, 20; 4 *Rep.* 58.

But where the right of the party, as well as the right of the crown, appears upon record, there the party shall have *monstrans de droit*, which is putting in a claim of right grounded on facts already acknowledged and established; and praying the judgment of the court, whether upon those facts, the king or the subject hath the right. As if, in the case before supposed, the whole special matter is found by an inquest of office, (as well the disseisin as the dying without any heir,) the party grieved shall have *monstrans de droit* at the common law. 4 *Rep.* 55. But as this seldom happens, and the remedy by *petition* was extremely tedious and expensive, that by *monstrans* was much enlarged, and rendered almost universal by several statutes; particularly 36 *Edw.* 3. c. 13; 2 & 3 *Edw.* 6. c. 8; which also allow inquisition of office to be traversed or denied, wherever the right of a subject is concerned, except in a very few cases. *Skin.* 608.

By the common law, whenever the king was in possession by virtue of an inquisition, the subject was put to his *petition* of right, unless the right of the party appeared in the inquisition, and then at the common law he might have had a *monstrans de droit*; but when the inquisition only entitled the king, and he was obliged to bring a *scire facias* against the party to recover possession, there at common law the party might have traversed the king's title; for in that case, the king being in nature of a plaintiff, the party in possession might, by pleading, have put him to prove the title upon which he would recover. But when the king was in pos-

session by virtue of the inquisition, there the party who would get that possession from him was in nature of a plaintiff, and therefore had no method of proceeding but by way of petition; for no action could lie against the king, because no writ could issue, as he could not command himself. This remedy by petition however being attended with great delay and charge to the party grieved, the statutes of 34 Edw. 3. c. 14; 36 Edw. 3. c. 13; and 2 & 3 Edw. 6. c. 8. were made to enable the subject to traverse inquisitions, or otherwise to show his right. Thus were traverses and *monstrans de droit* introduced in lieu of petitions, the only difference between them being, that in a traverse the title set up by the party is inconsistent with the king's title found by the inquisition, which he therefore must traverse; in a *monstrans de droit* he confesses and avoids the king's title: but in both cases he must make a title in himself; and if he cannot prove his title to be true, although he be able to prove that the king's title is not good, it will not serve him. In traverses at common law, however, the party is in nature of a defendant, and therefore need not set up any title in himself.

The method of proceeding at common law by petition, was, that the king's title being found by inquisition, the party petitioned to have an inquest of office, to inquire into his title: if his title was found by such office, then he came into court and traversed the king's title. So that the record began by setting out the first inquisition found for the king, and after that the return of the inquisition taken upon the petition, and then went on with "*Et modo ad hunc diem venit*," and so traversed the king's title. In conformity to these proceedings at common law, the traverse and *monstrans de droit* given by the statutes, begin by stating the inquisition, and then go on, "*Et modo ad hunc diem venit*," &c. And from this manner of pleading some have considered the party traversing as defendant: but when it is considered that this traverse comes in lieu of the petition at common law, and that it does not suspend the vesting in the king by the inquisition,—and that the judgment for the party is an *amoveus manus*, and the judgment against him a *nil capiat*,—it seems clear he ought to be deemed a plaintiff, and, as such, is capable of being nonsuited. *Tidd's Pract.*

These proceedings are had in the Petty-bag Office, in the Court of Chancery; and if upon either of them the right be determined against the crown, the judgment is *quod manus Domini Regis amoveantur, et possessio restitatur petenti, salvo jure Domini Regis*; which last clause is always added to judgments against the king, to whom no laches is ever imputed, and whose right, till it was otherwise provided by statute, was never defeated by limitation or length of time.

By the above judgment the crown is instantly out of possession, so that there needs not the indecorous interposition of his own officers to transfer the seisin from the king to the party aggrieved. *Finch. L. 459*; see 3 Comm. c. 17. p. 256, 257.

The lessee of an outlaw cannot maintain trespass, but must be relieved by *monstrans de droit*. *Ld. Raym. 307.*

MONSTRANS DE FAITS or **RECORDS**. Showing of deeds or records is thus: upon an action of debt brought upon an obligation, after the plaintiff hath declared, he ought to show his obligation, and so it is of records. And the difference between *monstrans de faits* and *oyer de faits* is this: he that pleads the deed or record, or declares upon it, ought to show the same; and the other against whom such deed or record is pleaded, may demand *oyer* of the same. *Cowell.*

Where a man pleads a deed, which is the substance of his plea or declaration, if he does not plead it with a *profert in curia*, his plea or declaration is bad upon a special demurrer showing it for cause; and if he plead it with a *profert in curia*, and the other party demand a sight of it, he cannot proceed till he hath shown it; and when the defendant has had a sight of it, if he demands a copy of the same,

the plaintiff may not proceed until a copy is delivered to him. See 4 & 5 Ann. c. 16; 2 Lil. Abr. 201, 202; and *tits. Oyer, Pleading, Profert in Curia.*

MONSTRAVERUNT. Is a writ which lies for tenants in ancient demesne, who hold land by free charter, when they are distrained to do unto their lords other services and customs than they or their ancestors used to do. Also in lieth where such tenants are distrained for the payment of toll, &c. contrary to their liberty, which they do or should enjoy. *F. N. B. 11*; 4 Inst. 269. This writ is directed to the sheriff, to charge the lord that he do not distrain them for such unusual services, &c. And if the lord nevertheless distrains his tenants for other services than of right they ought to do, the sheriff may command the neighbours who dwell next the manor, or take the power of the county to resist the lord, &c. And the tenants in such case may likewise sue an attachment against the lord, returnable in C. B. or B. R. to answer the contempt and recover damages. *New Nat. Br. 32.*

But the lord shall not be put to answer the writ of attachment sued against him upon the *monstraverunt*, before the court is certified by the treasurer and chamberlains of the Exchequer, from the book of Domesday, whether the manor be ancient demesne; so that it is requisite that the plaintiff in the *monstraverunt* do sue forth a special writ for the certifying of the same. *Ib. 35.* The writ of *monstraverunt* may be sued for many of the tenants, without naming any of them by their proper names, but generally *monstraverunt nobis homines de*, &c. But in the attachment against the lord, the tenants ought to be named; though one tenant may sue it in his own name, and the name of the other tenants by general words, *Et homines*, &c. 2 Hen. 6. c. 20. See *Ancient Demesne, Ne injuste vexas.*

MONSTRUM. Is sometimes taken for the box in which relics are kept. *Item unum monstrum cum ossibus St. Petri*, &c. *Monast. iii. 173.* *Monstrum* is also taken for what we call corruptly a muster of soldiers. *Cowell.*

MONTH, or **MONETH**, Sax. *monath, mensis, a mensione lune cursus.*] Signifies the time the sun goes through one sign of the zodiac, and the moon through all twelve properly the time from the new moon to its change, or the course or period of the moon, whence it is called *month* from the moon. *Lit. Dict.* A month is a space of time containing by the week twenty-eight days; by the calendar sometimes thirty, and sometimes thirty-one days; Julius Caesar divided the year into twelve months, each month into four weeks, and each week into seven days.

The space of a year is a determinate period, consisting commonly of 365 days; for though in Bissextile or Leap years it consists properly of 366, yet by 21 Hen. 8. c. 6. *anno Bissextili*, the increasing day in the Leap-year, together with the preceding day, shall be accounted for one day only. That of a month is more ambiguous; there being in common use two ways of calculating months, either as lunar consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year; or as calendar months of unequal lengths, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year there are only 12. A month in law is a lunar month, or 28 days; unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for 12 months is only for 33 weeks; but if it be for a twelvemonth in the singular number, it is good for the whole year. 6 Rep. 61. For here the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases, being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant a whole year, consisting of one solar revolution. 2 Comm. 13.

The month by the common law is but twenty-eight days

and in case of a condition for rent, the month shall be computed at twenty-eight days; so in the case of inrolment of deeds, and generally in all cases where a statute speaks of months; but where the statute accounteth by the year, half-year, or quarter of a year, then it is to be reckoned according to the calendar. 1 *Inst.* 135; 6 *Rep.* 62; *Cro. Jac.* 167; 6 *T. R.* 224.

When the word month occurs in any statute, it must be taken to mean a lunar month, unless calendar months are specified. *Cro. Eliz.* 135; *Yel.* 100.

A twelvemonth in the singular number includes the whole year, according to the calendar; but twelve months, six months, &c. in the plural number, shall be accounted after twenty-eight days to every month; except in case of presentation to benefices, to avoid lapse, &c., which shall be in six calendar months. 6 *Rep.* 61; *Cro. Jac.* 141. But if an agreement is to pay fifty shillings for the interest of one hundred pounds at the end of six months, the computation must be by calendar months, because, if it was by lunar months, the interest would exceed the rate allowed by the statute. So in bills of exchange and promissory notes, a month is always a calendar month; as if a bill or note is dated on the 10th of January, and made payable one month after date, it is due (the three days of grace being added) on the 13th of February.

The word month may in fact mean lunar or calendar, according to the intention of the contracting parties, therefore, when upon a sale of land upon the 24th of January it was agreed by the conditions of sale that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, to be returned by him at the end of two months from the said date, and that a draft of the conveyance should be delivered within three months from the said date, to be re-delivered within four months from said date, and the purchase to be completed on the 24th of June; making a period of precisely five calendar months from the date of the sale and conditions; the word month was held to mean calendar, and not lunar months, by reference to the whole period fixed for the completion of the contract. 1 *M. & S.* 111.

It is somewhat remarkable that the difference between six calendar months and half a year, does not seem to have been considered by legal writers. *Coke* says, half a year consists of 182 days. 1 *Inst.* 135. But six calendar months will be two or three days less or more than such a half year, accordingly as February is reckoned or not one of the six. *Coke*, in his report of *Catesby's* case, clearly considers the *tempus aestivum* to be six calendar months; 6 *Co.* 61; yet *Croke*, in his report of that case, states it as confidently to consist of 182 days: *Cro. Jac.* 141, 166; and in neither report is the difference taken notice of. 2 *Comm.* 141, in *n.*

A notice to a tenant from year to year to quit the premises, must be half a year, and not six calendar months. 3 *Wils.* 21; 1 *T. R.* 159; 7 *B. & C.* 64.

MONUMENT. An heir may bring an action against one that injures the monument, &c. of his ancestor; and the coffin and shroud of a deceased person belong to the executors or administrators; but the dead body belongeth to none. 3 *Inst.* 202, 203. See *Heir*, III. 3.

It has been decided by the Court of C. P. that although the freehold of the churchyard is in the parson, yet trespass may be maintained by the executor of a tombstone against one who wrongfully removes it from the churchyard, and erases the inscription. 3 *Bing.* 136.

MOORS, in the Isle of Man, who summon the courts for the several shreadings, are the lords bailiffs, called by that name; and every moor has the like office with our bailiff of the hundred. *King's Descript. Isle of Man.*

MOOT, from the Sax. *motian*, *placitare*, to treat or handle. A term in the Inns of Court, signifying the exercise of arguing of cases; which young barristers and students

used to perform at certain times the better to enable them for the practice and defence of clients' causes.

The place where moot-cases were argued was anciently called the Moot-Hall; and in the Inns of Court there is a bailiff of the moot yearly chosen by the benchers to appoint the mootmen for the Inns of Chancery, and keep accounts of the performances of exercises, both there and in the house. *Orig. Juridical.* 212.

MOOTA CANUM. A pack of dogs. *Cowell.*

MOOTMEN. Those who argue the reader's cases, called moot-cases, in the Inns of Chancery, in the term-time, and in the vacation. See *Moot*.

MORA. A moor, or barren or unprofitable ground, derived from the Sax. *mor*, signifying also marsh land. *Mon. Angl. tom.* ii. p. 50; 1 *Inst.* 5. Also a heath. *Fleta*, lib. ii. c. 71.

MORA MUSSA. A watery or boggy moor; a morass; and such, in Lancashire, they call *mosses*: *morossa* is used in the same sense. *Mon. Angl. tom.* i. p. 306.

MORATUR IN LEGE. He demurs; because the party goes not forward in pleading, but rests or abides upon the judgment of the court, in a certain point, as to the sufficiency in law of the declaration or plea of the adverse party, who deliberate and take time to argue and advise thereupon, and then determine it. *Co. Litt.* 71. See *Demurrer*.

MORAVIANS. See *Quakers*.

MORETUM. A sort of brown cloth with which caps were formerly made. *Mat. Paris*, anno 1258.

MORGANGINA, or **MORGANGIVA**, from Sax. *morgen*, the morning, and *gifan*, to give.] The gift on the wedding-day. Dower, or rather dowery.—*Si sponsa virum suum supervixerit, dotem et maritacionem suam, cartarum instrumentis, vel testium exhibitionibus et traditam, perpetuam habeat et morganginam suam.* *LL. Hen.* 1. c. 11, 70. In some books it is written *morgangiba*, *morgingab*, &c. In *Leg. Canuti apud Brompton*, it is written *morgagifa*, c. 99. It signifies literally *donum matutinale*; and it is what we now call *dowery money*, or that gift the husband presents to his wife on the wedding-day. It was usually the fourth part of his personal estate; not here, but amongst the Lombards. *Du Cange* in *v. Morgangiba*. *Cowell.*

MORIAM, Fr. *morion*; *cassis*] A head-piece. It seems to be derived from the Italian *morione*. See 4 & 5 *P. & M.* c. 2.

MORINA. Murrain; an infectious distemper in cattle. It also signifies the wool of sick sheep, and those dead with the murrain. *Fleta*, lib. ii. c. 79. par. 6.

MORLING, or **MORTLING.** That wool which is taken from the skin of dead sheep, whether being killed or dying of the rot. See 4 *Edw.* 4. c. 2 & 3; 27 *Hen.* 6. c. 2; (both repealed); 3 *Jac.* 1. c. 18; 14 *Car.* 2. c. 88; and *tit. Shurling*.

MOROSUS. Marshy. See *Mora*.

MORSELLUM, or **MORSELLUS TERRÆ.** A small parcel or bit of land. *Charta* 11 *Hen.* 3; *Matt. Paris*, 438; *Mon. Angl.* 282.

MORTARIUM. A light or taper set in churches to burn over the graves or shrines of the dead. *Consuetud. Dom. Earendon*, MS. fol. 48.

MORT-D'ANCESTOR. See *Assise of Mort d'Ancestor*.

MORTGAGE.

MORTGAGIUM, vel **MORTUUM VADUM**; from *mort*, *mortuus*, and *gage*, *pignus*.] A pawn of land or tenement, or any thing immoveable, laid or bound for money borrowed, to be the creditor's for ever, if the money be not paid at the day agreed upon; and the creditor holding land and tenement upon this bargain, is called *Tenant in Mortgage*. Of this we read in the *Grand Customary of Normandy*, c. 313, which see. *Glanvil*, likewise, lib. 10. c. 6. defineth it thus: *Mortuum vadum dicitur illud, cujus fructus vel redditus in-*

nent restrictions, to elude the justice of the court. 1 Vern. 383, 190; 2 Ch. Ca. 147; 1 Eden, 55.

But if a man borrows money of his brother, and agrees to make him a mortgage, and that if he has no issue male, his brother should have the land; such an agreement, made out by proof, will be decreed in equity. 1 Vern. 193.

A. in consideration of 1000*l.* made an absolute conveyance to B. of the reversion of certain lands after two lives, which, at the time, were worth little more; and by another deed, of the same date, the lands were made redeemable any time during the life of the grantor only, on payment of 1000*l.* and interest; A. died, not having paid the money; and it was held by Lord K. *Nottingham*, that his heir might redeem, notwithstanding this restrictive clause, and that it was a rule, once a mortgage, and always a mortgage; and that B. might have compelled A. to redeem in his life-time, or have foreclosed him. But on a rehearing, Lord *North* reversed the decree on the circumstances of this case; for it appeared by proof, that A. had a kindness for B., and that he married his kinswoman, which made it in the nature of a marriage-settlement; he likewise held, that B. could not have compelled A. to redeem during his life, which made it more strong. 1 Vern. 7, 192, 214, 232; 2 Vent. 364. *S. C.* where it is said, that Lord *North's* decree was affirmed in the House of Lords. See also *Hard*. 511.

If A. mortgage lands to B. worth 15*l.* per ann. for securing 200*l.*, and at the same time B. enters into a bond, conditioned, that if the 200*l.* and interest is not paid within a year, then he to pay A. his executors or administrators, the further sum of 78*l.* in full for the purchase of the premises, &c. and A. dies within the year, and the money is paid the next day after, the mortgage is forfeited to his administrator; yet A.'s heir may redeem, paying the 200*l.* and likewise the 78*l.* that was paid to the administrator. 1 Vern. 488.

So where A. for 550*l.* made an absolute assignment of a church lease for three lives to B., and B. by writing under his hand, agreed, that if A. paid 600*l.* at the end of the year, B. would convey; B. died, leaving C. his son and heir; two of the lives died, and the lease was twice renewed by C. and his father; and though it was near twenty years since the conveyance was made, yet the master of the rolls decreed a redemption on payment of 550*l.* and the two fines. 2 Vern. 84.

A. lends money to B. to carry on certain buildings and takes a mortgage from him to secure 1600*l.* with interest; and by another deed, executed at the same time, takes a covenant from B. that he should convey to him, if he thought fit, ground-rents to the value of 1600*l.* at the rate of twenty years' purchase; and on a bill brought to redeem, the master of the rolls decreed a redemption on payment of principal, interest, and costs, without regard to that agreement, but set aside the same as unconscionable; for a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement. 2 Vern. 520.

But though these and such like restrictions are relieved against, to make them answer the primary intention of the parties; yet if A. on a mortgage lends money at 5*l.* per cent. but agrees in the deed, that if the money were paid within three months after it became due, that he would accept of 4*l.* per cent. and the mortgagor neglects to pay the interest within the time, equity will not relieve him, but he must pay 5*l.* per cent.; for though the court relieves against unreasonable penalties, yet this is not so, for the mortgagee might have refused to lend his money under 5*l.* per cent. *Preced. Chanc.* 150; 1 P. Wms. 653. See post, III. *ad finem*.

So if the mortgagee devises that the mortgagor should be remitted part of his mortgage-money, provided he pays the principal and interest within three days after his decease; if the condition be not performed, the remittance is lost; be-

cause, being a voluntary bounty, and not *ex debito justitiae* the party must take it as it is limited, for *cujus est dare, ejus est disponere*; and the court cannot relieve in this case, after the day. 1 Ch. Ca. 52.

But where in a mortgage there was a proviso, that if the interest was behind six months, that then the interest should be accounted principal, and carry interest; this, by Lord *Comper*, was decreed to be a vain clause, and of no use; and he said, that no precedent had ever carried the advance of interest so far, and that an agreement made at the time of the mortgage will not be sufficient to make future interest principal; but, to make interest principal, it is requisite that interest be first grown due, and then an agreement concerning it may make it principal. 2 Salk. 499.

A distinction is made in chancery between an agreement that the interest shall be raised, if not punctually paid, and for abatement thereof upon punctual payment. For in the former case it is considered as a penalty which the courts of equity will relieve against; but in the latter as a condition, which must be strictly adhered to; in which case the debtor cannot have relief in equity after the day of payment elapsed, because the abatement is to be upon a condition which is not performed. 3 Burr. 1374, 5.

But though the condition on which the interest is to be abated must be strictly performed on the part of the mortgagor, yet the agreement for abatement is not considered strictly in the light of a condition as to be utterly defeated by a single breach. See 2 *Eden's R.* 197; 1 M. & S. 706.

The mortgagor, before forfeiture, and whilst it remains uncertain whether he will perform the condition at the time limited or not, hath the legal estate in him; also after forfeiture he hath an equity of redemption; so that he is still considered as owner and proprietor of the estate, until the equity of redemption he foreclosed; therefore may make leases or any settlement thereof, which will bind his equity of redemption. (But they will not bind the mortgagee, unless he is a party to the lease, &c.)

The legal interest of the mortgagor after default is that of a tenant at sufferance, not a tenant at will, since he may be ejected without notice. 8 B. & C. 767; whereas a tenant at will cannot be ejected on a demise laid previous to the determination of the will. 4 T. R. 680. And he is not, like a tenant at will, entitled to his growing crops after the will is determined. 1 T. R. 383; and see *Doughl.* 266, (270) *Id.* 21; 9 B. & C. 245. So where a mortgage was made with power to sell, if the money was not paid on a certain day, the mortgagor continuing in possession, it was held on an ejectment brought after the time was passed, that it might be maintained without giving notice to quit or demand of possession. 5 Bing. 421.

And by the recent statute of limitations, (3 & 4 Wm. 4. c. 27.) no mortgagor is to be deemed a tenant at will, if his mortgagee within the meaning of the seventh section relating to tenancies at will.

As to the nature of the estates of the mortgagor and mortgagee; it seems to be at length settled, that as the mortgagee is considered as holding the estate, merely in the nature of a pledge or security for payment of his money, a mortgagee, though in fee, (the legal estate in which descends to the heir at law,) is considered in equity only as personal estate. *Foster's Treat. Eq. lib. 3. c. 1. § 3 & 13 in n.*

Hence as the mortgagor, till the equity of redemption is foreclosed, is considered as owner of the land, it was held, where a bill for redemption was brought against a mortgagee in possession, and a decree accordingly, that the mortgagee, before the account taken, having presented to a church, which became void, should revoke his presentation, and present another person as the mortgagor or his vendee (he having contracted to sell) should appoint. *Preced. Chanc.* 71; 2 Vern. 401. So even though nothing but the advowson is mortgaged, and the deed contain a covenant that on any avoidance

the mortgagee should present. *3 Atk.* 559. For, in such case, though the presentation is not deemed the subject of value, and therefore cannot be brought into the account, it might be a benefit beyond the securing of the principal debt and lawful interest thereon; which decision overrules that in *2 P. Wms.* 403. The mortgagee may however grant leases of the premises, and avoid such leases as have, since his mortgage, been granted without his consent by the mortgagor. *Treat. Eq. lib. 3. c. 1. § 3.*

As to the estate of the mortgagee, though formerly debted whether he had more than a right of redemption, it is now established that he hath an actual estate in equity, which may be devised, granted, and entailed, and of which there might have been a *possessio fratris*, and may be a tenancy by the entirety. *1 Atk.* 603.

It is said that a tenant in tail of an equity of redemption, may devise it for the payment of debts. *11 M. 11.*

As to mortgages by tenants in tail under the recent statute for the abolition of fines and recoveries, see *Tail.*

The mortgagee of a lease has the same title to relief against an ejectment for non-payment of rent, and upon the same terms, as the lessee against whom the recovery is had. *3 Aust.* 42.

By *7 H. H. 1. c. 25*, "no person or persons shall be allowed to vote in election of members to serve in parliament, either by reason of any trust-estate or mortgages, unless such trust-estate mortgage be in actual possession, or receipt of profits of the same; but that the mortgagor, or tenant in fee simple, or tenant in possession, shall and may vote for the same as if standing such mortgage or trust." And see the *Reform Act, 1 H. 4. c. 15*, to the same effect.

And by *Ann. c. 5*, which requires that knights of the shire should pay 100*l.* per annum, and every other member 300*l.* per annum, it is enacted, "that no person shall be qualified to sit in the House of Commons, within the meaning of the act, by virtue of any mortgage whereof the equity of redemption is in any other person; unless the mortgagee shall have been in possession of the mortgaged premises for seven years before the time of election."

III. On an appeal to the House of Lords it was settled, that if there be several mortgages or other incumbrances upon the same estate, the first incumbrancer who has the legal estate shall be preferred to the second, and so on, according to the periods at which their respective securities bear date. *1 Bro. P. C.* 66.

It is a rule in equity, that where several persons have equal equity, he amongst them that has possession of the legal estate, may make all the advantages of it which the law allows, and thereby protect his title, although it be subsequent in point of time; and his adversaries shall have no help in equity, for it will not disarm a possessor, but where equity stands, it will leave the law to prevail. Therefore, where there are several mortgages, the last mortgagee having no legal estate, is to be considered as a subsequent mortgagee, and the intervening charges, (*3 Atk.* 24, 2 Ch. C. 100) by purchasing the precedent mortgage, which carries with it the legal estate, protect himself against any subsequent mortgagee, and the first and prior to the last, for he will have both law and equity upon his side. *1 Ch. C. 211; 1 P. Wms.* 187, 188; *2 Ves.* 73.

But where the interests affecting an estate are all equitable, they will attach upon it according to the times at which they were created; for it is a maxim in equity as well as at law, that *qui prior est tempore potior est jure*. *1 Atk.* 52, *1 Bro. P. C.* 28, *11 Ves.* 50, *15 Ves.* 52. It was at one time considered that the party who had the most equity to call for a conveyance of the legal estate was to be considered in the same situation as if he had the legal estate (*see 10 Ves.* 246; *11 Ves.* 618), but it has since been decided that the person having the best right to call for the

legal estate obtains no priority, unless he actually procures an assignment of such legal estate. *8 Prue.* 475.

It has been said to be an established rule of equity, that a second mortgagee, who has the title-deeds without notice of any prior incumbrance, shall in all cases be preferred; because if a mortgagee lend money upon real property without taking the title-deeds, he enables the mortgagor to commit a fraud. *1 Term Rep.* 762. But Lord *Thurlow, C.*, afterwards observed upon this, that he did not conceive that the not taking the deeds was alone sufficient to postpone the first mortgagee; if it were so, there could be no such thing as a mortgage of the reversion; and he held, that a second mortgagee in possession of the title-deeds was preferred only in cases where the first had been guilty of fraud or gross negligence. *2 Bro. C. R.* 652. It seems, however, that fraud or gross negligence would be presumed, unless the mortgagee could show that it was impossible for him to obtain possession of the title-deeds, or that he had used the due and necessary diligence for that purpose. *2 Comm.* 160, *in n.* See *Treat. Eq. lib. 1. c. 3. § 4*; where the rule of equity is thus stated on the ground of a solemn judgment in the Court of Exchequer; "that nothing but a voluntary, distinct, and unjustifiable concurrence on the part of the first mortgagee, to the mortgagor's retaining the title-deeds, shall be a reason for postponing his priority."

Whatever may be the value of the estate, it is of great importance to those who lend money upon real security, to be certain that there is no prior mortgage upon the estate; for it has been long settled, that if a third mortgagee, who at the time of his mortgage, had no notice of the second, purchases the first mortgage, even pending a bill filed by the second to redeem the first, both the first and third mortgages shall be paid out of the estate before any share of it can be appropriated to the second. The reason assigned is, that the third by thus obtaining the legal estate, has both law and equity on his side, which supersede the mere equity of the second. And Lord *Hobbs* held it right that the third should thus seize what he called *tabula in naufragio*, a plank in the shipwreck, and so leave the second to perish. See *2 Vent.* 337; *1 C. C.* 162, 36, 149. But among mortgagees, where none has the legal estate, the rule in equity, as has been already observed, is *qui prior est tempore potior est jure*. *2 P. Wms.* 491; *1 Bro. C. R.* 63; see also *2 Vern.* 81, 29, 525; *2 Atk.* 52, 347. If, however, the second or mesne incumbrancer has obtained a decree for an account, a subsequent incumbrancer cannot, by buying in the first incumbrance, defeat the effect of such decree. *3 Atk.* 809. See *Ponblanque's Treatise of Equity, lib. 1. c. 4. § 25*. Some reflections have been made by Mr. Christian on the above doctrine, *2 Comm.* 160, *in n.*; but it seems perfectly consistent with the maxim of law, *vigilantibus non dormientibus servit lex*. See *Treat. Eq. lib. 3. c. 3. § 1*.

2. As a puisne mortgagee, by purchasing a prior incumbrance that brings with it the legal estate, may unite it with his own, and thereby protect himself from intervening charges on the property, so a first mortgagee having the legal estate may tack a subsequent sum advanced by him upon the former security to his prior mortgage, and thereby protect himself against mesne incumbrances. *2 Cha. Ca.* 20.

So if there be first and second mortgagee, and the first lend money after the latter mortgage has been made, taking a judgment as security, he may tack this to his mortgage to protect himself against the second mortgagee, for he has the legal estate and the judgment, which, though it passes no interest presently in the land, operates as a lien. *2 Atk.* 352; *2 P. Wms.* 494; *2 Ves.* 663.

But such subsequent advances must be without notice of the intervening incumbrances. *Pre. Ch.* 226; and they must be made to one who has a right to charge the estate. *Nels. Rep.* 153.

As to what is considered a sufficient notice in equity, see 2 *Powell on Mortgages, by Coventry*, 1.

3. It is well observed by *Blackstone*, that in *Glannil's* time, when the universal method of conveyance was by livery of seisin, or corporal tradition of the lands, no gage or pledge of lands was good, unless possession was also delivered to the creditor, for which the reason given is, to prevent subsequent and fraudulent pledges of the same land. *Glann. lib. 10. c. 8.* And the frauds which have arisen, since the exchange of those public and notorious conveyances for more private and secret bargains, has well evinced the wisdom of our ancient law. 2 *Comm. c. 10. p. 160.*

There is one case in which the legislature has thought proper to take from the mortgagor the equity of redemption, and to give the mortgagee an absolute estate in the land, that is, where the former is guilty of a fraud upon the latter by concealing prior incumbrances. For by the 4 & 5 *W. & M. c. 16.* it is enacted, that if any person shall borrow any money, and for payment thereof, or for any other valuable consideration, shall voluntarily give a judgment, statute, or recognizance, and shall afterwards borrow any other sum of another, or for other valuable consideration become indebted to such other, and for securing the repayment and discharge thereof shall mortgage lands, or any part thereof, to the second lender, &c. or to any other in trust for or to the use of such second lender, &c. and shall not give notice to the said mortgagee, of such previous judgment, &c. in writing, under his hand, before the execution of the said mortgage or mortgages; unless such mortgagor or his heirs, upon notice given by the mortgagee, his heirs, &c. in writing, &c. attested by two witnesses, of any such former judgment, &c. shall within six months pay off the said judgment, &c. and all interest and charges, and procure the same to be vacated, &c., then the mortgagor or his heirs, &c. shall have no benefit or remedy against the said mortgages or his heirs, &c. in equity or elsewhere, for redemption; but the mortgagee shall hold the lands, &c. for such estate and term as was granted to the mortgagee, against the mortgagor, and all persons claiming under him, freed from equity of redemption, &c.

And if any person who shall once mortgage lands for valuable consideration, shall again mortgage the same lands, or any part thereof, to any other person for valuable consideration, (the former mortgage being in force,) and shall not discover to the second mortgagee the former mortgage, in writing under his hand, such mortgagor, his heirs, &c. shall have no relief or equity or redemption against the second or after mortgagee, &c. And such second or third mortgagees may redeem any former mortgage, upon payment of the principal debt, interest, and costs of suit, to the proper mortgagee, &c.

But the statute does not bar any widow of any mortgagor from her dower, who did not legally join with her husband in such mortgage, or otherwise lawfully exclude herself.

It hath been held, that this statute extends to assignees of a mortgagee; and that if a man mortgages certain lands to one man, and mortgages those lands with some others to another; though this seems to be a case omitted out of the above statute against clandestine mortgages, yet if it appears to be a contrivance to evade it, as if an acre or two of land were only added, this will not exempt it; also a person, who will take advantage of the statute, must be an honest mortgagee; therefore, if a man has used any fraud or practice in obtaining a second mortgage, he shall not have the benefit of the statute. 2 *Vern. 589, 590*; 1 *Eq. Ca. Ab. 320, pl. 5.*

IV. As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure whereby the estate becomes absolute, the mortgagee may

enter upon it, and take possession without any possibility at law of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here the courts of equity interpose; and though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee, at the common law, yet they will consider the real value of the tenements, compared with the sum borrowed; and if the estate be of greater value than the sum lent thereon, they will allow the mortgagor, at any reasonable time, to recall or redeem his estate, paying to the mortgagee his principal, interest, and expences. And by the 7 *Geo. 2. c. 20.* after payment or tender by the mortgagor of principal, interests, and costs, the mortgagee can maintain no ejectment, but may be compelled to re-assign his securities. See the statute at length, *post*, at the end of this division.

This reasonable advantage, allowed to mortgagors, is called the equity of redemption; and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back, and account for the rents and profits received on payment of his whole debt and interest; thereby turning the mortuum into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently; or in default thereof to be for ever foreclosed from redeeming the same; that is, to lose his equity of redemption without possibility of recall. It is not, however, usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious or small, or where the mortgagor neglects even the payment of interest; when the mortgagee was frequently obliged to bring an ejectment and take the lands into his own hands, in the nature of a pledge, or *pignus* of the Roman law already alluded to; *ante*, I. But it has now been determined that the mortgagee is not obliged to bring an ejectment to recover the rents and profits of his estate; for where there is a tenant in possession by a lease prior to the mortgage, the mortgagee may at any time give him notice to pay the rent to him, and he may distrain for the rent which is due at the time of the notice, and also for all that accrues afterwards. *Moss v. Gallimore, Doug. 260. (279).* See *Treat. Eq. lib. 3. c. 1. § 8. in n.*

A mortgagee, however, is entitled only to such rents as accrue due while he is in possession of the premises; he is therefore no claim for rents paid to a receiver appointed in a suit for establishing the will of the mortgagor, notwithstanding, after such appointment, he gave notice to the tenant to pay the rents to himself. He should have moved the court to discharge the receiver. 4 *Russ. 464.*

Prior to the recent statute of limitations, if the mortgagor had been twenty years in possession, the Court of Chancery, in conformity to the time of bringing an ejectment, would not permit a mortgagor to redeem; unless during part of that time such mortgagor has been an infant or a married woman; or unless the mortgages admitted he held the estate by a special mortgage, or there was some other special circumstance which formed an exception to the general rule. 1 *Eq. Abr. 171. 2 Bro. C. R. 399*; *Treat. Eq. lib. 3. c. 1. § 7.* See 1 *Eq. 99*; 4 *Dom. P. C. 27*; and remarks of *Plumer, M. R. 1. 68 & Walk. 63*; 2 *Jac. & Walk. 183.* For the provisions of the statute, see *Limitation of Actions, II. 1.*

Where two different estates are mortgaged by the owner to the same person, one cannot be redeemed without the other. *Ambt. 733.* So of other securities given by the mortgagor to the mortgagee. See *Treat. Eq. lib. 3. c. 1. § 9.* See 2 *Russ. 275.*

Although, after breach of the condition, an absolute fee simple is vested at common law in the mortgagee; yet a right of redemption being still inherent in the land, till the equity of redemption be foreclosed, the same right shall descend to the heirs and is vested in such persons as have a right to the land in case there had been no mortgage or incumbrance whatsoever; and as an equitable performance as effectually defeats the

interest of the mortgagee, as the legal performance doth at common law, the condition still hanging over the estate till the equity is totally foreclosed, on this foundation, it hath been held, that a person who comes in under a voluntary conveyance, may redeem a mortgage; and though such right of redemption be inherent in the land, yet the party claiming the benefit of it, must not only set forth such right, but also show that he is the person entitled to it. *Hard. 465; 1 Vern. 182, 193.*

The right of redemption is not confined to the mortgagor, his heirs, executors, assignees, or subsequent incumbrances; but extends to all persons claiming any interest whatsoever in the premises as against the mortgagor; therefore a person claiming under a deed void as being voluntary against a subsequent mortgagee, may redeem; for the deed, though void as to the mortgagee, is binding on the mortgagor. *1 Ch. Ca. 59; 1 Vern. 193.* A feoffee may any person who has acquired for valuable consideration an interest in the land; as a tenant under the mortgagor; or a judgment creditor having previously sued out a writ of execution; or a tenant by *chattel*, *share*, or *jointure*; or tenant by the *curtesy*, or in *law*, or a jointress; the crown may also redeem estates mortgaged, and afterwards forfeited by the treason, &c. of the mortgagor. *Treat. Eq. lib. 3. c. 1. § 8. n.* and the author has there cited. And see *1 Id. n. R. 117.*

As the heir at law is regularly entitled to the benefit of redemption, he is also entitled to the assistance of the personal estate of the mortgagor for that purpose; according to the doctrine established in the courts of equity, that the personal estate, in the hands of the executor, shall be employed in discharge of the heir, by whatever means the heir becomes indebted as heir; for the personal estate having received the benefit by contracting the debt, the real is considered only as a pledge for it; according to the common rule, *quis scilicet communi sentire debet et onus.* *Preced. Chanc. 477.* See *Treat. Eq. lib. 3. c. 2. § 1; and ante, tit. Executor, V. 6.*

And on this foundation it hath been frequently held, that if a man mortgage lands, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied in exoneration of the mortgage. *2 Salk. 449.*

Also it is held by some opinions, that this benefit shall not only extend to the heir at law, or *heres natus*, but also to an *heres factus*; from a presumption, that it is the intention of the testator, that he should have all the privileges of the *heres natus*; and it has been even held, that an ordinary devisee shall have this benefit. *1 Vern. 37.* But as to this last point it hath been held otherwise; and that if a man mortgage his land, and devises it to J. S. or A. B. in fee, the remainder to B. that there the *heres factus* doth press with the estate, there appearing no intention of the testator that he should have it discharged. *2 Chan. Ca. 84; 1 Chan. Ca. 27.*

This distinction, however, between an *heres factus* and a particular devisee, has been long since overruled, and the opinion in *1 Vern. 37.* is now established law. *2 Atk. 43.* And the devisee of a particular estate shall not only have his devised estate exonerated out of the personal estate, but if there be another estate expressly devised for payment of debt, and the personal estate be excepted or exhausted, though the particular estate devised to him be covered subject to the incumbrances thereon. *2 P. Wms. 385.* So if the personal estate be exempt or exhausted, and there be no other estate expressly devised for payment of debts, but there be a devised estate, the devisee of a particular estate shall be exonerated out of the devised estate. *2 Bl. 109.*

And if the mortgagor conveys away the equity of redemption, the purchaser shall not have the benefit of the personal estate, but must take it *cum onere.* *2 Salk. 450; 1 Vern. 193.*

It has likewise been held, that the heir of the mortgagor shall have the benefit of the personal estate to pay off the mortgage, though there be no covenant in the mortgage-deed for the payment thereof; because the mortgage-money is a debt whether there be any express covenant for its payment or not, and the personal estate has had the benefit of it. *2 Salk. 449; 1 Vern. 436; Preced. Chanc. 61.*

But where a mortgage in fee was made redeemable at Michaelmas, 1702, or any other Michaelmas day following, on six months' notice; and there was no covenant for payment of the mortgage-money; it was held by lord chancellor *Comper*, that the mortgagor having devised his personal estate to his wife and daughter, and having during his life paid the interest of the mortgage, the personal estate should not be applied in ease and exoneration of the real estate for the benefit of the heir at law; for, being no covenant for paying of the money, there was no contract at all between them, neither express nor implied; nor would any action lie against the mortgagor to subject his person, to compel him to pay this money. But this was in nature of a conditional purchase, subject to be defeated on payment by the mortgagor, or his heirs, of the sum stipulated between them, at any Michaelmas day, at election of the mortgagor or his heirs; for here was an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, which could not be forfeited at law like other mortgages; therefore there could be no equity of redemption, or any occasion for the assistance of this court; but the plaintiffs might, even at law, defeat the conveyance, by performing the terms and conditions of it; which were not limited to any particular time, but might be performed on any Michaelmas day, to the end of the world; and since there was no covenant or contract, either express or implied, to charge the personal estate of the mortgagor, he thought there was no reason to lay the load of this debt upon that which was given to other persons. *Preced. Chanc. 423; 2 Vern. 701.*

If an estate descends, subject to a mortgage, and the heir creates a new mortgage for securing the old debt and one contracted by himself, and fixes a new day of payment, he makes himself liable to both debts, notwithstanding he exempts his person and his property, except what is comprised in the new mortgage, from liability in respect of the same debts; and there is no equity for separating the aggregate debt and throwing any part of it on the estate which descended. *1 Sim. 435, 478.*

The 7 Geo. 2. c. 20. before alluded to, enacts, that where any action shall be brought on any bond for the payment of the money secured by mortgage, or performance of the covenants therein contained; or where any action of ejectment shall be brought by any mortgagee, &c. for the recovery of the possession, and no suit shall be then depending in equity, for foreclosing or redeeming such mortgaged lands, if the person having right to redeem shall appear and become defendant in such action, and shall, at any time pending such action, pay unto such mortgagee, or in case of his, her, or their refusal, shall bring into court where such action shall be depending, all the principal money and interest due on such mortgage, and also all such costs as have been expended in any suit at law or in equity upon such mortgage (such money for principal, interest, and costs, to be ascertained and computed by the court where such action is or shall be depending), the monies so paid, &c. shall be deemed and taken to be in full satisfaction and discharge of such mortgage; and the court shall discharge every such mortgagor or defendant of and from the same accordingly, and shall, by rule of the same court, compel such mortgagee, at the costs of such mortgagor, to assign, surrender, or reconvey such mortgaged lands, and deliver up all deeds, &c. relating to the title.

And that where any bill or suits shall be filed or brought in equity by any person having or claiming any estate, right,

or interest in any lands, &c., by virtue of any mortgage, to compel the defendant to pay the plaintiff the principal money and interest, together with any sum due on any incumbrance or specialty, charged or chargeable on the equity of redemption; and in default of payment to foreclose such defendant's right of equity of redeeming such mortgaged lands, &c. upon his admitting the right and title of the plaintiff, such court of equity shall at any time before such suit shall be brought to hearing, make such order or decree therein as it might or could have made therein, in case the same had been regularly brought to hearing; and all parties to such suit shall be bound by such order or decree, to all intents and purposes, as if the same had been made at or subsequent to the hearing of the cause.

This act not to extend to any case where the person against whom the redemption shall be prayed, shall (by writing under his hand, or the hand of his attorney, &c. to be delivered, before the money shall be brought into court at law, to the attorney or solicitor for the other side) insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; nor to any cause where the right of redemption to the mortgaged lands shall be controverted or questioned by or between different defendants in the same cause; nor shall be any prejudice to any subsequent mortgagee or subsequent incumbrancer.

If a mortgagee recovers possession of the mortgaged premises under a judgment in an undefended ejectment, the court has no jurisdiction to restore, on payment of the debt, interest, and costs, the possession to the mortgagor who has not appeared. 4 Taunt. 887.

But if the recovery is had against a tenant of the mortgagor, the court will set aside the judgment, and let in the mortgagor to defend as landlord, that he may be in a condition to apply to the court to stay proceedings. See the terms of the statute. *Ibid.*

In an ejectment on a forfeiture for not paying mortgage money, the defendant is entitled to have the proceedings stayed under the above statute, on payment of principal and interest, with the costs incurred at law and in equity, without paying any bygone interest or the expense of preparing the mortgage deed or any assignment of it. 1 Dougl. P. C. 579; and see 2 C. & J. 619.

It was heretofore held, that if a contract were made in England for a mortgage of a plantation in the West Indies, no more than legal interest might be paid; and that a covenant in such mortgage for payment of 8 per cent. interest would be within the statute of usury, notwithstanding this were the rate of interest where the lands lay. But now this point is settled by the 3 Geo. 4. c. 47. § 2, which enacts that all mortgages made in Great Britain of lands, &c. in Ireland or the West Indies, and all collateral securities for the same, and for the interest thereon, shall be as good and effectual as if made and entered into in the country, island, &c. where the lands, &c. mortgaged, lie; and no person shall be liable to the penalties of the statute of Anne, for recovering interest on the same lent, so as the interest do not exceed the rate of interest in the country, island, &c. where the lands lie.

If the mortgagee assign the mortgage, with the concurrence of the mortgagor, all money really and bona fide paid by the assignee, that was due to the mortgagee, shall be considered as principal, and the assignee shall have interest upon the interest then due, and paid by him, as well as upon the principal originally lent. 2 Ch. Ca. 67, 68, 258; 1 Vern. 169; 2 Vern. 135. As to the other cases in which interest shall become principal, see 2 Powell on Mortgages, c. 5.

A remainder-man can force the tenant for life to keep the interest down if the land be charged; but cannot directly compel him to redeem, though indirectly he may, by purchasing in the mortgage; when the tenant for life must pay

one-third, or part with the possession. *Rep. Eq. 69.* See 5 Ves. 99; 9 Ves. 560.

Arrears of interest are only recoverable for six years. See *Limitation of Actions*, II.

By the 1 Wm. 4. c. 60. § 3. the Lord Chancellor may direct the committees of mortgagees, who are lunatics, to convey the mortgaged estates to such persons as he shall think proper. See further *Lunatic*.

By § 6. infant mortgagees are empowered, by the direction of the Court of Chancery, to convey lands vested in them to such persons as the court shall think proper.

And by § 7. infant mortgagees of land within the jurisdiction of the courts of Lancaster and Durham, may convey the same by the direction of those courts.

§ 14. Mortgage money belonging to infants is to be paid into the Bank, or as the court shall direct.

§ 19. The husbands of female mortgagees are to be deemed trustees within the act.

For the general provisions of this statute, see *Trust*.

For the law with respect to devises of mortgaged estates, see *Will*.

For further matter relative to mortgages, see *Powell on Mortgages*; *Bac. Abr.*; *Vin. Abr.*; *Treat. Eq.*; and *Com Dig.*

MORTGAGOR. Is he who mortgages or pawns the lands; as he to whom the mortgage is made is called the **MORTGAGEE**.

MORTH, murder; Sax. *morth*, death; *morthlaga*, a murderer or manslayer. *Morth-luge*, homicide or murder, &c.

MORTIFICATION. See *Mortmain*.

MORTITIVUS. Dead of the rot, applied to sheep and lambs. *Mon. Angl. ii. 114.*

MORTMAIN, *manus mortua*, from the French *mort*, *mortu*, and *main*, *manus*. *Cowell, Skene, Hottoman.* An alienation of lands and tenements to any guild, corporation, or fraternity, and their successors, as bishops, parsons, vicars, &c. which could never be done without the king's licence, and that of the lord of the manor, or of the king alone, if it be immediately holden of him. The reason of the name may be deduced from hence, because the services and other profits due, for such lands, as escheats, &c. should not with such licence come into a dead hand, or into such a hand as were dead, and so dedicated unto God, or pious uses, as to be abstractedly different from other lands, tenements, or hereditaments, and never to revert to the donor, or any temporal or common use. *Magna Carta, c. 36.*

Polydore Virgil, in the seventeenth book of his *Chronicon*, mentions this law, and gives this reason of the name: *Legem hanc manum mortuam vocarunt, quod res sancte de collegiis succedendum, non utique rursus venderentur velut in ritibus hoc est, usui aliorum mortalium in perpetuum adeptae essent. Lex diligenter servatur, sic, ut nihil possessionum ordini ecclesiastici a quoquam detur, nisi regis permisso; but the statutes of mortmain are in some manner abridged by 39 Ed. c. 2, by which the gift of lands, &c. to hospitals is permitted, without obtaining licences in mortmain. But see *post*.*

Hottoman, in his *Commentaries, De verbis Feudalibus*, verbo *Manus mortua*, hath these words: *Manus mortua locatio quae usurpatur de re, quoniam possessio eius non deest manibus est, quae nunquam hereditem habere desinit. quod de re res nunquam ad priorem dominum revertitur, nam manus possessione dicitur mortua per antiphrasin pro immortalitate. Petrus bullaga de specul. Principum, fol. 76. Jus immortalitatis est licentia capiendi ad manum mortuam: to the same read *Cassan. de Consuet. Burgund. p. 348, 387, 1184*. 1201, &c. *Skene de verb. signif.* *Dimittere* is to give to manum mortuam est idem atque dimittere ad multitudinem universitatem, quae nunquam moritur, idque per antiphrasin a contrario sensu, because commonalties never die.*

William the Conqueror, demanding the cause why he conquered the realm by one battle, which the Danes could not do by many, Frederick, abbot of St. Albans, answered, that

MORTMAIN.

And notwithstanding this, previous to the 9 Geo. 2, c. 36,

But as this prohibition extended only to religious houses, bishops and other sole corporations were not included therein ;

and the aggregate ecclesiastical bodies found many means to creep out of this statute, by buying in lands that were *bond fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms for one thousand or more years, which are now so frequent in conveyances. This produced the statute *de religiosis*, 7 *Edw.* 1, which provided that no person, religious or other, whatsoever, should buy, or sell, or receive, under pretence of a gift or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or on his default for one year, the lords paramount, and in default of all of them, the king might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain; but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant, who by fraud and collusion made no defence; and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law, upon a supposed prior title; and thus they had the honour of inventing those fictitious adjudications of right which afterwards became the great assurance of the kingdom, under the title of *common recoveries*. But upon this the stat. *West.* 2. 13 *Edw.* 1. c. 32. enacted that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin, otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter, 33, of the same statute, in case the tenants set up crosses on their lands (the badges of knights templars and hospitaliers,) in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this prince to prevent any future evasions, that when the statute of *quia emptores*, 18 *Edw.* 1. abolished all sub-infeudations, and gave liberty for all men to alienate their lands, to be holden of their next immediate lord, a proviso was inserted that this should not extend to authorize any kind of alienation in mortmain. See 18 *Edw.* 1. st. 1. c. 3; 2 *Inst.* 501. And when afterwards the method of obtaining the king's licence by writ of *ad quod damnum*, was marked out by 27 *Edw.* 1. st. 2. it was further provided by 34 *Edw.* 1. st. 3. that no such licence should be effectual without the consent of the mesne or intermediate lords.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees to the use of the religious houses; thus distinguishing between the possession and the use, and receiving the actual profits, while the seisin of the lands remained in the nominal feoffee, who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestui que use* for the rents and emoluments of the estate; and it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But they did not long enjoy the advantage of their new device, for the 15 *R.* 2. c. 5. enacts, that the lands which had been so purchased to uses, should be amortised by licence from the crown, or else be sold to private persons; and that for the future, uses shall be subject to the statute of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land adjoining to churches, and consecrating them by the name of church-yards, such subtle

imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws: and lastly, as during the times of popery, lands were frequently given to superstitious uses, though not to any corporate bodies, or were made liable in the hands of heirs and devisees, to the charge of obits, chauntries, and the like, which were equally pernicious in a well-governed state, as actual alienations in mortmain; therefore at the dawn of the Reformation, the 23 *Hen.* 8. c. 10. declares, that all future grants of lands for any of the purposes aforesaid, for a longer term than twenty years, shall be void.

During all this time, however, it was in the power of the crown, by granting a licence of mortmain, to remit the forfeiture, so far as related to its own rights, and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed by the 18 *Edw.* 3. st. 3. c. 5. But as doabts were conceived at the time of the Revolution, how far such licence was valid, since under the Bill of Rights, the king had no power to dispense with the statutes of mortmain, by a clause of *non obstante*, which was the usual course, though it seems to have been unnecessary (see *Co. Lit.* 99); and as by the gradual declension of mesne seigniories, through the long operation of the statute of *quia emptores*, the rights of intermediate lords were reduced to a very small compass; it was therefore provided by 7 & 8 *Wm.* 3. c. 37. that the crown for the future, at its own discretion, may grant licences to alienate or take in mortmain, of whomsoever the tenements may be holden.

After the dissolution of monasteries under Henry VIII though the policy of the next Popish successor affected to grant a security to the possessors of abbey lands, yet in order to regain so much of them as either the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years by 1 *S.* 2. P. & M. c. 8; and during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any licence whatsoever.

By the 39 *Eliz.* c. 5. the gift of lands, &c. to hospitals is permitted without obtaining licences of mortmain. See *the Hospitals*.

Afterwards, for the augmentation of poor livings, it was enacted by 17 *Car.* 2. c. 3. that appropriators may annex the great tithes to the vicarages, and that all benefices in the gift of the crown, or of any bishop or other ecclesiastical superior, 100*l.* per annum may be augmented by the purchase of land, without licence of mortmain in either case; and the like provision hath been since made in favour of the governors of Queen Anne's bounty. 2 & 3 *Anne*, c. 11. § 4. See also 15 *Car.* 2. c. 17. as to the incorporation of commissioners for Bedford Level; and 22 *Car.* 2. c. 6. and other statutes for the sale of the fee-farms rents of the crown.

It hath also been held, that the 23 *Hen.* 8. c. 10. before mentioned did not extend to any thing but superstitious uses, and that therefore a man may give lands for the maintenance of a school, an hospital, or any other charitable use. 1 *R.* 2. c. 24. But as it was apprehended from recent experience, that persons on their death-beds might make large and impudent dispositions, even for these good purposes, and defeat the political end of the statutes of mortmain; it is therefore enacted by 9 *Geo.* 2. c. 36. that no lands or tenements, or money to be laid out thereon, shall be given for or enlarged with any charitable uses whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery, within six months after its execution except stocks in the public funds, which may be transferred within six months previous to the donor's death; and no such gift be made to take effect immediately, and be without power of revocation; and that all other gifts shall be void

The two universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are excepted out of this act; but such exemption was granted with a proviso that no college should be at liberty to purchase more advowsons than were equal in number to one moiety of the fellows; or where there were no fellows, one moiety of the students upon the respective foundations. This restriction has, however, since been repealed. See *Post*.

The words of the above statute 9 Geo. 2. c. 36. are "that no man, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever, ~~and~~ such gift, appointment, conveyance, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds), be and are made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death), and be enrolled in his majesty's High Court of Chancery, within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor (including the days of the transfer and death), and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever for the benefit of the donor or grantor, or any person or persons claiming under him." § 1. And the 2d section declares all gifts and dispositions, settlements, incumbrances, &c. otherwise made, void.

The said st. 9 Geo. 2. c. 36. has been uniformly construed by our courts of law and equity, so as to give it its full force and effect, and by no means to give way to the subtleties which, by devices, overthrown the law in many respects, at the same time that all proper encouragement has been given to such gifts and bequests to charities, as did not manifestly appear to contravene the policy of the statute.

The statute was not meant solely to restrain devises of land, or money to be laid out in lands, to charities, but has also been construed to the prohibition of any devise of lands to trusts, so as to all them and convert the profits of the same to such purposes, for this mode, though it does not seem directly within the mischief intended to be prevented by the act, might be a device to evade the law. See 1 *Yes.* 187; 2 *Yes.* 52; and *Attorney-Gen. v. Ingham*, A. D. 1704, cited in *Highmore's Charitable Uses*.

A devise of a mortgage, or of a term of years, or of a rent-charge on lands, to a charity, is not good. It has been urged that the words of the statute, "that the lands shall not be conveyed or settled for any estate or interest whatsoever, or any ways charged or incumbered," relate merely to the case of a person charging his own lands for the benefit of a charity, and not to prevent the bequeathing a mortgage made to secure a personal debt; but it has been always said that the devise of a mortgage passeth the land so mortgaged, for the equity of redemption may ultimately vest in the mortgagee; but a charity is precluded from a right of foreclosure; and therefore the bequest of a real security to a charity is in its nature void. See *Cro. Car.* 37; *Atk.* 605; 2 *Ves.* 44, 547;

1 *Bro. C. R.* 271; and *Highmore's Char. Uses*; as to the indirect way in which this may be in some manner affected, by marshalling the assets, so as to pay the debts out of the mortgage, and leave the personal estate free to answer the legacy to the charity; a matter in which the courts of equity are very nice and careful.

A testatrix, after charging her estate with the payment of an annuity, devised the same to G. S., his heirs and assigns for ever; expressing her wish and desire to be, that G. S. in his lifetime should convey the estate to some charitable uses, the choice of which was left entirely to his discretion; and, subject to this, G. S. was to enjoy the estate to his own use for his life. This was held to be void as to the devise in fee under the st. 9 Geo. 2. Under § 4. of that act, the estate given, and not merely the trust, is to be void, and the legal estate, upon the death of the devisee for life, descended on the heir at law. By codicils to the will, certain legacies were bequeathed, charged upon the estate; and a power was given to G. S. (who was also named executor) to cut down timber to pay them; and interest was directed to be paid by him to legatees after the expiration of two years; but these personal charges were not construed to raise by implication the express estate for life given to G. S. into an estate in fee. 2 *B. & A.* 710.

Money for which there is a lien on real estate cannot be given in mortmain; therefore, where a testator had contracted to sell his real estate, and he bequeathed the purchase-money, which was unpaid, to a charitable use, it was determined that the bequest was void. 1 *Russ. & M.* 71.

Money left to repair parsonage-houses, or to build upon land already in mortmain, is held not to be within the statute. 1 *Bro. C. R.* 444; *Ambl.* 373, 651; and see 4 *Russ.* 342. But where a testator directed a sum of money to be laid out in building a chapel, the bequest was declared void; the settled rule of construction being, that a direction to build is to be considered as including a direction to purchase land for the purpose of building, unless the testator distinctly points to land already in mortmain. 3 *Russ.* 456. So a legacy to the corporation of Queen Anne's bounty is void, as by the rules of the corporation it must be laid out in land. 1 *Bro. C. R.* 13, in note.

Although, however, the statute prohibits the gift of money or personal estate, to be laid out in lands, for charitable uses, yet, as has been already hinted, money, &c. given generally, is not forbidden: so also the residue of a personal estate hath been decreed not to be within the act; and if money be given to be laid out "in lands or otherwise" to a charitable use, such devise is good; by reason of the option thereby given to lay it out in personal securities, which are not restrained by the statute, unless they are converted into land. See *St. v. H. v. H.*, A. D. 1740. *Grundy v. Grundy*, A. D. 1754; cited in *Highmore's Charitable Uses*.

The statute had the effect of making void many devises and bequests to the governors of Queen Anne's bounty; but this was remedied by the 43 Geo. 3. c. 107, which in substance exempted the 2 & 3 Anne, c. 11, from its operation.

By the exemption in the 4th section of the statute, in favour of the universities, any land, or personal estate to be laid out in land, may still be disposed of in trust for their benefit, or for any colleges thereof, as it might have been before the making of the act. But the extension to the colleges of Eton, Winchester, and Westminster, seems confined to any disposition for the better support and maintenance of the scholars only upon those foundations, so that a devise to those colleges for any other purpose would apparently be declared void. *Highm. Char. Uses*.

Section 5. of the statute was made to prevent successions in colleges from happening so rapidly, as that fit members might not be left either to govern the college or to succeed to the vacant benefices. By 45 Geo. 3. c. 101. reciting "that the said restriction had been found by experience to operate to the prejudice of such colleges, by rendering the succession

too slow," the said section of the said statute 9 Geo. 2. was repealed.

The concluding section of the statute exempts all estate real or personal in Scotland from the restraints imposed on those in England. A case has occurred where an estate in Ireland was devised to charitable uses in Ireland. 1 Bro. C. R. 27. There does not appear any case where estates either in Scotland or Ireland were devised to charities in England; though it may be concluded, if the charities were incorporated, and so became capable of taking, such a devise would not be void. Upon the same principles a devise of lands, or of a rent-charge on lands, in the West Indies, to a charity in England, is good. Instances of the latter have actually occurred, and the executors or heirs at law never thought of contesting the devise against the charity. *Highmore, Char. Uses.*

In the case of a legacy in South Sea annuities bequeathed for the maintenance of poor labourers in Edinburgh and towns adjacent, the Court of Chancery was of opinion, that no directions could be given there as to the distribution of the money; that belonging to another jurisdiction, viz. to some of the courts in Scotland; and therefore directed that the annuities should be transferred to such persons as the plaintiffs should appoint, to be applied to the uses of the will. See *Ambl. 286.*

A Scotchman, who resided in Montrose, made a journey to London to transact some business, and being suddenly taken ill, he there made his will, whereby he gave the residue of his personal estate to trustees (of whom some, but not all, were resident in Scotland) on trust to lay out the same in purchase of lands, or rents of inheritance, in fee simple, for the intent expressed in an instrument of same date with his will; by which instrument he directed the said trustees to pay the rents annually to certain other trustees, who were at all times to be persons residing within twenty miles of Montrose, to be by them applied to the relief of indigent ladies in Montrose, or within twenty miles of the town.—Held, that the bequest was void (under the Mortmain Act), on the ground that the will was made in England, in the English form, and said nothing as to laying out the money in Scotch purchases. *Attorney-Gen. v. Mill, 3 Russ. 328; and see Dom. & C. 394. S. C.*

Courts of equity have by several decisions favoured devises if made for intended charities, though they were not in esse at the time of the making the will. See *Highmore.*

An opinion prevailed, that where a full and valuable consideration was given for lands purchased for charitable uses, it was unnecessary to comply with the requisitions of the 9 Geo. 2. c. 36, with respect to the sealing, attesting, and enrolling of the conveyance; whereas the provision in the statute on which the misapprehension arose, was only intended to prevent deeds from being avoided by the death of the grantor within twelve months afterwards. Many purchases were made under this belief, which are rendered valid by the 9 Geo. 4. c. 85; but the act does not dispense with the prescribed formalities in deeds subsequently executed.

It is incident to every corporation to have a capacity to purchase lands for themselves and successors; and this is regularly true at common law. 10 Rep. 50. But they are excepted out of the statute of Wills, 34 Hen. 8. c. 5.; so that no devise of lands to a corporation, except for charitable uses, by 43 Eliz. c. 4, which exception is again greatly narrowed by the above st. 9 Geo. 2. c. 36. So that now a corporation, whether ecclesiastical or lay, cannot purchase without licence from the crown, though that capacity seems to be vested in them by the common law. And such charities which have not this licence, which is now granted by act of parliament, charter of incorporation, or letters-patent, are reduced to the necessity of choosing from among themselves certain persons to be trustees, and to purchase in their names, and to take the lands in trust for the charity; for if they were bought in the name of the institution, not being

incorporated, they would instantly vest in the crown, as a forfeiture in mortmain. *Highmore on Charitable Uses.*

It frequently happens that a donor or testator is not readily furnished with the correct title of the hospital or institution to whose charitable designs he wishes to contribute: to obviate this difficulty, it appears that a statute was passed, 14 Hen. c. 14, evidently made for the benefit of Christ's Hospital, St. Thomas's, and St. Bartholomew's, but including also all other hospitals, declaring "that all gifts and legacies, by will, feoffment, or otherwise, for relief of the poor in any hospital, then remaining and being in esse, shall be as valid, according to the true meaning of the donor, as if the said corporation had been rightly named." The same act then recites one preceding, and explains "that the words Master or Guardian of any hospital mentioned therein, were intended and meant of all hospitals, Masons-houses, bead-houses, and other houses ordained for the sustentation or relief of the poor; and shall be so expounded and taken for ever." It has been decided that the 13 Eliz. c. 10, to which this refers, extends to all manner of hospitals, whether incorporated by name of master or warden, or any other name; or whether a sole corporation, or aggregate of many. 5 Co. 14, b.; 11 Co. 76, a.; *Palmer, 216.* See *Highmore on Charitable Uses.*

By 43 Geo. 3. c. 108. for promoting the building and providing churches and chapels, and houses for ministers, and churchyards and glebes (in England and Ireland), proprietors of land may, by deed inrolled, or by will executed three months before death, give land not exceeding five acres, or personally not exceeding 500*l.*, for the purposes of the act. By 51 Geo. 3. c. 115. the king may vest lands in any person for building any church, chapel, parsonage house, &c. And by § 2. of the same act, rectors or vicars may (with consent of the bishop) grant part of their glebe land (not exceeding one acre) for the site of a new church or churchyard. By 54 Geo. 3. c. 117. rectors and vicars in Ireland, are empowered (with consent of the bishop) to grant an acre of their glebe land for the site of a new church or churchyard. By 55 Geo. 3. c. 147. (which does not appear to extend to Ireland,) spiritual persons are enabled to exchange the parsonage or glebe houses, or glebe lands belonging to them, for benefices, for others of greater value, or more conveniently situated; and also to purchase and annex lands to become glebe. By 56 Geo. 3. c. 141. (which also appears to be confined to England,) ecclesiastical corporations, or spiritual persons being a corporation sole, are empowered to sell lands adjoining to churchyards, for the purpose of enlarging them. By 58 Geo. 3. c. 45. (amended and rendered more effectual by 59 Geo. 3. c. 134. and 2 & 3 Will. 4. c. 61.) for building and promoting the building of additional churches in parishes (in England and Wales), the commissioners of the said act may accept sites for churches, churchyards, residences of the clergy; and all persons and corporations are empowered to convey accordingly. See § 33—39. &c. of the act. See further 7 & 8 Geo. 4. c. 72. and acts therein recited; also 1 & 2 Will. 4. c. 38; and tit. Churches, Churchyards.

By an act of the 3 & 4 Will. 4. c. 9. for incorporating "the Seamen's Hospital Society," that corporation may purchase or accept by way of gift, or devise, if landed property to the amount of 12,000*l.* per annum.

MORTUARY, *mortuarium, mortarium.* A gift left by a man at his death to his parish church for the redemption of his personal tithes and offerings not duly paid in his lifetime. A mortuary is not properly and originally due to ecclesiastical incumbents from any but those only of his own parish to whom he ministers spiritual instruction, and hath right to their tithes. But by custom in some places of this kind they are paid to the parsons of other parishes, as the custom passes through them.

Mortuarium (says *Lindene*) *sic dictum est quia retribuitur ecclesie pro anima defuncti.* Custom did so prevail, that mortuaries being held as due debts, the payment of them was

enjoined as well by the statute *De circumspecte agatis*, 13 Edw. 1. st. 4. as by several constitutions, &c.

The 13 Edw. 1. c. 4. enacts, That a prohibition shall not lie for mortuaries in places where mortuaries used to be paid.

A mortuary was anciently called *sank secal*, which signifies *pecunia sepulchralis*, or *symbolic annua*. After the Conquest it was called a *corse present*, because the least was presented with the body at the funeral, and sometimes a principal; of which see a learned discourse in the *Antiquities of Warwickshire*, fol. 679, and *Selden's Use of Tithes*, p. 287; *Lb. Canuti*, c. 13.

A mortuary seems to have been originally an oblation made at the time of a person's death. In the Saxon times there was a funeral duty to be paid, which was called *pretium sepulchralis*, and *syndrum annua*, or the *soul shot*, which was required by the council of Altham, and enforced by the laws of King Canute, and this was due to the church which the party deceased belonged to, whether he was buried there or not. 1 *Stult.* 171.

There is no mortuary due by law, but by custom. 2 *Inst.* 491; see *Spehm. de Concil.* tom. 2. 390; *Fleta*, lib. 2. c. 600. par. 30. See *Nonagium, Principal*. In the Irish canons it is called *Pretium sepulchri*, and *Sedatium*; viz. *Omne corpus sepulchrum habet in jure suo vaccam et equum et vestimentum et ornamentum loci sui*, &c. *Canon. Hibern.* lib. 19. c. 6. And another place, *Rogat principem loci*, (i. e. the bishop,) *ut bene faciat, si fuerit, &c. et reddat amicus pretium ejus et sedatium*, &c.

The word *mortuarium* was sometimes used in a civil as well as an ecclesiastical sense, and was payable to the lord of the fee as well as to the priest of the parish. *Debentur domino* (i. e. *manerii de Wrechwyke*) *nominibus herioti et mortuarii duæ vacce pret. xii. sol.*—*Paroch. Antiq.* 470. *Co. H.*

Seld. says that the usage anciently was, bringing the mortuary along with the corpse when it came to be buried, and offer it to the church as a satisfaction for the suppression, negligence and omissions the defunct had been guilty of, in not paying his personal tithes; and from thence it was called a *corse-present*; a term which bespeaks it to have been once a voluntary donation. *Selden's History of Tithes*, 287. c. 10.

Dr. Stillingfleet makes a distinction between *mortuaries* and *corse-presents*; the mortuary, he says, was a right settled on the church upon the decease of a member of it; and a *corse-present* was a voluntary oblation usually made at funerals. 1 *Stult.* 172, 173.

Mortuaries are, in fact, a sort of ecclesiastical heriots, being a certain gift claimed by, and due to, the minister in very many parishes on the death of his parishioners. 2 *Comm.* c. 28. p. 425. They seem originally to have been, like lay-heriots, only a voluntary bequest to the church; being intended, as above mentioned, and as Lindewode states from a constitution of Archbishop Langham, as a kind of expiation and amends to the clergy for the personal tithes and other ecclesiastical duties which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, after the lord's heriot or best good was taken out, the second-best chattel was reserved to the church as a mortuary. *Co. Litt.* 180; *Lindew. Provinc.* l. 1. tit. 3.

In Bracton's time, so early as Henry III., this was riveted into an established custom, inasmuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels, and that the lord should have the best good left him as an heriot, and the church the second best as a mortuary. See *Bracton*, l. 2. c. 26; *Fleta*, l. 2. c. 57. See *Herald*.

The custom still varies in different places, not only as to the mortuary to be paid, but the person to whom it is payable. In Wales a mortuary or *corse-present* was due upon

the death of every clergyman to the bishop of the diocese, till abolished upon a recompense given to the bishop by 12 *Ann.* st. 2. c. 6. And in the archdeaconry of Chester a custom also prevailed that the bishop, who is also archdeacon, should have, at the death of every clergyman dying therein, his best horse or mare, bridle, saddle, and spurs; his best gown or cloak, hat, upper garment under his gown, and tippet; and also his best signet or ring. *Cro. Car.* 237. But by 28 *Geo.* 2. c. 6. this mortuary is directed to cease, and an equivalent is settled upon the bishop in its room.

The king's claim to many goods on the death of all prelates in England, seems to be of the same nature; though Coke apprehends that this is a duty due upon death, and not a mortuary; a distinction seemingly without a difference. For not only the king's ecclesiastical character, as supreme ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowledged mortuary, puts the matter out of dispute. The king, according to the record vouched by Sir Edward Coke, is entitled to six things: the bishop's best horse or palfrey, with his furniture; his cloak or gown and tippet; his cup and cover; his bason and ewer; his gold ring; and lastly, his *mota canum*, his mew or kennel of hounds. See 2 *Inst.* 491; 2 *Comm.* 426, 427.

This variety of customs, with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other, it was thought proper, by 21 *Hen.* 8. c. 6. to reduce them to some kind of certainty. For this purpose it is enacted, "That all mortuaries, or corse-presents, to parsons of any parish, shall be taken in the following manner: viz. for every person who does not leave goods to the value of ten marks (6l. 13s. 4d.) nothing; for every person who leaves goods to the value of ten marks, and under 30l., 3s. 4d.; if above 30l. and under 40l., 6s. 8d.; if above 40l., of what value soever they may be, 10s. and no more. And no mortuary shall throughout the kingdom be paid for the death of any feme covert; nor for any child; nor for any one of full age that is not a housekeeper; nor for any way-faring man, but such way-faring man's mortuary shall be paid in the parish to which he belongs.

"No person shall pay mortuaries in more places than one, or more than one mortuary; and no mortuary shall be demanded of any but in such places where mortuaries are due by custom, and have used to have been paid: also in places where mortuaries have been of less value than as aforesaid, no person shall pay any more than has been accustomed.

"If a parson, vicar, &c. take or demand more than is allowed by the statute for a mortuary, he shall forfeit all he takes beyond it, and 40s. more, to the party grieved, to be recovered by action of debt," &c.

Since this statute, whereby mortuaries are reduced to a certainty, and on which stands the law of mortuaries to this day, an action of debt will lie upon the said statute in the courts of common law for recovery of the sum due for a mortuary, being by custom as aforesaid, although before that statute they were recoverable only in the spiritual court; but as such actions have never been brought, it is said they are still recoverable in that court only. *Wats. Clergym. Law*, 475.

Where by custom a mortuary hath not been usually paid, if a person be libelled in the spiritual court, he shall have a prohibition by virtue of the statute 21 *Hen.* 8. c. 6. And upon a prohibition the custom may be tried, &c. 2 *Lutw.* 1066; 3 *Mod.* 268.

No suit in equity lies for a mortuary. 2 *Strange*, 715.

MORTUARIUM. A mortuary hath been sometimes used in a civil as well as ecclesiastical sense, being payable to the lord of the fee. *Paroch. Antiq.* 470.

MOSS-TROOPERS. A rebellious sort of people in the North of England, that lived by robbery and pilage, not unlike the tories in Ireland, the buccaneers in Jamaica, or

banditti of Italy. The counties of Northumberland and Cumberland were charged with a yearly sum, and a command of men to be appointed by justices of the peace, to apprehend and suppress them. See 4 Jac. 1. c. 1; 13 & 14 Car. 2. c. 22; 30 Car. 2. c. 2; 6 Geo. 2. c. 37. (all repealed.)

MOTE, *mota*, Sax. *gemote*.] *Curia, placitum, conventus*; as *mota* de Hereford, i. e. *curia vel placita comitatûs de Hereford*. In the charter of Maud the Empress, daughter of King Henry the First, we read thus: *Sciatis me fecisse Milonem de Gloucester Comitem de Hereford, et dedisse ei motam Herefordiæ cum toto castello, &c.* Hence *burgmote*, *curia vel conventus burgi*; *swainmote*, *curia vel conventus ministrorum, scil. forestæ, &c.* From this also we draw our word *mote* and *moot*, to plead. The Scots say, to *mute*, as the Mute-hill at Scone, i. e. *Mons placiti de Scona*. See *Fole-mote*.

The word *moot* was usually applied to that arguing of cases used by young students in the Inns of Court and Chancery. In the charter of peace between King Stephen and Duke Henry, afterwards king, it is taken to signify a fortress, as *turris* de London, *mota* de Windsor; the tower of London and fortress of Windsor. *Mote* also signifies a standing pool of water to keep fish in.

It likewise signifies a great ditch encompassing a castle or dwelling-house. *Chart. Antiq.*

MOTE-BELL, or *Mot-bell*. The bell so called which was used by the English Saxons to call people together to the court. *Leg. Ed. Confess. c. 35.*

MOTEER. A customary service or payment at the mote or court of the lord, from which some persons were exempted by charter of privilege. *Rot. Chart. 4 Joh. m. 9.*

MOTHERING. A custom of visiting parents on Mid-lent-Sunday. See *Lætare, Jerusalem*.

MOTIBILIS. One that may be removed or displaced, or rather a vagrant. *Flota, l. 6. c. 6.*

MOTION IN COURT. An occasional application to the court by the parties or their counsel, in order to obtain some rule or order of court which becomes necessary in the progress of a cause. 3 *Comm.* 304.

There are also other motions not necessarily connected with any action; as to set aside an annuity, and deliver up the securities to be cancelled, &c.

All rules moved for in court are denominated special rules, and they are either absolute in the first instance, or only *nisi*, to show cause, or, as they are commonly called, *rules nisi*, i. e. unless cause be shown to the contrary, which are afterwards moved to be made absolute.

Motions are of a civil or criminal nature. Of the latter kind is the motion for an attachment, which may be moved for on account of contemptuous words spoken of the court or its process; for a rescue; or disobedience to a subpoena or other process; against a sheriff for not returning the writ or bringing in the body; against an attorney for not performing his undertaking, or otherwise misbehaving himself; against other persons for non-payment of costs on the master's allocatur; for the non-payment of money generally; or not performing an award, &c.

An attachment for misbehaviour is commonly preceded by a motion for a rule to answer the matters of the affidavit; and the party being taken on the attachment, either remains in custody or puts in bail before a judge, (for he is not bailable before the sheriff,) to answer interrogatories to be exhibited against him; which interrogatories must be signed by counsel; and if judgment be not given the same term, the name of the cause should be inserted in the list of motions appointed to come on peremptorily in the ensuing term. R. M. 34 Geo. 3; 5 T. R. 474; *Tidd's Pract.*

It is not consistent with the nature of this work to give more than a general outline of the cases in which motions are made for the obtaining of rules of court during the progress of a suit, or in other proceedings unconnected with any

action; neither will any attempt be here made to specify what rules are absolute in the first instance and what are *rules nisi*; but the reader is referred to the various books of practice connected with the subject. See also tit. *Rule of Court*.

Motions of a civil nature are made on behalf of the plaintiff or of the defendant. On behalf of the plaintiff, they are either, 1. for something to be done in the common and ordinary course of the suit, as to increase issues; for a *concilium*; or judgment on demurrer, special verdict, or writ of error; for leave to enter up judgment on an old warrant of attorney; or *nunc pro tunc*; to enter up judgment and take out execution after an award, where a verdict has been taken for the plaintiff's security; or after a verdict for the plaintiff against one of several underwriters, where the rest have agreed to be bound by it; or to take out execution pending a writ of error; to amend the pleadings or other proceedings in the course of a suit; or to set aside a judgment of non-pros or of nonsuit; or a verdict or inquisition. Or, 2. they are for something to be done out of the common and ordinary course of the suit; as for the defendant to abide by his plea to refer it to the master to assess the damages, without a writ of inquiry; for the execution of a writ of inquiry before a judge; for a trial at bar, or in an adjoining county; for a view in trespass or in other cases; for a special jury; to have witnesses examined on interrogatories; or for leave to inspect and take copies of books, court-rolls, &c. or to have them produced at the trial.

On behalf of the defendant motions may be considered as they arise and succeed one another in the course of the suit. Before declaration;—they are to quash the writ; justify bail; reverse an outlawry; or after several rules for time to declare, that the plaintiff declare peremptorily. After declaration;—they are, to set aside an interlocutory judgment for irregularity; as being signed contrary to good faith, or upon an affidavit of merits; to set aside or stay proceedings in actions upon bail-bonds, or in other actions if irregular or unfounded; and if the defendant is a prisoner, to discharge him out of custody upon common bail; or if the proceedings are regular, to stay them upon terms; to compound penal actions; change the venue; consolidate actions; for time to plead or reply, &c. under special circumstances; to plead several matters, or pay money into court, (see *Money into Court, payment of*); to withdraw the general issue and plead *it de novo*, with a notice of set-off; or upon paying money into court; to add or withdraw special pleas—all these are generally; but sometimes, to pay the issue money into court in a *qui tam* action, (see *Penal Action*); to put off a trial if the defendant is not ready, or if the plaintiff will not proceed to trial; or inquiry; or for judgment as in case of a nonsuit; or arrest of judgment; or for a suggestion after verdict to entitle the defendant to costs; to set aside an execution, and discharge the defendant; or restore to him the money levied, or to retain it in the sheriff's hands.

The defendant also as well as the plaintiff may move for a *concilium* or judgment on a demurrer, special verdict, or writ of error; to amend; for a trial at bar, or in an adjoining county; for a view or special jury; to have witnesses examined on interrogatories; or for leave to inspect and take copies of books, court-rolls, &c. or have them produced at the trial; to set aside a verdict or inquisition; either party may likewise move to make a judge's order, submit, or to arbitration, or order of *nisi prius*, a rule of court; to enlarge the time for making an award; to set aside an award, or judge's order; for the master to make his report; or review his taxation.

There are some motions peculiar to the action of ejectment such as for judgment against the casual ejector generally, but where there is any thing peculiar in the service of the declaration it should be mentioned to the court; and when the affidavit of service is defective, they will give leave to file a supplemental one;—that service on the tenant's son.

daughter, &c. may be deemed good service; for the landlord to be admitted defendant instead of the tenant, or for leave to take out execution in such case against the casual ejector after the landlord has failed in his defence. See *Ejectment*.

An attachment for non-payment of costs, and against the sheriff for not returning the writ, may be moved for the last day of term. 1 *Burr.* 651; 5 *Burr.* 2686. But a motion to answer the matters of an affidavit cannot be made on that day; 4 *Burr.* 2502; or any motion which would operate as a stay of proceedings, unless it appear to the court that, under the circumstances, it could not have been made earlier.

By the general rules, H. T. 2 *Wm.* 4. (r. 6.) side-bar rules may be obtained on the last as well as on other days in term.

A motion is in general accompanied with an affidavit, and sometimes preceded by a notice. The affidavit should be properly attested, and contain a full statement of all the circumstances necessary to support the application; and the rat or as it is a rule not to receive any supplementary affidavit on showing cause. 2 *T. R.* 641. Motions and affidavits for attachments in civil suits, are proceedings on the civil side of the court, until the attachments issue, and are to be attested with the names of the parties. 3 *T. R.* 253. But as soon as the attachments issue, the proceedings are on the crown side; and from that time the king is to be named as the prosecutor. 3 *T. R.* 133, 253. And where a submission to an award is made a rule of court under the statute, there being no action, the affidavits on which to apply for an attachment for disobeying the award, need not be intitled in any cause, but the affidavit in answer must. 3 *T. R.* 601. An affidavit sworn before the attorney in the cause cannot be read, except for the purpose of holding the defendant to special bail. *Tidd*. And where an affidavit is made before a commissioner by a person who from his signature appears to be illiterate, the commissioner taking the affidavit shall certify or state in the jurat, that it was read, in his presence, to the party making the same, who seemed perfectly to understand it, and wrote his signature in the presence of the commissioner. *R. E.* 31 *Geo.* 3. 4 *T. R.* 284.

The notice of motion though seldom necessary, is frequently given, in order to save time and expense; by affording the adverse party an opportunity of showing cause in the first instance, or by inducing the court to disallow the costs of proceedings taken after the notice, and before the motion.

The 14 *Geo.* 2. c. 17. required notice of motion for judgment as in case of a nonsuit; but in the Court of King's Bench the rule to show cause was deemed a sufficient notice. *Lofft.* 65. It was otherwise in C. B. See 1 *H. Blud.* 197.

Now by *Reg. Gen.* H. T. 2 *Wm.* 4. a rule nisi for judgment as in case of a nonsuit may be obtained on motion without previous notice; but in that case it shall not operate as a stay of proceedings.

The rule to show cause is drawn up for a particular day in term, previous to which it should be duly served. To bring a party into contempt, a copy of the rule must be personally served, and the original at the same time showed to him; in other cases the same degree of strictness is not required in the service of the rule, but it is sufficient, without showing the original, to leave a copy of it with any person representing the party at his dwelling house or place of abode. 3 *T. R.* 1. And when a rule is obtained for a stay of proceedings for irregularity, and to stay proceedings in the mean time, the proceedings are suspended for all purposes till the rule is discharged. 1 *T. R.* 1.

For the time when notices of rules and rules must be served, see *tit. Rule of Court*.

On the day appointed for that purpose the counsel for the party called upon by the rule, may show cause against it, either upon or without an affidavit as circumstances require. But the copy must be first taken of the rule, and of the affidavit on which it was granted; or otherwise counsel

cannot be heard. Previous to showing cause, it is usual to deliver over the affidavit against the rule to the counsel for the rule, who has a right to make any objection appearing on the face of it; and if a doubt arises upon the statement of the facts contained in the affidavit, it is inspected by the judges, or read by the officer of the court; when an affidavit has been made use of, but not before, it may be filed, in order that, if it be not true, the party may be indicted for perjury. *Tidd's Pract.*

If cause be not shown on the day appointed, the counsel for the party obtaining the rule may move, the next day, to make it absolute; which is done as a matter of course if no cause be shown on an affidavit of service. But it frequently stands over by consent of the parties, or for the accommodation of counsel, till a subsequent day, when the counsel on either side may bring it on by moving to make the rule absolute, or to discharge it; though if not brought on, or enlarged during the same term, it falls to the ground. When the counsel for the party obtaining the rule is not ready to support it, he may move to enlarge the rule till a future day in the same or next term, which is pretty much of course, when it is in his own delay; but otherwise the court will not enlarge the rule without consent, or some evident necessity; and they will never enlarge the plaintiff's rule when it would have the effect of continuing the defendant in custody. In like manner when the counsel for the party called upon by the rule is not prepared to show cause against it, he may apply to enlarge the rule till a future day, which is a matter of right if the rule was not served in time, so as to give the party an opportunity of answering it; but otherwise the court may impose upon him what terms they think proper, and they commonly require him to file his affidavits, so as to give the adverse party an opportunity of inspecting them, previous to the day appointed for showing cause. In cases of urgency, the court towards the end of the term will sometimes enlarge the rule till a day in the vacation, when it is to be brought on before a judge at chambers. *Tidd's Pract.*

And by the general rules, H. T. 2 *Wm.* 4. (r. 97.) a rule may be enlarged if the court think fit without notice.

On showing cause against the rule, the court either make it absolute or discharge it, and that either with or without the costs of the application; or such costs are directed to abide the event of the suit; according to the discretion of the court under all the circumstances of the case.

In hearing motions, the course formerly was, to begin every day with the senior counsel within the bar, and then to call to the next senior, in order, and so on as long as it was convenient to the court to sit, and to proceed again in the same manner upon the next and every subsequent day, although the bar had not been half, or perhaps a quarter gone through, upon any one of the former days; so that the juniors were very often obliged to attend in vain, without being able to bring on their motions for many successive days. 1 *Burr.* 57. This practice bearing hard upon junior counsel, Lord Mansfield introduced a different rule, which has ever since been adhered to; of going quite through the bar, even to the youngest counsel, before he would begin again with the seniors, even though it should happen to take up two or more days before all the motions which were ready at the bar upon the first day could be heard. 1 *Burr.* 57.

Particular days are appointed for certain business, as Tuesday and Friday, which are called paper days, for going through the paper of causes, wherein counsels have been moved for on the civil side; and Wednesday and Saturday for transacting business on the crown side. All motions or rules, in matters of length or consequence, are appointed for particular days, and called on first. Special causes are to be argued in the same order they are entered in the paper, and not to be entered anew or put off without a special application to the court; and all enlarged rules must come on peremptorily during the first week of the term.

If a rule be made absolute or discharged by surprise, the court will open it; and if by mistake it be drawn up wrong, they will order it to be set right. See *Tidd's Pract.* and the various authorities there cited.

Monday is a special day for motions in B. R. by the ancient course; but they are made upon any day, as the business of the court will permit. 2 *Lal.* 208, 210.

After motion in arrest of judgment, no motion shall be for a new trial; but after motion for a new trial, one may move in arrest of judgment. 2 *Salk.* 617. See *Arrest of Judgment, Trial.*

In B. R. one ought not to move the court for a rule for a thing to be done, which by the common rules of practice may be done without moving the court; nor shall the court be moved for doing what is against the practice of the court; one ought not to move for several things in one motion; and where a motion hath been denied, the same matter may not be moved again by another counsel without acquainting the court thereof, and having their leave for the same. Every person who makes a solemn argument at the bar is allowed by the court a motion for his argument. 2 *Lil. Abr.* 209, 210. But counsel cannot move for his argument in a matter of course in the paper, in B. R. 1 *Wils.* 76.

If there be divers rules of court made in a cause, and the party intends to move thereon, he must produce the rule last made in the cause, and move upon that; but it is necessary to have all the rules and copies of the affidavits, to satisfy the court how the cause hath been proceeded in and how it stands in court; though the last rule is the most material; and where a motion is made to set aside a rule grounded on an affidavit, a copy of the affidavit must be produced, that the court may be informed upon what grounds the rule was made, and judge whether there be cause shown upon the motion sufficient to set aside the rule. *Pasch.* 13 *Car. B. R. Hk.* 1649.

If any thing be moved to the court upon a record, the record is to be in court, or the court will make no rule upon such motion. *Hil.* 22 *Car. B. R.*

For the reasons of the several motions as arising from the progress of a cause through the courts from the commencement of the action to execution; which motions form the greatest part of the visible practice of courts of law; see *Eunomus, Dial.* 2. § 26—40. See *Practice, Rule of Court.*

In Chancery, during term, every Thursday is a day for hearing special motions before the chancellor (unless it happen to be the second day of the beginning, or the last day but one of the end of the term), as are the first and last days of the term; in vacation, only the general seal days appointed by the lord chancellor are days of motion.

Previous to the 3 & 4 *Wm.* 4. c. 94. motions were only to be made before the lord chancellor, but by that act the master of the rolls is to hear motions. See further, *Orders.*

MOVEABLES. All sorts of things moveable are included under the name of things personal, or are personal estate, i. e. all those things which may attend a man's person wherever he goes. See 2 *Comm. c.* 24.

MOULT. An old English word for a mow of corn or hay; *mullo feni*, &c. *Paroch. Antiq.* 401.

MUFFLE. Winter gloves made of ram-skins. In *Leg. Hen.* 1. c. 70. they are called *musfluc*, and sometimes *musflu*.

MULCT, *Mulcta*.] A fine of money set upon one for some fault or misdemeanor; fines laid on ships or goods by a company of trade, to raise money for the maintenance of consuls, &c. are called *mulcts*. *Merch. Dict.*

MULIER. As used in our law, seems to be a word corrupted from *melior*, or the Fr. *meilleur*; and signifies the lawful issue, born in wedlock, preferred before an elder brother born out of matrimony. See 9 *Hen.* 6. c. 11; *Smith's Repub. Angl. lib.* 3. c. 6. But by *Glanvil*, lawful issue are said to be *Mulier*, not from *melior*, but because begotten of *muliere*, and not *ex concubina*; for he calls such issue *filius*

mulieratos, opposing them to bastards. *Glanv. lib.* 7. c. 1. It appears to be thus used in Scotland also; *Skene* saying, *mulieratus filius* is a lawful son, begotten of a lawful wife.

If a man hath a son by a woman before marriage, which is a bastard and unlawful, and after he marries the mother of the bastard, and they have another son, this second son is *mulier* and lawful, and shall be heir to his father, but the other cannot be heir to any man; and they are distinguished in our old books with this addition. *Bastard eigné*, and *mulier puisné*. *Co. Lit.* 170, 243.

Where a man has issue by a woman, if he afterwards marries her, the issue is *mulier* by the civil law, though not by the laws of England. 2 *Inst.* 99; 5 *Rep.* 416. Of ancient time, *mulier* was taken for a wife, as it is commonly used for a woman, particularly one not a maid; and sometimes for a widow; but it has been held, that a virgin is included under the name *mulier*. See *Co. Lit.* 170, 243; 2 *Inst.* 434, 2 *Comm.* 248; and tit. *Bastard*.

MULIERTY. The being or condition of a *mulier*, or lawful issue. *Co. Lit.* 352, h.

MULLONES FCENI. Cocks or ricks of hay. *Paroch. Antiq.* p. 401. Hence in old English a *moult*, now a mow, of hay or corn. *Cowell*. See *Moult*.

MULMUTIN LAWS. See *Molmutian Laws*.

MULNEDA. A place to build a water-mill. *Mon.* ii. 28.

MULTE, or MULTURA EPISCOPI. Is derived from the Latin word *mulcta*, for that it was a fine given to the king, that the bishop might have power to make his last will and testament, and to have the probate of other men's, and the granting administrations. 2 *Inst.* 401.

MULTIPLE POINDING. In Scotch law means a double distress, and gives name to an action which may be brought by a person possessed of money or effects liable to claims from different claimants. Thus, where the rents of an estate are claimed by different persons, the tenant may raise an action of multiple poinding, calling the different parties to dispute their preferences, and to have it proved that the tenant is liable once, and in a single payment only. *Scotch Dict.*

MULTIPLICATION OF GOLD AND SILVER. Was prohibited and declared to be felony by 5 *Hen.* 4. c. 4. When a statute was made on a presumption that persons skilled in chemistry could multiply or augment these metals by changing other metals into gold or silver; and the endeavours of some persons in making use of extraordinary methods for the producing of gold and silver, and finding out the philosopher's stone, were found to be so prejudicial to the public, from the lavish waste of many valuable materials, and the ruin of many families by such useless expenses, that they occasioned the above statute. But the restraint thereby having no other effect, from the unaccountable vanity of those who followed those attempts practicable, than to send them beyond seas to try their experiments with impunity in other countries; 5 *Hen.* 4. c. 4. was at last repealed by 1 *W. & M.* c. 30. See *Dyer*, 88; 1 *Hawk. P. C.* c. 18. § 12.

This repeal, it is said, was obtained by the learned and celebrated Robert Boyle: who was himself an excellent chemist, and in some measure a favourer of what is called *chymy*, or the art of obtaining the *Philosophers' Stone*, for the transmutation of metals.

MULTITUDE, *Multitudo*.] According to some authors must be ten persons or more; but Sir *Edm. Coke* says he could never find it restrained by the common law to any certain number. *Co. Lit.* 257. See *Riot*.

MULTO TIORIORI, or A MINORI AD MAJUS. Is an argument often used by *Littleton*, and is framed thus: "If it be so in a feoffment passing a new right, much more it is for the restitution of an ancient right," &c. See *Ch. Lit.* 253. See 260, a.

MULTO, MUTILO, MOLTO, MUTO, MUTTO.

mutton or sheep, or rather a wether, *quia testiculis mutilati*. *Cowell*.

MULTONES AURI. Pieces of gold money imprest with an *Agnus Dei*, a sheep or lamb on the one side, and from that figure called *Multones*. This coin was more common in France, and sometimes current in England, as appears by a patent, 33 *Ldw.* 1, cited by *Spelman*; though he had not then considered the meaning of it. *Cowell*.

MULTURE, *molitura*, vel *multura*.] The toll that the miller takes for grinding corn. *Cowell*.

MULTURERS. In the Scotch law, are the persons grinding at a mill; and, as the tenants and proprietors of some lands are bound by tenure, to use a particular mill, the lands so bound or restricted to the mill are termed the *thirl* or *soken*, (*soken*), and the tenants, &c. so bound, are called the *in-soken multurers*; while those who use the mill without being bound by tenure so to do, are termed the *out-town*, or *out-soken multurers*.

MUM. A sort of beer or strong liquor brewed from wheat, oats, and ground beans. It was one of the articles subject to the regulation of the excise-laws. Brunswick is the most celebrated place for brewing this liquor.

MUMMING, from *Teuton. Mummien*, to mimic. Antic diversions in the Christmas holidays, to get money and good cheer. Mummers to be imprisoned, 3 *Ann.* 8. c. 9.

MUNDBRECH, from Sax. *mund*, munitio, defensio, and *brech*, fractio. This is mentioned among divers crimes as *quæ facta, læsio majestatis*, &c. *Spelm. Gloss.*

Some would have *mundbrech* to signify an infringement of privilege; though of later times it is expounded *clausurarum fractio*, a breach of inclosures, by which many duchies and manors are called in many parts of England; and we say, when lands are fenced in and hedged, that they are *mounded*. See the next article.

MUNDE. Peace, hence *Mundebrece*, a breach of it. *Leg. Hen.* 1. c. 37.

MUNDEBURDE, *Mundeburdum*, from Sax. *mund*, i. e. *tela*, and *burd* = *brech*, i. e. *publ. fractio*.] A receiving to avoid and protection. *Cowell*.

MUNDICK. See *Metal*.

MUNICIPAL LAW. Is defined by *Ida Estius*, 1 *Comm. Introductio* a rule of civil conduct prescribed by the superior power, a statute, and for this definition he gives his reasons at large, to which we refer the reader. See *Idem*.

MUNIMENT-HOUSE, *Munimenta*. In cathedral and collegiate churches, castles, colleges, or public buildings, is a house or little room or storeroom, purposely made for keeping the seal, evidences, deeds, charters, writings, &c. of such church, college, &c. See evidences of title to estates, whether of public bodies or private persons, being called *Munimenta*, commonly *muniments*, or *Muniments*, to record, &c. See *Munimenta* and possessions are defended by them. *Test. 176. Law Terms*; 5 *Rich.* 2. c. 8; 35 *Hen.* 6. c. 37.

MUNIMENTS, *Munimenta*.] See the preceding article.

MUNUS ECCLESIASTICUM. The consecrated bread, out of which a little piece is taken for a communicant. *Mon. Angl.* ii. 838.

MURAGE. *Murage*. A reasonable tax, to be taken of every cart and horse coming upon the walls of a city or town, for the lading or repairing of the public walls, &c. levied by grant or prescription, it seems to be a duty levied on a town by a king for collecting of money towards the repair of the walls. See *Idem* 1. c. 30. 2 *H. 1. c. 2*. The sum of money for labour done by inhabitants and adjoining tenants for building or repairing the walls of a city or castle, was called *murorum operatio*; and when this personal duty was commuted into money, the tax so gathered was called *Murage*. *Paroch. Antiq.* 114. In the city of Chester, there are two ancient officers called *Murengers*, being two of the principal aldermen, yearly chosen to see the walls kept in

good repair; for the maintenance of which they receive certain tolls and customs.

MURALE. The city wall. *Huntind. lib.* 8. p. 392.

MURATIO. A town or borough, surrounded with walls. *Bromp. Vit. K. Steph.*

MURDER. See *Homicide*, III. 3.

MURORUM OPERATIO. The service of work and labour done by inhabitants and adjoining tenants in building or repairing the walls of a city or castle. From which duty some were exempted by special privilege. So King Henry II. granted to the tenants within the honour of Wallingford, *Ut quieti sint de operationibus castelorum et murorum*. *Paroch. Antiq.* 114. When this personal duty was commuted into money, the tax so gathered was called *Murage*. *Cowell*. See *Murage*.

MUSCOVY COMPANY. See *Russia Company*.

MUSICIANS. The musicians of England were incorporated by King Charles II. anno, 1670. See *Minstrels*.

MUSLINS. See *Linen*.

MUSSA, *Lat.*] A moss or marsh ground; also a place where sedge grows; a place over-run with moss. *Cowell, Mon.* i. 426.

To **MUSTER**, from Fr. *Monstre*.] To show men, and their arms, that are soldiers, and enrol them in a book. *Terms de Ley.* See *Courts Martial, Soldiers*.

MUSTER-MASTER GENERAL. See *Master of the King's Musters*.

MUTA CANUM, Fr. *Meute de chiens*.] A kennel of hounds, one of the mortuaries to which the king was entitled at a bishop's and abbot's decease. See *Mortuary*.

MUTARE. To mew up hawks in the time of their molting or casting their plumes. In the reign of King Edward II. the manor of Broughton in Com. Oxon. was held—*Per serjeantiam mutandi unum hostricum domini regis*, &c. *Paroch. Antiq.* 500.

The Mews (*Muta Regia*) near Charing Cross, London, was formerly the falconry or place for the king's hawks.

MUTATORIUS. Change of apparel. *Mat. Par. Ann.* 1207.

MUTATUS ACCIPITER. A mewed hawk. *Cowell*.

MUTE, *Mutus*.] One dumb, who cannot or refuses to speak. And by our law a prisoner may stand mute two ways:

1. When he speaks not at all; in which it shall be inquired whether he stand mute out of malice, or by the act of God? and if by the latter, then the judge ought to inquire whether he be the same person, and of all pleas which he might have pleaded in his defence, if he had not been mute.
2. When the prisoner does not plead directly, or will not put himself upon the inquest to be tried; and a person feigning himself mad, and refusing to answer, shall be taken as one who stands mute. 2 *Inst. H. P. C.* 226.

If a prisoner on his trial peremptorily challenged above the number of jurors allowed by law, this being an implied refusal of a legal trial, he was formerly dealt with as one who stood mute. *H. P. C.* 259; *Kel.* 36; 2 *Hawk. P. C.* c. 30.

And it was, indeed, long since clearly settled, that a prisoner thus perversely and obstinately offending, was, in high treason, *ipso facto* attainted. 2 *Hale*, 268; 4 *Comm.* c. 25. p. 325; c. 27. p. 354. And in felony the challenge was overruled. 2 *Hale*, 576.

Now by the 7 & 8 *Geo.* 4. c. 28. § 3. if any person indicted for treason, felony, or piracy, challenge peremptorily above the number allowed by law, every such challenge beyond the number allowed by law shall be void, and the trial proceed as if no such challenge had been made.

Regularly a prisoner was said to stand mute, when being arraigned for treason, or felony, he either, 1. made no answer at all; or, 2. answered foreign to the purpose, or with such matter as was not allowable, and would not answer otherwise; or, 3. upon having pleaded not guilty, refused to put

himself upon the country. 2 Hal. P. C. 316. If he said nothing, it was the duty of the court *ex officio* to impanel a jury to inquire whether he stood obstinately mute, or whether he was dumb *ex visitatione Dei*. If the latter appeared to be the case, the judges of the court (who were to be of counsel for the prisoner, and to see that he had law and justice,) should proceed to the trial, and examine all points as if he pleaded not guilty. But whether judgment of death could be given against such a prisoner, who had never pleaded, and could say nothing in arrest of judgment, was a point (says Blackstone) undetermined. See 2 Hal. P. C. 317; 9 Hawk. P. C. c. 30. § 7.

If he were obstinately mute (which a prisoner was held to be who cut out his own tongue. 3 Inst. 178.) then, if it were in an indictment for high treason, it was clearly settled that standing mute was equivalent to a conviction, and he should receive the same judgment and execution. 2 Hawk. P. C. c. 30. § 9; 2 Hale, P. C. 317, 332. And as in the highest crime, so in the lowest species of felony, *vis.* in petit larceny, and in all misdemeanors, standing mute was always equivalent to conviction.

But in other felonies, or petit treason, the prisoner was not by the ancient law looked upon as convicted, so as to receive judgment for the felony, but should for his obstinacy have received the terrible sentence of *penance* or *peine* (probably a corrupted abbreviation of *prisone*) *forte et dure*.

Before this was pronounced, the prisoner had not only *trina admonitio*, but also a respite of a few hours, and the sentence was distinctly read to him, that he might know his danger; and after all, if he continued obstinate, and his offence was clergyable, he had the benefit of his clergy allowed, even though he was too stubborn to pray it. 2 Hal. P. C. 320, 321; 2 Hawk. P. C. c. 30. § 24. Thus tender was the law of inflicting this dreadful punishment; but if no other means could prevail, and the prisoner (when charged with a capital felony) continued stubbornly mute, the judgment was then given against him without any distinction of sex or degree. A judgment which was purposely ordained to be exquisitely severe, that by that very means it might rarely be put in execution.

The judgment of penance for standing mute was as follows:—that the prisoner be remanded to the prison from whence he came, and put into a low, dark chamber, and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear; and more, that he have no sustenance, save only on the first day three morsels of the worst bread; and on the second day three draughts of standing water, that should be nearest to the prison door; and in this situation this should be alternately his daily diet, till he died, or (as anciently the judgment ran) till he answered. Brit. c. 4, 22; Flet. lib. 1, c. 34. § 33.

It has been doubted, whether this punishment subsisted at the common law, or was introduced in consequence of West. 1. 3 Edm. 1. c. 12; which latter seems to be the better opinion. 2 Inst. 179; 2 Hal. P. C. 322; 2 Hawk. P. C. c. 30. § 19; Staundf. P. C. 149; Barr. 82. For not a word of it is mentioned in Glanvil or Bracton, or in any ancient author, case, or record (that hath yet been produced) previous to the reign of Edward I.; but there are instances on record in the reign of Henry III. where persons accused of felony, and standing mute, were tried in a particular manner, by two successive juries, and convicted; and it is asserted by the judges in 8 Hen. 4. that by the common law, before the statute, standing mute on an appeal, amounted to a conviction of the felony. This statute of Edward I. directs such persons "as will not put themselves upon inquests of felonies, before the judges at the suit of the king, to be put into (or rather shall be sent back to) hard and strong prison, (*soient mys 2* (the best copies read *remys*) *en la prisone forte et dure*) as those which refuse to be at the common law of the land."

And immediately after this statute, the form of the judgment appears in Fleta and Britton to have been only a very strait confinement in prison, with hardly any degree of sustenance, but no weight is directed to be laid upon the body, so as to hasten the death of the sufferer; and indeed any surcharge of punishment on persons adjudged to penance, so as to shorten their lives, is reckoned by Horne, in the Mirror, as a species of criminal homicide. Mirr. c. 1. § 9. It appears by a record of 31 Edm. 3. that the prisoner might then possibly subsist for forty days under this lingering punishment. It seems, therefore, that the practice of loading him with weights, or, as it was usually called, *pressing him to death*, was gradually introduced between 31 Edm. 3. and 8 Hen. 4. at which last period it first appears upon our books; being intended as a species of mercy to the delinquent, by delivering him the sooner from his torment; and hence it seems also that the duration of the penance was then first altered; and instead of continuing till he answered, it was directed to continue till he died, which must very soon happen under an enormous pressing. Year B. 8 Hen. 4. 1, 2.

The uncertainty of its original, the doubts that were conceived of its legality, and the repugnance of its theory (for it rarely was carried into practice) to the humanity of the laws of England, all concurred to require a legislative abolition of this process, and a restitution of the ancient common law; whereby the standing mute in felony, as well as in treason and in trespass, amounted to a confession of the charge. Or, if the corruption of the blood, and the consequent escheat in felony had been removed, the judgment of *peine forte et dure* might perhaps have still innocently remained, as a monument of the rapacity with which the tyrants of feudal antiquity hunted after escheats and forfeitures; since no one would ever have been tempted to undergo such a horrid alternative. For the law was, that by standing mute, and suffering this heavy penance, the judgment, and of course the corruption of the blood and escheat of the lands, were saved in felony, and petit treason, though not the forfeiture of the goods; and, therefore, this lingering punishment was probably introduced in order to extort a plea, without which it was held that no judgment of death could be given, and so the lord lost his escheat. But in high treason, as standing mute is equivalent to a conviction, the same judgment, the same corruption of blood, and the same forfeitures, always attended it as in other cases of conviction. 2 Hawk. P. C. c. 30. § 9. It was enacted by the 12 Geo. 3. c. 20. that every person who, being arraigned for felony or piracy, stood mute or not answer directly to the offence, should be convicted of the same; and the same judgment and execution (with all their consequences in every respect) should be thereupon awarded, as if the person had been convicted by verdict or confession of the crime.

Two instances occurred after the passing of the act, of persons who refused to plead, and who were in consequence condemned and executed: one at the Old Bailey for murder in 1778, the other for burglary at the summer assizes at Wells in 1792. See 4 Comm. c. 25, p. 324—329, and *n.*

Now by the 7 & 8 Geo. 4. c. 28. § 2. if any person arraigned upon, or charged with, any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute or malice, or will not answer directly, the court may order the officer to enter a plea of "not guilty" on behalf of such person; and the plea so entered shall have the same effect as if such person had actually pleaded the same.

The trial and safe custody of insane offenders not capable of pleading or being mute by the visitation of God, are regulated by the 39 & 40 Geo. 3. c. 94, and 58 Geo. 3. c. 7. See further *Idiots and Lunatics*, VI.

Although this subject is now become matter of curiosity rather than of instruction, the following further particulars as to this terrible punishment, are preserved for the satisfaction of the inquiring student.

Hawk as, in his description of the *peine forte et dure*, says, that the manner of inflicting this punishment may be best found from the books of entries and other law books; all of which generally agree, that the prisoner shall be remanded to the place from whence he came, and put into some low dark room, and there laid on his back without any manner of covering, except for the privy parts, and that as many weights be laid upon him as he can bear, and more, and that he shall have no manner of sustenance but the worst bread and water, and that he shall not eat the same day on which he drinks, nor drink the same day on which he eats, and that he shall so continue till he die. But that it is said that anciently the judgment was not, that he should continue until he should die, but until he should answer; and that he might save himself from the penance by putting himself upon his trial, which he cannot do at this day after judgment of penance once given. 2 *Hawk. P. C. c. 30. § 16.*

And as to the words in *some low dark room*, he says that this clause is omitted in *Keilw. 70. a*; 1 *Edm. 4. 11. pl. 18.* but is mentioned in all the other books above cited, but with this difference, that 14 *Edm. 4. 11. pl. 17.* says only he shall be put in a chamber, without adding that it shall be low or dark.

And as to the words *there laid on his back*, &c. he says, that in this all the books above cited seem to agree. And 14 *Edm. 4. 8. pl. 17*; and *S. P. C. 150. (E)*; and 2 *Inst. 178*; add, that he shall lie without any litter or other thing under him, and that one arm shall be drawn to one quarter of the room with a cord, and the other to another, and that his feet shall be used in the same manner. But that these clauses are wholly omitted in all the other books above cited, except *H. P. C.* which takes notice of the latter of them only. And *Ra. Ent. 385. pl. 2.* adds, that an hole shall be made for the head. And *Keilw. 70. a.* says, that the head shall not touch the earth.

And as to the words, *that as many weights shall be laid upon him as he can bear, and more*, &c. he says, that in this all the books above cited agree.

And as to the word *bread*, he says that 14 *Edm. 4. 8. pl. 17*; *S. P. C. 150. (E)*; and 2 *Inst. 178*; are, that he shall have three morsels of barley bread a day; *Keilw. 70. a.* that he shall have only rye bread; and *Ra. Ent. 385. pl. 2.* and 2 *Hen. 4. 1. pl. 2.* generally that he shall have the worst bread.

And as to the word *water*, he says, that in 14 *Edm. 4. 8. pl. 17*; *S. P. C. 150. (E)*; 2 *Inst. 178*; and 8 *Hen. 4. 1. pl. 2.* and *Keilw. 70. a*; are, that he shall have the water

next the prison, so that it be not current; but *Ra. Ent. 385. pl. 5.* is general that he shall have the worst water.

And as to the words, *not eat the same day on which he drinks, nor drink the same day on which he eats*, &c. he says, that is omitted in *Keilw. 70. a.* and in *Hen. 4. 1. pl. 2.*

And as to the words *till he die*, he says, this is omitted in none of the books above cited, except 14 *Edm. 4. 11.* and *H. P. C. 227.* But that neither of these books give the whole judgment at large. 2 *Hawk. P. C. c. 30.*

The rack or question, to extort a confession from criminals, was a practice of a different nature: this having been only used to compel a man to put himself upon his trial, that being a species of trial in itself. See *Torture*.

To advise a prisoner to stand mute, is a high misprison, a contempt of the king's court, and punishable by fine and imprisonment. See *Misprison*.

MUTILATION. The depriving a man of any member, &c. See *Maim*.

For some offences the law punishes with mutilation, or dismembering, by cutting off the hand, or ears, &c. See *Judgment Criminal, Misprison*.

MUTINY. See *Courts-Martial, Militia, Soldiers*.

MUTUAL DEBTS. See *Set-off*.

MUTUAL PROMISE. Is where one man promises to pay money to another, and he in consideration thereof promises to do a certain act, &c. See *Assumpsit, Pleading*.

MUTUATUS. If a man oweth another 10*l.* and hath a note for the same, without seal, action of debt lies upon a *mutuatus*; but in this there might have been wager of law, which there might not be in an action upon the case, on an implied promise of payment, &c. See *Debt*.

MUTUO. To borrow or lend. 2 *Sand. 201.*

MUTUS ET SURDUS. Dumb and deaf. See *Deaf*.

MUTUUM. The contract by which things are given in loan, which cannot be used without their extinction or alienation, and which, therefore, imposes an obligation on the borrower to restore as much of the article borrowed of the same kind and value as he received. See *Bailment*.

MYSTERY, Misterium, from the Fr. *meister, métier, ars, artificium*.] An art, trade, or occupation.

Among the additions required to be given to defendants in an indictment by the 1 *H. 5. c. 5.* are the addition of their "estate, or degree, or mystery."

Mystery means the defendant's trade, art, or occupation, such as merchant, mercer, tailor, parish clerk, schoolmaster, husbandman, labourer, or the like. 2 *Hawk. c. 23. § 11.*

N.

NATIONAL DEBT.

NACELLA. A skiff or boat. *Mat. Paris.*
NACKA, NACTA. A small ship, yacht, or transport vessel. *Chartular Abbat. Rading. MS. fol. 51.*

NAM, or NAAM, namium; from the Sax. *niman, capere.* The taking or distraining another man's moveable goods. Lawful Naam, which is a reasonable distress, proportionable to the value of the thing distrained for, was anciently called either *vif* or *mort*, quick or dead, as it consisted of dead or quick chattels; and it is when one takes another man's beasts damage-feasant in his ground; or by reason of some contract made, as for default of payment of an annuity, it shall be lawful to distrain in such or such lands, &c. There is also a Naam unlawful mentioned in our books. *Horn's Mirror, lib. 2; Leg. Canut. c. 18; Spelm. Gloss.; this Dict. tit. Namium, Replevin.*

NAMATION, namatio. A taking or distraining; and in Scotland it is used for impounding: *Namatus*, distrained. *Charta Hen. 2.* See *Namium, Velitum, Withernam.*

NAME, nomen, Fr. nosme or nom. By which any person is known or called. There is a name of persons, bodies politic, and places; and of baptism and surname; also names of dignity, &c. In some cases a name by reputation is sufficient; but it is not so of a thing, if the matter and substance be not right. *11 Rep. 21; 4 Rep. 65; 4 Rep. 170.* What foundation will support a name by reputation, see *Ld. Raym. 301, 304; and tit. Misnomer.*

NAMIVM VETITUM. An unjust taking the cattle of another, and driving them to an unlawful place, pretending damage done by them. In which case the owner of the cattle may demand satisfaction for the injury, which is called *placitum de namio vetito*. *2 Inst. 140; 3 Com. 140.* See *Replevin, Withernam.*

NARR. An abbreviation of *narratio*; a declaration in a cause.

NARRATOR, Lat. A pleader or reporter. *Serviens narrator*, a serjeant at law; a serjeant-counter. *Fleta, lib. 2. cap. 37.*

NASSE or NESSE. From Sax. *Næse, Promontorium.* The name of the port or haven of Orford, in Suffolk, mentioned in *4 Hen. 7. c. 21.* Hence also Sheerness.

NATALE. The state and condition of a man.

NATHWYTE. Seems to be derived from the Sax. *nath, i. e. lewdness*; and so to signify the same with *Lairnute*. See that title.

NATIONAL DEBT. The money owing by Government, for which it pays interest, part to our own people, part to foreigners, and which forms our National Funds. After the Revolution, when our new connections with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in maintaining long wars, as principals, on the continent, for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the house of Austria, maintaining the liberties of the Germanic body, and other purposes, increased to an unusual degree; insomuch that it was not thought advisable to raise all the expenses of

NATIONAL DEBT.

any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of the times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the state, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed; by this means converting the principal debt into a new species of property, transferable from one man to another, at any time and in any quantity. A system which seems to have had its original in the state of Florence, A.D. 1344, which government then owed about 60,000*l.* sterling; and being unable to pay it, formed the principal into an aggregate sum, called, metaphorically, a mount of bank, the shares whereof were transferable, like our stock, with interest at 5*l.* per cent., the prices varying according to the exigencies of the state. This laid the foundation of what is called the national debt; for a few long annuities created in the reign of Charles II. will hardly deserve that name. And the example then set was so closely followed during the long wars in the reign of Queen Anne, and hitherto, that the capital of the national debt has by degrees increased to a wonderful sum of between 650 and 700 millions sterling. (For its present amount, see *post*), to pay the interest of which and the charges for management, the extraordinary revenues of the kingdom (excepting only the land-tax and an income-tax) are in the first place mortgaged, and made perpetual by parliament; redeemable, however, by the authority that imposed them; which, if at any time they pay off the capital, will abolish those taxes which are raised to discharge the interest. See *1 Comm. c. 8.*

The following account and origin of the national debt is principally taken from *McCulloch's Commercial Dictionary*.

The practice of borrowing money, in order to defray a part of the war expenditure, began, in this country, in the reign of William III. In the infancy of the practice it was customary to borrow upon the security of some tax, or portion of a tax, set apart as a fund for discharging the principal and interest of the sum borrowed. This discharge was, however, very rarely effected. The public exigencies continuing, the loans were, in most cases, either continued, or the taxes were again mortgaged for fresh ones. At first the practice of borrowing for a fixed period, or, as it is commonly termed, upon terminable annuities, was almost exclusively abandoned, and most loans were made upon interest annuities, or until such time as it might be convenient for the government to pay off the principal.

In the beginning of the funding system, the term meant the taxes or funds appropriated to the discharge of the principal and interest of loans; those who held government securities, and sold them to others, selling, of course, a corresponding claim upon some fund. But after the debt began to grow large, and the practice of borrowing upon terminable annuities had been introduced, the meaning attached to the term fund was gradually changed; and, instead of signifying the security upon which loans were advanced, it, for a long time, signified the principal of the loans themselves.

Owing partly, perhaps, to the scarcity of disposable capital at the time, but far more to the supposed insecurity of the revolutionary establishment, the rate of interest paid by government in the early part of the funding system was comparatively high. But as the country became richer, and the confidence of the public in the stability of government increased, ministers were enabled to take measures for reducing the interest, first in 1716, and again in 1749.

During the reigns of William III. and Anne, the interest stipulated for loans was very various. But in the reign of George II. a different practice was adopted. Instead of varying the interest upon the loan according to the state of the money market at the time, the rate of interest was generally fixed at three, or three and a half per cent.; the necessary variation being made in the principal funded. Thus suppose government were anxious to borrow, that they preferred borrowing in a three per cent. stock, and that they could not negotiate a loan for less than four and a half per cent., they effected their object by giving the lender, in return for every 100*l.* advanced, 150*l.* three per cent. stock; that is, they bound the country to pay him, or his assigns, 4*l.* 10*s.* a-year, in all time to come, or, otherwise, to extinguish the debt, by a payment of 150*l.* In consequence of the prevalence of this practice, the principal of the debt now existing amounts to nearly two-fifths more than the sum actually advanced by the lenders.

Some advantages are, however, derivable, or supposed to be derivable, from this system. It renders the management of the debt, and its transfer, more simple and convenient than it would have been, had it consisted of a greater number of funds bearing different rates of interest; and it is contended, that the greater field for speculation afforded to the holders in stocks bearing a low rate of interest, has enabled government to borrow, by funding additional capitals, for a considerably less payment, on account of interest, than would have been necessary, had no such increase of capital been

permitted. Were this a proper place for entering upon such discussions, it would be easy to show that the advantages now ascribed to the present mode of funding, by an increase of capital, has been a most imprudent one, and most injurious to the public interests. But it would be quite foreign from the objects of this work, to enter into an examination of such questions; and our readers will, however, find them fully investigated in an article in the ninety-third Number of the Edinburgh Review. Here we have merely to consider funded property, or government securities, as transferable or marketable commodities.

The following is an account of the progress of the national debt of Great Britain, from the Revolution to the present time:—

	Principal.	Interest.
Debt at the Revolution, in 1689	£. 664,263	1. 8. 3.5
Excess of debt contracted during the reign of William III., above debt paid off	15,730,439	1,271,087
Debt contracted during Queen Anne's reign, on the accession of George I., in 1714	16,394,702	1,310,042
Debt contracted during Queen Anne's reign, on the accession of George I., in 1714	37,150,661	2,040,416
Debt contracted during the reign of George I., above debt paid off	54,145,363	3,351,358
Debt contracted during the reign of George I., above debt paid off	2,053,125	1,133,807
Debt at the accession of George II., in 1727	52,092,235	2,217,551
Debt at the accession of George II., in 1727	86,773,192	2,634,500
Debt at the accession of George II., in 1727	138,865,430	4,852,051
Debt at the accession of George II., in 1727	10,281,795	380,480

	Principal.	Interest.
Debt at the commencement of the American war, in 1775	£. 128,583,635	£. 4,471,571
Debt contracted during the American war	121,267,993	4,980,201
Debt at the conclusion of the American war, in 1784	249,851,628	9,451,772
Paid during peace, from 1784 to 1793	10,501,380	243,277
Debt at the commencement of the French war, in 1793	239,350,148	9,208,495
Debt contracted during the French war	608,932,329	24,645,971
Total funded and unfunded debt, 5th of January, 1817, when the English and Irish exchequer were consolidated	848,282,477	33,854,466

Since 1817 a deduction has been made of about sixty millions from the principal of the debt, and about five millions from the annual charge on its account. This diminution has been principally effected by taking advantage of the fall in the rate of interest since the peace, and offering to pay off the holders of different stocks, unless they consented to accept a reduced payment; and had it not have been for the highly objectionable practice, already adverted to, of funding large capitals at a low rate of interest, the saving in this way might have been incomparably larger.

The total funded and unfunded debt, on the 5th of January, 1833, was 781,378,549*l.* 10*s.* 2*d.*; and the annual charge thereon, 28,351,352*l.* 18*s.* 1*d.*

We shall now subjoin some account of the different funds, or stocks, forming the public debt.

I. Funds bearing Interest at Three per Cent.

1. *South Sea Debt and Annuities.*—This portion of the debt, amounting on the 5th of January, 1833, to 10,144,584*l.*, is all that now remains of the capital of the once famous, or rather infamous, South Sea Company. The company has, for a considerable time past, ceased to have any thing to do with trade; so that the functions of the directors are wholly restricted to the transfer of the company's stock, and the payment of the dividends on it; both of which operations are performed at the South Sea House, and not at the Bank. The dividends on the old South Sea annuities are payable on the 5th of April, and 10th of October; the dividends on the rest of the company's stock are payable on the 5th of January, and 5th of July.

2. *Debt due to the Bank of England.*—Until recently consisted of the sum of 14,686,800*l.* lent by the Bank to the public, at three per cent.: dividends payable on the 5th of April, and 10th of October. It must not be confounded with the Bank capital of 14,553,000*l.*, on which the stockholders divide. Under the provisions of the 3 & 4 W. 1. c. 58. renewing the Bank Charter, one-fourth of the above debt was to be repaid, which has been accomplished by the Bank agreeing to accept in lieu thereof 4,080,000*l.* three per cent. reduced annuities. See 4 & 5 W. 4. c. 80.

3. *Bank Annuities created in 1726.*—The civil list settled on George I. was 700,000 a-year; but having fallen into arrear, this stock was created for the purpose of cancelling exchequer bills, that had been issued to defray the arrear. "The capital is irredeemable; and being small, in comparison with the other public funds, and a stock in which little is done on speculation, the price is generally at least one per cent. lower than the three per cent. consols." (Cohen's edit. of *Fairman on the Funds*, p. 40.)

4. *Three per Cent. Consols, or Consolidated Annuities.*—This stock forms by much the largest portion of the public debt. It had its origin in 1751, when an act was passed, consolidating (hence the name) several separate stocks, bearing an interest of three per cent., into one general stock. At the period when the consolidation took place, the principal of the funds, blended together, amounted to 9,137,821*l.*; but, by

finding of additional loans, and parts of loans, in this stock, it amounted, on the 5th of January, 1833, to the immense sum of 347,458,931*l*.

The consolidated annuities are distinguished from the three per cent. reduced annuities by the circumstance of the interest upon them never having been varied, and by the dividends becoming due at different periods. This stock is, from its magnitude, and the proportionably great number of its holders, the soonest affected by all those circumstances which tend to elevate or depress the price of funded property. And on this account, it is the stock which speculators and jobbers most commonly select for their operations. Dividends payable on the 5th of January, and 5th of July.

5. *Three per Cent. Reduced Annuities*.—This fund was established in 1757. It consisted, as the name implies, of several funds which had previously been borrowed at a higher rate of interest; but, by an act passed in 1749, it was declared that such holders of the funds in question, as did not choose to accept in future of a reduced interest of three per cent, should be paid off,—an alternative, which comparatively few embraced. The debts that were thus reduced and consolidated amounted, at the establishment of the fund, to 17,571,574*l*. By the addition of new loans, they now amount to 123,029,013*l*. And see *ante*, 2. Dividends payable on the 5th of April and 10th of October.

II. Funds bearing more than Three per Cent. Interest.

1. *Annuities at three and a half per Cent., 1818*.—This stock was formed in 1818, partly by subscription of three per cent. consolidated, and three per cent. reduced annuities, and partly by a subscription of exchequer bills. It was made redeemable at par any time after the 5th of April, 1829, upon six months' notice being given. Dividends payable on the 5th of April and 10th of October. The capital of this stock amounts to 12,350,802*l*.

2. *Reduced three and a half per Cent. Annuities*.—This stock was created in 1824, by the transfer of stock bearing interest at four per cent. (old four per cents.) It is redeemable at pleasure. Dividends payable on the 5th of April and 10th of October. Amount, on the 5th of January, 1833, 63,453,824*l*.

3. *New three and a half per Cent. Annuities*.—This stock was formed by the act of 11 Geo. 4. c. 13, out of the stock known by the name of new four per cents.; amounting, on the 5th of January, 1830, to 154,331,212*l*. The holders of this four per cent. stock had their option, either to subscribe into the new three and a half per cent. annuities, or into a new five per cent. stock, at the rate of 100*l*., four per cents, for 70*l*., five per cents. Dissentients to be paid off. Only 467,713*l*. new five per cent. stock was created under this arrangement. The sum required to pay dissentients was 2,610,000*l*. The new three and a half per cent that was thus created amounted on the 5th of January, 1833, to 137,613,820*l*. Dividends payable 5th of January and 5th of July.

4. *Four per Cent. Annuities created in 1826*.—By virtue of the 7 Geo. 4. c. 39, 3,000,000 of exchequer bills were funded, at the rate of 107*l*. four per cent. annuities for every 100 bills. In 1829, (10 Geo. 4. c. 31), three additional millions of exchequer bills were funded in this stock, at the rate of 101*l*. 10*s*. stock, for every 100 bills. Dividends payable 5th of April and 10th of October. Amount, 5th of January, 1833, 10,796,340*l*. A considerable sum was transferred from this stock for the purchase of annuities, under the 10 Geo. 4. c. 24.

By an act of the 4 & 5 W. 4. c. 31, these four per cent. annuities were reduced, and added to the above new three and a half per cent. annuities. This stock thus created, is not to be redeemed before the 5th of January, 1840. Dissentients (who are understood to be numerous) are to be paid off.

5. *New five per cent.*—Amount, 5th of January, 1833,

462,737*l*. (See above, 3, New three and a half per Cent Annuities.)

III. Annuities.

1. *Long Annuities*.—These annuities were created at different periods, but they all expire together in 1860. They were chiefly granted by way of premiums, or douceurs, to the subscribers to loans: payable on the 5th of April, and 10th of October.

2. *Annuities under 4 Geo. 4. c. 22*. This annuity is payable to the Bank of England, and is commonly known by the name of the "dead weight" annuity. It expires in 1860. It is equivalent to a perpetual annuity of 470,317*l*. 10*s*.

3. *Annuities under 48 Geo. 3. c. 142, &c.; and 10 Geo. 4. c. 24*.—The 48 Geo. 3. c. 142, was the first act that authorised the granting of life annuities, and that statute was followed by various others, whereby its provisions were amended and extended, all of which were repealed by the 9 Geo. 4. c. 16, but this latter act did not affect annuities that had then been granted. By the 10 Geo. 4. c. 24 the commissioners for the reduction of the national debt, were once more empowered to grant annuities for terms of years, and life annuities, accepting in payment either money or stock, according to rates specified in tables, to be approved by the lords of the treasury. No annuities are granted on the life of any nominee under fifteen years of age, nor in any case not approved by the commissioners. Annuities for terms of years not granted for any period less than ten years. These annuities are transferable, but not in parts or shares. Those for terms of years, payable 5th of January and 5th of July, and those for lives, 5th of April and 10th of October. See also 2 & 3 W. 4. c. 59. and 3 & 4 W. 4. c. 24.

The annuities for terms of years, granted under the above acts, amounted, on the 10th of October, 1830, to 772,714*l*. being equal to a perpetual annuity of 491,058*l*. The life annuities amounted, at the same period, to 666,411*l*; being equal to a perpetual annuity of 266,071*l*. (*Parl. Paper*, No. 174, Sess. 1831.)

Irish Debt.—It seems unnecessary to enter into any details with respect to the public debt of Ireland. The various descriptions of stock of which it consists, and their amounts, are specified above. The dividends on the Irish debt are paid at the Bank of Ireland; and, in order to accommodate the public, stock may be transferred, at the pleasure of the holders, from Ireland to Great Britain, and from the latter to the former.

Exchequer Bills.—Are bills of credit, issued by authority of parliament. They are for various sums, and bear interest (at present at the rate of one and a half per diem, per 100*l*) according to the usual rate at the time. The advances of the Bank to government are made upon exchequer bills, and the daily transactions between the Bank and government are principally carried on through their intervention. None of the time at which out-standing exchequer bills are to be paid off is given by public advertisement. Bankers provide for vesting in exchequer bills to any other species of stock, even though the interest be for the most part comparatively small, because the capital may be received at the treasury at the rate originally paid for it; the holders being exempted from any risk of fluctuation. Exchequer bills were first issued in 1696; and have been annually issued ever since. The amount outstanding, and unprovided for, on the 5th of January, 1833, was 27,279,000*l*. By the 4 & 5 W. 4. c. 31, the commissioners of the treasury may issue exchequer bills to the amount of 14,000,000*l*, for the service of the year 1833.

India Stock and India Bonds are also quoted in the prices of the public funds. The stock, on which the East India Company divide, is, 6,000,000*l*., the dividend on which has been, since 1793, ten and a half per cent. provisions for its payment under the 3 & 4 W. 4. c. 83. *East India Company*, II. India bonds are generally for 100*l*. each, and bear at present two and a half per cent. interest.

payable 31st of March, and 30th of September. In selling them, the interest down to the day of sale is, with the premiums, added to the amount of the bills; the total being the sum to be paid by the purchaser. The premium, which is, consequently, the only variable part of the price, is influenced by the circumstances which influence the price of stocks generally, the number of bonds in circulation, &c.

The price of stocks is influenced by a variety of circumstances. Whatever tends to shake or to increase the public confidence in the stability of government, tends at the same time to lower or increase the price of stocks. They are also affected by the state of the revenue; and, more than all, by the facility of obtaining supplies of disposable capital, and the interest which may be realised upon loans to responsible persons.

From 1730, till the rebellion of 1745, the three per cents. were never under 89; and were once, in June, 1737, as high as 107. During the rebellion, they sunk to 76; but, in 1749, rose again to 100. In the interval between the peace of Paris, in 1763, and the breaking out of the American war, they averaged from 80 to 90; but towards the close of the war they sunk to 54. In 1792 they were, at one time, as high as 96. In 1797 the prospects of the country, owing to the successes of the French, the mutiny in the fleet, and other adverse circumstances, were by no means favourable; and, in consequence, the price of three per cents. sunk, on the 20th of September, on the intelligence transpiring of an attempt to negotiate with the French republic having failed, to 47½; being the lowest price to which they have ever fallen.

The commissioners for auditing the public accounts, in the year 1786, strongly recommended the adoption of some effectual plan for the reduction of the national debt; and various measures were taken accordingly towards accomplishing this purpose.

In the first place, a sinking fund, of one million payable at the exchequer quarterly in every year, was created in the year 1786, (see *26 Geo. 3. c. 31*) to which certain annuities were directed to be added, upon the expiration of the terms for which they were respectively granted, and the whole was vested in commissioners for the reduction of the national debt; these sums were afterwards directed to be paid out of the consolidated fund, *17 Geo. 3. c. 12 § 19*; and such annuities for lives as should remain unclaimed for three years, were added to the same sinking fund, which was, nevertheless, to operate no longer as a sinking fund, at compound interest, whenever the monies annually placed to the account of the commissioners, including the original million, should amount to the sum of four millions. From this period, the annual sum of four millions was still to be applied to the same purpose; but the interest of the debt purchased thereby, and the annuities which might afterwards expire, were to remain at the disposition of parliament.

In the year 1792, a further provision was made; (by *32 Geo. 3. c. 55*); that when the interest of any redeemable stock is reduced, or the capital paid off by money raised at a lower interest, a sum, equal to the interest so saved, should be paid quarterly from the consolidated fund, and placed to the account of the commissioners: the operation of this fund at compound interest was, by this act, directed to cease, whenever the monies annually paid to the commissioners on the account, as well as on those above stated, should amount to three millions, exclusive of the original million, or of any additions which parliament may direct to be made thereto, or of any sinking fund which may be created in consequence of new loans. From this period, the annual sum of four millions so constituted, was also to be applied as before directed. By the same act it was also enacted, "for the more effectually preventing the inconvenient and dangerous accumulation of debt thereafter, in consequence of any further loans;" that an annual sum, equal to one hundredth part of the capital stock created by any such loans, should be paid

to the Bank, and placed to the account of the commissioners for the reduction of the national debt, without any limits to its operation short of redeeming the whole of the stock created by such loans respectively.

To accelerate the effect of all the preceding measures, parliament, in every year, from 1792 to 1802, uniformly granted, and applied the sum of 200,000*l.*; pursuing the principle laid down in times of peace, even through a period of war, notwithstanding the necessary increase of public burdens.

In order that the public might have a continual view of the state of the national debt, and also of its progressive reduction, it is further provided that an account of each shall be laid before both Houses annually. By *27 Geo. 3. c. 13. § 72*, it was enacted that there shall be presented, within fourteen days after the commencement of every session, an account of all additions which shall have been made to the annual charge of the public debt by the interest or annuities for, or on account of, any loan made after the passing of that act, and within ten years next preceding the date of such account; together with an account of the produce, within the year next preceding, of any duties which shall have been imposed, or of any additions which shall have been made to the revenue for the purpose of defraying the increased charge occasioned by every such loan respectively.

By *48 Geo. 3. c. 142*, the chief baron of the court of exchequer, in England, (or, in his absence, one of the puisne barons), was added to the commissioners for the reduction of the national debt.

By *56 Geo. 3. c. 98*, (for uniting and consolidating into one fund all the public revenues of Great Britain and Ireland, and to provide for the application thereof to the general service of the united kingdom,) § 1. and 13. so much of any existing acts as appoints commissioners for the reduction of the national debt in Ireland is repealed; and the British commissioners are declared commissioners for the reduction of the national debt of the united kingdom, produced by the consolidation of the national debt of Great Britain and Ireland.

By *58 Geo. 3. c. 66. § 1*, three commissioners are empowered to act in all cases.

Various other statutes were subsequently passed, relating to the management and reduction of the national debt, prior to the *10 Geo. 4. c. 27* (amended by the *3 & 4 W. 4. c. 24*); which, in effect, abolished the sinking fund, by enacting that the sum to be thenceforth applicable should consist of the actual surplus revenue.

NATIONAL EDUCATION. Notwithstanding the attention that has been attracted of late years to the subject of education, and although the necessity of establishing a national system for the instruction of the lower classes is now generally admitted, no legislative measure has yet been passed, recognizing this important duty of a government, with the exception of an act passed in the session before the last (*3 & 4 W. 4. c. 103*), usually called the Factory Act; which renders it compulsory on the employers of children engaged in factories, to allow them to attend some school for two hours, at least six days in the week.

NATIVI DE STIPITE. In the survey of the duchy of Cornwall, there is mention of *nativi de stipite*, and *nativi conventionarii*; the first were villeins or bondmen, by birth or stock; the other, by contract or agreement. *LL. Hen. 1. cap. 76*. And in Cornwall it was a custom, that a freeman marrying *natusum*, if he had two daughters, one of them was free, and the other villein. *Bract. lib. 4. c. 21, 22*.

NATIVITY, nativitas. Birth, or the being born in a place. The casting the nativity, or by calculation seeking to know how long the queen should live, &c. was made felony by *23 Eliz. c. 2*.

Nativitas (Nefsty) was anciently taken for the servitude, bondage, or villeinage, of women. *Leg. Wil. 1.*

NATIVO HABENDO. A writ that lay to the sheriff for a lord who claimed inheritance in any villein, when his villein was run away, for the apprehending and restoring him to the lord; and the sheriff might seize the villein, and deliver him unto his lord, if he confessed his villeinage; but if he alleged that he was a freeman, then the sheriff ought not to seize him, but the lord was to sue forth a *pone* to remove the plea before the justices of C. B. &c. And if the villein purchased a writ *de libertate probanda* before the lord had taken out the *pone*, it was a *supersedeas* to the lord, that he proceeded not on the writ of *nativo habendo*. *Reg. Orig.* 7, 8; *F. N. B.* 77; *New Nat. Brev.* 171, 172.

This writ *nativo habendo* was in nature of a writ of right, to recover the inheritance in the villein; upon which the lord was to pursue his plaint, and declare thereupon, and the villein to make his defence so as the freedom was to be tried. *New Nat. Br.* 171, 173. See *Villein*.

NATIVUS. He who was born a servant, and so differed from him who suffered himself to be sold, of which servants there were three sorts, bondmen, natives, and villains: bondmen were those who bound themselves by covenants to serve, and took their name from the word *bond*; natives we spoke of just before; and villains were such who, belonging to the land, tilled the lord's demesnes, nor might depart thence without the lord's licence. *Spelman's Gloss.* See *Chart. R.* 2; *Quid omnes manumittit a bondagio in com. Hertf. Walsingham, p.* 254. *Conell.* See *Villain*.

NATURAL-BORN SUBJECTS. By the 4 *Geo.* 2. c. 21. (made to explain the third section of the 7 *Ann.* c. 5. relative to children of the natural-born subjects of this kingdom) children of natural-born subjects, born out of the allegiance of the crown, are declared to be natural-born subjects; but by § 2. this is not to extend to the issue of persons attainted of treason, or in the service of foreign princes in enmity with the crown.

By the 13 *Geo.* 3. c. 21. these benefits are further extended to persons born out of the allegiance of the crown, whose fathers were by the former statute entitled to the rights of natural-born subjects. See *Alien, I.*

NATURAL AFFECTION, naturalis affectio.] Is a good consideration in a deed; and if one, without expressing any consideration, covenant to stand seised to the use of his wife, child, or brother, &c. here the naming them to be of kin, implies the consideration of natural affection, whereupon such use will arise. *Cart.* 188. See *Consideration*.

NATURALIZATION. See *Alien, II. III.*

NATURÆ Pudenda, Privities. *Leg. Hen.* 1. c. 83.

NAVAGIUM. A duty incumbent on tenants, to carry their lord's goods in a ship. *Mon. Angl.* i. 922.

NAVAL STORES. See *Public Stores*.

NAUFRAGE. A sea term for shipwreck. *Merch. Dict.*

NAVIGABLE RIVERS. See *Rivers*.

NAVIGATION. Is the art of sailing at sea, also the manner of trading; and a navigator is one who understands navigation, or imports goods in foreign bottoms.

NAVIGATION ACTS.

These statutes, which form an important branch of our maritime code, comprise the enactments that have been passed for regulating the commercial intercourse of this kingdom and its colonies with other countries; by what vessels it shall be carried on; and generally the mode in which it is to be conducted.

The prominent objects of the old navigation acts were—first, the securing to our own shipping, as far as circumstances would safely admit, the carrying trade, as the great source of our naval strength; secondly, the confining our trade, as much as possible, without exciting jealousy in our neighbours, to the capital of our own merchants by excluding foreigners, who were not the subjects of the countries of which the articles are the growth, produce, or manufacture, from becoming

the intermediate negociators; and thirdly, the encouragement of our own manufactures, by checking, through the means of absolute prohibitions or high duties, the introduction into the same market of such articles of foreign manufactures as might rival our own; especially those in a progressive state of improvement.

The origin of the navigation laws of England may be traced to the reign of Richard II. or perhaps to a still more remote period. But, as no intelligible account of the varying and contradictory enactments framed at so distant an epoch could be pressed within any reasonable space, it is sufficient to observe, that in the reign of Henry VII. two of the leading principles of the late navigation law were distinctly recognized, in the prohibition of the importation of certain commodities, unless imported in ships belonging to English owners, and manned by English seamen. In the early part of the reign of Elizabeth (5 *Eliz.* c. 5.) foreign ships were excluded from our fisheries and coasting trade. The republican parliament gave a great extension to the navigation laws by the act 1650, which prohibited all ships, of all foreign nations whatever, from trading with the plantations in America, without having previously obtained a licence. These acts were, however, rather intended to regulate the trade between the different ports and dependencies of the empire, than to regulate our intercourse with foreigners. But in the following year, (9th of October, 1651,) the republican parliament passed the famous act of navigation. This act had a double object. It was intended not only to promote our own navigation, but also to strike a decisive blow at the naval power of the Dutch, who then engrossed almost the whole carrying trade of the world, and against whom various circumstances had conspired to incense the English. The act in question declared, that no goods or commodities whatever of the growth, production, or manufacture of Asia, Africa, or America, should be imported either into England or Ireland, or any of the plantations, except in ships belonging to English subjects, and of which the master and the greater number of the crew were also English. Having thus secured the import trade of Asia, Africa, and America, to the English ship-owners, the act went on to secure to them, as far as that was possible, the import trade of Europe. For this purpose, it further enacted, that no goods of the growth, production, or manufacture of any country in Europe should be imported into Great Britain except in British ships, or in such ships as were the real property of the people of the country or place in which the goods were produced, or from which they could only be, or most usually were, exported. The latter part of the clause was entirely levelled against the Dutch, who had but little native produce to export, and whose ships were principally employed in carrying the produce of other countries to foreign markets. Such were the leading provisions of this famous act. They were adopted by the regal government which succeeded Cromwell, and form the basis of the act of the 12 *Car.* 2. c. 18. which continued to a very recent period to be the rule by which our naval intercourse with other countries was mainly regulated, and has been designated the *Charta Maritima* of England.

In the 12 *Car.* 2. c. 18. the clause against importing foreign commodities, except in British ships, or in ships belonging to the country or place where the goods were produced, or from which they were exported, was so far modified, that the prohibition was made to apply only to the goods of Russia and Turkey, and to certain articles since well known in commerce by the name of enumerated articles, leave being at the same time given to import all other articles in ships of any description. But this modification was of very little importance in commerce, as timber, grain, tar, hemp and flax, potashes, wines, spirits, sugar, &c. Parliament seems, however, to have very speedily come round to the opinion that too much had been done in the way of relaxation; and in the 11th of Charles II. a supplemental statute was passed, avowedly with

the intent on of obviating some evasions of the statute of the preceding, which, it was affirmed, had been practised by the Hollanders and Germans. This, however, seems to have been a mere pretence to excuse the desire to follow up the blow aimed, by the former statute, at the carrying trade of Holland. And such was our jealousy of the naval and commercial greatness of the Dutch, that in order to cripple it, we did not hesitate totally to proscribe all trade with them; and to prevent the possibility of fraud or of clandestine or indirect intercourse with Holland, we went so far as to include the commerce with the Netherlands and Germany in the same proscription. The 11 Car. 2. prohibited all importation from these countries of a long list of enumerated commodities, under any circumstances, or in any vessels, whether British or foreign, under the penalty of seizure and confiscation of the ships and goods. So far as it depended on us, Holland, the Netherlands, and Germany, were virtually placed out of the pale of the commercial world; and though the extreme rigour of this statute was subsequently modified, its principal provisions remained in full force until the late alterations. See *McCulloch's Com. Dict.* 817.

The changes in the navigation laws were effected partly by the bills introduced by Mr. (now Lord Wallace) in 1821, and Mr. Huskisson in 1825, and partly by what has been called the Reciprocity System. By the 6 Geo. 4. c. 100. the intercourse of all European countries in amity with this country was placed on the same footing.

That statute was amended by several subsequent enactments; and for the purpose of consolidating the law into one act, the 3 & 4 Wm. 4. c. 54. was passed.

Ships in which only enumerated goods of Europe may be imported.—The several sorts of goods hereinafter enumerated, being the produce of Europe; (that is to say,) masts, timber, boards, tar, tallow, hemp, flax, currants, raisins, figs, prunes, olive oil, corn or grain, wine, brandy, tobacco, wool, shumac, madders, madder roots, barilla, brimstone, bark of oak, cork, oranges, lemons, linseed, rape seed, and clover seed, shall not be imported into the united kingdom to be used therein, except in British ships, or in ships of the country of which the goods are the produce, or in ships of the country from which the goods are imported.—§ 2.

Places from which only goods of Asia, Africa, or America, may be imported.—Goods, the produce of Asia, Africa, or America, shall not be imported from Europe into the united kingdom, to be used therein, except the goods hereinafter mentioned; (that is to say,)

(1.) Goods, the produce of the dominions of the Emperor of Morocco, which may be reported from places in Europe within the Straits of Gibraltar;

(2.) Goods, the produce of Asia or Africa, which having been brought into places in Europe within the Straits of Gibraltar, from or through places in Asia or Africa within the Straits, and not by way of the Atlantic ocean, may be imported from places in Europe within the Straits of Gibraltar.

(3.) Goods, the produce of places within the limits of the East India Company's charter, which (having been imported from these places into Gibraltar or Malta in British ships) may be exported from Gibraltar or Malta:

Goods taken by way of reprisal by British ships: Bullion, diamonds, pearls, rubies, emeralds, and other jewels or precious stones.—§ 3.

Ships in which only goods of Asia, Africa, or America, may be imported.—Goods, the produce of Asia, Africa, or America, shall not be imported into the united kingdom, to be used therein, in foreign ships, unless they be the ships of the country in Asia, Africa, or America, of which the goods are the produce, and from which they are imported, except the goods hereinafter mentioned; (that is to say,)

(1.) Goods, the produce of the dominions of the Grand Seigneur, in Asia or Africa, which may be imported from his dominions in Europe, in ships of his dominions:

Raw silk and mohair yarn, the produce of Asia, which may be imported from the dominions of the Grand Seigneur in the Levant seas, in ships of his dominions:

Bullion.—§ 4.

Manufacture deemed produce.—All manufactured goods shall be deemed to be the produce of the country of which they are the manufacture.—§ 5.

From Guernsey, &c.—No goods shall be imported into the united kingdom from the islands of Guernsey, Jersey, Alderney, Sark, or Man, except in British ships.—§ 6.

Exports to Asia, &c. and to Guernsey, &c.—No goods shall be exported from the united kingdom to any British possession in Asia, Africa, or America, nor to the islands of Guernsey, Jersey, Alderney, Sark, or Man, except in British ships.—§ 7.

Coastwise.—That no goods shall be carried coastwise from one part of the united kingdom to another, except in British ships.—§ 8.

Between Guernsey, Jersey, &c.—No goods shall be carried from any of the islands of Guernsey, Jersey, Alderney, Sark, or Man, to any other of such islands, nor from one part of any of such islands to another part of the same island, except in British ships.—§ 9.

Between British possessions in Asia, &c.—No goods shall be carried from any British possession in Asia, Africa, or America, to any other of such possessions, nor from one part of any of such possessions to another part of the same, except in British ships.—§ 10.

Imports into British possessions in Asia, &c.—No goods shall be imported into any British possessions in Asia, Africa, or America, in any foreign ships, unless they be the ships of the country of which the goods are the produce, and from which the goods are imported.—§ 11.

No ship British, unless registered and navigated as such, &c.—No ship shall be admitted to be a British ship unless duly registered and navigated as such; and every British registered ship (so long as the registry of such ship shall be in force, or the certificate of such registry retained for the use of such ship) shall be navigated during the whole of every voyage (whether with a cargo or in ballast,) in every part of the world by a master who is a British subject, and by a crew, whereof three-fourths at least are British seamen; and if such ship be employed in a coasting voyage from one part of the united kingdom to another, or in a voyage between the united kingdom and the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from one of the said islands to another of them, or from one part of either of them to another of the same, or be employed in fishing on the coasts of the united kingdom, or any of the said islands, then the whole of the crew shall be British seamen.

Exceptions as to registry.—Provided that all British-built vessels under fifteen tons burden, wholly owned and navigated by British subjects, although not registered as British ships, shall be admitted to be British vessels, in all navigation in the rivers and upon the coasts of the united kingdom, or of the British possessions abroad, and not proceeding over sea, except within the limits of the respective colonial governments within which the managing owners of such vessels respectively reside; and that all British-built vessels wholly owned and navigated by British subjects, not exceeding thirty tons, and not having a whole or a fixed deck, and employed solely in fishing on the banks and shores of Newfoundland, and of the parts adjacent, or on the banks and shores of the provinces of Canada, Nova Scotia, or New Brunswick, adjacent to the gulf of Saint Lawrence, or on the north of Cape Canso, or of the islands within the same, or in trading coastwise within the said limits, shall be admitted to be British boats or vessels, although not registered, so long as such boats or vessels shall be solely so employed.—§ 13.

Honduras ships.—All ships built in the British settlements at Honduras, and owned and navigated as British ships, shall

be entitled to the privileges of British registered ships in all direct trade between the united kingdom or the British possessions in America and the said settlements; provided the master shall produce a certificate under the hand of the superintendent of those settlements, that satisfactory proof has been made before him that such ship (describing the same) was built in the said settlements, and is wholly owned by British subjects; Provided also, that the time of the clearance of such ship from the said settlements for every voyage shall be endorsed upon such certificate by such superintendent.—§ 14.

Ships of any foreign countries.—No ship shall be admitted to be a ship of any particular country, unless she be of the built of such country; or have been made prize of war to such country; or have been forfeited to such country under any law of the same, made for the prevention of the slave trade, and condemned as such prize or forfeiture by a competent court of such country; or be British-built (not having been a prize of war from British subjects to any other foreign country); nor unless she be navigated by a master who is a subject of such foreign country, and by a crew of whom three-fourths at least are subjects of such country; nor unless she be wholly owned by subjects of such country usually residing therein, or under the dominion thereof: Provided always, that the country of every ship shall be deemed to include all places which are under the same dominion as the place to which such ship belongs.—§ 15.

Master and seamen, when British seamen.—No person shall be qualified to be a master of a British ship, or to be a British seaman within the meaning of the act, except the natural-born subjects of his majesty, or persons naturalized by any act of parliament, or made denizens by letters of denization; or except persons who have become British subjects by virtue of conquest or cession of some newly acquired country, and who shall have taken the oath of allegiance to his majesty, or the oath of fidelity required by the treaty or capitulation by which such newly acquired country came into his majesty's possessions; or persons who shall have served on board any of his majesty's ships of war in time of war for the space of three years: Provided always, that the natives of places within the limits of the East India Company's charter, although under British dominion, shall not, upon the ground of being such natives, be deemed to be British seamen: Provided always, that every ship (except ships required to be wholly navigated by British seamen, which shall be navigated by one British seaman, if a British ship, or one seaman of the country of such ship, if a foreign ship, for every twenty tons of the burden of such ship, shall be deemed to be duly navigated, although the number of other seamen shall exceed one-fourth of the whole crew.—§ 16.

Foreigners serving two years on board his majesty's ships during war.—His majesty, by his royal proclamation during war, may declare that foreigners, having served two years on board any of his majesty's ships of war in time of such war, shall be British seamen within the meaning of the act.—§ 17.

British ship not to depart from British port unless duly navigated, &c.—No British registered ship shall be suffered to depart any port in the united kingdom, or any British possession in any part of the world, (whether with a cargo or in ballast), unless duly navigated: Provided that any British ships, trading between places in America, may be navigated by British negroes; and ships trading eastward of the Cape of Good Hope within the limits of the East India Company's charter, may be navigated by Lascars, or other natives of countries within those limits.—§ 18.

*If excess of foreign seamen, penalty 10*l.* for each, &c.*—If any British registered ship shall at any time have, as part of the crew in any part of the world, any foreign seaman not allowed by law, the master or owners of such ship shall for every such foreign seaman forfeit ten pounds: Provided, that if a due proportion of British seamen cannot be procured in

any foreign port, or in any place within the limits of the East India Company's charter, for the navigation of any British ship; or if such proportion be destroyed during the voyage by any unavoidable circumstance, and the master of such ship shall produce a certificate of such facts under the hand of any British consul, or of two known British merchants, if there be no consul at the place where such facts can be ascertained, or from the British governor of any place within the limits of the East India Company's charter; or, in the want of such certificate, shall make proof of the truth of such facts to the satisfaction of the collector and controller of the customs of any British port, or of any person authorized in any other part of the world to inquire into the navigation of such ship, the same shall be deemed to be duly navigated.—§ 19.

Proportion of seamen may be altered by proclamation.—If his majesty shall, at any time by his royal proclamation, declare that the proportion of British seamen necessary to the due navigation of British ships shall be less than the proportion required by this act, every British ship navigated with the proportion of British seamen required by such proclamation shall be deemed to be duly navigated, so long as such proclamation shall remain in force.—§ 20.

Goods prohibited only by navigation law may be imported for exportation.—Goods of any sort or the produce of any place, not otherwise prohibited than by the law of navigation herebefore contained, may be imported into the united kingdom from any place in a British ship, and from any place not being a British possession in a foreign ship of any country and however navigated, to be warehoused for exportation only, under the provisions of any law in force for the time being, made for the warehousing of goods, without payment of duty upon the first entry thereof.—§ 21. See *Warehousing*.

Forfeitures.—If any goods be imported, exported, or carried coastwise, contrary to the law of navigation, all such goods shall be forfeited, and the master of such ship shall forfeit the sum of one hundred pounds.—§ 22.

The duties payable upon goods and articles imported into, or exported out of this country, are closely connected with the present subject. These duties are generally known by the name of the customs; and have already been treated of under that title. Subsequent, however, to the printing off of that portion of this work, the 6 *G. 4. c. 106.* and various subsequent acts, relative to the customs, have been repealed, by the 3 & 4 *W. 4. c. 50.* with a view to their amendment and consolidation.

The 3 & 4 *W. 4. c. 51.* embodies the provision for the management, and the 3 & 4 *W. 4. c. 52.* those for the general regulation of the customs; and the latter act contains tables of goods prohibited to be imported or exported, and of articles that may be imported, subject to certain restrictions, or prohibited from exportation by the royal proclamation.

By § 105, of *c. 52.* all trade, from one part to another of the united kingdom, or from any part to another in the Isle of Man, is to be deemed coastwise.

The 3 & 4 *W. 4. c. 56.* grants the new duties of customs, which are specified with the drawbacks allowed on certain articles in the tables annexed to the act.

By § 3. his majesty, with the advice of his privy council, by order of council, may, from time to time, direct the levying of an additional duty, not exceeding one-fifth of any existing duty, upon goods or merchandize, the growth or manufacture of any country, which shall levy higher or other duties upon any article, the growth or manufacture of any of his majesty's dominions, than upon the like article, the growth or manufacture of any other foreign country; and, in like manner, impose such additional duties upon goods when imported in the ships of any country which shall levy higher or other duties upon any goods when imported in British ships, than when imported in the national ships of such country; or which shall levy higher or other tonnage

or port or other duties upon British ships, than upon such national ships; or which shall not place the commerce or navigation of this kingdom upon the footing of the most favoured nation in the ports of such country; and either prohibit the importation of any manufactured article, the produce of such country, in the event of the export of raw material, of which such article is wholly or in part made, being prohibited from such country to the British dominions; or impose an additional duty, not exceeding one-fifth, as aforesaid, upon such manufactured article; and also impose such additional duty, in the event of such raw material being subject to any duty upon being exported from the said country to any of his majesty's dominions.

Formerly various bounties or premiums were offered and paid by government to the producers, exporters, or importers of certain articles, or to those who employed ships in certain trades.

Bounties on production were most commonly given with a view to encourage the establishment of some new branch of industry, or to foster and extend an old branch that was considered of great importance to the national prosperity.

The linen manufactory throughout the united kingdom was stimulated and encouraged by a variety of bounties, both as regarded its production and exportation, for a long series of years, down to 1830, when the premiums on its exportation, as well as on other articles, ceased. And by the 4 & 5 W. 4. c. 14. all acts authorizing the appropriation of sums of money for the encouragement of the raising and dressing of flax were repealed.

The whale fishery was likewise for many years protected by large bounties, which were gradually reduced and abolished in 1824; as were also those granted for the encouragement of the herring fishery in 1830.

The bounty granted on the exportation of corn was repealed in 1815.

See further *Ships, Smuggling*.

NAVIS ECCLESIA. The nave or body of the church, as distinguished from the choir, and wings, or isle; it is that part of the church where the common people sit. *Du-Cange*.

NAVIS, NAVICULA. A small dish to hold frankincense before put into the *thuribulum*, censor, or smoking pot; and seems to have its name from the shape, resembling a boat or little ship; we have several of these boat-cups in silver, &c. for various uses. *Paroch. Antiq.* 598.

NAVITHALAMUS. A ship or barge that noblemen use for pleasure, with fine chambers and other stately ornaments. *Law Lat. Dict.*

NAVY.

The fleet or shipping of a prince or state; or an armament at sea.

- I. Of the Navy of England, and its Jurisdiction in the British Seas.
- II. Of raising and paying the Mariners, and of the Laws made for their protection. [As to their prize-money, see also tit. *Admiralty*.]
- III. Of their Discipline, under the Articles of War and Naval Courts Martial.

I. THE NAVY OF ENGLAND, it has been observed, excels all others for three things, viz. beauty, strength, and safety; for beauty our ships of war are so many floating palaces; for their strength so many moving castles; and for safety, they are the most defensive walls of the land; and as our naval power gives us authority in the most distant climates, so the superiority of our fleet above other nations, renders the British monarch the arbiter of Europe.

The Kings of England in ancient times commanded their fleets in person; and King Arthur vindicated the dominion of the seas, making ships of all nations salute our ships of war by lowering the topsail, and striking the flag, as in like manner they shall do to the forts upon land; by which sub-

mission they are put in mind that they are come into a territory, wherein they are to own a sovereign power and jurisdiction, and receive protection from it; and this duty of the flag, which hath been constantly paid to our ancestors, serves to imprint reverence in foreigners, and adds new courage to our seamen; and reputation abroad is the principal support of any government at home.

King Edgar, successor to Arthur, stiled himself *sovereign of the narrow seas*; and having fitted out a fleet of four hundred sail of ships, in the year 937, sailing about Britain with his mighty navy, and arriving at Chester, was there met by eight kings and princes of foreign nations, come to do him homage; who, as an acknowledgment of his sovereignty, rowed this monarch in a boat down the river Dee, himself steering the boat; a marine triumph which is not to be paralleled in the histories of Europe.

Canute, Edgar's successor, laid the ancient tribute called *danegeld*, for guarding the seas, and sovereignty of them; with the following emblem expressed, viz. Himself sitting on the shore in his royal chair, while the sea was flowing, speaking, *Tu mee ditionis es, et terra in qua sedeo est, &c.*

Egbert, Althred, and Elthred kept up the dominion and sovereignty of their predecessors; nor did the succeeding princes of the Norman race waive this great advantage, but maintained the right to the four adjacent seas surrounding the British shore; the honour of the flag King John challenged, not barely as a civility, but a right to be paid *cum debita reverentia*, and the persons refusing he commanded to be taken as enemies; and the same was ordained not only to be paid to whole fleets, bearing the royal standard, but to those ships of privilege that wear the prince's ensigns or colours of service; this decree was confirmed and bravely asserted by a fleet of five hundred sail, in a royal voyage to Ireland, wherein he made all the vessels which he met with in his way, in the eight circumfluent seas, to pay that duty and acknowledgment, which has been maintained by our kings to this day, and was never contested by any nation unless by those who attempted the conquest of the entire empire.

Trade gave occasion to the bringing mighty fleets to sea, and on the increase of trade, ships of war were necessary in all countries for the preservation of it in the hands of the just proprietors.

In ancient times the several counties of England were liable to a particular taxation for building ships of war and fitting out fleets, every one in proportion to their extent and riches; so that the largest counties were each of them to furnish a first-rate man of war, and the others every one to build one in proportion; but this method has been long disused, and the fitting out our navy for many ages has been always thrown into the public charge.

King Edward III. in his wars with France, had a fleet of ships before Calais, so numerous that they amounted to seven hundred sail; but these were only very small vessels.

Notwithstanding that the fleets of Great Britain have been remarkable for several ages past, for the great and signal victories obtained from time to time over their enemies, and that in the reigns of some of our ancient kings there have been greater numbers of ships fitted out at different times, upon certain expeditions, than have been of late years, yet that of a royal navy was never properly established until by Henry VIII. in the fourth year of his reign, anno 1512; at which time, that king taking umbrage at the mighty naval preparations of France, made an augmentation of twenty-five large ships of war to those already in being; he likewise erected an office for the navy, and established a certain number of commissioners, to whom the charge of the navy was committed, and whose duty it was to inspect into the state and condition of the king's ships, and to make a report thereof to the lord high admiral, in order to their being repaired or rebuilt, and supplied with every thing necessary

for the public service, according as the case required it; for till that time, the establishment of the naval forces of this kingdom seems to have been upon an auxiliary dependency of the sea ports and maritime towns, who were under certain conditions of furnishing their respective quotas of ships for the king's use, upon previous notice given to them in that behalf; after which, they all came to the appointed rendezvous, and were then disposed of by the king's order upon the services intended. Upon this augmentation, the king's fleet at that time consisted of no more than forty-five ships, with which that of the French was soon overcome. Of those towns which furnished ships for the public service, the cinque ports were the most noted, and whose privileges still subsist on account of the services which they obliged themselves in particular to perform to the crown. See *Cinque Ports*.

There are lists of the fleet of Queen Elizabeth, which make it appear there was but one private gentleman a captain, all the rest being lords and knights, so high was the esteem for service at sea in those days, when our princes ruled with the most consummate glory; but the opinion of serving at sea in late times having been very much lessened, it has since been declined by the nobility and gentry.

The navy of England is at present divided into three squadrons, distinguished by the different colours of the several flags, viz. red, white, and blue; the principal commander whereof bears the title of admiral, and each has under him a vice-admiral, and a rear-admiral, who are likewise flag officers. There are belonging to his majesty's navy six great yards, Chatham, Deptford, Woolwich, Portsmouth, Sheerness, and Plymouth; fitted with several docks, and furnished with store of timber, masts, anchors, cables, &c. And for the management of the royal navy, there are several officers of trust and authority, besides the commissioners of the admiralty; as the treasurer, controller, surveyor, commissioners of the navy, commissioners of the victualling office, &c. the principal whereof hold their offices by patent under the great seal.

By a late act, 2 Wm. 4. c. 40, in case his majesty shall revoke the patents of the commissioners of the navy and the commissioners for victualling, &c. the powers, duties, and authorities vested in them by any acts of parliament shall be vested in the lords commissioners of the admiralty; and by § 2. after the revocation of the patents, all lands, buildings, &c. vested in the commissioners of the navy and the commissioners for victualling, are to be transferred to and vested in the lords commissioners of the admiralty; and by § 3. all contracts, covenants, and agreements entered into with the commissioners of the navy and the commissioners for victualling, &c. shall be transferred to and vested in the lords commissioners of the admiralty. By § 4. all the duties of the treasurer of the navy are to be transferred to the lords commissioners of the admiralty, except receipts and payments of money, and the management of the Greenwich out-pensioners.

The maritime state, says *Blackstone*, though nearly related to the military, is much more agreeable to the principles of our free constitution. The royal navy of England hath ever been its greatest defence and ornament; it is its ancient and natural strength, the floating bulwark of the island; an army from which, however strong and powerful, no danger can ever be apprehended to liberty; and accordingly it has been assiduously cultivated, even from the earliest ages. To so much perfection was our naval reputation arrived in the twelfth century, that the code of maritime laws, which are called the laws of Oleron, and are received by all nations in Europe as the ground of all their marine constitutions, was confessedly compiled by our King Richard I. at the isle of Oleron, on the coast of France, then part of the possessions of the crown of England. 4 Inst. 144. And yet so vastly inferior were our ancestors in this point to the present age, that even in the maritime reign of Queen Elizabeth, Sir

Edward Coke thinks it matter of boast that the royal navy of England then consisted of thirty-three ships. The present condition of our marine has been thought to be in a great measure owing to the salutary provisions of the old Navigation Acts; whereby the constant increase of English shipping and seamen was not only encouraged, but rendered unavoidably necessary. See *Navigation Acts*.

At the same time that the good economy of the royal navy is displayed, it seems necessary to take some notice of that which affords it an opportunity of appearing in more magnificent grandeur than can be represented by the ablest writer in the world, namely, the ocean on which it is borne; especially as there is a peculiar sovereignty and property inherent therein to the monarchs of Great Britain; the preservation of which, for several ages past, has not a little conduced to increase the glory of the nation, and to gain it such a reputation abroad as must justly make our fleets seem as formidable to strangers as they are to us, who know their real strength. This right is so ancient and undeniable, that even the most haughty of our neighbours dare not pretend to control it by any public act, however they may presume to contradict it by bare words; neither was any thing ever written against it until it was undertaken by *Hugo Grotius*, in his book called *Mare Liberum*; which was answered by *Selden*, in his treatise *Mare Clausum, or Right and Dominion of the Sea*, 1625, translated into English 1652. The duty of the flag, which is an acknowledgment of the British dominion on the sea, is as old as King John, and has been constantly asserted by his successors. This mark of respect had always been acknowledged as our right by foreigners, so that it was never inserted as a stipulation in a treaty till 1654. The refusal of the Dutch admiral to strike the flag in compliance with the signal of the English admiral was the immediate cause of the commencement of war at that time, and the Dutch admitted they had ever before paid that mark of respect to the English flag. See *Bac. Ab. tit. Court of Admiralty, note, 7th ed.*

The boundaries properly said to encompass what are called the British Seas are thus accounted under the distinction of the four cardinal points of the compass; taking it for granted in general that all the seas which surround Great Britain, Ireland, and the other islands appertaining to the crown, are called the British Seas; but as to particulars they stand thus:—On the south is the British Channel, which separates England from France, the boundaries of which extend to the opposite shores of France, and to those of Spain, as far as Cape Finisterre. From that cape it extends on the west in an imaginary line running in twenty-three degrees of longitude from London, to the latitude of sixty-three degrees north, which last is called the Western Ocean of Britain. From the aforesaid latitude of sixty-three degrees it extends in another line (supposed to be drawn) in that parallel of latitude, to the middle point of the land, Van Staten, on the coast of Norway, which is the northern boundary; and from that point it extends along the shores of Norway, Denmark, Germany, and the Netherlands, to the channel first mentioned; which last boundary comprehends what is called the Eastern Ocean of Britain.

There being no lands lying on the west and north sides of the British dominions nearer than the continent of America, the island of Newfoundland, and Greenland, and the king of Great Britain having possessions in the two first places; the boundaries of his maritime empire cannot be said to be strictly limited on that side. Moreover, as to Greenland, it was at first discovered in the reign of Edward the Sixth, by Sir Hugh Willoughby, for the use of the crown of England; and still again to the northward there is some foundation for extending this sovereignty a great deal farther, on account of the acquisitions of King Arthur, a record of which is to be found in *Hackluyt*, 205, translated from the Latin original there quoted from *Geoffrey of Monmouth's Hist.*

According to this ancient right, the British dominion on

the North Sea is very extensive; and so far from being questioned, or the trade of the British subjects in those parts obstructed, that on the contrary, (without regard to the above relation concerning King Arthur,) Britain has a prior right even to Denmark and Norway in the Greenland fishery and Davis's Straits; these places being unknown to them and the rest of Europe till John Davis's voyage for discovery of the north-west passage in the year 1585, though it seems that the Danes afterwards demanded toll for our fishing at Greenland, but it was refused to them. See an incomplete note on this subject, 1 *Inst.* 107, a. n. 6.

A temporary act, 48 *Geo. 3. c. 16.* was passed for inquiring into irregularities and abuses in the admiralty and other naval departments, and into the business of prize agency. This act expired at the end of the session, 46 *Geo. 3.*

By the 54 *Geo. 3. c. 159.* regulations are made for the better security of his majesty's naval arsenals, by empowering the lords of the admiralty to prohibit vessels from entering the ports and harbours which they shall specify in the London Gazette, with gunpowder on board; and authorizing them to appoint places where vessels not belonging to the royal navy shall unlade and deposit all gunpowder exceeding five pounds weight, which they may have on board.

This act contains a variety of other provisions with respect to the royal dock yards and arsenals, and the harbours of the united kingdom.

II. Many laws have been made for the supply of the royal navy with seamen, for their regulation when on board, and to confer privileges and rewards on them during and after their service.

As to their supply, the power of impressing seamen, though one of the most mischievous, has ever been found one of the most certain means. It has been a matter of some dispute, and submitted to not without a national reluctance: it is now, however, established by the law of the land beyond question, and from the spirit of the constitution the exercise of it resides in the crown. See *Impressing Seamen*.

But besides this method of impressing (which, after all, is only defensible from absolute public necessity, to which all private considerations must give way,) other ways have been adopted, and many of them still continue to be, that tend to the increase of seamen and manning the royal navy. Among these deserves to be marked the law that every foreign seaman, who during a war shall serve two years in any man-of-war, merchantman, or privateer, is naturalized, *see infra*, 13 *Geo. 3. c. 1.* and serving three years may be employed as a British man-of-war, 34 *Geo. 3. c. 8.*; and by various statutes, seamen having served ten years for a limited time, are free to use any trade or profession in any town in the kingdom without exception.

For the recruiting of recruits for the fleet, an act of parliament 7 & 8 *W. 3. c. 1.* was passed, by which it was enacted, that all seamen, watermen, &c. above the age of eighteen years, and under fifty, capable of sea service, who shall register themselves voluntarily for the king's service in the royal navy, to the number of thirty thousand, should be paid to them the yearly sum or bounty of forty shillings, and their pay for actual service, and that whether they were in service or not; and among such mariners, &c. as were registered should be capable of preferment to any commission, or be warrant officers in the navy; and such registered persons were exempted from serving on juries, parish rates, &c. also from service abroad after the age of fifty-five years, unless they went voluntarily; and when by age, sickness, or other accidents, they were disabled for future service, they were to be admitted into Greenwich Hospital, and there be provided for during life; and the widows of such seamen as should be slain or drowned, not of ability to provide for themselves, should be likewise admitted into the hospital, and their children educated, &c. But if any regis-

tered seaman should withdraw himself from the king's service, in his ships or navy, or if any such mariner relinquished the service without consent of the commissioners of the admiralty, he was for ever to lose the benefit of the act, and be compelled to serve in his majesty's fleet six months without pay. This registry being by experience proved to be ineffectual, as well as oppressive, was abolished, and the above statute repealed, by 9 *Ann. c. 21. § 64.*

In consequence, however, of the strong feeling entertained throughout the country against impressment, the plan of endeavouring to dispense with its necessity by establishing a registry of seamen is again in agitation, and in all probability will be adopted.

By 4 *Anne, c. 19. § 18.* watermen plying on the Thames between Gravesend and Windsor, on notice given by the commissioners of the admiralty to the company of watermen, are to appear before the said company, to be sent to his majesty's fleet, or on refusal they shall suffer one month's imprisonment, and be disabled working on the Thames for two years.

The 2 & 3 *Anne, c. 6.* provides, that poor boys whose parents are chargeable to the parish, may, by churchwardens and overseers of the poor, with consent of two justices of peace, be placed out apprentices to the sea service, until the age of twenty-one years, they being thirteen years old at the time of their placing forth; these apprentices shall be protected from being impressed for the first three years (if they are not more than eighteen years old; 4 *Anne, c. 19. § 17.*); and if they are impressed afterwards, the master shall be allowed their wages. And all masters and owners of ships, from thirty to fifty tons burthen, are required to take one such apprentice, one more for the next fifty ton, and one more for every hundred ton above the first hundred, under the penalty of ten pounds. Masters of apprentices placed out by the parish, may, with the consent of two justices, turn over such apprentices to masters of ships.

Of more modern statutes, the following deserve particular notice:

By 35 *Geo. 3. c. 5. 9. 19. and 29.* and 36 *Geo. 3. c. 115.* a number of men were raised for the navy according to a certain proportion imposed on every county and port in Great Britain. The execution of this act was intrusted to the justices of peace and magistrates of corporations, and the expense defrayed by rates made upon every parish, out of which bounties were paid to volunteers entering.

To further the urgent demand for sailors, the 35 *Geo. 3. c. 34.* was passed to enable magistrates to levy for his majesty's navy in their several jurisdictions, "all able-bodied, idle, and disorderly persons, who could not on examination prove themselves to exercise and industriously follow some lawful trade or employment, or to have some substance sufficient for their maintenance." The execution of this act was by a clause therein allowed to be suspended and revived according to necessity, by his majesty's proclamation or notice from the admiralty.

By various acts, private militia-men having served in the navy, were allowed to be discharged from the militia in order to re-enter into the navy, to a certain extent. See the latest act, 43 *Geo. 3. c. 62. 76.* By 43 *Geo. 3. c. 50. § 7.* no seafaring man shall be a militia-man.

To encourage seamen to enter voluntarily into the service of his majesty, to ensure them their wages, to protect their persons, to provide for their families, and to secure them from impositions, in relation to their prize-money and other advantages, several acts of parliament have from time to time been past. The first of these was the stat. 31 *Geo. 2. c. 10.*

From the year 1758, the period of passing the above act, when Mr. Grenville so ably filled the office of first lord of the admiralty, down to Mr. Dundas's time, scarcely any parliamentary regulation appears to have been applied to dis-

bursements on account of the navy, and these increasing with the expense of our marine, to an amount beyond all former example, had opened a wide door to imposition on our seamen.

Incapable as sailors are of taking care of their property, beyond every other description of men, they were, in numberless instances, either by forgeries committed upon them, or from their own credulity, defrauded of their wages and deprived of rewards due to them for a long and laborious service. This evil had arisen to its greatest height towards the close of the war, which ended in 1788, and was practised by the lowest orders of the community, who watching the necessities, and encouraging the vices and follies of the inexperienced sailor, supplied him with small sums of money, and in the hour of intoxication induced him to grant instruments which in one moment robbed him of all he had acquired, as well as of what he might afterwards be entitled to receive as a recompence for his toils and gallantry in the service. In other instances, less scrupulous as to the means, the same unprincipled set of men (always selecting for the objects of their spoil such names as appeared to have the largest sums due to them), forged at once the authorities under which they pretended to act, and with great facility deprived of a just maintenance the widows and orphan children of those who had unhappily lost their lives in their country's cause.

The remedy for these evils was first applied in the year 1786, by an act introduced by Mr. Dundas (afterwards Lord Melville). By this act, 26 Geo. 3. c. 68. modes were prescribed for executing all wills and instruments of delegated authority, which, by making the superior officers of our ships (and other persons above the reach of corruption) necessary witnesses to all such deeds, struck at the root of forgery. Every sort of guard was meant to be provided by it (as far as human nature in the character of a British seaman can be guarded) to protect the thoughtless and ignorant, or at least to insure that the act of the sailor, thus legalized, was not done under the influence of fear, false pretences, or intoxication.

Mr. Dundas's attention was in the next place directed to the protection of that property which devolved upon widows and other representatives of seamen dying in the service, and leaving arrears of wages due to them.

This portion of the sailor's reward seldom reached the door of his disconsolate widow and helpless children. The same class of people who had theretofore defrauded him, being no longer able, from the operations of the above-mentioned act, to interfere with his property while he continued in the service, now turned their designs upon intercepting that part of it which he should leave behind him in the event of his death. This was principally effected by the means of wills made in their own favour, and which, under false pretences, they easily procured from the unsuspecting sailor; and there is reason to believe that no less than one-half of the arrears due at the end of the war before-mentioned, was obtained by such impositions, or by entire forgeries of wills, which were not at that time directed to be attested and executed under sufficient regulations.

Against these infamous practices an act of parliament was passed (32 Geo. 3. c. 34), which was framed with great ingenuity.

By the above and another act, all those protections and privileges which had hitherto been enjoyed exclusively by the seamen, were extended to our marines, a most useful and meritorious part of our navy; and in the same session, the benefits arising from them were also extended to persons residing in Ireland, who were also admitted to participate in the benefit of 3 Geo. 3. c. 16. with respect to the pensioners of Greenwich hospital.

By the 55 Geo. 3. c. 60, the acts of 26 Geo. 3. c. 68, and 32 Geo. 3. c. 34. and also so much of any other acts in force as related to letters of attorney and wills of petty officers, seamen, and marines, were repealed, and new provisions en-

acted upon the like principles, but with such more effectual powers as experience had shown to be necessary.

With respect to the forgery of wills, &c. see *Forgery*, IV.

But notwithstanding so much had been done for the seaman, and every assistance had been extended to his widow and other representatives, something still was wanting, while his wife and family remained in poverty and distress during his absence. No effectual scheme had hitherto been proposed, none even thought of, to grant them assistance; and it was reserved for Mr. Dundas to establish a system of remittance and supply, so extensive as to convey relief into every corner of the kingdom to the scattered families of our brave defenders. Provisions were made by an act of parliament, which he procured to be passed in 1795, 35 Geo. 3. c. 28 (explained and enforced by 37 Geo. 3. c. 58; 46 Geo. 3. c. 127; 49 Geo. 3. c. 108; 58 Geo. 3. c. 60; 57 Geo. 3. c. 20, 1 & 2 Geo. 4. c. 49); for a regular monthly supply to be paid to the wife and each child, or to the parent of every seaman who was willing, upon a representation being made to him, to allow a portion of his pay to be appropriated to the support and comfort of his family during his absence.

The advantages of this act, 35 Geo. 3. c. 28. were, by another of a similar nature, extended to non-commissioned officers and their families. See 35 Geo. 3. c. 95. And the government of Ireland afterwards applied for the provisions of both to be extended to that country, in order to enable their seamen to receive their united benefits. The numerous list of persons relieved by this benevolent regulation, was a convincing proof of its national importance, not less than 30,000 families of seamen, in different parts of the three kingdoms, being from time to time supported by the voluntary application of that portion of their wages which sailors were formerly induced to squander, in a most unprofitable manner, either at seaport towns, or in London during their attendance at the navy pay office.

The higher classes of the service, as well as the lower, felt the good effects of Mr. Dundas's measures. In the session of 1795, he obtained an act, 35 Geo. 3. c. 91. (amended by 37 Geo. 3. c. 20) by which naval officers, who were not in affluent circumstances, were enabled to accept commands, or to undertake other services, without pecuniary embarrassment. For this purpose the arrears which were due to an officer from his half-pay, and three months of his full pay, were paid him in advance, as soon as his appointment took place. A fund was also provided for those who might wish to receive a part of their pay whilst employed upon foreign service, and the principle of remittance was extended to every one desirous to avail himself of its advantages.

For the purpose of consolidating and amending the laws relating to the pay of the royal navy, the above and various other subsequent statutes were repealed by the 11 Geo. 4. and 1 Wm. 4. c. 20. which contains a variety of provisions embodying former enactments with such improvements as had been suggested by time and experience. Several of these provisions have been altered and extended by the 3d & 4th Wm. 4. c. 25.

The following is an abstract of the principal clauses of both acts:

1. *Of the Advances made to Volunteers and others, and Time of Payment of their Wages, &c.*

By the 11 Geo. 4. and 1 Wm. 4. c. 20. § 2. volunteers are to receive certificates of their time of entry, to entitle them to wages, conduct-money, and two months' pay in advance; and every seaman and able-bodied landman entered on the books of any ship as a supernumerary, and who shall not be borne for wages on the books of any other ship, shall be entitled to wages on the books of the first ship in which he shall serve as part of the complement thereof or as a supernumerary for wages: provided the lord high admiral, or the commissioners for executing the office of lord high admiral, may authorize the payment of such advance to supernumeraries and others

who may have entered themselves after the ship on board which they shall be serving shall have proceeded to sea.

By the 4 & 5 H. 11. c. 25. boatswains, gunners, carpenters, second masters, and petty officers, are also entitled to receive two months' wages in advance.

§ 3. From time to time a certain portion of the pay due to such warrant and petty officers (not entitled to draw bills for their pay, as thereafter provided), and also to such seamen and others as may be desirous of receiving it, shall be issued to them at the expiration of every month, or as soon after as the convenience of the service will admit, in such proportions per month as have been or shall be for that purpose directed by the lord high admiral or the commissioners for executing the office of lord high admiral; and to this end the captain shall make out a complete list of the names of the men, with their respective numbers on the ship's books, desirous of receiving a portion of their pay; and the purser shall then draw, for the amount of the said portion of pay so to be issued, a bill of exchange at three days sight upon the commissioners of the navy, in the accustomed form, or such other form as shall be supplied to the ship.

§ 7. Whenever any petty officer, seaman, or marine, shall be turned over from one ship to another, in any port of the united kingdom, or on the coast thereof, he shall, on the arrival of the ship to which he shall be removed at any port having an establishment of clerks of the treasurer of the navy, and before such ship shall proceed to sea, be paid all the wages due to him upon pay lists made out and signed by the captain and proper signing officers of the ship from which he shall be turned over, except in urgent cases, when the lord high admiral, &c. shall otherwise direct; and in such cases he shall be paid whenever the ship shall return to any port where there shall be a commissioner or other authorized officer of the navy to control such payment; provided no petty officer or seaman turned over from one ship to another shall be rated in a lower degree than that in which he was rated in the books of his former ship.

§ 8. In case the ship to which any person shall be so turned over be abroad, the captain shall, previous to his removal, cause to be made out a ticket, to be called a foreign remove ticket, which shall be delivered to the party to enable him to receive payment of his wages.

§ 9. When any petty officer, &c. shall be sent sick to any hospital or sick quarters at home or abroad, a ticket, to be called a sick ticket, shall in like manner be made out by the captain and sent with him, which upon his being thence discharged back to his own ship, he shall leave with the surgeon or agent; but if discharged to any other ship not to rejoin his own ship, the said ticket shall be sent with him, and be paid conformably with the established regulations of the navy; and in case he shall be discharged from the said hospital or sick quarters as unseviceable, a certificate of his discharge shall be delivered to him with the said sick ticket, to enable him to receive his wages; provided that all petty officers, &c. wounded in action with the enemy, shall receive the full amount of their wages and allowances until their wounds shall be healed, or be declared incurable, until they shall receive a pension or be admitted into the royal hospital at Greenwich; but no other petty officers, &c. discharged from hospitals or sick quarters at home, either to a ship or from the service, shall be allowed wages for more than thirty days of the time they remain in such hospital or sick quarters.

§ 10. When a petty officer, &c. shall by wounds or infirmity be disabled, the captain shall represent the same to the commander-in-chief or senior officer, who shall cause a survey according to the practice of the navy; and if upon such survey, such petty officer, &c. be found unfit for further service, he shall be discharged, and the captain shall thereupon make out and sign a ticket, to be called an unseviceable ticket, for the wages due to such unseviceable man.

§ 12. When any petty officer, &c. shall die in the service

of his majesty, the captain of the ship to which he shall belong shall thereupon make out a ticket, to be called a dead ticket, for the wages due to the deceased for his service on board the same; which ticket, signed by the captain and the proper signing officers of the ship, shall be transmitted by the captain to the commissioners of the navy, in order that payment thereof may be made to the legal representative of the deceased; the deceased's clothes or other effects shall be publicly sold at the mast, and the sums for which the same shall be sold, charged in the ship's books against the wages of the respective purchasers, but no person shall purchase beyond the amount of the net wages then due to him; an account specifying the articles sold, &c. shall be transmitted to the commissioners of the navy, annexed to the dead ticket; and in case the deceased shall not have left any clothes or effects, the captain shall certify on the dead ticket to that effect.

§ 13. When any petty officer, &c. shall be promoted abroad to any rank above the rank of petty or non-commissioned officer, the captain shall cause to be delivered to him a ticket, to be called a promotion ticket, for the wages due to him, certifying that he has been actually promoted to the station therein mentioned, which ticket shall consist of the same particulars prescribed in regard to foreign remove tickets, and shall be transferable by indorsement of the party in whose favour it is made out, and be payable to the indorsee thereof.

By § 14. No ticket, except the promotion ticket, is to be transferable.

§ 22. Deserters are to forfeit their wages; but the admiralty may authorize the payment of their wages in certain cases.

§ 67. When any petty officer or seaman, non-commissioned officer of marines, or marine, shall be discharged for any cause from any ship of his majesty, the captain shall cause to be made out and sign a certificate describing the period of such discharged person's service on board the ship, his number on the ship's books, and his stature, complexion, and age, which shall be delivered to the party at the time of his discharge; and no petty officer, seaman, non-commissioned officer, or marine shall be entitled to receive his wages, prize-money, or other allowances, unless he shall produce such certificate at the time the same are claimed, or unless he shall be identified by one or more of the commission or warrant officers who belonged to the vessel during some part of the period for which he may so claim.

§ 68. Payment may be made of orders under 10*l*., executed by seamen.

§ 70. Monies due to lunatic officers or men made payable to persons having the care of them.

§ 80. It shall not be lawful for any person to arrest or take out of his majesty's service any petty officer, seaman, non-commissioned officer of marines, or private marine, belonging to any ship of his majesty, by any warrant, process, or writ of execution whatever, to be issued either in the united kingdom or in any other part of his majesty's dominions, for any debt, unless such debt shall have been contracted by such officer, &c. when he did not belong to his majesty's service, and unless before the issuing of such process or execution the plaintiff in the suit, or some person on his behalf, shall make affidavit that the debt justly due and owing to the plaintiff, over and above all costs, was contracted by the defendant at a time when he did not belong to the service of his majesty, a memorandum of which oath shall be marked on the back of such process or execution, and of the warrant issued in pursuance thereof.

2. Of Allotments of Wages by Seamen for the Maintenance of their Wives and Families, &c.

§ 32. Every boatswain, gunner, carpenter, petty officer (not entitled to draw bills for pay), seaman, landman (boys

excepted), and non-commissioned officer and private of marines, being part of the complement of a ship, or borne on the books as a supernumerary, for wages and victuals, may make an allotment of a certain portion, not exceeding one moiety, of his monthly wages, in favour or for the maintenance of the following relatives only (that is to say), wife, father, mother, child or children being under the age of fourteen years, or labouring under any bodily infirmity; and all the monies hereafter allotted shall, at the expiration of every calendar month (the first payment to be reckoned from the first day of the month subsequent to the date of the declaration of allotment, and not to include the period between that date and the first of the ensuing month), be paid to the parties entitled to receive the same; but no payment shall be made at any one time for a shorter period than a calendar month, and whenever any increase or decrease shall take place in the rate of allotment by promotion, disrating, or otherwise, payment of the same shall commence from the ending of the last preceding payment.

By the 4 & 5 Wm. 4. c. 25. § 4. allotments are extended to a brother, sister, grandfather, grandmother, mother-in-law, and child or children of the age of eighteen years or upwards, and to trustees for the support of any child under that age; and the next clause empowers the admiralty to fix from time to time the amount of the allotment, but which is never to exceed one moiety of the monthly wages. By § 6, allotments may be stopped until debts due to the public on the ship's books are cleared.

By 11 Geo. 4. and 1 Wm. 4. c. 20. § 33. whenever any person entitled to make an allotment shall declare his intention so to do, the captain shall cause such person to subscribe his name or mark to a declaration or to a list of declarations for that purpose, which shall be transmitted to the commissioners of the navy, in order that they may take the necessary measures for causing allotment bills to be made out thereon, and payment to be made of the portion of wages so allotted.

§ 34. specifies how allotment bills are to be made out and paid.

By § 35. if the wife of any person by whom an allotment has been made, shall die, or desert her family, &c. payment may be stopped, or made to some other person.

§ 36. Allotments may be revoked by the person making the same, if the commissioners of the navy are satisfied with his reasons.

§ 37. Or by commissioners in cases of death or desertion.

By § 38. so soon as it shall come to the knowledge of the minister or of any churchwarden or elder of the parish, that any person resident therein, and entitled to receive payment of an allotment bill, is dead, such minister, &c. shall immediately give notice thereof, by letter, to the commissioners of the navy, or to the officer of the revenue, or clerk to the treasurer of the navy, by whom such allotment is payable, who shall immediately indorse the date of the receipt of such notice upon such allotment bill, and transmit the same to the navy office, and from that time all payments thereunder shall be discontinued.

§ 39. Payments of allotments made by collectors of customs and excise, to be refunded every three months.

§ 44. The party to whom allotment bills are payable, is to appear personally, and may be required to take an oath.

§ 45. If payment of allotment is not demanded within six months, the bill to be returned; but it may be renewed.

3. Of Remittances of Wages by Seamen for the Benefit of their Wives and Families, &c.

§ 40. Whenever a ship, not being in any port of the united kingdom, or on the coast thereof, shall have been twelve calendar months in sea pay, and so from time to time at the end of every six months, the captain shall, at the next subsequent muster of the ship's company, cause to be read

over the names of the petty officers, seamen, non-commissioned officers and privates of marines, and cause each to answer to his name; and if any of them who have not made any allotment of their pay shall declare their desire that the whole or any part of their pay, except for the last six months, shall be paid either to a wife, child or children above the age of eighteen years, father, mother, grandfather, grandmother, brother, or sister, the captain shall cause to be transmitted to the commissioners of the navy a list of such persons, containing their names, their numbers on the ship's books, and the names and residence of the parties to whom they shall desire the same to be paid; and the commissioners shall cause the requisite steps to be taken for making out the necessary remittance bills in the form heretofore used, or in such other form as shall be found most convenient, to be signed by a commissioner of the navy, and to be addressed to the same persons and in the same manner as allotment bills are by the act required to be addressed.

By § 41. every warrant officer not authorized to draw bills, and every petty officer, seaman, non-commissioned officer, or marine, entitled to the payment of any wages, or the wife of any such warrant officer (being legally empowered to receive her husband's wages), shall, if present at the place where such wages are paid, be at liberty in like manner to make a remittance thereof, or of any part thereof, to any person within the united kingdom, or if not present, but resident more than seven miles from the place of payment, shall, upon transmitting to the commissioners of the navy a regular certificate of discharge from the service, or other satisfactory proof of identity, be entitled to a remittance bill. (but payable to the party only) in any part of his majesty's dominions where naval payments are usually made; and payment may in like manner be made to the executors and administrators of any such deceased warrant officer, if they shall desire it.

But by 4 & 5 Wm. 4. c. 25. § 7. any petty officer, seaman, non-commissioned officer of marines, or marine, notwithstanding he may have made an allotment of his pay, may cause to be paid by remittance in the manner thereby provided, any further portion of his pay which may remain due to him, except for the last six months, and any such remittance of wages may be made payable either to any of the relatives mentioned in the above act, or to any child or children of the age of eighteen years or upwards of the party making the allotment, or if under that age then to a trustee on the behalf of such child or children; or any such petty officer, seaman, non-commissioned officer of marines, or marine, may authorize any such part of his pay to be invested for his benefit in such savings bank, and under and subject to such rules and regulations as the admiralty shall establish for that purpose.

4. Of Advances and other Payments to Officers, &c.

§ 23. Any commission or warrant officer, on being appointed to any ship of his majesty in commission, he being entitled to half pay, and there being no imposts standing against him, upon application to the commissioners of the navy, and on the production of the affidavit usually required from half pay officers, and a certificate of the date of his commencing sea pay, may receive the arrears of half pay due to him up to that date; and every such officer who shall have been on half pay for three months next before his appointment to any ship, and shall have no imposts outstanding against him, shall, on joining his ship, upon like application to the said commissioners, be entitled to receive the amount of three months personal sea pay in advance. provided in case any such officer shall be again put on half pay before the expiration of three lunar months from the time of such appointment, the amount of the three months wages so paid in advance, or for such part of the time as he shall not serve, shall be placed as an imposts against his future half pay.

§ 24. Every flag officer, commission officer, master (such commission officer or master not being in the command of a ship, or not having accounts to pass), secretary to a flag officer or commodore, physician, chaplain, second master, and assistant surgeon (not acting as surgeon), who shall be actually in the naval service of his majesty, and entitled to full pay in the fleet, may, at the expiration of every three, six, or twelve lunar months, or of any longer period, draw a bill of exchange, or a set of bills, of the same tenor and date, upon the commissioners of his majesty's navy for the net balance of the personal wages due to him; which bill or set of bills shall be made payable to himself or to his order at ten days sight, and shall state the rate or description and name of the ship to which he shall belong, and his station or rank on board the same, and also the full amount of the personal wages then due to him, and the period for which the same accrued, together with the amount of such charges and deductions as shall appear on the ship's books against him, and the net residue of the personal wages due to him, for which residue and no more the bill shall be drawn.

§ 25. Every captain, lieutenant, or master commanding a ship, surgeon, purser, and assistant surgeon acting as surgeon, may draw bills of exchange in like manner and under similar regulations, for three-fourths, and no more, of their net personal pay; and every mate, midshipman, and master's assistant, who shall have passed his examination for a lieutenant, master, or second master respectively, and every school-master, secretary's clerk, and captain's clerk, may draw bills in like manner and under similar regulations, at the end of every six or twelve, but not for a shorter period than six lunar months, for the net personal pay due to him: provided that no person who shall have received three months' advance shall be permitted to draw any such bill for the first three months after he shall have joined his ship.

By the 4 & 5 Wm. 4. c. 25. § 2. the officers who under the above clause could only claim for three-fourths of their pay, are now authorized to draw for the whole: provided that all bills for personal pay to be drawn under the authority either of the above act or that act, shall be drawn for such periods of time, and up to such periodical days in the year as the admiralty shall fix. And by § 1. every mate, midshipman, and master's assistant, although any such person shall not have passed his examination, and also every volunteer of the first class, and every engineer and assistant engineer belonging to any steam vessel of his majesty, at the end of every six or twelve months, but not for a shorter period than six months, may draw bills periodically upon the account-keeper of the navy for the net personal pay then due to him: provided always, that no person authorized to make any allotment of his wages, or entitled to receive monthly pay, under the provisions of the 11 Geo. 4. and 1 Wm. 4. c. 20. shall be allowed to draw any such bill as aforesaid for any period during which any such allotment shall be in force or in the course of payment, or during which he shall be in the receipt of such monthly pay.

By § 6. any officer fraudulently drawing any such bill for pay, when there shall not be pay to the amount so drawn for owing to him, shall forfeit all pay and other allowances to which he shall be then entitled, and moreover, upon being convicted thereof by court martial, shall be cashiered and rendered incapable of holding any office, civil or military, in his majesty's service: provided that no officer whose duty it shall be to transmit any logs, journals, returns, or other documents, either to the admiralty office or to the navy office, shall be entitled to receive any pay due at the time of his discharge, or any half pay afterwards to accrue due, until he shall have duly transmitted such logs, &c., or unless he shall have obtained a dispensing order from the lord high admiral, &c.

§ 31. Whenever any officer who is required to pass accounts to entitle him to the balance of his pay, shall have

cleared his accounts for the period during which he shall have been on full pay, to the satisfaction of the commissioners of the navy and victualling respectively, he shall be entitled to a bill usually called a general certificate, specifying the net balance due to him, which shall be payable by the treasurer of the navy, and be negotiable like other bills.

§ 42. Any officer of the royal navy or royal marines entitled to half pay or to a pension, and also any person entitled to any money or allowance from the compassionate fund of the navy, or to his majesty's most gracious bounty given to the relatives of persons slain in fight with the enemy, or to a pension as the widow of an officer of the navy, and any petty officer, seaman, non-commissioned officer, or private marine entitled to a pension or allowance in respect of his services or wounds, shall be at liberty to receive such pay, allowance, bounty, or pension by means of a remittance bill as aforesaid.

§ 46. Naval officers and widows entitled to half pay or pensions, may draw on the navy board or be paid by extract.

By § 47. all assignments or sales and contracts by any person entitled to any marine half pay, or by any person entitled to an allowance from the compassionate fund, or to any pension as the widow of an officer, or of in relation to such half pay, allowance, or pension respectively, and all assignments or sales and contracts of or relating to any wages, half pay, prize money, pension, gratuities, and other allowances payable in respect of the services of any petty officer or seaman, non-commissioned officer of marines or marine, shall be null and void.

§ 54. all wages, pay, and other allowances payable for the service of any commission or warrant officer of his majesty's navy shall be paid to the officer himself, if present, at the pay table, or to his lawful attorney, upon the production of the usual certificates; but if he shall have assigned or sold his pay, the same shall be paid to the assignee, being duly authorized to receive the same; and if there shall be more assignments than one, they shall be satisfied according to priority of date; but the treasurer of the navy shall not pay regard to any assignment which shall not be presented at the pay table, accompanied by the usual certificates and papers, at the time the wages or pay are appointed to be paid, and unless a true copy of such assignment be left at the same time with the said treasurer, nor shall he be liable to pay under any assignment conveying generally any annual or other periodical wages or allowance to grow due, but only under such assignments of wages, pay, or other allowances due, as shall be made to secure payment of any sum advanced by the assignee, which shall be truly set forth in such assignment, and for the amount of which, and no more, the wages, pay, and other allowances payable to the officer shall be liable.

§ 71. All pensions to which the widows of officers of the royal navy are entitled, shall be paid in the same manner as other pensions for services in the royal navy are payable; and the admiralty may make regulations for the payment of marine half pay, &c.

5. Of Wills, &c. and Letters of Attorney made by Seamen.

§ 48. No will made by any petty officer or seaman, non-commissioned officer of marines or marine, before his entry into his majesty's service, shall be valid to pass any wages, prize money, or other monies payable in respect of services in his majesty's navy; and no letter of attorney made by any such person who shall be or shall have been in the said service, or by the widow, next of kin, executors, or administrators of any such person, shall be valid or sufficient to entitle any person to receive any wages, prize money, or other allowance of money of any kind for the service of any such person in his majesty's navy, unless such letter of attorney shall be therein expressed to be revocable; and no such letter of attorney shall be valid or sufficient to entitle any person to receive any such wages or other monies; nor shall any will

made or to be made by any petty officer or seaman, non-commissioned officer of marines, or marine, who shall be or shall have been in the naval service of his majesty, be valid or sufficient to pass any such wages, prize money, or other monies, unless such letter of attorney or will respectively shall contain the name of the ship to which the person executing the same belonged at the time or to which he last belonged, nor unless such letter of attorney, if made by an executor or administrator, shall contain the name of the ship to which his or her testator or intestate last belonged, and also in every case a full description of the degree of relationship or residence of the person or persons to whom or in whose favour, either as attorney or attorneys, executor or executors, the same shall be made, and also the day of the month and year and the name of the place when and where the same shall have been executed, nor shall any such letter of attorney or will be valid for the purposes aforesaid unless the same respectively shall, in the several cases hereinafter specified, be executed and attested in the manner hereinafter mentioned; (that is to say,) in case any such letter of attorney or will shall be made by any such petty officer or seaman, non-commissioned officer of marines or marine, while belonging to and on board of any ship of his majesty as part of her complement, or borne on the books thereof as a supernumerary or as an invalid, or for victuals only, the same shall be executed in the presence of and be attested by the captain, or (in his absence) by the commanding officer for the time being, and who in that case shall state at the foot of the attestation the absence of the captain at the time, and the occasion thereof; and in case of the inability of the captain, by reason of wounds or sickness, to attest any such will or letter of attorney, then the same shall be executed in the presence of and be attested by the officer next in command, who shall state at the foot of such attestation the inability of the captain to attest the same, and the cause thereof; and if made in any of his majesty's hospital ships, or in any naval or other hospital, or at any sick quarters either at home or abroad, the same shall be executed in the presence of and be attested by the governor, physician, surgeon, assistant surgeon, agent, or chaplain of any such hospital or sick quarters, or by the commanding officer, agent, physician, surgeon, assistant surgeon, or chaplain for the time being of any such hospital ship, or by the physician, surgeon, assistant surgeon, agent, chaplain, or chief officer of any military or merchant hospital or other sick quarters, or one of them; and if made on board of any ship or vessel in the transport service, or in any other merchant ship or vessel, the same shall be executed in the presence of and be attested by some commission or warrant officer or chaplain in his majesty's navy, or some commission officer or chaplain belonging to his majesty's land forces or royal marines, or the governor, physician, surgeon, or agent of any hospital in his majesty's naval or military service, if any such shall be then on board, or by the master or first mate thereof; and if made after he shall have been discharged from his majesty's service, or if such letter of attorney be made by the executor or administrator of any such petty officer or seaman, non-commissioned officer of marines or marine, if the party making the same shall then reside in London or within the bills of mortality, the same shall be executed in the presence of and be attested by the inspector for the time being of seamen's wills and powers of attorney, or his assistant or clerk; or if the party making the same shall then reside at or within the distance of seven miles from any port or place where the wages of seamen in his majesty's service are paid, the same shall be executed in the presence of and be attested by one of the clerks of the treasurer of the navy resident at such port or place; or if the party making such letter of attorney or will shall then reside at any other place in Great Britain or Ireland, or in the islands of Guernsey, Jersey, Alderney, Sark, or Man, the same shall be executed in the presence of and be attested by one of his ma-

jestry's justices of the peace, or by the minister or officiating minister or curate of the parish or place in which the same shall be executed; or if the party making the same shall then reside in any other part of his majesty's dominions, or in any colony, plantation, settlement, fort, factory, or any other foreign possession of his majesty, or any settlement within the charter of the East India Company, the same shall be executed in the presence of and be attested by some commission or warrant officer or chaplain of his majesty's navy, or commission officer of royal marines, or the commissioner of the navy, or naval storekeeper at one of his majesty's naval yards, or a minister of the Church of England or Scotland, or a magistrate or principal officer residing in any of such places respectively; or if the party making the same shall then reside at any place not within his majesty's dominions, or any of the places last mentioned, the same shall be executed in the presence of and be attested by the British consul or vice consul, or some officer having a public appointment or commission, civil, naval, or military, under his majesty's government, or by a magistrate or notary public or near the place where such letter of attorney or will shall be executed; nor shall any will of any petty officer, seaman, non-commissioned officer of marines or marine, be deemed good or valid in law, to any intent or purpose, which shall be contained, printed, or written in the same instrument, paper, or parchment with a power of attorney: provided that if it shall appear to the satisfaction of the treasurer of his majesty's navy, in the case of any will or letter of attorney executed on board any of his majesty's ships, that in the attestation thereof the captain's signature hath by accident or inadvertence been omitted, and that in all other respects the execution has been conformable to the provisions and to the intent and meaning of this act, it shall be lawful for the inspector of seamen's wills and powers to pass the same as valid and sufficient.

§ 49. Provided, that every letter of attorney or will, which hath been or which hereafter shall be made by any petty officer or seaman, non-commissioned officer of marines or marine, while a prisoner of war, shall be valid, provided it shall have been executed in the presence of and be attested by some commission officer of the army, navy, or royal marines, or by some warrant officer of his majesty's navy, or by a physician, surgeon, or assistant surgeon in the army or navy, agent to some naval hospital, or chaplain of the army or navy, or by any notary public; but so as not to invalidate or disturb any payment which hath been already made under any letter of administration, certificates, or otherwise, in consequence of the rejection of any such wills by the inspector of seamen's wills for want of the due attestation thereof according to the directions of any former act of parliament.

§ 50. Wills, &c. to be noted in the muster book.

§ 51. Letters of attorney and wills to be examined by the inspector.

§ 52. No letter of attorney of any petty officer or seaman, non-commissioned officer of marines or marine, which shall not have been made or executed on board the ship to which the party shall have belonged, in the manner required by the act, shall be passed, stamped, or allowed by the said inspector until a certificate shall have been produced to him, under the hand of the captain, specifying the period of the party's service on board under the command of such captain, and a description of his height, complexion, and age, unless reasonable cause shall be shown to and allowed by the said treasurer or inspector for dispensing with such certificate.

§ 53. The treasurer of the navy shall not be bound to pay regard to any power of attorney, or check of any power, under which any wages may be claimed as due to any officers, seamen, or marines, unless such power or check of power, as the case may be, shall be actually produced at the time payment is claimed, and, in the case of an officer's pay, unless the power or a copy of the power be left with the proper

officer of the said treasurer, accompanied with the usual certificates and papers; and in cases of the wages of a seaman or marine being claimed by any master under any indenture of apprenticeship, every such master shall, before he shall be entitled to receive the same, adduce satisfactory proof to the officer of the said treasurer that the indenture to be produced by him was in full force during the period for which such wages are claimed, and that the apprentice was, at the time of the execution of the indenture, under the age of eighteen years, and had not previously used the sea; but in case the indenture shall not be produced at the pay table when the wages shall be demanded, and such proof as aforesaid shall not be given, such wages shall be paid to the apprentice, and not to the master.

§ 55. specifies the mode by which executors are to obtain probate of such wills as therein before mentioned.

§ 56. enacts the mode of obtaining administration where no will has been made.

§ 59. When any probate or letters of administration shall have been so obtained, the proctor employed therein shall immediately send the same to the treasurer of the navy, with a copy of the will in the case of probate, and an account of his charges; and upon receipt thereof the inspector shall issue a check, containing the heads of such probate or letters of administration, and shall note thereon the amount of the proctor's charges and the address of the claimant; and so soon as the wages and prize money due to the deceased shall have been calculated in the proper departments, the amount shall be noted on the check, and, after abating the proctor's charges, the balance shall be paid to the party personally, or by means of a remittance bill, in the manner and under similar regulations as are therein before provided with respect to other contingencies of wages, and the check shall then be delivered to the party, to stand instead of probate or letters of administration, to enable him to receive whatever other sums may be payable to the deceased's estate.

§ 60. 1. any proctor, registrar, or other officer of any ecclesiastical court shall deliver any letters of administration, probate of will, or letters of administration with will annexed, to any other person than the treasurer of the navy or the said inspector, he shall forfeit one hundred pounds; and if any agent for prizes shall pay any prize money due to a petty officer or seaman, non-commissioned officer of marines or marine, under any authority whatever, other than the inspector's check directed by the act, such payment shall be null and void, and the agent shall forfeit a sum equal to the amount of the prize money paid.

§ 61. limits the expense of probate, &c. to the sums specified in the schedule to the act.

§ 63. directs the manner of proceeding in case of executors, &c. crying before the receipt of wages.

§ 64. regulations are made for preventing fraudulent claims by pretended creditors of seamen and marines.

but (§ 5.) creditors to be paid if there are no executors or administrators.

§ 69. sums not exceeding 20*l.* due to deceased petty officers, &c. are to be paid on certificate; extended by 4 & 5 Edw. 1. c. 25, § 8. to 32*l.*

6. Provisions for the Passage Home and Maintenance of Unserviceable or Shipwrecked Sailors.

§ 11. In case there shall be no opportunity of a passage by a king's ship, every man discharged abroad, either from a ship or from any hospital or sick quarters, shall be sent home by the first convenience of a merchant vessel, the master of which is thereby required (under 50*l.* penalty) to afford a passage to and subsist all such men, not exceeding four men to every 100 tons burthen of his ship, for which such allowance per day shall be made as shall be authorized by the lord high admiral, and except in cases when the man so discharged

shall perform the duty of one of the crew of the vessel, and for which he may be entitled to receive wages from the owner.

§ 82. The governors, ministers, consuls, and other officers of his majesty in foreign parts, and in places where there shall be no such, then any two British merchants there residing, shall send for and provide for all such seafaring men and boys, being subjects of the United Kingdom, who shall by shipwreck, or by any other means, or from any cause whatever, be driven to or cast away or left or be in distress at any such foreign parts or places, or who shall have been discharged from any of his majesty's ships, and subsist all such seafaring men and boys, and for so doing they shall be allowed so much per day as hath been or shall be authorized by the admiralty, for the amount of which disbursements they shall send bills, together with proper vouchers, to the commissioners of the navy, in order that, after due examination of such vouchers, payment of the amount thereof may be made to them; and the said governors, &c. shall cause such men and boys to be put or sent on board the first or any ship or vessel belonging to any subjects of his majesty which shall be bound from thence or from the neighbourhood to any part of the United Kingdom, and shall be in want of men to make up their complement; and if there shall be no such ship in want of men within a convenient time, then they shall provide and order a passage home for such seafaring men and boys in the first ship or vessel of his majesty's subjects bound to any part of the said United Kingdom; and every master or other person having the charge of any such ship or vessel thereby required (under 100*l.* penalty) to receive and afford a passage, and subsistence during the voyage, to all such seafaring men and boys as shall be so sent on board his ship, not exceeding four for every 100 tons of his ship's burthen; and every such master, on the production to the commissioners of the navy of a certificate under the hands of any such governors, &c. specifying the number and names of the men and boys, and the time when they were so received on board, and upon making oath as to the number of days they were subsisted, and that he did not during that period want of his own complement of men, or if he did want any, then the number he so wanted of his complement, and for what time he shall be entitled to receive from the said commissioners an allowance in respect of the subsistence and passage of each such man and boy (exceeding the number so wanting of his complement), according to such rate per day in that behalf authorized by the admiralty. And see 6 Geo. 4. c. 87. § 18.

7. Of Forgeries, &c. under the Act.

§ 83. If any person shall forge, or offer, utter, dispose of, or put off, knowing the same to be forged, any ticket, certificate, or document whatever authorized or required by the act, shall be guilty of felony, and be liable to be transported for life or for not less than seven years, or to be imprisoned not exceeding four years nor less than two years.

§ 84. If any person shall falsely and deceitfully personate any officer, or seaman, or commission or non-commissioned officer of marines or marine, or the wife, widow, or relation, executor, administrator, or creditor of any such officer, seaman, or marine, or any person entitled to any allowance from the compassionate fund of the navy, in order to receive any wages, &c. or other allowance for money due or payable to any such officer, &c. with intent to defraud any person whomsoever, shall be guilty of felony, and be liable to the like punishment. And see 5 Geo. 4. c. 107. § 5.

§ 85. If any person shall fraudulently and deceitfully take a false oath, in order to obtain probate of any will, or letters of administration of the effects of any deceased officer, or seaman, or commission or non-commissioned officer of marines or marine; or shall fraudulently receive or demand any wages, &c. or any allowance of money whatever, payable or sup-

posed to be payable in respect of the services of any such officer, &c. or from the compassionate fund of the navy, or any pension to the widow of an officer, by virtue of any probate of a will or letters of administration, knowing such will to be forged, or such probate or letters of administration to have been obtained by means of a false oath, with intent in any of the said cases to defraud any person whomsoever, every such offender shall be guilty of felony, and be liable to the same punishment.

§ 86. If any person shall subscribe any false petition or application to the treasurer of his majesty's navy, or to the paymaster of royal marines, representing herself or himself therein to be the widow, executor, nearest or one of the nearest of kindred of any deceased officer of the navy, or commission officer of marines, or of any petty officer or seaman, non-commissioned officer of marines or marine, or shall utter or publish any such petition or application, knowing the same to be false, in order to procure, or to enable any other person to procure, a certificate from the said inspector of seamen's wills or from the paymaster of royal marines as hereinbefore respectively provided, thereby to obtain, or to enable any other person to obtain, without probate or letters of administration, payment of any wages, &c. payable in respect of the services, &c. of any officer in the royal navy, or thereby to obtain, or to enable any other person to obtain, probate of the will or administration of the effects of any deceased petty officer, seaman, non-commissioned officer of marines or marine; or if any person shall receive or demand any wages, &c. thereof, or any other allowance due or payable in respect of the services of any commission or warrant officer of the navy, or commission officer of royal marines, or of any petty officer, seaman, non-commissioned officer of marines or marine, by virtue of any certificate of the inspector of seamen's wills or paymaster of royal marines respectively as aforesaid, knowing any such certificate to have been obtained by any false representation or pretence; every such offender shall be guilty of felony, and be liable to be transported beyond the seas for not exceeding fourteen and not less than seven years, or to be imprisoned for not exceeding three years nor less than one year.

§ 87. If any person shall forge, or shall utter, offer, or exhibit, knowing the same to be forged, any paper writing purporting to be an extract from any register of marriage, baptism, or burial, or any certificate of marriage, baptism, or burial, in order to sustain any claim to any wages, prize money, or other monies due or payable in respect of the services of any officer, seaman, or marine in his majesty's navy, or to sustain any claim to any half-pay payable to an officer of the royal navy or marines, or to any pension as the widow of an officer, or to any payment or allowance from the compassionate fund of the navy, or to any gratuity or bounty of his majesty given to the relatives of persons slain in fight with the enemy; or if any person shall make any false affidavit, or utter or exhibit any false affidavit, certificate, or other voucher or document, in order fraudulently to procure any person to be admitted a pensioner as the widow of an officer of the royal navy, or in order to sustain any claim to any wages, prize money, or other monies, or to any half-pay or pension, or arrears thereof, or any allowance from the compassionate fund of the navy, or to any gratuity or bounty as aforesaid, with intent to defraud any person whomsoever; every person in any of the said cases offending shall be deemed guilty of felony, and be liable to be transported for not exceeding fourteen and not less than seven years, or to be imprisoned for not exceeding three years nor less than one year.

§ 88. In the case of every offence made felony by the act, every principal in the second degree and every accessory before the fact shall be punishable in the same manner as the principal in the first degree; and every accessory after the

fact to any such felony shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and that where any person shall be convicted of any offence punishable under the act for which imprisonment shall or may be awarded, the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also direct him to be kept in solitary confinement for the whole or any portion or portions of such imprisonment.

§ 89. If any petty officer or seaman, non-commissioned officer of marines or marine, shall obtain or attempt to obtain his pay, or any part thereof, upon or by means of any false or forged certificate purporting to be a certificate of service in or discharge from any of his majesty's ships, or from any hospital or sick quarters, every person so offending shall be deemed guilty of a misdemeanor, and be liable to such pains and penalties as persons convicted of wilful and corrupt perjury are by law liable to.

§ 90. If any person shall take a false oath or make false affirmation in any case wherein an oath or affirmation is authorized or required by the act to be taken or made, and for which no punishment is otherwise by the act provided, every such person, being thereof duly convicted, shall be liable to such pains and penalties as persons guilty of wilful and corrupt perjury are by law subject to.

8. The General Provisions of the Statute.

§ 15. All tickets, certificates, pay lists, and other vouchers for wages to be made out as aforesaid, shall be in the forms theretofore established and in use in his majesty's naval service, or in such other forms as the lord high admiral, &c. shall from time to time authorize; and if any officer or other person shall make out, sign, or issue any ticket, &c. other than in the form and under the regulations therein prescribed, he shall forfeit 50*l.* and if belonging to his majesty's naval service shall moreover be liable to such punishment and forfeiture of wages as a court-martial shall adjudge.

§ 43. Any collector, clerk, &c. delaying payment or taking any fee, is liable to a penalty of 50*l.*

§ 62. If any officer, proctor, or other person shall take more than the sums allowed in the schedule, he shall forfeit 50*l.* with full costs of suit; or if any registrar, proctor, or other officer of any ecclesiastical court shall be aiding or assisting in procuring probate of any will or letters of administration, whereby any person may be enabled to claim any wages, pay, prize money, or allowance of money of any kind for the services of any such petty officer or seaman, non-commissioned officer of marines or marine, otherwise than in the manner prescribed by the act, he shall forfeit 500*l.* and shall moreover forfeit his office and be rendered incapable of acting in any capacity in any court of admiralty or ecclesiastical jurisdiction.

§ 64. recites that "by an act of the 54th year of the reign of his late majesty, for regulating the payment of navy prize money, agents for prizes are prohibited from paying any prize money or bounty money to any person upon any order made within the distance of five miles of the place where the same shall be payable, (such prize money or bounty money being in course of distribution at the time of making such order) under the penalty therein mentioned:" it is enacted, that if any agent licensed by the treasurer of his majesty's navy, or if any other person, shall insert in any order for payment of prize money or bounty money payable in respect of the services of any petty officer or seaman, non-commissioned officer of marines or marine, in his majesty's navy, the name of any captured ship, vessel, fortress, or place, the proceeds of which or the bounty money payable in respect whereof shall be then in course of distribution within six miles of the place where such name or names shall be inserted, and where such order shall be intended to be attested under the prov-

sions of the said last-mentioned act, or shall utter any such order with the name or names of any such captured ship, &c. inserted therein, for the purpose of demanding or receiving payment of any prize money or bounty money for or in respect of such captured ship, &c. such prize money or bounty money being then in course of distribution or payment within six miles of the place where such order shall have been made or drawn and attested, every such person so offending shall forfeit 50*l*.

§ 72. Wages, pay, prize money, &c. not claimed within six years, are declared forfeited; but the admiralty may authorize payment notwithstanding.

§ 73. Letters to and from the treasurer to go free.
As also (§ 74) letters to and from certain other officers to go free.

And by § 75. letters relating to the business of the commissioners of the navy or the victualling department to go free: persons sending letters other than those permitted, shall forfeit 100*l*.

§ 78. exempts from stamps all bills and documents made out under the act.

By § 81. the act is to extend to the royal marines.

§ 92. Treasurer and commissioners of the navy may act as justices.

In pursuance of the same plan, for the comfort and relief of the defenders of their country, it had been provided by several previous acts, the last 46 Geo. 3. c. 92. that letters to and from non-commissioned officers, seamen, and privates, in any departments of the army, navy or militia, shall be subject only to a penny postage.

Also 47 Geo. 3. st. 1. c. 52; 51 Geo. 3. c. 105. for establishing and supporting the Royal Naval Asylum for the education of orphans of officers and men of the navy and marines.

By the 6 Geo. 4. c. 26. the Royal Naval Asylum was consolidated with Greenwich Hospital, and the governors of the latter are empowered to make rules for its superintendence.

Acts are usually passed during war, for regulating the payment of prize money. See 51 Geo. 3. c. 93; 55 Geo. 3. c. 60; 59 Geo. 3. c. 56; and 1 Geo. 4. c. 85. and ante, 8.

The pay and wages of one man in a hundred, of every ship of war, and value of his victuals, shall be applied for relieving poor widows of officers of the navy, 6 Geo. 2. c. 25.

By the 3 & 4 Wm. 4. c. 53. justices might have sentenced persons convicted of smuggling to serve on board the royal navy for five years, but this was repealed by the 4 & 5 Wm. 4. c. 12.

III. The treasurer, comptroller, surveyor, and clerk of the acts, and commissioners of the navy, &c. have power to examine and punish all persons who make any disturbance, fighting or quarrelling, in the yards, and offices, &c. of the navy, and on any days, by rote and imprisonment, and to bind the offenders to good behaviour, and to answer at the assizes or sessions.

The method of ordering seamen in the royal fleet, and keeping up discipline there, is directed by certain express rules, and orders, first enacted by the authority of parliament soon after the Restoration, but since new modelled and altered. In the thirteenth year of King Charles II. an act passed for the regulating the government of the fleet, 13 Geo. 2. st. 1. c. 9. which was repealed by 22 Geo. 2. c. 23. and amended by 19 Geo. 3. c. 17. These two latter statutes contain not only the thirty-six articles of war, but almost every possible offence is explicitly set down, and the punishment thereof annexed or left to the discretion of a court martial; but also sundry clauses of express rules and orders for assembling and holding courts for the trial of any of the offences specified therein.

By 39 & 40 Geo. 3. c. 100. whereby his majesty was authorized to grant commissions for natives of Holland to

serve on board certain Dutch ships of war which had surrendered, the articles of war were directed to be translated into Dutch, and the crews of the ships were made subject thereto.

The following are the ARTICLES of WAR above alluded to:

1. Officers are to cause public worship, according to the liturgy of the church of England, to be solemnly performed in their ships, and take care that prayers and preaching by the chaplains be performed diligently, and that the Lord's Day be observed.

2. Persons guilty of profane oaths, cursing, drunkenness, uncleanness, &c. to be punished as a court martial shall think fit.

3. If any person shall give or hold intelligence to or with an enemy without leave, he shall suffer death.

4. If any letter or message from an enemy be conveyed to any in the fleet, and he shall not in twelve hours acquaint his superior officer with it, or if the superior officer, being acquainted therewith, shall not reveal it to the commander-in-chief, the offender shall suffer death; or such punishment as a court martial shall impose.

5. Spies and persons endeavouring to corrupt any one in the fleet, shall suffer death, or such punishment as a court martial shall impose.

6. No person shall relieve an enemy with money, victuals, or ammunition, on like penalty.

7. All papers taken on board a prize shall be sent to the Court of Admiralty, &c. on penalty of forfeiting the same of the prize, and such punishment as a court martial shall impose.

8. No person shall take out of any prize any money or goods, unless for better securing the same, or for the necessary use of any of his majesty's ships, before the prize shall be condemned; upon penalty of forfeiting his share and such punishment as shall be imposed by a court martial.

9. No person on board a prize shall be stripped of his clothes, pillaged, beaten, or ill-treated, upon pain of such punishment as a court martial shall impose.

10. Every commander who, upon signal or order of fight, or sight of any ship which it may be his duty to engage, or who, upon likelihood of engagement, shall not make necessary preparation for fight, or encourage the crew, officers and men to fight, shall suffer death; or such punishment as a court martial shall deem him to deserve. And if any person shall treacherously or cowardly yield or cry for quarter, he shall suffer death.

11. Every person who shall not obey the orders of his superior officer, in time of action, to the best of his power, shall suffer death; or such punishment as a court martial shall deem him to deserve.

12. Every person who, in time of action, shall withdraw or keep back, or not come into the fight, or do his utmost to take or destroy any ship which it shall be his duty to engage, and to assist every ship of his majesty or his allies, which it shall be his duty to assist, shall suffer death or other punishment. See post, and 19 Geo. 3. c. 17. § 3.

13. Every person who, through cowardice, &c. shall forbear to pursue the chase of any enemy, &c. or shall not assist or relieve a known friend in view, to the utmost of his power, shall suffer death, or other punishment. See post.

14. If any person shall delay or discourage any action or service commanded, upon pretence of arrears of wages, or otherwise, he shall suffer death, or such punishment as a court martial shall deem him to deserve.

15. Every person who shall desert to the enemy, or run away with any ship, ordnance, &c. to the weakening of the service, or yield up the same cowardly or treacherously to the enemy, shall suffer death.

16. Every person who shall desert, or entice others so to do, shall suffer death; or such punishment as a court martial shall think fit. If any commanding officer shall receive a deserter, after discovering him to be such, and shall not

with speed give notice to the captain of the ship to which he belongs, or, if the ship is at a considerable distance, to the secretary of the admiralty, or commander-in-chief, he shall be cashiered. [See also 44 Geo. 3. c. 13. by which petty officers or seamen, taken out of the navy for any civil or criminal matter, shall be kept in custody till discharged from such suit, and shall then be conveyed and delivered to some officer of the navy to continue their service therein. This act was passed to prevent desertion, under colour of false actions or prosecutions.]

17. Officers and seamen of ships appointed for convoy of merchant ships, or of any other, shall diligently attend upon that charge according to their instructions; and whosoever shall not faithfully perform their duty, and defend their ships in their convoy, or refuse to fight in their defence, or run away cowardly and submit the ships in their convoy to hazard, or exact any reward for conveying any ship, or misuse the master or mariners, shall make reparation of damages, as the Court of Admiralty shall adjudge; and be punished criminally by death, or other punishment, as shall be adjudged by a court martial. See *Insurance*.

18. If any officer shall receive or permit to be received on board any goods or merchandise, other than for the sole use of the ship, except gold, silver, or jewels, and except goods belonging to any ship which may be shipwrecked, or in danger thereof, in order to the preserving them for the owners, and except goods ordered to be received by the lord high admiral, &c. he shall be cashiered, and rendered incapable of further service.

19. Any person making or endeavouring to make any mutinous assembly shall suffer death. Any person uttering words of sedition or mutiny shall suffer death; or such punishment as a court martial shall deem him to deserve. If any officer, mariner, or soldier, in or belonging to the fleet, shall behave himself with contempt to his superior officer, being in the execution of his office, he shall be punished according to the nature of his offence, by the judgment of a court martial.

20. Any person concealing any traitorous or mutinous practice or design, shall suffer death; or such punishment as a court martial shall think fit. Any person concealing any traitorous or mutinous words, or any words, practice, or design, tending to the hinderance of the service, and not forthwith revealing the same to the commanding officer; or, being present at any mutiny or sedition, shall not use his utmost endeavours to suppress the same, shall be punished as a court martial shall think he deserves. [See the 37 Geo. 3. c. 71. for restraining intercourse with the crews of certain ships in a state of mutiny and rebellion; and for the suppression of such mutiny and rebellion; and 37 Geo. 3. c. 70. making it felony without clergy to attempt to seduce seamen (or soldiers) from their duty. This last act, and the Irish act, 37 Geo. 3. c. 40. for the same purpose are made perpetual by 57 Geo. 3. c. 7.]

21. Any person finding cause of complaint of the unwholesomeness of victuals, or upon other just ground, he shall quietly make the same known to his superior, who, as far as he is able, shall cause the same to be presently remedied; and no person upon any such or other pretence shall attempt to stir up any disturbance, upon pain of such punishment as a court martial shall think fit to inflict.

22. Any person striking any his superior officer, or drawing or offering to draw or lift up any weapon against him, being in the execution of his office, shall suffer death. And any person presuming to quarrel with any his superior officer, being in the execution of his office, or disobeying any lawful command of any his superior officer, shall suffer death, or such other punishment as shall be inflicted upon him by a court martial.

23. Any person quarrelling or fighting with any other person in the fleet, or using reproachful or provoking speeches

or gestures, shall suffer punishment as a court martial shall impose.

24. There shall be no wasteful expense or embezzlement of any powder, shot, &c. upon penalty of such punishment as by a court martial shall be found just.

25. Every person burning or setting fire to any magazine, or store of powder, ship, &c. or furniture thereunto belonging, not then appertaining to an enemy, shall suffer death.

26. Care is to be taken that through wilfulness or negligence no ship be stranded, run upon rocks or sands, or split or hazarded; upon pain of death, or such punishment as a court martial shall deem the offence to deserve.

27. No person shall sleep upon his watch, or negligently perform his duty, or forsake his station, upon pain of death, or such punishment as, &c.

28. Murder; And,

29. Buggery or sodomy, shall be punished with death.

30. Robbery shall be punished with death, or otherwise as a court shall find meet.

31. Every person knowingly making or signing, or commanding, counselling, or procuring the making or signing, any false muster, shall be cashiered and rendered incapable of further employment.

32. Provost marshal refusing to apprehend or receive any criminal, or suffering him to escape, shall suffer such punishment as a court martial shall deem him to deserve. And all others shall do their endeavours to detect and apprehend all offenders, upon pain of being punished by a court martial.

33. If any flag-officer, captain, commander, or lieutenant, shall behave in a scandalous, infamous, cruel, oppressive, or fraudulent manner, unbecoming his character, he shall be dismissed.

34. Every person in actual service and full pay, guilty of mutiny, desertion, or disobedience, in any part of his majesty's dominions on shore, when in actual service relative to the fleet, shall be liable to be tried by a court martial, and suffer the like punishment as if the offence had been committed at sea.

35. Every person in actual service and full pay, committing upon shore, in any place out of his majesty's dominions any crime punishable by these articles, shall be liable to be tried and punished as if the crime had been committed at sea.

36. All other crimes not capital, not mentioned in this act, shall be punished according to the laws and customs used at sea. No person to be imprisoned for longer than two years. Court martial not to try any offence (except under the fifth, thirty-fourth, and thirty-fifth articles) not committed upon the main sea, or in great rivers beneath the bridges, or in any haven, &c. within the jurisdiction of the admiralty, or by persons in actual service and full pay, except such persons as mentioned in fifth article; nor to try a land officer or soldier on board of a transport-ship. The lord high admiral &c. may grant commissions to any officer commanding a chief any fleet, &c. to call courts martial, consisting of commanders and captains. And if the commander-in-chief shall die or be removed, the officer next in command may call courts martial. No commander-in-chief of a fleet, &c. of more than five ships, shall preside at any court martial in foreign parts, but the officer next in command shall preside. If a commander-in-chief shall detach any part of his fleet &c. he may empower the chief commander of the detachment to hold courts martial during the separate service. If two or more ships shall meet in foreign parts, the senior officer may hold courts martial and preside thereat. Where it is improper for the officer next to the commander-in-chief to hold or preside at a court martial, the third officer in command may be empowered to preside at, or hold, the same. No court martial shall consist of more than thirteen, nor less than five persons. Where there shall not be less than three, and yet not so many as five of the degree of a post-captain or superior rank, the officer who is to preside must call to his assistance

as many commanders under the degree of a post-captain, as together with the post-captains shall make up the number five, to hold the court martial.

Proceedings shall not be delayed, if a sufficient number remain to compose the court, which shall sit from day to day (except Sunday) till sentence be given.

The judge advocate, and all officers constituting a court martial, and all witnesses, shall be upon oath. Persons refusing to give evidence may be imprisoned. Sentence of death within the narrow seas (except in case of mutiny) shall not be put in execution till a report be made to the lord high admiral, &c. Sentence of death beyond the narrow seas, shall not be put in execution but by order of the commander-in-chief of the fleet, &c. Sentence of death in any squadron detached from the fleet, shall not be put in execution (except in case of mutiny) but by order of the commander of the fleet, or lord high admiral, &c. And sentence of death passed in a court martial, held by the senior officer of five or more ships met in foreign parts, (except in case of mutiny,) shall not be put in execution but by order of the lord high admiral, &c.

The powers given by the said articles shall remain in force with respect to crews of ships wrecked, lost, or destroyed, until they be discharged or removed into another ship, or a court martial shall be held to inquire of the causes of the loss of the ship. And if upon inquiry it shall appear that all or any of the officers and seamen did their utmost to save the ship, and behaved obediently to their superior officers, their pay shall go on; as also shall the pay of officers and seamen taken by the enemy, having done their best to defend the ship, and behaved obediently. If any officer shall receive any goods on board, contrary to the eighteenth article, he shall neither forfeit the value of such goods, or 500*l.* at the election of the admiralty, half to the informer, and half to Greenwich Hospital. See *Seamen, Ships*.

By 31 *Geo. 2. c. 10. § 1.* a competent number of printed copies of the above articles of war are to be delivered to the captain or commander of every ship or vessel; who is to cause them to be hung up and affixed to the most public places of the ship, and to have them constantly kept up and renewed, so that they may be at all times accessible to the inferior officers and seamen on board; and likewise to observe that such abstract be audibly and distinctly read over, once in every month, in the presence of the officers and seamen, immediately after the articles of war are read. And by 32 *Geo. 3. c. 67.* abstracts of the several acts relating to the pay, &c. of the seamen are to be hung up on board all ships, &c. in like manner as the articles of war.

The offences comprehended and specified in the above articles of war may be classed under four general heads:—1. Those immediately against God and religion, contained in the first and second articles, viz. neglecting public worship, and being guilty of swearing, drunkenness, &c., the punishment of which is left to the discretion of the courts martial.—2. Such as affect the executive power of the state, or concern the criminal neglect of the established rules of discipline; these offences are specified in articles 3, 4, 5, 15, 16, 19, 20, 21, 24, 25, 27, and 31, viz. holding intelligence with an enemy or rebel; concealing letters or messages from, or revealing them; deserting to an enemy; running away with ships, stores, &c. or yielding the same to an enemy; desertion from the service, or entertaining deserters; waste or embezzlements of stores; mutinous assemblies; seditious or mutinous words; concealing any traitorous or mutinous designs, &c. striking, quarrelling, or disobeying the orders of a superior officer, sleeping upon the watch, neglecting duty or forsaking a station allotted; and knowingly signing false muster-books.—3. Such as violate or transgress the rights and duties which are owing to individuals or fellow-subjects: under which may be classed murder, robbery, &c. See articles 28, 29, 30.—4. Offences in themselves strictly military, and such as are

peculiarly the object of martial law. These are recited in articles 10, 11, 12, 13, 14, and 17. The 12th and 13th articles as they formerly stood, by restraining the power of a court martial to the positive inflicting the punishment of death in the cases therein mentioned of cowardice, negligence, or disaffection in time of action, &c. were deemed too severe, and attended with peculiar inconveniences; one instance of which was the case of the unfortunate Admiral Byng. These articles were therefore explained and amended by § 3. of 19 *Geo. 3. c. 17.* whereby it is now lawful for a court martial to pronounce sentence of death, "or to inflict such other punishment as the nature and degree of the offence therein recited shall be found to deserve." See *McArthur on Naval Courts Martial*.

It is already mentioned under *Courts Martial*, that desertion from the king's armies in time of war is made felony by 18 *Hen. 6. c. 19.* It may here be added that by 5 *Edw. 1. c. 5. § 27.* this penalty extended to mariners and gunners serving in the navy.

The ground of the jurisdiction of naval courts martial depends on nearly the same reasoning as relates to those of the army; as to which see *Courts Martial*. The theory and general principles of courts of inquiry and courts martial in both services also rest upon the same basis. Some observations, however, more peculiarly applicable to the latter, are here introduced, chiefly from *McArthur on Naval Courts Martial*, and the authorities referred to by him.

It is to be observed, that though in this as in the ordinary course of the criminal judicature of the kingdom, the king has the prerogative of pardoning or remitting punishment; yet he can no more alter the sentence of a court martial than he can a judgment of any other court. At the same time it is unquestionable that the royal prerogative may be exercised on all occasions in dismissing officers from the service, even though acquitted by a court martial.

Among many reasons urged against naval courts martial, the most cogent and constitutional, at the first glance, is that of the inferior officers and seamen not being tried by their peers; for by the statute, no courts martial shall consist of more than thirteen or less than five persons, to be composed of such flag-officers, captains, or commanders, then present, as are next in seniority to the officer who presides at the court martial. This objection, however, is (we may say completely) obviated by the necessity of subordination, which could not be preserved by admitting those as jurymen, who certainly would have too great a fellow-feeling in the fate of the culprit; besides that, it would open a dangerous door to confederacies that might destroy the whole discipline of the navy.

To institute one inferior or divisional court martial, subject to appeal in the navy, analogous to the regimental courts in the army, would not be adequate to remedy some other evils complained of: for according to the ancient practice of the sea, and as established by the fourth article of the general printed instructions, a captain or commander of any of his majesty's ships or vessels has the power of inflicting punishment upon a seaman in a summary manner, for any faults or offences committed contrary to the rules of discipline and obedience established in the navy; such punishment not to exceed twelve lashes for any one fault.

All courts martial are to be held, and offences tried, in the forenoon, and in the most public part of the ship, where all who will may be present; and the captains of all his majesty's ships in company who take post, have a right to assist thereat. *Instr. art. 4.*

Under the 22 *Geo. 2. c. 33.* no member of any court martial, after the trial commenced, could go on shore, or leave the ship in which the court martial should first assemble, until sentence was given; but it having been found that this restraint and confinement might, in many cases, be attended with great inconvenience, and even prejudice to the health of

the members, this clause was repealed by § 1, 2, of 19 Geo. 3. c. 17. under which all the members are now at liberty to retire upon every adjournment.

The jurisdiction of naval courts martial extends to the trial of all offences specified in the articles of war, which may be committed upon the main sea, or on great rivers only, beneath the bridges of the said rivers nigh to the sea, or in any haven, river, or creek within the jurisdiction of the admiralty; and which shall be committed by persons then in actual service and full pay in the fleet or ships of war of his majesty. 22 Geo. 2. c. 33, § 4. Likewise to the trial of all spies, and all persons whatsoever who shall come and be found in the nature of spies, as specified in the fifth of the above articles of war; as well as to the trial of every person who shall be guilty of mutiny, desertion, or disobedience to any lawful command, in any part of his majesty's dominions on shore, when in actual service, relative to the fleet; and for crimes committed on shore by such persons, in any places out of his majesty's dominions as are more fully specified in the thirty-fourth and thirty-fifth of the said articles.

Murders are cognizable by courts martial only in cases where the stroke or poison is given on board ship, and the person dies in consequence thereof on board; but in order to prevent any failure of justice, it is enacted by the 3 Geo. 4. c. 31. by which the former act (2 Geo. 2. c. 24.) is repealed, that if any person be stricken or poisoned at sea or abroad, and die in England, or being stricken or poisoned in England, die at sea or abroad, the murderer and accessories are to be given up to the civil power, and may be indicted and tried in the county where the stroke, poison, or death happened. See *Homicide*, III. 3.

Naval courts martial can likewise take cognizance of crimes committed by warrant officers or men belonging to ships in ordinary; that is, stationed for particular purposes in the several dock-yards of the kingdom, and not in active public service. But they cannot take cognizance of offences committed by masters, mates, or seamen belonging to navy transports, as they are persons not subject to naval discipline. They are entitled to be discharged in time of war or peace, on their own application. The articles of war are never stuck up or read on board these navy transports; though the officers and men receive their wages quarterly at the dock-yards, in the same manner as the officers and men of his majesty's ships in ordinary.

By § 23 of the said 22 Geo. 2. c. 33, it is enacted, that no person, not flying from justice, shall be tried or punished by a court martial for any offence, unless the complaint of such offence be made in writing, or (and?) unless a court martial to try such offender shall be ordered within three years after the offence shall be committed; or within one year after the return of the ship into any of the ports of Great Britain or Ireland.

Pardons, when extended to a criminal tried by a naval court martial, are sent to the lords commissioners of the admiralty, who immediately transmit (as secret) their order of relieve or pardon to the commander-in-chief or senior officer of the place for the time being, where the execution would take place; signed by the lords under the admiralty seal, signifying his majesty's royal clemency, and directing the commander-in-chief to keep the whole of the order extremely secret, until the offender is, on the day appointed for execution, brought out upon deck, and every thing prepared for his execution, agreeable to the custom of the navy; and then only to make known to him his majesty's pleasure, and to release him from his confinement. *M'Arthur*.

As to conditional pardons to persons under sentence of naval courts martial, by which the transportation of such offenders is authorized, see 24 Geo. 3. st. 2. c. 56; 37 Geo. 3. c. 140; 55 Geo. 3. c. 156; and 56 Geo. 3. c. 5.

Some doubts having been entertained in the time of William III. whether the commissioners of the admiralty had the

same power to issue commissions to a court martial to try a prisoner, as the lord high admiral was allowed to have; this and all the other powers of a lord high admiral were vested in such commissioners, by 2 W. & M. st. 2. c. 2. See *Admiral*.

It is hinted under title *Courts Martial*, (ante, vol. i.) that members of courts martial are liable to answer, in damage, to the party injured, for the consequences of any unjust sentence. A remarkable instance of this occurred in the case of Lieutenant Frye, of the marines, who, in the year 1743, was sentenced to fifteen years' imprisonment by a court martial. He brought an action against the president Sir Chaloner Ogle, and recovered 1000*l.* damages; and the judge informing him that he was at liberty to bring his action against any of the members, he proceeded against Rear-Admiral Mayne, and Captain Rentone, who were arrested by a capias from the Court of Common Pleas, at the breaking up of the court martial on Admiral Lestock, where the former presided, and the latter sat as member. This was much resented by that court martial, who passed some resolutions on the subject, reflecting in interperate language on the chief justice of the court, (Sir John Willes,) and these were laid by the lords of the admiralty before the king: upon this the chief justice caused every member of the court to be taken into custody; and was proceeding in legal measures to assert and maintain the authority of his office, when a stop was put to the process by a public written submission, signed by all the members of the court, transmitted to the lord chief justice, received and read in the Court of Common Pleas, registered in the Remembrancer's Office, and inserted in the Gazette of November 15, 1746. "A memorial (as the chief justice observed) to the present and future ages, that whoever set themselves up in opposition to the laws, or think themselves above the law, will in the end find themselves mistaken." See the case stated in *M'Arthur on Courts Martial*, vol. i. appendix xiii.; see further, *Ships*.

NAVY BILLS. As to counterfeiting, forging, or stealing them, see *Forgery*, *Larceny*.

NE ADMITTAS. A writ directed to the bishop for the plaintiff or defendant, where a *quare impedit* or assize of *darrein presentment* is depending, when either party fears that the bishop will admit the other's clerk during the suit between them; it ought to be brought within six calendar months after the avoidance, before the bishop may present by livery; for it is in vain to sue out this writ when the title to present is devolved upon the bishop. *Reg. Orig.* 31; *F. N. B.* 37. Assizes of *darrein presentment* are however now abolished by the 1 & 4 Wm. 4. c. 7.

Writ of *ne admittas* doth not lie, if the plea be not depending in the king's court by *quare impedit*, or *darrein presentment*; therefore there is a writ in the register directed to the chief justice of C. B. to certify the king in the chancery if there be any plea before him and the other judges between the parties, &c. So that the writ should not be granted until that be done; but yet it may be had out of the chancery before the king is certified that such plea of *quare impedit* is depending: and then the party grieved may require the chief justice to certify, &c. *New Nat. Br.* 83, 84. The writ runs, *Prohibemus vobis, ne admittas, &c.*

Immediately on the suing out of a *quare impedit*, if the plaintiff suspects that the bishop will admit the defendant's or any other clerk pending the suit, he (or the defendant *versé*) may have this prohibitory writ of *ne admittas*, which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever till such content be determined. And if the bishop doth, after the receipt of this writ, admit any person, even though the patron's right may have been found in a *jure patronatus*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by writ of *scire facias*, 2 *Sid.* 94. And he shall have a special action

against the bishop, called a *quare incumbavit*, to recover the presentation; and also satisfaction in damages for the injury done him by incumbering the church with a clerk pending the suit, and after the *ne admittas* received. *F. N. B.* 46. But if the bishop has incumbered the church by instituting the clerk, no *quare incumbavit* lies; for the bishop hath no legal notice till the writ of *ne admittas* is served upon him. The patron is therefore left to his *quare impedit* merely, which, since the stat. *Westm. 2.* lies as well upon a recent usurpation within six months past, as upon a disturbance without usurpation had. See 3 *Comm. c.* 16. p. 248, 9.

NEAT, or NET. Is the weight of a pure commodity alone, without the cask, bag, dross, &c. *Merch. Diet.*

NECESSARY INTROMISSION. Is when a husband or wife continues in possession of the other's goods, after their decease, for preservation. *Scotch Diet.*

NECESSITY. The law charges no man with default where the act is compulsory, and not voluntary, and where there is not a consent and election; therefore if there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as, in presumption of law, he cannot overcome, such necessity carries a privilege in itself. See *Bac. Elem.* 25—29.

Compulsion and inevitable necessity are considered, by *Blackstone*, among those causes from whence arises a defect of will; and under which, therefore, an action is not to be considered as criminal which would otherwise be so.

These he states to be a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

Of this nature, in the first place, is the obligation of civil subjection, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest; as when a legislature establishes iniquity by a law, and commands the subject to do an act contrary to reason or sound morality. How far this excuse will be admitted in *foro conscientie*, or whether the inferior in this case is bound to obey the divine, rather than the human law, is a question not determinable by municipal law, though among casuists it will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff who burnt Latimer and Ridley, in the reign of Queen Mary, was not liable to process from Elizabeth, for executing so horrid an office; being justified by the commands of the then existing magistracy.

As to persons in private relations, the principal case where constraint of a superior is allowed as an excuse for criminal conduct, is with regard to the matrimonial subjection of a wife to her husband; for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master; though in some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment even for capital offences; as to which see *the Baron and Feme*, VII.

Another species of compulsion or necessity, is what our law calls *duress per minas*; as to which see *Duress*.

There is a third species of necessity, which may be distinguished from the actual compulsion of external force or being the result of reason and reflection, which act would constrain a man's will, and oblige him to an action, which, without such obligation, would be criminal. And that is, when a man has his choice of two evils set before him, and, being under a necessity of choosing one, he chooses the least pernicious of the two. Here the will cannot

be said freely to exert itself, being rather passive than active or if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority; it is here justifiable, and even necessary, to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue; for the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public, and therefore excuse the felony which the killing would otherwise amount to. 1 *Hal. P. C.* 58; see 4 *Comm.* 27—31.

As to homicide justifiable by necessity, see *Homicide*, I.

In an action founded in tort against a master of a ship for throwing goods overboard, it is a good defence for him to prove that they were cast into the sea from necessity, to prevent the vessel from sinking. 2 *Bulstr.* 280.

The evidence of persons interested is admitted from necessity, in cases where from the nature of the subject of inquiry, it is exceedingly improbable that individuals not interested should possess any knowledge of the facts. Thus it is the constant course to admit the servant of a tradesman to prove the delivery of goods, and the payment of money, without any release from the master. 1 *T. R.* 790. So it has been held, that an apprentice is a competent witness, to prove money has been overpaid by mistake. *Str.* 647. So in an action against a carrier for not delivering a parcel, its delivery may be proved by his servant. *Ross v. Rowe*, *Ford's MSS.* 98. See further, 1 *Stark on Ev.* 120.

A wife is also sometimes admitted *ex necessitate* as a witness against her husband, as on a charge against him of violence committed on her person. 1 *St. Tr.* 387; 1 *Str.* 633; 1 *T. R.* 698. See *Baron and Feme*, 1, 2.

A right of way by necessity may likewise be pleaded to an action of trespass. See *Ways*.

NE DISTURBAS. The general issue in *Quare Impedit*. *Hob.* 162; *Bac. Abr. Simony* (1). But there is a dictum of *Ashhurst, J.* that there is no general issue in that action. 3 *T. R.* 158.

It simply denies that the defendant obstructed the presentation, and is adapted to no other ground of defence. Consequently it is never pleaded, unless in cases where there has been actually no refusal to institute and induct the plaintiff's clerk. It amounts to a confession of the right of patronage; and, therefore, upon its being pleaded, the plaintiff may immediately pray judgment and a writ to the ordinary. Or if he pleases, he may proceed in the action to maintain the disturbance, and recover damages. 1 *Arch.* 441; *Hob.* 162; *Bac. Abr. Simony* (1). See further *Quare Impedit*.

NE DONA PAS, or NON DEDIT. Was the general issue in a *formedon*. See 10 *Wentw.* 182. It merely denied the gift in tail to have been made in manner and form as alleged, and was therefore the proper plea, if the tenant meant to dispute the fact of the gift, but did not apply to any other case. See 5 *East*, 289.

NEEDLE-WORK. May be exported duty free. 11 & 12 *W. 3. c.* 3. § 15.

NE EXEAT REGNO; (or as it is sometimes, ungrammatically as it seems, termed, *ne exeat regnum*.) A writ (issuing out of chancery) to restrain a person from going out of the kingdom without the king's licence. *F. N. B.* 85. It may be directed to the sheriff to make the party find surety that he will not depart the realm; and on his refusal, to commit him to prison: or it may be directed to the party himself; and if he then goes, he may be fined. 2 *Inst.* 178.

The use and object of this writ is, in fact, at present, exactly the same as an arrest at law in the commencement of an action, *viz.* to prevent the party from withdrawing his person and property beyond the jurisdiction of the court, before a judgment could be obtained and carried into execution: so

where there is a suit in equity for a demand, for which the defendant cannot be arrested in an action at law, upon an affidavit made that there is reason to apprehend that he will leave the kingdom before the conclusion of the suit, the chancellor by this writ will stop him, and will commit him to prison, unless he produces sufficient sureties that he will abide the event of the suit. 1 *Comm. c. 7. p. 266. n.* And see 2 *Com. Dig.; F. N. B. 85, &c.; 2 C. C. 245; La. 29; 7 Mod. 9; Pre. Ch. 171; 1 P. Wms. 263, and Mr. Cox's note there; 15 Vin. 537, 9.*

The affidavit of a threat or intention to go abroad must be positive, not upon information and belief. 3 *Ves. 597; 16 Ves. 470.* But the court acts on evidence of design to go without regard to denial. 3 *Swanst. 575.* And notice of motion for the writ need not be given, for that might defeat its object. 18 *Ves. 355.* A bill must however be first filed. 6 *Ves. 92; and 3 P. W. 312, post.*

The demand for which a *ne exeat* may be issued must in general be equitable, and not legal, except in the case of an account. 1 *Ball & B. 327.* It must be completely due, and be such a debt, that the sum to be marked on the writ may be ascertained. 3 *Swanst. 577; 1 Turn. & Russ. 343.* This writ may be obtained by a British subject against a foreigner who happens to be in this country, to enforce the adjustment of an account upon a foreign transaction, although according to the law of that country, the foreigner could not there have been held to bail. 1 *Jac. & W. 405.* And see 1 *B. & Ad. 284.*

This writ of *ne exeat* is also used where a party has been decreed by the ecclesiastical courts to pay alimony and costs, and is about to withdraw himself from the court's jurisdiction. A bill is filed in these cases founded on the affidavit, and prays for the writ; the granting it is matter of discretion, and as it is a severe process, and such use of it is a departure from its original purpose, the discretion is exercised with great caution. See 1 *Ves. jun. 94; 7 Ves. 171; 1 Turn. and Russ. 322.*

A *ne exeat regno* has been granted to stay a defendant from going to Scotland: for though it is not out of the kingdom, yet it is out of the process of the court, and within the same mischief. *Salk. 702; 3 Mod. 127, 169; 4 Mod. 179.* If the writ be sued for the king, the party against whom sued may plead licence by letters-patent, &c. which shall discharge him; but where any subject goes beyond sea with the king's licence, and continues longer than his appointed time, it hath been held he loses the benefit of a subject. 4 *Leon. 29.* And if a person beyond sea refuses to return to England on the king's letters under his privy seal, commanding him upon his allegiance to return; being certified into the chancery, a commission may be awarded to seize his lands and goods for the contempt; and so it is if such person's servants hinder a messenger from delivering his message, on affidavit of it, &c. *Jenk. Cent. 246; 3 Nels. Abr. 211. See King, V. 3.*

The right which the king has, whenever he sees proper, of confining his subjects to stay within the realm, (or of recalling them when beyond sea,) is classed by *Blackstone* among his prerogatives as *Generalissimo* of the realm. By the common law every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave; provided he is under no injunction of staying at home; (which liberty was expressly declared in king *John's* great charter, though left out in that of *Henry III.*), but, because that every man ought of right to defend the king and his realm, therefore the king at his pleasure may command him by his writ that he go not beyond the seas, or out of the realm without licence; and if he do the contrary, he shall be punished for disobeying the king's command. *F. N. B. 85.* Some persons there anciently were, that, by reason of their stations, were under a perpetual prohibition of going abroad without licence obtained; among which were reckoned all peers, on account of their being counsellors of the crown; all knights,

who were bound to defend the kingdom from invasions: all ecclesiastics, who were expressly confined, by the fourth chapter of the constitution of *Clarendon*, on account of their attachment in the times of popery to the see of Rome; all archers and other artificers, lest they should instruct foreigners to rival us in their several trades and manufactures. This was law in the times of *Britton*, who wrote in the reign of *Edw. I.* And *Sir E. Coke* gives us many instances to this effect in the time of *Edw. III.* *Britton, c. 133; 3 Inst. 175.* In the succeeding reign the affair of travelling wore a very different aspect: an act of parliament being made (5 *Ric. 2 c. 2.*), forbidding all persons whatever to go abroad without licence; except only the lords and other great men of the realm; and true and notable merchants; and the king's soldiers. But this act was repealed by 4 *Jac. 1. c. 1.* And at present every body has, or at least assumes, the liberty of going abroad when he pleases. Yet undoubtedly if the king by writ of *ne exeat regno* under his great seal or privy seal, thinks proper to prohibit him from so doing, and the subject disobeys, it is a high contempt of the king's prerogative, for which the offender's lands shall be seized till he return, and then he is liable to fine and imprisonment. 1 *Hawk. P. C. 22; 1 Comm. c. 7.*

It is said, in *Lord Bacon's Ordinances*, No. 89, that, "towards the latter end of the reign of king *James I.* this writ was first thought proper to be granted, not only in respect of attempts prejudicial to the king and state; (in which case the lord chancellor granted it on application from any of the principal secretaries, without showing cause, or upon such information as his lordship should think of weight;) but also in the case of interlopers in trade; great bankrupts in whose estates many subjects might be interested; in duels and other cases that did concern multitudes of the king's subjects."

But in the year 1734, Lord Chancellor *Tulbot* declared, that in his experience he never knew this writ of *ne exeat regno* granted or taken out without a bill first filed. It is true, it was originally a state-writ, but for some time, though not very long, it has been made use of in aid of the subjects for the helping of them to justice; but it ought not to be made use of where the demand is entirely at law, for there the plaintiff has bail, and he ought not to have double bail both in law and equity. 3 *P. Wms. 312.*

NEGATIVE. Is a proposition by which something is denied; also a particle of denial; as, not. An affirmative includes a negative; for where any thing is limited to be done in one form, this includes a negative on the contrary. *Plowd. 206. b. 207. a; 2 P. Wms. 19.* But, *2 contra*, a negative or prohibition does not necessarily imply an affirmation. 2 *P. Wms. 9.*

A negative cannot be proved or testified by witnesses, only an affirmative. 2 *Inst. 682.* Though a negative is incapable of being proved directly, yet indirectly it is otherwise. For in case one accuses B. to have been at York, and there to have committed a certain fact, in proof of which he produces several witnesses; here B. cannot prove that he was not at York against positive evidence that he was; but shall be allowed to make out the negative by collateral testimony, that at that very time he was at Exeter, &c. in such a house and in such a company. *Fortescue, 87.*

Negative may be implied by an affirmative, but not necessarily *2 contra*. As the saying, that a papist, unless he conforms, shall not take by devise, does not necessarily imply that if he does conform he shall take by devise, &c. 2 *P. Wms. 9.*

NEGATIVE PREGNANT, *negativa pregnans.* Is a negative, implying also an affirmative; as if a man being impleaded to have done a thing on such a day, or in such a place, denieth that he did it *modo et forma declarata*, which implieth, nevertheless, that in some sort he did it; or if a man be said to have alienated land in fee, and he saith he hath not aliened in fee, that is a negative pregnant, for

though he hath not aliened in fee, yet it may be, he hath made an estate in tail. *Terms of the Law*.

A negative pregnant is a fault in pleading, to which there must be a special demurrer, for the court will intend every pleading to be good, till the contrary doth appear. See 2 Leon. 248; Bro. Issue join. pl. 81; Huth's Mac. 53; 2 Loe. 199; Cro. Jac. 559, 560.

A negative pregnant is such a form of negative expression, as may imply or carry within it an affirmative. This is considered as a fault in pleading; and the reason why it is so considered is, that the meaning of such a form of expression is ambiguous. In trespass, for entering the plaintiff's house, the defendant pleaded that the plaintiff's daughter gave him licence to do so, and that he entered by that licence. The plaintiff replied, that he did not enter by her licence. This was considered as a negative pregnant; and it was held that the plaintiff should have traversed the entry by itself, or the licence by itself, and not both together. Cro. Jac. 87. It will be observed that this form of traverse may imply, or carry within it, that a licence was given, though the defendant did not enter by that licence. It is, therefore, in the language of pleading, said to be pregnant with that admission,—viz., that a licence was given. Bac. Abr. Pleas, &c. At the same time the licence is not expressly admitted; and the effect therefore is, to leave it in doubt, whether the plaintiff means to deny the licence, or to deny that the defendant entered by virtue of that licence. It is this ambiguity which appears to constitute the fault. 28 Hen. 6, 7; Hob. 295; *States' Prac. Reg. tit. Negative Pregnant*.

This rule, however, against a negative pregnant, appears in modern times at least to have received no very strict construction. For many cases have occurred, in which, upon various grounds of distinction from the general rule, that a negative expression has been held free from objection. See several instances in *Com. Dig. Pleader, (R. 6.)* Thus in debt on a bond, conditioned to perform the covenants in an indenture of lease, one of which covenants was, that the defendant, the lessee, would not deliver possession to any but the lessor, or such persons as should lawfully evict him; the defendant pleaded, that he did not deliver the possession to any but such as lawfully evicted him. On demurrer to this plea, it was objected that the same was ill, and a negative pregnant; and that he ought to have said, that such an one lawfully evicted him, to whom he delivered the possession; or that he did not deliver the possession to any; but the court held the plea as pursuing the words of the covenant good, being in the negative,—and that the plaintiff ought to have replied, and assigned a breach; and therefore judgment was given against him. 1 Lev. 88. *Stephen on Pleading*, 428; *1st ed.* See further, 15 Vin. Abr. title *Negative pregnant*; and title *Pleading*.

MAGNITUDE. To claim kindred. *Leg. H. 1. c. 70*; *1 L. Ind. § 7, 8*.

Negligence. Negligence may be considered, 1st, generally as a test of civil or criminal liability. A gross and wanton disregard of the interests of others is not distinguishable, either in point of moral guilt, or evil results, from a malicious intention to injure; and therefore, where a man so even his own carelessly and negligently, and without a reasonable degree of care and caution not to injure others, where injury is likely to ensue, he is usually not only civilly but even criminally responsible for the consequences. It may be regarded as an important and fundamental principle of adjudication, in cases where a loss occasioned by spoliation of fraud must fall on one, or the other of two innocent persons, that he through whose negligence or want of caution the injury has been effected should bear the loss. See 6 Loe. 76; 1 B. & C. 70.

In the next place, negligence may be regarded as a species of fault, being a breach of some undertaking, either express or implied; in this point of view its effect will at present be

considered. Where the plaintiff complains of an injury resulting from the negligence or unskilful conduct of the defendant, in the performance of some work or duty undertaken by the latter, he must, whether the action be framed in contract or in tort, prove, 1st. The contract or undertaking on the ground of which the defendant acted. 2dly, The negligence of the defendant. 3dly, The loss which has resulted from it, according to the allegations in the declaration. The degree of negligence which is essential to the action varies much in reference to circumstances. According to the soundest principles of morality, the very foundation of the law itself—"whoever undertakes another man's business, makes it his own, that is, promises to employ upon it the same care, attention, and diligence, that he would do if it were actually his own; for he knows that the business was committed to him with that expectation, and with no more than this." This principle seems to govern all cases where one man acts gratuitously for another, whether the business in which he acts does or does not import particular skill and knowledge. If the party act gratuitously, and in a situation which does not import particular skill and experience, and act *bond fide* to the best of his ability, and with as much discretion as he would exercise in his own affairs, he is not liable to an action for any loss which ensues.

Thus, where a merchant voluntarily, and without reward, undertook to enter a parcel of goods at the custom-house for the plaintiff, together with a parcel of his own, and made the entry under a wrong denomination, in consequence of which the goods were seized, it was held that having acted *bond fide*, and to the best of his knowledge, he was not liable. 1 H. Bl. 158. But it seems, that in such a case, if a ship broker or clerk in a custom-house had undertaken to enter the goods, although gratuitously, such a mistake in making the entry would have amounted to gross negligence, since his situation and employment would then have necessarily implied a complete degree of knowledge in making such entries. See Lord Loughborough's observations, 1 H. B. 162.

Although in each of the preceding cases the agent acted gratuitously, in the former he was not liable, because he acted to the best of his ability, which was all that he engaged to do; in the latter, he impliedly undertook to exert a degree of skill and knowledge which he failed to do.

Most then of the cases of this nature, if not all, resolve themselves into a question of understanding and compact. Lord Holt, in the case of *Coggs v. Bernard*, 2 Ld. Ray. 808, held, that the mandatory was liable, because in such a case a neglect is a deceit to the bailor: for when he trusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him; and a breach of trust undertaken voluntarily will be a good ground of action.

Where a party receives a reward for the performance of certain acts, he is by law answerable for any degree of neglect on his part; the payment of the money may be considered as an insurance for the due performing of what he has undertaken. See 1 H. Bl. 161. And it seems, that in general, where a person professes himself to be of a certain business, trade, or profession, and undertakes to perform an act which relates to his particular employment, an action lies for any injury resulting either from want of skill in his business or profession, or from negligence or carelessness in his conduct. 8 East, 348.

In some instances, as in the cases of carriers and innkeepers, (see these titles,) the undertaking results as a legal obligation incident to the character in which the defendant undertakes to act; and it is consequently sufficient to show that the plaintiff dealt with him in that character, without proof of any special undertaking of agreement.

The question of negligence is usually one of fact for the jury. The question may be either one of law, where the case

falls within any general and settled rule or principle; or of fact, where no such rule or principle is applicable to the particular circumstances, and where therefore the conclusion of negligence in fact must be found, or excluded by the jury.

In an action against a coach owner for negligence, proof that the coach broke down, and that the plaintiff was greatly bruised, is *prima facie* evidence that the injury arose from the unskilfulness of the driver, or the insufficiency of the coach. 2 Camp. 79. See 2 Stark. on Ev. 526; and further, *tits. Attorney, Bailment, Carriers, Innkeepers, &c.*

NEGRO. See titles *Slaves and Slave-trade.*

By the 3 & 4. Wm. 4. c. 54. (for the encouragement of British shipping and navigation) § 18. British ships trading between places in America may be navigated by British negroes.

NEIF, Fr. neif, Lat. naturalis, nativa.] A bondwoman, or she villen, born in one's house, mentioned in 9 R. 2. c. 2. *Terms de Ley.* See title *Villein.*

NEIFTY, Nativitas.] There was an ancient writ called *Writ of Neifty*, whereby the lord claimed such a woman for his Neif; now out of use. See title *Villein.*

NEIGHBOUR, vicinus.] One who dwells near another. See *Vicinage; Jury.*

NE INJUSTE VEXES. A writ founded on *Magna Carta*, c. 10, that lay for a tenant distrained by his lord, for more services than he ought to perform; and it was a prohibition to the lord not unjustly to distrain or vex his tenant: in a special use, it was where the tenant had prejudiced himself, by doing greater services, or paying more rent, without constraint, than he needed; for in that case, by reason of the lord's seisin, the tenant could not avoid it by avowry, but was driven to his writ for remedy. *Reg. Orig. 4; F. N. B. 10.* And if the lord distrained to do other services, or to pay other rent than due, after the prohibition delivered unto him, then the tenant should have an attachment against the lord, &c. and when the lord came thereon, the tenant should count against him, and put himself upon the grand assise, &c. whereupon judgment should be given. *New Nat. Br. 22.*

This writ was one of the remedies which the ancient law provided to remedy the oppression of lords; though it was of the prohibitory kind, yet it was in the nature of a writ of right. *Booth, 126.* It lay where tenant in fee simple and his ancestors had held of the lord by certain services, and the lord had obtained seisin of more or greater service, by the inadvertent payment or performance of them by the tenant himself; there the tenant could not in an avowry avoid the lord's possessory right, because of the seisin given by his own hands; but was driven to this writ to divest the lord's possession, and to establish the mere right of property, by ascertaining the services, and reducing them to their proper standard. 3 Comm. c. 15. p. 234.

The writ was always ancestral, where the tenant and his ancestors had holden of the lord and his ancestors; and the lord had encroached any rent, &c. A feoffee could not avoid seisin of rent had by encroachment of his feoffor, nor have the writ *ne injuste vexes*; also a man could not have a writ of *ne injuste vexes* against the grantee of the seignior. *Mich. 18 Ed. 2; 10 Ed. 3.* Tenant in tail might not have this writ; but should plead and show the matter, and not to be estopped by the payment of his ancestors, &c.; *Trin. 20 Ed. 3*; for he might avoid such seisin of the lord obtained from the payment of his ancestors, by plea to an avowry in replevin. *F. N. B. 11; 2 Inst. 21.*

This writ has been long laid aside, as almost every question that arose, where it was formerly in use, might be determined in an action of trespass. It is now abolished by the 3 & 4 W. 4. c. 27. s. 35.

The following was the form of the writ of *ne injuste vexes* :—

George the Third, &c. To A. B. greeting: We command you, that you do not vex or trouble C. D., or suffer him to be vexed, for his freehold messuage, &c. which he holds of you, in, &c. Nor in any manner exact, or permit to be exacted

from him, services which therefore he ought not to do, (or rent which he owes not,) nor has been accustomed, &c.

NEMINE CONTRADICENTE. Words used to signify the unanimous consent of the members of the House of Commons in parliament to a vote or resolution. The term *Nemine dissentiente* is, in the same manner, applied in the House of Peers.

NE RECIPIATUR. A caveat against the receiving and setting down a cause to be tried; that is, where the cause is not entered in due time. See *Trial.*

NE UNQUES EXECUTOR, or ADMINISTRATOR. A plea whereby a defendant denies his being executor or administrator. It does not deny the cause of action, but only that the defendant is the personal representative of the testator or intestate. 1 Saund. 207, a.

NE UNQUES ACCOUPLE, in loyal matrimonio.] A plea, whereby the tenant in an action of dower, under *nihil habet*, controverts the validity of the demandant's marriage with the person out of whose lands she claims dower. Co. Ent. 180, a; Com. Dig. Pleader, (2 Y 10.)

To this plea the demandant must reply, that she was accoupled in lawful matrimony at B., in such a diocese, upon which a writ issues to the bishop of that diocese, requiring him to certify the fact to the court. Co. Ent. 180, a; Rast. Ent. 228, b; Dyer 313 a, 308, b; 2 H. Bl. 145.

NE UNQUES SEISIE QUE DOWER. The general issue in an action of dower under *nihil habet*. Upon this plea the jury are only to inquire whether the husband was ever seised of a dowerable estate; and if they find the affirmative, judgment must be for the demandant, although the estate has been defeated by title paramount. Rast. Ent. 230, a; Co. Ent. 176, a; Co. Lit. 31, b; Dyer, 41, a; 1 Leon. 66. But see *Winch, 77.*

NE VICECOMES, colore mandati Regis, quoniam amoveat à possessione Ecclesie minus justè. *Reg. Orig. 61.*

NEW ASSIGNMENT. In many actions the plaintiff who hath alleged in his declaration a general wrong, may, in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh, with all its specific circumstances, in such a manner as clearly to ascertain and identify it consistently with his general complaint; which is called a new or novel assignment. 3 Comm. 311. See *Pleading.*

The following perspicuous account of the nature and object of a new assignment is taken from Serjeant Stephens's valuable treatise on pleading :—

A new assignment is a method of pleading, to which the plaintiff, in such cases, is obliged to resort in his replication for the purpose of settling the defendant's right. An example shall be given in an action for assault and battery. A case may occur, in which the plaintiff has been twice assaulted by the defendant; and one of these assaults may have been justifiable, being committed in self defence, while the other may have been committed without any legal excuse. Supposing the plaintiff to bring his action for the latter, it will be found, by referring to the precedents of declaration for assault and battery, that the statement is so general, as not to indicate to which of the two assaults the plaintiff means to refer. The defendant may, therefore, suppose, or affect to suppose, that the first is the assault intended, and will plead *son assault demesne*, (see that title.) This plea the plaintiff cannot safely traverse; because, as an assault was in fact committed by the defendant, under the circumstances & excuse here alleged, the defendant would have a right, upon the issue joined upon such traverse, to prove those circumstances, and to presume such assault, and no other, as the cause of action. And it is evidently reasonable that he should have this right; for, if the plaintiff were, at the trial of the issue, to be allowed to set up a different assault than the defendant might suffer by a mistake, into which he had been led by the generality of the plaintiff's declaration. The

plaintiff, therefore, in the case supposed, not being able safely to traverse, and having no ground for demurrer, or for pleading in confession and avoidance, has no course but, by a new pleading, to correct the mistake occasioned by the generality of the declaration, and to declare that he brought his action, not for the first, but for the second assault, and this is called a new assignment.

The example that has been given is a case where the defendant, in his plea, wholly mistakes the subject of complaint. But it may also happen, that the plea correctly applies to part of the injuries; while, owing to a misapprehension occasioned by the generality of the statement in the declaration, it fails to cover the whole. Thus, in trespass *quare clausum fregit*, for repeated trespasses, the declaration usually states, that the defendant, on divers days and times, before the commencement of the suit, broke and entered the plaintiff's close, and trod down the soil, &c., without setting forth more specifically in what parts of the close, or on what occasions, the defendant trespassed. Now the case may be, that the defendant claims a right of way over a certain part of the close; and, in exercise of that right, has repeatedly entered, and walked over it; but has also entered and trod down the soil, &c., on other occasions, and in parts out of the supposed right of way; and the plaintiff, not admitting the right claimed, may have intended to point this action both to the one set of trespasses and to the other. But from the generality of the declaration, the defendant is entitled to suppose that it refers only to his entering and walking in the line of way. He may therefore, in his plea, allege, as a complete answer to the whole complaint, that he has a right of way by grant, &c., over the said close; and if he does this, and the plaintiff replies himself, in his replication, to a traverse of that plea, or if the defendant at the trial proves a right of way as alleged, the plaintiff would be precluded (upon the principle already explained, from giving evidence of any trespasses committed out of the line or tract in which the defendant should thus appear entitled to pass. His course of pleading in such a case, therefore, is, both to traverse the plea, and also to new assign, by alleging that he brought his action, not only for the trespasses supposed by the defendant, but for others, committed on other occasions, and in other parts of the close, out of the supposed way, which is usually called a new assignment, *extra viam*; or if he means to admit the right of way, he may new assign simply without the traverse. See examples of a new assignment, *extra viam*, 9 *Went.* 323, 326.

As the object of a new assignment is to correct a mistake occasioned by the generality of the declaration, it always occurs in answer to a plea; and is, therefore, in the nature of a replication. It is not used in any other part of the pleadings, because the statements subsequent to the declaration are not in that nature, such, when properly framed, to give rise to the kind of mistake which requires to be corrected by a new assignment. *See the Next Assignment.*

A new assignment chiefly occurs in an action of trespass; but it is generally allowed in all actions in which the declaration makes the reason of the practice applicable.

Several new assignments may occur in the course of the same series of pleading. Thus, in the example given above, if it be supposed that three different assaults had been committed, two of which were justifiable, the defendant might plead, as above, to the declaration; and then, by way of new assignment, he might again justify, in the same manner, another assault; upon which, it would become necessary for the plaintiff to new assign a third; and this is required by the same principle by which the first new assignment was required. 1 *Saund.* 299 c.

A new assignment is said to be in the nature of a new declaration. *Bac. Abr. Trespass*, (I.), 4, 2; 1 *Saund.* 299, c. It seems, however, to be more properly considered as a re-

petition of the declaration, differing only in this, that it distinguishes the true ground of complaint, as being different from that which is covered by the plea. Being in the nature of a new, or repeated declaration, it is consequently to be framed with as much certainty or specification of circumstance as the declaration itself. *Bac. Abr. ubi supra*. In some cases, indeed, it should be even more particular; so as to avoid the necessity of another new assignment.

A new assignment was formerly of frequent occurrence in an action of trespass *quare clausum fregit*. In that action it was, until recently, allowable for the plaintiff to declare for breaking his close in a certain parish, without naming, or otherwise describing the close. See 2 *Bl.* 1089. If the defendant happened to have any freehold land in the same parish, he might be supposed to mistake the close in question for his own; and might, therefore, plead what is called the *common bar*, viz., that the close in which the trespass was committed was his own freehold. And then, upon the principle already explained, it became necessary for the plaintiff to new assign; alleging, that he brought his action in respect of a different close from that claimed by the defendant as his freehold. In order, however, to avoid the necessity of a new assignment, it has long been the practice to name or describe the close in the declaration; and now, by the general rules, *H. T. & W. 4.* the close must be designated in the declaration by name, or abutments, or other description; in failure whereof, the defendant may demur specially. See further *Pleading, Trespass*.

NEWCASTLE UPON TYNE. No person shall ship, load, or unload any goods to be sold, into or from ships at any place on the river Tyne, but at the town of Newcastle, on pain to forfeit the goods; and none shall raise any wear in the haven there, between certain places on the said river, &c. *Stat. 21 H. 8. c. 18.*

NEW FOREST, Hampshire. See 39 & 40 G. 3. c. 86; & 41 G. 3. (U. K.) c. 108, for the preservation of timber there, and for ascertaining the bounds of the forest.

NEWFOUNDLAND. See *Fisheries, Plantations*.

NEWPORT, in the Isle of Wight. The poll for a knight of the shire is to be held at Newport for the whole of the island, which is now severed from Hampshire. See 2 *W. 4. c. 45.* § 16.

NEW RIVER. See *Rivers*.

NEWS. Spreading false news, to make discord between the king and nobility, or concerning any great man of the realm, is punishable at common law with fine and imprisonment; which is confirmed by *Westm. 1. 3 E. 1. c. 34*; 2 *R. 3. st. 1. c. 5*; 12 *R. 2. c. 11*; 2 *Inst.* 226; 3 *Inst.* 198; 4 *Comm. c. 11. p. 149.* See *False News*.

NEWSPAPERS. The earliest attempt at periodical literature was made, in England, in the reign of Elizabeth. It was in the shape of a pamphlet, called the "English Mercury;" and its first number, dated 1588, is still preserved in the British Museum. No newspapers, however, appeared in England, in single sheets of paper, until many years afterwards. The first newspaper, called "The Public Intelligencer," was published by Sir Roger L'Estrange, on the 31st of August, 1663. Periodical pamphlets, which had become fashionable in the reign of Charles I., were more rare in the reign of James II. The rebellion in 1641 gave rise to a great number of tracts, filled with violent appeals to the public, many of which bore the title of diurnal occurrences of parliament. The first gazette in England was published at Oxford, on the 7th of November, 1665; the court being then held there. On the removal of the court to London, the title was altered to "The London Gazette." The "Orange Intelligencer" was the third newspaper published, and the first after the Revolution in 1688. This latter continued to be the only daily newspaper in England for some years; but, in 1690, there appears to have been nine London newspapers published weekly. In Queen Anne's reign, (in 1709), the number of these was increased to eighteen; but still there

continued to be but one daily paper, which was then called "The London Courant." In the reign of George I., the number was three daily, six weekly, and ten published three times in the week.

In 1833, the number of newspapers in the United Kingdom amounted to 369; whereof 248 were published in England, 46 in Scotland, and 75 in Ireland.

A variety of statutory regulations have been made with respect to newspapers, for the purpose of securing to government the heavy duties with which they are charged, and for facilitating the proof of their publication.

By the 5 G. 3. c. 46. the persons applying for stamped paper for newspapers, were first to give security to his majesty for the payment of the advertisement duties.

By the 29 G. 3. c. 50. the duties on newspapers were put under the management of the commissioners of stamps; and (§ 10) the proprietors of such papers were required to join in the security to be given under the above act.

By the 38 G. 3. c. 78. no person is to print or publish a newspaper until an affidavit be delivered at the stamp office, specifying the names and abode of the printer, publisher, and of the proprietors, if the number, exclusive of the printer and publisher, do not exceed two; and in case they exceed that number, then of two of such proprietors, and also their proportional shares in the paper, with a description of the printing house and the title of such paper. Printing, &c., a newspaper without such an affidavit renders the party liable to a penalty of 500*l*.

§ 10. requires the names of the printers and publishers of the paper to be printed in some part thereof, under a penalty of 100*l*.

By § 11, after production of the affidavit, or a certified copy thereof, and of a newspaper intituled as that mentioned in such affidavit, it shall not be necessary to prove that such paper was purchased of the defendants or their servants.

§ 17. A copy of every newspaper is to be delivered within six days after publication to the commissioners of stamps, on a penalty of 100*l*.

By the 60 G. 3. & 1 G. 4. c. 9. (passed to restrain the publication of blasphemous and seditious libels,) all pamphlets, and papers containing public news, intelligence, or occurrences, or remarks thereon, or upon any matter of church or state, printed in any part of the United Kingdom, and published periodically in parts or numbers, at intervals not exceeding twenty-six days, where the same shall not exceed two sheets, and be published for less than sixpence, exclusive of the duty thereon imposed, shall be deemed newspapers, within the acts relating to newspapers.

By § 8. no person shall print or publish newspapers or pamphlets containing public news, &c., without entering into a recognizance of 300*l*., if such papers, &c., are printed in London, or Westminster, or in Edinburgh, or in Dublin; or giving a bond in 200*l*. (or 300*l*., if within twenty miles of London) with two or three sufficient sureties, where the papers, &c. are printed elsewhere, for securing fines upon conviction for blasphemous or seditious libels.

By the 1 W. 4. c. 73. the amount of recognizances to be given under the above act, by principals and their sureties, is increased to 400*l*., and of bonds, to 300*l*.; and damages due for any libel may be recovered on such recognizances, &c.

By 6 G. 4. c. 119. newspapers, which before could not be contained on sheets of paper exceeding thirty-two inches in length, and twenty-two inches in breadth, may be printed on paper of any size.

By the 3 & 4 W. 4. c. 23. the duties on advertisements were considerably reduced; but no alterations has been made in the amount of the stamps required on newspapers, which are regulated by the 55 G. 3. c. 184.

For the conveyance of newspapers by post, see *Post Office*.
See further, *Advertisements, Libel, Pamphlets, Stamps*.

NEW STYLE. See *Year*.

NEW TRIAL. Judgments are often suspended by granting new trials. The causes of suspending the judgment by granting a new trial, are at present wholly extrinsic, arising from matter foreign to or *dehors* the record. See *Trial*.

NEXT OF KIN. See *Descent*; *Executor*, III.; and V 8.

NICOLE. Anciently used for Lincoln. 7 E. 1; 30 Ed. 1; *et sæpe alibi*. *Cowell*.

NIDERLING, NIDERING, or NITHING. A vile, base person, or sluggard. *Will. of Malmsb. p. 121*; *Mat. Par. Ann. 1088* Chicken-hearted. See *Spelman in voc.*

NIENT COMPRISE. Is an exception taken to a petition, because the thing desired is not contained in that deed or proceeding whereon the petition is founded; for example, one desires of the court wherein a recovery is had of lands, &c. to be put in possession of a house, formerly among the lands adjudged unto him; to which the adverse party pleads, that this is not to be granted, by reason this house is not comprised amongst the lands and houses for which he had judgment. *New Book Entries*.

NIENT DEDIRE. Signifies to suffer judgment to be had against one, by not denying or opposing it, i. e. by default.

When a fair and impartial trial cannot be had in the county where the venue is laid, the court, on an affidavit of the circumstances, will change it in transitory actions; or in local actions, will give leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in an adjoining county. 1 *Tidd's Pr. 655*, 8th ed.

NIGER LIBER. The black book or register in the Exchequer is called by this name. Several chartularies of abbeys, cathedrals, &c. are distinguished by a like appellation.

NIGHT. Is when it is so dark that the countenance of a man cannot be discerned; and by some opinions, burglary in the night may be committed at any time after sun-set, and before rising. *H. P. C. 79*; 3 *Inst. 63*; 1 *Hawk. P. C.* See *Noctanter*; *Burglary*.

Under the act against poaching by night (9 G. 4. c. 69. § 12.) the night is to be considered to commence at the expiration of the first hour after sun-set, and to conclude at the beginning of the last hour before sun-rise.

NIGHTWALKERS. Are such persons as sleep by day, and walk by night, being oftentimes pilferers, or disturbers of the peace. 5 Ed. 3. c. 14.

Constables are authorised by the common law to arrest nightwalkers, and suspicious persons, &c. Watchmen may also arrest nightwalkers, and hold them until the morning; and it is said, that a private person may arrest any suspicious night-walker, and detain him till he give a good account of himself. 2 *Hawk. P. C.* Watchmen, either those appointed by the statute of *Winchester*, 13 E. 1. c. 4, to keep watch and ward in all towns from sun-setting till sun-rising, or such as are mere assistants to the constable, may, *virtute officii*, arrest all offenders, and particularly nightwalkers, and commit them to custody till morning. 4 *Comm. c. 31. p. 292*; cites 2 *Hawk. P. C. 88—96*. One may be bound to the good behaviour for being a nightwalker; and common nightwalkers and haunters of bawdy-houses are to be indicted before justices of peace, &c. 1 *Hawk. P. C.*; 2 *Hawk. P. C.*; *Latch. 173 Poph. 280*.

By the 5 G. 4. c. 83. all provisions theretofore made, relative to idle and disorderly persons, rogues and vagabonds, incorrigible rogues, or other vagrants, in England, are repealed. The provisions of this statute will be found under tit. *Vagrants*.

NIHIL CAPIAT PER BREVE, or *per Billam*. Is the judgment given against the plaintiff in an action, either in bar of his action, or in abatement of his writ or bill, &c. *Co. Litt. 363*.

Proceedings by bill are now abolished. See *Process*.

NIHIL, or NIL DEBET. Was the proper form of the general issue, not only in debt or simple contract, but in all

other actions of debt, not founded on a deed or specialty. And an action was not considered as founded on a deed or specialty, so as to require a plea of *non est factum*, if the deed were mentioned in the declaration only as introductory to some other main cause of action. Therefore *nil debet* was a good plea in debt for rent, upon an indenture, or in debt for an escape, or in debt upon a devastavit. 1 *Tidd*, 701, 8th ed.

There was hardly any matter of defence to an action of debt, to which the plea of *nil debet* might not be applied; because almost all defences resolved themselves into a denial of the debt. See *Stephen on Pleading*, 194, 1st ed.

Now, by the general rules, *H. T. 4. W. 4.* the plea of *nil debet* is no longer allowed in any action.

NIHIL, or NIL DICIT. Is a failing by the defendant to put in an answer to the plaintiff by the day assigned; which being omitted, judgment is had against him of course, as saying nothing why it should not. See *Judgment*.

NIHIL, or NIL HABUIT IN TENEMENTIS. A plea to be pleaded in an action of debt only, brought by a lessor against lessee for years, or at will, without deed. 2 *Lil. Abr.* 214. In debt for rent upon an indenture of lease, *nil habuit in tenementis* may not be pleaded; because it is an estoppel, and a general demurrer will serve. 3 *Lev.* 146. But if debt is brought for rent upon a deed poll, the defendant may plead this plea; and where a defendant pleaded *nil habuit in tenementis tempore dimissionis*, the plaintiff replied, *quod habuit in tenementis*, &c. and verdict and judgment was had for the plaintiff; whereupon writ of error being brought, it was assigned for error, that the replication was not good, for he ought to have shown what estate he then had; and of that opinion was the court; and it had been bad upon demurrer; but being after a verdict, it is good. *Cro. Jac.* 312. If a less estate is found than the plaintiff pleads in his reply to a *nil habuit*, &c. so as it be sufficient to entitle the plaintiff to make a lease, it is good enough. 10 *W. 3.* *Nil habuit in tenementis* cannot be given in evidence where the plaintiff hath been in possession. *Ld. Raym.* 746.

But though *nil habuit in tenementis* is a bad plea, when demurred to, yet where the declaration merely states *quod cum dimissionet*, without stating an indenture, it is, *prima facie*, a good plea, till the plaintiff reply to the indenture, and rely on the estoppel; and if the plaintiff replies, that he had a sufficient estate in the premises, he loses the benefit of the estoppel. 6 *T. R.* 62; 1 *Will. Saund.* 276, b. And if the lessor become bankrupt, the assignees have the benefit of the estoppel, if the demise is by indenture. 7 *T. R.* 537: and see *Bac. Ab. tit. Pleas, G. 3. p. 253*, (7th ed.) In assumpsit for use and occupation, *nil habuit* is a bad plea. 1 *Wils.* 314. See *Covenant, Pleading*.

NIHILS, or NICHILS. Were issues which the sheriff that was apposed in the Exchequer said were nothing worth, and illeivable, for the insufficiency of the parties from whom due. Accounts of *nihil* should be put out of the Exchequer. 5 *R. 2. c. 13*.

But now, by the 3 & 4 *W. 4. c. 99.* sheriffs are no longer to be apposed, or to pass their accounts in the Exchequer; but these are to be audited by the commissioners for auditing the public accounts.

NISI PRIUS. The commission to justices of assize; so called from a judicial writ of *distringas*, whereby the sheriff is commanded to distrain the empannelled jury to appear at Westminster before the justices at a certain day, in the following term, to try some cause. *Nisi prius justic. domini regis ad assisas capiend. venerint*, viz. unless the justices come before that day to such a place, &c. 2 *Inst. 1. c. 1. Inst.* 169.

A writ of *nisi prius* is where an issue is joined; then there goes a venire to summon the jury to appear at a day in court; and upon the return of the venire, with the panel of the jurors' names, the record of *nisi prius* is made up and sealed, and there goes forth the writ of *distringas* to have the jurors in

court, *Nisi prius justic. venerint*, &c. such a day in such a county, to try the issue joined between the parties. 2 *Lil.* 215.

All civil causes at issue in the courts at Westminster, are brought down in the two issuable vacations before the day of appearance appointed for the jury above, into the county where the action was laid to be tried there, viz. at the assizes; and then, upon the return of the verdict given by the jury to the court above, the next term, the judges there give judgment for the party for whom the verdict is found; and these trials by *nisi prius* are for the ease of the county, the parties, jurors, and witnesses, by saving them the charge and trouble of coming to Westminster; but in matters of great weight and difficulty, the judges above, upon motion, will retain causes to be tried there; though laid in the country, and then the juries and witnesses in such causes must come up to the courts at Westminster for trial at bar; and the king hath his election to try his suits at the bar, or in the county, &c. *Wood's Inst.* 479.

The statute of *Westm. 2. 13 Ed. 1. st. 1. c. 30.* having ordained, "that all pleas in either bench, which require only an easy examination, shall be determined in the country, before justices of assize, by virtue of the writ appointed by that statute, commonly called the writ of *nisi prius*; it has been held, that an issue joined in the King's Bench upon an indictment or appeal (now abolished,) whether for treason or felony, or a crime of an inferior nature, committed in a different county from that wherein the court sits, may be tried in the proper county by writ of *nisi prius*: but as the king is not expressly named in this statute, and it is a general rule that he shall not be bound except named, it is said, where the king is party, a *nisi prius* ought not to be granted without his special warrant, or the assent of his attorney; though the court may grant it in appeals in the same manner as any other actions. 2 *Inst.* 424; 4 *Inst.* 160; *Dyer* 46; 2 *Hawk P. C. c. 42. § 2, 3*.

Justices of *nisi prius* have power to record nonsuits and defaults in the country at the days assigned; and are to report them at the bench, &c. And are to hear and determine conspiracy, confederacy, champerty, &c. 4 *Ed. 3. c. 11*.

Nisi prius was granted in attainds (abolished by 6 *G. 4. c. 50. § 60*); but that which cannot be determined before the justices upon the *nisi prius*, shall be adjourned to the bench where they are justices; and the justices before whom inquisitions, inquests, and juries, shall be taken by the king's writ of *nisi prius*, are empowered to give judgment in felony and treason, &c. and to award execution by force of their judgment. 5 *Ed. 3. c. 11*; 14 *Hen. 6. c. 1*.

It was held by Hale, that the justices of *nisi prius* have not any original power of determining felony, without special commission for that purpose; and by virtue of 27 *Ed. 1. st. 1. c. 3*; 14 *H. 6. c. 1*, they have authority to determine such felonies only as are sent down to be tried before them; in which case, on removal of the indictments, they may proceed to trial and judgment as if justices of gaol-delivery. 1 *H. 1. Hist. P. C. 1*.

The sessions of the judges at *nisi prius* are chiefly confined to criminal causes, those in London and Middlesex being regulated by 18 *Edw. 1. c. 12*; 12 *Geo. 1. c. 31*; 24 *Geo. 2. c. 18*; 1 *G. 3. c. 1*, and 1 *Wm. 4. c. 70*; and those at the assizes by the statute of Westminster 2, 13 *Edw. 1. c. 30*; 27 *Edw. 1. c. 4*; 12 *Edw. 2. st. 1. c. 3*; and 14 *Edw. 3. st. 1. c. 16*.

By the construction of these statutes, the Court of King's Bench may grant a writ of *nisi prius* as well in cases of treason and felony, as in other common cases. 2 *Hawk. c. 3. § 7; c. 42. § 2*. Yet, inasmuch as the king is not expressly named in the statute of *Westm. 2*, it seems to have been generally holden, that whenever the king is a party, it is irregular to grant a trial by *nisi prius* without his special warrant, or the assent of the attorney-general. 6 *Mod.* 246; 2 *Hawk. c. 42. § 3*. And in one case where, on an indict-

ment for barratry against a justice of peace, the attorney-general himself moved for a trial at *nisi prius*, the court (thinking it was a cause that required great examination) refused the motion, unless the king, by his letters, should signify his pleasure that the indictment should be so tried, which was afterwards so done. *Cro. Car.* 348. So in another case, where the attorney-general opposed the motion of a defendant for a trial at bar, the court said, that they were not satisfied that the attorney-general ought to have a *nisi prius*, (where a trial at bar is reasonable), without consent. *6 Mod.* 123.

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By virtue of that statute, in case any one having right to approve waste ground, &c. raised and levied a ditch or hedge, and it was thrown down in the night-time, and it could not be known by a verdict of the assize or a jury by whom; or if the neighbouring towns could not indict such as are guilty, they were liable to be distrained to make again the hedge or ditch at their own costs, and to answer damages. *2 Inst.* 476. And the *noctanter* writ thereupon was directed to the sheriff of the county to make inquisition relative thereto. On the return of this writ by the sheriff, that the same was found by inquisition, and that the jury were ignorant who did it, the return being filed in the Crown-office, there went out a writ of inquiry of damages, and a *distringas* to the sheriff to distrain the circumadjacent vills, to repair the hedges and fences so destroyed at their own charge, and also to restore the damages, &c. See *2 Lil. Abr.* 217.

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A *nolle prosequi* is an acknowledgment or agreement by the plaintiff, that he will not further prosecute his suit as to the whole or a part of the cause of action; or where there are several defendants, against some or one of them; and it is in nature of a *retraxit* operating as a release or perpetual bar. *Tidd, Pract.* cites *Cro. Car.* 239, 243; *2 Rol. Ab.* 100. *Hard.* 153; *8 Co.* 58; *Cro. Jac.* 211. But see *Ld. Raym.* 599, where there are other defendants.

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If there be a demurrer to part, and an issue upon other part, and the plaintiff prevails upon the demurrer, it was in one case holden, that without a *nolle prosequi* as to the issue, he cannot have a writ of inquiry on the demurrer; because on the trial of the issue, the same jury will ascertain the damages for that part which is demurred to. *1 Salk.* 219, 12 *Mod.* 378. But in a subsequent case, where the declaration consisted of four counts, to three of which there was a plea of *non assumptum*, and a demurrer to the fourth; and after judgment on the demurrer, the plaintiff took out a writ of inquiry and executed it; this was moved to be set aside, there being no *nolle prosequi* on the roll; and it was insisted that the plaintiff ought to take out a *venire*, as well to try the issue as to inquire of the damages upon the demurrer; *sed per curiam* that is, indeed, the course where the issues are carried down

trial before the demurrer is determined, and in that case the jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover all he goes for upon that count, there is no reason why we should force him to carry down the record to *nil prius*, and as to the want of a *nolle prosequi* upon the roll, he may supply that when he comes to enter the final judgment; if not, you will have the advantage of it upon a writ of error. The judgment upon the inquiry must stand. 1 *Str.* 532; 8 *Mod.* 108.

In trespass or other action for a wrong, against several defendants, the plaintiff may, at any time before final judgment, enter a *nolle prosequi* as to one defendant, and proceed against the others, 1 *Hob.* 70; *Cro. Car.* 259, 243; 2 *Roll. Abr.* 100; 2 *Salk.* 55, u, 7; 3 *Salk.* 244, 5; 1 *Wils.* 306; so in *assumpsit*, or other action upon contract, against several defendants, one of whom pleads bankruptcy, or other matter in his personal discharge, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the other defendants. 1 *Wils.* 89. But a *nolle prosequi* cannot be entered as to one defendant after final judgment against the others. 2 *Salk.* 455.

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Thus in *assumpsit* against two, where one pleads *non assumpsit* and a plea of bankruptcy, and the plaintiff enters a *nolle prosequi* as to him, as to the several matters pleaded by him, and the other defendant pleads *non assumpsit*, the latter is not discharged by the *nolle prosequi*. 2 *M. & S.* 114.

Where, in an action against several defendants, the jury by mistake have assessed several damages, the plaintiff may cure it by entering a *nolle prosequi* as to one of the defendants, taking judgment against the others. 11 *Co.* 1, *Cro. Car.* 215; *Carth.* 19.

Where there are several defendants, and they severally plead, whereupon issue is joined, the plaintiff may enter a *nolle prosequi* as to one defendant at any time before the record is sent down, so to be tried at *nil prius*. 2 *Roll. Abr.* 100; *Salk.* 157. See *Ansaut*.

A plaintiff comes by his attorney *hic in curiam et fatetur se ulterius nolle prosequi*; whereupon judgment was given that the defendant *eat sine die*, and no morement upon the plaintiff; this was held erroneous; for the plaintiff ought also to be awarded. 3 *Rep.* 58. But later determinations have settled that in entering a *nolle prosequi* the plaintiff need not be amerced *pro falso clamore*, but it is sufficient that the defendant be put without day. 1 *Str.* 574.

Where there are two defendants, and one pleads not guilty, and the other another plea; if on demurrer there is judgment for the plaintiff against one on the demurrer, and a *nolle prosequi* for the other, there it ought to be *eat sine die*, or it is ill, and the entry of *quod eat sine die* is a discharge to the defendant. *Cro. Jac.* 439; *Hob.* 180.

With respect to criminal proceedings, the king may, by his attorney-general, enter a *nolle prosequi* on an information, but it shall not stop the proceedings of the informer. 1 *Leon.* 119.

But the clerk of the crown cannot enter a *nolle prosequi* on an indictment without leave of the attorney-general. 1 *Ed. Raym.* 721. Nor can an agreement between the parties for this purpose be effected, unless the attorney-general actually enters a *nolle prosequi*. 2 *Wils.* 341; 5 *East.* 302; 2 *Bing.* 258.

By the 3 & 4 *Wm. 4. c. 42. § 32.* where any one or more of several defendants shall have a *nolle prosequi* entered as to him or them, or upon a trial a verdict shall pass for him or them, every such person shall be adjudged to pay his costs, unless the judge, in case of a trial, shall certify on the record there was reasonable cause for making him a defendant.

And by § 32, where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to his costs.

NOMENCLATOR. One who opens the etymologies of names, interpreted *Thesaurarius*. *Spelman*; *Cowell*.

NOMINATION, *nominatio*.] Is the power (by virtue of some manor or otherwise) of appointing a clerk to a patron of a benefice, by him to be presented to the ordinary. The right of nomination a man may have by deed; and in such case, if the patron refuse to present the nominee, or presents another, he may bring a *quare impedit*; for he who is to present, is only an instrument to him who nominates; and the person who hath the nomination is in effect the patron of the church. *Plowd.* 529; *Moor.* 47. A nominator must appoint his clerk within six months after avoidance; if he doth not, and the patron presents his clerk before the bishop hath taken any benefit of the lapse, he is obliged to admit that clerk. But where one hath the nomination, and another the presentation, if the right of presentation should afterwards come to the king, it is said he who hath the nomination will be entitled to the presentation also; because the king, who should present, cannot be subservient to the nominator, being contrary to his dignity. *Hughes's Par. Lam.* 76, 77. Right of nomination may be forfeited to the crown as well as presentation, where the nominator corruptly agrees to nominate, within the statute of *Simony*, &c. See *Admanson*, *Parson*.

NOMINA VILLARUM. Edward II. in the 9th year of his reign, sent his letters to every sheriff in England, requiring an exact account and return into the Exchequer of the names of all the villages, and possessors thereof, in every county, which being done accordingly, the returns of the sheriffs all joined together are called *nomina villarum*, still remaining in the Exchequer, anno 9 *Ed.* 2.

NOMINE PENÆ. A penalty incurred for not paying rent, &c. at the day appointed by the lease or agreement for payment thereof. 2 *Lil.* 221.

This *nomine penæ* is incident to the rent, and will descend to the heir; if an annual rent, therefore, be devised, the *nomine penæ* passes as incident thereto, and the devisee may have an action of debt for the arrears. *Co. Lit.* 61 b; *Cro. Eliz.* 383; *Lutw.* 1156.

If rent is reserved, and there is a *nomine penæ* on the non-payment of it, and the rent be behind and unpaid, there must be an actual demand thereof made before the grantee of the rent can distrain for it; the *nomine penæ* being of the same nature as the rent, and issuing out of the land out of which the rent doth issue. *Hob.* 82, 133. And where a rent-charge was granted for years, with a *nomine penæ* and clause of distress, if it was not paid on the day; on the rent's being behind, and the term expired, the court was moved that the grantee might distrain for the *nomine penæ*; but it was held that he could not, because the *nomine penæ* depended on the rent, and the distress was gone for that, and by consequence for the other. 2 *Nels. Abr.* 1182. See 8 *Ann.* c. 14.

When any sum *nomine penæ* is to be forfeited for non-payment of the rent at the time, &c. the demand of the rent ought to be precisely at the day, in respect of the penalty; and debt will not lie on a *nomine penæ* without a demand. 7 *Rep.* 28; *Cro. Eliz.* 383; *Style*, 4. If there is a *nomine penæ* of such a sum for every day after rent becomes due, it has been a question whether there must be a demand for every day's *nomine penæ*, or one demand for many days. And by the better opinion it hath been holden, that for every day there ought to be a demand; and that one will not be sufficient for the whole; but where a *nomine penæ* of forty shillings was limited *quolibet die proximo* the feast-day on which the rent ought to be paid, it was adjudged that there was but one forty shillings forfeited, because the word *proximo* must relate to the very next day following the rent day; so likewise when the rent became due and unpaid at the next rent day after that, and so on. *Palm.* 207; 2 *Nels.* 1182.

This penalty, it should seem, is waived by an acceptance of the rent. *Comp.* 247.

An assignee is chargeable with a *nomine penæ* incurred

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A plaintiff comes by his attorney *hic in curiam et fatetur ut ulterius nolle prosequi*; whereupon judgment was given that the defendant *eat sine die*, and no amercement upon the plaintiff; this was held erroneous; for the plaintiff ought not to be amerced. 8 *Rep.* 88. But later determinations are settled that in entering a *nolle prosequi* the plaintiff need not be amerced *pro falso clamore*, but it is sufficient that the defendant be put without day. 1 *Str.* 574.

Where there are two defendants, and one pleads not guilty, and the other another plea, if on demurrer there is judgment for the plaintiff against one on the demurrer, and a *nolle prosequi* for the other, there it ought to be *eat sine die*, or it shall, and the entry of *quod eat sine die* is a discharge to the defendant. *Cro. Jac.* 459; *Hob.* 180.

With respect to criminal proceedings, the king may, by his attorney-general, enter a *nolle prosequi* out of an information; but shall not stop the proceedings of the informer. 1 *Leon.* 1. But the clerk of the crown cannot enter a *nolle prosequi* on an indictment without leave of the attorney-general. 1 *Ed. Ryym.* 721. Nor can an agreement between the parties for this purpose be effected, unless the attorney-general actually enters a *nolle prosequi*. 2 *Wils.* 341; 5 *East.* 302; 2 *B. & C.* 258.

By the 1 & 2 H. 6, c. 12, § 12, where any one or more of several defendants shall have a *nolle prosequi* entered as to him or them, or upon a trial a verdict shall pass for him or them, every such person shall have judgment for his costs, and the judge, in case of a trial, shall certify on the record that was a reasonable cause for making him a defendant.

And by § 33, where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to his costs.

NOMENCLATOR. One who opens the etymologies of names, interpreted *Thesaurarius*. *Spelman*; *Cowell*.

NOMINATION, nominatio. Is the power (by virtue of some manor or otherwise) of appointing a clerk to a patron of a benefice, by him to be presented to the ordinary. The right of nomination a man may have by deed; and in such case, if the patron refuse to present the nominee, or presents another, he may bring a *quare impedit*; for he who is to present, is only an instrument to him who nominates; and the person who hath the nomination is in effect the patron of the church. *Plowd.* 529; *Moor.* 47. A nominator must appoint his clerk within six months after avoidance; if he doth not, and the patron presents his clerk before the bishop hath taken any benefit of the lapse, he is obliged to admit that clerk. But where one hath the nomination, and another the presentation, if the right of presentation should afterwards come to the king, it is said he who hath the nomination will be entitled to the presentation also; because the king, who should present, cannot be subservient to the nominator, being contrary to his dignity. *Hughes's Par. Law.* 76, 77. Right of nomination may be forfeited to the crown as well as presentation, where the nominator corruptly agrees to nominate, within the statute of *Simony*, &c. See *Advomson, Parson*.

NOMINA VILLARUM. Edward II. in the 9th year of his reign, sent his letters to every sheriff in England, requiring an exact account and return into the Exchequer of the names of all the villages, and possessors thereof; in every county, which being done accordingly, the returns of the sheriffs all joined together are called *nomina villarum*, still remaining in the Exchequer, anno 9 Ed. 2.

NOMINE PENÆ. A penalty incurred for not paying rent, &c. at the day appointed by the lease or agreement for payment thereof. 2 *Lit.* 221.

This *nomine penæ* is incident to the rent, and will descend to the heir; if an annual rent, therefore, be devised, the *nomine penæ* passes as incident thereto, and the devisee may have an action of debt for the arrears. *Co. Lit.* 61 b; *Cro. Eliz.* 383; *Lutw.* 1156.

If rent is reserved, and there is a *nomine penæ* on the non-payment of it, and the rent be behind and unpaid, there must be an actual demand thereof made before the grantee of the rent can distrain for it; the *nomine penæ* being of the same nature as the rent, and issuing out of the land out of which the rent doth issue. *Hob.* 82, 133. And where a rent-charge was granted for years, with a *nomine penæ* and clause of distress, if it was not paid on the day; on the rent's being behind, and the term expired, the court was moved that the grantee might distrain for the *nomine penæ*; but it was held that he could not, because the *nomine penæ* depended on the rent, and the distress was gone for that, and by consequence for the other. 2 *Nels. Abr.* 1182. See 8 *Ann.* c. 14.

When any sum *nomine penæ* is to be forfeited for non-payment of the rent at the time, &c. the demand of the rent ought to be precisely at the day, in respect of the penalty; and debt will not lie on a *nomine penæ* without a demand. 7 *Rep.* 28; *Cro. Eliz.* 383; *Style.* 4. If there is a *nomine penæ* of such a sum for every day after rent becomes due, it has been a question whether there must be a demand for every day's *nomine penæ*, or one demand for many days. And by the better opinion it hath been holden, that for every day there ought to be a demand; and that one will not be sufficient for the whole; but where a *nomine penæ* of forty shillings was limited *quolibet die proximo* the feast-day on which the rent ought to be paid, it was adjudged that there was but one forty shillings forfeited, because the word *proximo* must relate to the very next day following the rent day; so likewise when the rent became due and unpaid at the next rent day after that, and so on. *Palm.* 207; 2 *Nels.* 1182.

This penalty, it should seem, is waived by an acceptance of the rent. *Comp.* 247.

An assignee is chargeable with a *nomine penæ* incurred

after the assignment, but not before *Moor, 357; 2 Lil. Abr. 221.*

Though forfeiture is mentioned to be *nomine pœnæ*, for not paying of a collateral sum, it is no *nomine pœnæ*, if it be not of a rent. *Lutw. 1156.*

It is not unusual to mention stipulated penalties for other things, as for ploughing up ancient meadow, or above a certain number of acres in one year, for changing the character of particular premises or the like, by the general name of *nomine pœnæ*. See further *Distress, IV.*

NON-ABILITY. Is an exception taken against the plaintiff in a cause, upon some just ground, why he cannot commence any suit in law; as *præmunire*, outlawry, excommunication, &c. *F. N. B. 35, 65.* See *Abatement; Disability.*

NONÆ ET DECIMÆ. Payments made to the church by those who were tenants of church farms; where *nonæ* was a rent or duty for things belonging to husbandry, and *decimæ* were claimed in right of the church. Formerly a ninth part of moveable goods was paid to the clergy on the death of persons in their parish, which was called *nonagium*, and claimed on pretence of being distributed to pious uses. *Blount.*

NON-AGE. In general understanding, is all the time of a person's being under the age of twenty-one; and in a special sense, where one is under fourteen as to marriage, &c. See *Age, Infant.*

NON ASSUMPSIT. The general issue in an action of *assumpsit*, whereby a man denies that he made any promise. See further *Pleading.*

By this plea, until recently, the defendant could put in issue all the material allegations of the declaration; and under the summary denial it contained of the plaintiff's case, could, with a few exceptions, urge any ground of defence, whether it were in direct repudiation of the contract or obligation charged, or by way of confession in avoidance of the cause of action.

Now by the general rules of *H. T. 4 W. 4.* in all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Ex. gr.—In an action on a warranty, the plea will operate as the denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

Where there have been two accounts stated between the parties, and the plaintiff sues upon the former, the defendant cannot, since the above rules, under the plea of *non assumpsit*, give the second account in evidence. *1 C. M. & R. 108.*

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In an action of *indebitatus assumpsit* for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which makes such receipt by the defendant a receipt to the use of the plaintiff.

In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing or making, or indorsing or accepting, or presenting, or notice of dishonour of the bill or note.

In every species of *assumpsit*, all matters in confession and

avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.* insanity, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c. bills or notes, by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

NON ASSUMPSIT INFRA SEX ANNOS. See *Limitation of Actions.*

NON-CEPIT. The general issue in replevin. See that title.

NON-CLAIM. An omission or neglect of one that claimed not within the time limited by law, as within a year and a day, where a continual claim ought to have been made, or in five years after a fine had been levied, &c. by which a man might be barred of his right of entry. See *4 H. 7. c. 24; 32 H. 8. c. 33.*

Now by the *3 & 4 W. 4. c. 27. § 11.* no continual or other claim shall preserve any right of making an entry or distress, or of bringing an action.

And by the *3 & 4 W. 4. c. 74.* fines are abolished. See further *Claim, Entry, Fine, Limitation of Actions.*

NON COMPOS MENTIS. One not of sound mind, memory, and understanding. See *Idiots and Lunatics.*

NON-CONFORMISTS. Persons not conforming to the rites and ceremonies of the Church of England as by law established. The stats. *1 Eliz. c. 2; 13 & 14 Car. 2. c. 4.* were made for the uniformity of common prayer and service in the church. Non-conformists to be punished by imprisonment, and to submit in three months, or to abjure the realm; and keeping a non-conformist in the house after notice, subjected the offender to the penalty of 10*l.* a month. *35 Eliz. c. 1.* Penalties on being at conventicles. *22 Car. 2. c. 1.*

Toleration of the episcopal communion in Scotland. *10 Ann. c. 7.* Episcopal meeting-houses in Scotland to be registered; and a penalty imposed on unqualified ministers officiating in Scotland. *19 Geo. 2. c. 38.* Episcopal ministers in Scotland to be ordained by a bishop of England or Ireland. *16. and 21 Geo. 2. c. 34.* Peers and others present at unlawful meeting-houses in Scotland disqualified from voting. *19 Geo. 2. c. 38.* A form of affirmation to be taken instead of an oath by the members of the *unitas fratrum*; and privileges granted to the members thereof who should settle in America. *22 Geo. 2. c. 30.*

After the Revolution, it was enacted by the Toleration Act, *1 W. & M. st. 1. c. 18.* that the *1 Eliz. c. 2. § 1; 23 Eliz. c. 1; 29 Eliz. c. 6; 3 Jac. c. 4; 3 Jac. c. 5.* (or any other statute made against Papists, with two exceptions, but the whole of which last mentioned statutes are now in effect repealed by the Roman Catholic Relief Act, *10 Geo. 4. c. 7*) should not extend to persons dissenting from the Church of England that should take the oaths of allegiance and supremacy, and subscribe the declaration against popery.

By *52 Geo. 3. c. 155.* the acts *18 & 14 Car. 2. c. 1.* for preventing mischief by Quakers and others refusing lawful oaths; *17 Car. 2. c. 2.* for restraining non-conformists from inhabiting in corporations; and *22 Car. 2. c. 1.* to prevent and suppress seditious conventicles, were repealed.

By *9 Geo. 4. c. 17.* so much of the *13 Car. 2. st. 2. c. 1* and the *25 Car. 2. c. 2.* (commonly called the Test and Corporation Acts), and of the *16 Geo. 2. c. 30.* as required the persons therein described to receive the Sacrament as a qualification for offices, were repealed; and by *§ 2.* all mayors, aldermen, recorders, and corporate officers are within one month before or upon their admission to office to make and subscribe the declaration set forth in the act, to the effect that they will not use the power or influence of their office to injure or weaken the Protestant church, or disturb the bishops or clergy in the rights and privileges to which they are by law entitled. See *Bac. Abr. Office (E), 7th ed.*

By the 10 Geo. 4. c. 7. the acts requiring the declarations against transubstantiation, &c. were repealed; and by § 10. his majesty's subjects professing the Roman Catholic religion may hold any offices, civil or military, and places of trust or profit, under his majesty, and exercise any other franchise (except as therein mentioned) on taking the oath therein set forth instead of the oaths of allegiance, supremacy, and abjuration, and instead of such other oaths as were then by law required to be taken for the purpose aforesaid by Roman Catholics. See further *tits. Dissenters, Non-Jurors, Oaths, Quakers, Roman Catholics.*

NON CULPABILIS. See *Not Guilty.*

NON DAMNIFICATUS. A plea to an action of debt upon bond, with condition to save the plaintiff harmless. 2 *Lit. Abr.* 224.

It cannot be pleaded to an action of debt on bond conditioned for payment of a sum of money on a certain day, although it appears by the condition that the bond was given by way of indemnity. 1 *Bos. & Pull.* 688; and see as to this plea, *Bac. Abr. Pleas (I.)* 7th ed.

NON DECIMANDO. A custom or prescription. *De non decimando* is to be discharged of all tithes, &c. See *Modus Decimandi, Tithes.*

NON DEMISIT. Where a demise is stated to have been by indenture, this is not a good plea to an action of debt for rent, though it may be pleaded when the plaintiff declares *quod cum demisisset* without stating the indenture. *Bull. N. P.* 177; *Gibb. on Action of Debt*, 436, 438.

And as a less cannot plead *habuit in tenementis* to an action of covenant, neither can he nor his assignee plead *non demisit.* 2 *Taunt.* 278.

NON DETINET. The general issue in an action of detinue.

By the rules, H. T. 4 *Wm.* 4. this plea shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under it.

NON DISTRINGENDO. A writ not to distrain, used in divers cases. *Table of Reg. of Writs.*

NONES, nonas.] So called from their beginning the ninth day before the *Ides.* The seventh day of March, May, July, and October, and the fifth day of all other months. By the Roman account the *nones* in the above-mentioned months are to six days next following the first day, or the *calends*; and of others the four days next after the first, according to these *VERBS* :—

Sex Nonas, Maius, October, Julius, et Mars, Quatuor at reliqui, &c.

Though the last of these days is properly called *nones*; for the others are reckoned backwards as distant from them, and accounted the third, fourth, or fifth *nones.* See *Ides.*

NON EST FACTUM. The general issue, in an action on bond or other deed, whereby the defendant denies that to be his deed whereon he is implicated. *Broke.* In every case where a bond is void, the defendant may plead *non est factum.* and when a bond is voidable only, he must show the special matter, and conclude judgment. *Si actio, &c.* 2 *Lit.* 226.

None but the party, his heirs, executors, &c. can plead *non est factum.* *Lutw.* 602. For a stranger to the deed cannot plead a special *non est factum*; but must say, nothing passed by the deed. 1 *Rot.* 188.

Now by the rules of H. T. 4 *Wm.* 4. in debt on specialty or covenant, the plea of *non est factum* shall operate as a denial of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable. See *Com. Dig. tit. Pleading*; and this *Dict. tit. Bond, Ired. Pleas.*

NON EST INVENTUS. The sheriff's return to a writ when the defendant is not to be found in his bailiwick. And there was a return that the plaintiff *non invenit plegiam* on original writs. *Shep. Epit.* 1129. See further *Process.*

NON-FEASANCE. An offence of omission of what ought to be done; as in not coming to church, &c. which need not be alleged in any certain place; for, generally speaking, it is not committed any where. But non-feasance will not make a man a trespasser, &c. *Hob.* 251; 8 *Rep.* 146.

Non-feasance is to be distinguished from misfeasance or malfeasance. Non-feasance is the not doing that which it was a legal obligation or duty, or contract, to perform; misfeasance is the performance in an improper manner of an act which it was either the party's duty or his contract to perform, or which he had a right to do; and malfeasance the unjustifiable performance of some act which the party had no right, or which he had contracted not to do. These several modes of committing private injuries are compensated by peculiar and appropriate remedies, in which the cause of action must be properly described. See *Nuisance, Trespass.*

NON IMPLACITANDO ALIQUEM DE LIBERO TENEMENTO SINE BREVI. A writ to prohibit bailiffs, &c. from distraining or impleading any man touching his freehold without the king's writ. *Reg. Orig.* 171.

NON INTROMITTENDO, QUANDO BREVE PRÆCIPE IN CAPITIS SUBDOLE IMPETRATUR. Was a writ directed to the justices of the bench, or in eyre, commanding them not to give one, who had, under colour of entitling the king to land, &c. as holding of him *in capite*, deceitfully obtained the writ called *præcipe in capite*, any benefit thereof, but to put him to his writ of right. *Reg. Orig.* 4. This writ having dependence on the court of wards, since taken away, is now disused.

NON-JOINDER. A plea in abatement.

In actions upon contracts, when there are several parties, the action should be brought by or against all of them if living; 1 *Saund.* 291, b. (4); or if some are dead, by or against the survivors. 2 *Saund.* 121, c. (1). But if an action be brought upon a joint contract against one of several partners, he can only plead an abatement, though the plaintiff knew and even contracted with the other partners. 5 *Burr.* 2611; 2 *Bl.* 695; 5 *T. R.* 649.

In actions for wrongs, as they are of a joint and several nature, the plaintiff may proceed against all or any of the parties who committed them; and it is no plea in abatement, or ground of nonsuit, that there are other parties not named. In an action on the case, therefore, against a common carrier for the loss of goods, or for not safely carrying a passenger, the defendant cannot plead in abatement the non-joinder of a co-partner. And by the Common Carriers' Act, 11 Geo. 4. & 1 *Wm.* 4. c. 68. § 5. any one or more of several mail contractors, stage-coach proprietors, or common carriers, may be sued; and no action commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner in any mail, stage-coach, or other public conveyance by land for hire.

By Lord Tenterden's Act, 9 Geo. 4. c. 14. § 2. no plea in abatement can be supported alleging the non-joinder of parties against whom no action is maintainable for want of a written promise.

By the 3 & 4 *Wm.* 4. c. 42. § 8. pleas in abatement must state that the person, the non-joinder of whom is pleaded, resides in the jurisdiction of the court, and his residence must be stated with convenient certainty in affidavits verifying such pleas.

§ 9. To a plea in abatement for non-joinder the plaintiff may reply that the person has been discharged by bankruptcy and certificate, or under the Insolvent Acts.

§ 10. A plaintiff commencing another action against defendants in the action wherein a plea of abatement was pleaded, and the persons named in such plea as joint-contractors (if it shall appear by the pleadings or on the trial of such subsequent action that all the original defendants are liable, but one or more of the others are not,) shall nevertheless be entitled to judgment, or to a verdict and judgment

against the defendants appearing liable; and every defendant not so liable shall have judgment and his costs as against the plaintiff, who shall be the same against the original defendants; but the latter may in the trial adduce evidence of the liability of the defendants named by them.

By the rules H. T. 4 *Wm.* 4, in all cases under the above section, the commencement of the declaration shall be in the form thereby given.

NON-JURORS. Persons who refuse to take the oaths to government, who are liable to certain penalties.

By 13 & 14 *Car.* 2. c. 1. those who maintained that oaths in any case were unlawful, were for a third offence to abjure the realm, or otherwise to be transported; but this statute was repealed by 52 *Geo.* 3. c. 155.

Ecclesiastical persons not taking the oaths on the Revolution, were rendered incapable to hold their livings; but the king was empowered to grant such of the non-juring clergy as he thought fit, not above twelve, an allowance out of their ecclesiastical benefices for their subsistence, not exceeding a third part. 1 *W. & M.* sess. 1. c. 8. Persons refusing the oaths shall incur, forfeit, and suffer the penalties then inflicted on Popish recusants, and the Court of Exchequer may issue out process against their lands, &c. 7 & 8 *W.* 3. c. 27.

Blackstone enumerates, among the contempts to the king's title, the refusing or neglecting to take the oaths appointed by the statutes for the better securing the government, and yet acting in a public office, place of trust, or other capacity for which the said oaths are required to be taken, viz. those of allegiance, supremacy, and abjuration, which must be taken within six calendar months after admission. The penalties for this contempt, inflicted by 1 *Geo.* 1. st. 2. c. 13. are very little if any thing short of those of a *præmunire*; being an incapacity to hold the said offices or any other, to prosecute any suit, to be guardian or executor, to take any legacy or deed of gift; and to vote at any election for members of parliament; and after conviction the offender shall also forfeit 500*l.* to him or them that will sue for the same. Members on the foundation in any college of the two universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college register within one month after; otherwise, if the electors do not remove him and elect another within twelve months, or after, the king may nominate a person to succeed him, by his great seal or sign manual. Besides thus taking the oaths for offices, any two justices of the peace may by the same statute summon and tender the oaths to any person whom they shall suspect to be disaffected. 4 *Comm.* 123, 124. See further *Dissenters, Non-conformists, Oaths, Roman Catholics.*

NON MERCHANDIZANDO VICTUALIA. An ancient writ to justices of assize, to inquire whether the magistrates of such a town do sell victuals in gross, or by retail, during the time of their being in office, which is contrary to an obsolete statute; and to punish them if they do. *Reg. Orig.* 184.

NON MOLESTANDO. A writ that lies for a person who is molested contrary to the king's protection granted him. *Reg. of Writs*, 184.

NON OBSTANTE, Notwithstanding.] Was a clause heretofore frequent in statutes and letters-patent, and was a licence from the king to do a thing which at the common law might be lawfully done; but which being restrained by act of parliament, could not be done without such licence. *Vaugh.* 347; *Plowd.* 501. But this doctrine of *non obstante*, which sets the prerogative above the laws, was effectually demolished by the Bill of Rights at the Revolution, and abdicated at Westminster Hall when King James abdicated the kingdom. 1 *Comm.* 342. See *tit. Grant of the King; King, V. 3; Mortmain; Pardon.*

NON OMITTAS. A writ directed to the sheriff, where the bailiff of a liberty or franchise who hath the return of

writs refuses or neglects to serve a process for the sheriff to enter into the franchise and execute the king's process himself, or by his officer.

Before this writ is granted, the sheriff ought to return that he hath sent to the bailiff, and that he hath not served the writ; but for despatch, the usual practice was to send a *non omittas* with a *capias* or *latitat.* *F. N. B.* 68, 74; 2 *Inst.* 453. And a clause of *non omittas* is to be inserted in the *capias* given by the uniformity of process act. See *Process.*

If a sheriff return that he sent the process to the bailiff of a liberty, who hath given him no answer, a *non omittas* shall be awarded to the sheriff. And if he returns that he sent the process to such bailiff, who hath returned a *cepi corpus*, or such like matter, and the bailiff bring not in the body, or money, &c. at the day, the bailiff shall be amerced, and a writ issue to the sheriff to distrain the bailiff to bring in the body. 2 *Hawk. P. C.*

The *Reg. of Writs* mentions three sorts of this writ, given to prevent liberties being privileged to hinder or delay the general execution of justice; and the clause of the *non omittas* is, *quod non omittas, propter aliquam libertatem, (viz. such liberty to which the sheriff hath made a mandavi ballivo, quod nullum dedit responsum) quin in am ingrediaris et capias A. B. Si, &c.*

Writs of *capias utlagatum* and of *quo minus* (now abolished) out of the Exchequer, and it is said all writs whatsoever at the king's suit, are of the same effect as a *non omittas*; and the sheriff may by virtue of them enter into a liberty and execute them. 2 *Lil. Abr.* 229.

NON PLEVIN, non plevina.] Is defined to be *defaulta post defaultam*; and in *Hengham Magna, cap.* 8. it is said that the defendant is to replevy his lands seized by the king within fifteen days; and if he neglects, then, at the instance of the plaintiff, at the next court-day, he shall lose his seisin, *sicut per defaultam post defaultam.* But by 9 *Edw.* 3. c. 2. it was enacted, that none should lose his land, because of *non plevin*, i. e. where the land was not replevied in due time.

NON PONENDIS IN ASSISIS ET JURATIS. A writ formerly granted for freeing and discharging persons from serving on assizes and juries; and when one had a charter of exemption, he might have sued the sheriff for returning him. This writ was founded on the *West.* 13 *Edw.* 1. st. 1. c. 38. and *Articuli super Chartas*, 28 *Edw.* 1. st. 3. c. 9; both of which are now repealed by the 6 *Geo.* 4. c. 50. § 62. See *F. N. B.* 165; 2 *Inst.* 127, 447.

NON PROCEDENDO AD ASSISAM REGE INCONSULTO. A writ to stop the trial of a cause appertaining to one who is in the king's service, &c. until the king's pleasure be farther known. *Reg. Orig.* 220.

NON PROS, or NON PROSEQUITUR. See *Nolle Prosequi Nonsuit.*

NON RESIDENCE. The absence of spiritual persons from their benefices. See *Residence.*

NON RESIDENTIA PRO CLERICUS REGIS. A writ directed to the bishop, charging him not to molest a clerk employed in the king's service, by reason of his non-residence; in which case he is to be discharged. *Reg. Orig.* 58.

NON SANE MEMORY, Non sanæ Memoriae.] See *Idiots and Lunatics.*

NONSENSE. Where a matter set forth is grammatically right, but absurd in the sense and unintelligible, some words cannot be rejected to make sense of the rest, but must be taken as they are; for there is nothing so absurd but what by rejecting may be made sense; but where the matter is nonsense by being contradictory and repugnant to some precedent, there the precedent matter which is sense shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected. As in ejectment where the declaration is of a demise the 2d of January, and

that the defendant *postea*, to wit, on the 1st of January, ejected him; here the *scilicet* may be rejected, as being expressly contrary to the *postea* and the precedent matter; per Holt, C. J. 1 Salk. 324. But per Powell, J.—Words unnecessary might in construction be omitted or rejected, though they are not repugnant or contradictory; but in *causis omnibus* agreed with the chief justice. See *Awardment, Mistake*.

NON SOLVENDO PECUNIAM, AD QUAM CLERICUS MILITATUR PRO NON RESIDENTIA. A writ prohibiting an ordinary to take a pecuniary mulet, imposed on a clerk of the king's for non-residence. *Reg. of Writs, fol. 59.*

NONSUIT.

[**NON EST PROSECUTUS.**] A renunciation of a suit by the plaintiff or demandant, most commonly upon the discovery of some error or defect, when the matter is so far proceeded in that the jury is ready to deliver their verdict. The civilians term it *litis renunciationem*. *Cowell.*

If the plaintiff in an action neglects to deliver a declaration in two terms after the defendant appears, or suffers delay or delays or defaults against the rules of law, in any subsequent stage of the action, he is adjudged not to follow or pursue his remedy as he ought to do; and thereupon a nonsuit or non *prosequitur* is entered, and he is said to be non *prosecuted*. And for thus deserting his complaint, after making a false claim (*pro falso clamore suo*), he shall not only pay costs to the defendant, but is liable to be amerced to the king. A nonsuit differs from a *retraxit*, in that the former is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit in court, and by this he for ever loses his action. 3 *Comm. c. 20.* 95, 296.

Before the jury gave their verdict on a trial, it was formerly usual to call or demand the plaintiff, in order to answer the amercement, to which by the old law he was liable, in case he failed in his suit. 3 *Comm. 376.* And it is now usual to call him, whenever he is unable to make out his case, or by reason of his not adducing any evidence in support of it, or any evidence arising in the proper county. The cases in which it is necessary that the evidence should arise in a particular county, are either where the action is in itself local, or made so by act of parliament, as in action upon penalties, statutes, &c. or where upon a motion to change or retain venue, the plaintiff undertakes to give material evidence in the county where the action was brought. 2 *Black. Rep.* See *Action, Venue*. And there is this advantage attending a nonsuit, that, as is already hinted, the plaintiff, if he pay costs, may afterwards bring another action for the same cause, which he cannot do after a verdict against him. *Tidd's Pract.*

- I. Who may be Nonsuit; in what Action, and at what time, there may be a Nonsuit.
- II. How far the Nonsuit of one shall be the Nonsuit of another; and how far a Nonsuit for part of the thing in demand shall be a Nonsuit for the whole.
- III. Of the effect of a Nonsuit; and of its being a temporary bar.
- IV. Of Judgments as in case of a Nonsuit.

I. It is agreed that the king being, in supposition of law, always present in court, cannot be nonsuit in any information or action wherein he is sole plaintiff, but it is held, that a nonsuit, as well in respect of the king as of himself, is a nonsuit, as in respect of the king as of himself. *Nonsuit, 68; Co. Lit. 139, b; 2 Roll. Abr. 131.* If an infant bring an assize by guardian, although the infant disavow the suit in proper person, yet no nonsuit shall be awarded. 39 *Ass. pl. 1; 2 Roll. Abr. 130.*

If an attorney of the Common Pleas sues an action there, he shall not be demanded, because he is supposed always present aiding the court. 2 *H. 6. 44 b; 1 Roll. Abr. 581.* See *qu.* as to this doctrine. In many cases it is the interest of the plaintiff to be nonsuit, instead of having a verdict against him, as he may bring a new action, wherein, if properly advised and pursued, he may recover. *J. M.*

A person may be nonsuit in a writ of error. 2 *Roll. Abr. 130; 1 Sid. 255.* So in a writ of false judgment. 20 *H. 6. 18 b; 2 Roll. Abr. 130, S. C.*

One cannot be nonsuit in an action in which he is not an actor or demandant; and though he afterwards becomes an actor, yet not being originally so, he cannot be nonsuit, as an avowant; so of garnishees who become actors, but were not so originally. 22 *Edm. 4. 10.*

So if a person outlawed hath a charter of pardon, and sues a *scire facias* against the party, though hereby he is an actor, yet he cannot be nonsuit. 2 *Roll. Abr. 130.*

So if a man traverse an office he cannot be nonsuit, though he is an actor, for he hath no original pending against the king. 2 *Roll. Abr. 130; Dyer, 141, pl. 47;* where it is made a *quære*.

But in a petition of right against the king, the plaintiff may be nonsuit. 11 *H. 4. 52; 2 Roll. Abr. 130.*

So in an *audita querela*, to avoid a statute, the plaintiff may be nonsuit, for he is plaintiff in this action. 47 *Edm. 3. 5 b.*

So he may be nonsuit in *scire facias* as well as in other actions. 1 *Camp. 484.*

If in two *nihilis* returned to a *scire facias* on a charter of pardon, the plaintiff does not appear, he shall be nonsuit; for the statute ordains, that upon his appearing he ought to count against the defendant. 45 *Edm. 3. 16.*

At the common law, upon every continuance, or day given over before judgment, the plaintiff was demandable, and upon his non-appearance might have been nonsuit. *Co. Lit. 1. 9, b.* That if at common law he did not like the damages given by the jury, he might be nonsuit. See 5 *Mod. 208.*

But by 2 *Hen. 4. c. 7.* it was enacted in the words following: "Whereas, upon verdict found before any justice in assize of *novel disseisin, mort d'ancestor*, (now abolished,) or any other action whatsoever, the parties before this time have been adjourned upon difficulty in law, upon the matter so found; it is ordained and established, that if the verdict goes against the plaintiff, the same plaintiff shall not be nonsuited."

Notwithstanding this statute, it has been held, that the plaintiff may be nonsuited after a special verdict, or after a demurrer and argument thereon. *Co. Lit. 139; 2 Jon. 1; 2 Roll. Abr. 131, 132; 3 Leon. 28; and see 2 Hawk. P. C. c. 23, § 95.*

A nonsuit can only be at the instance of the defendant; and therefore where the cause at *nisi prius* was called on, and jury sworn, but no counsel, attorneys, parties, or witnesses appeared on either side, the judge held, that the only way was to discharge the jury; for nobody has a right to demand the plaintiff but the defendant, and the defendant not demanding him, the judge could not order him to be called. 1 *Stra. 267.* See also 2 *Stra. 1117.*

But the plaintiff may be nonsuited in an undefended cause if he do not make out a proper case, or for a variance. 3 *Taunt. 81.* Where a cause is undefended at *nisi prius*, and the judge directs a nonsuit, with liberty for the plaintiff to move to enter a verdict, the court may order the verdict to be entered accordingly for the plaintiff. 4 *B. & A. 418.*

When a cause is carried down by *proviso*, and the plaintiff does not appear at the trial, he should be nonsuited. 1 *B. & C. 110; and see 1 B. & C. 94.*

After a plea of tender the plaintiff, it is said, cannot be nonsuited. 1 *Camp. 327,* (but see the notes.) It is the practice to nonsuit him if he cannot make out his case, 2 F

although money has been paid into court. 2 Salk. 597; 7 T. R. 372.

The plaintiff in no case is compellable to be nonsuited after he has appeared; 2 T. R. 275; and therefore if he insist upon the matter being left to a jury, they must give in their verdict, which is general or special. If it be for the plaintiff, or for the defendant in *replevin*, the jury should regularly assess the damages; but when the plaintiff is nonsuited on the trial of an issue, he cannot have contingent damages assessed for him on a demurrer. 1 Stra. 507. Though when the plaintiff in *replevin* is nonsuited, the jury may assess damages for the defendant. Comb. 11; 5 Mod. 76; and see *Tidd's Pract.*

With respect to nonsuits in ejectment, see that title, VII.

II. In real or mixt actions, the nonsuit of one demandant is not the nonsuit of both; but he who makes default shall be summoned and severed; but regularly, in personal actions, the nonsuit of one is the nonsuit of both. Co. Lit. 139; 2 Inst. 563; and see *Roll. Abr.* 132, several cases to this purpose.

But in personal actions brought by executors, there shall be summons and severance, because the best measure shall be taken for the benefit of the dead; and so it is in action of trespass, as executors for goods taken out of their own possession. Like law in account, as executors by the receipt of their own hands. Co. Lit. 139, a. See *Executors*, VI. 2.

In an *audita querela* concerning the personalty, the nonsuit of the one is not the nonsuit of the other; because it goeth by way of discharge, and freeing themselves, therefore the default of the one shall not hurt the other. Co. Lit. 139. In an *audita querela*, *scire facias*, *attaint*, the nonsuit of one shall not prejudice the other. 6 Co. 26.

In a *quid juris clamat*, the nonsuit of the one is the nonsuit of both; because the tenant cannot attorn according to the grant. Co. Lit. 139, a.

So on an appeal against divers, whether they pleaded to the same or several issues, it was adjudged that a nonsuit against one, at the trial of any of the issues, was a nonsuit as to all, because a nonsuit operated as a release of the whole. Cro. Eliz. 460, pl. 6; *Dyer*, 120; 2 *Roll. Abr.* 133; 1 *Sid.* 378.

A *latital* was sued out against four defendants in trespass, the plaintiff was nonsuit for want of a declaration, and the defendant's attorney entered four nonsuits against him; and it was held to be irregular, because the trespass is joint; and though the plaintiff may count severally against the defendants, yet it remains joint till severed by the court. 2 Salk. 455. There is a nonsuit before appearance at the return of the writ, or after appearance at some day of continuance. Co. Lit. 138, b.

In an action against several defendants, the plaintiff must be nonsuited as to all or none of them; and, therefore, if one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited as to him; but such defendant must have a verdict if the plaintiff fail to make out his case. 3 T. R. 662.

It is laid down as a general rule, that a nonsuit for part is a nonsuit for the whole; but it hath been held, that if a defendant plead to one part, and thereupon issue is joined, and demur to the other, the plaintiff may be nonsuit as to one part, and proceed for the other. 2 Leon. 177; *Hob.* 180.

If in debt the defendant acknowledges the action as to part, and joins issue as to the residue, and the plaintiff hath judgment for that which is confessed; but there is a *cesset executio*, by reason of the damages to be assessed by the jury; if the plaintiff be nonsuited in this issue, this shall be a nonsuit for the damages to be given, because that he had judgment. 2 *Roll. Abr.* 134.

If in trover the defendant pleads, that as to some of the goods they were fixed to his freehold, as to others, that he had them of the gift of the plaintiff, and as to the rest not

guilty; and as to the first, the plaintiff enters *non vult ulterius prosegui*; this amounts only to a *retraxit*, and is no nonsuit, so as to bar the plaintiff from proceeding on the other parts of the plea, on the rule that a nonsuit for part is a nonsuit for the whole. 2 Leon. 177.

III. A NONSUIT, as hath been observed, is regularly no peremptory bar; but the plaintiff may, notwithstanding, commence any new action of the same or like nature; but this general rule has or had the following exceptions:—

1. It is peremptory in a *quare impedit*; and in that action a discontinuance is also peremptory; and the reason is, for that the defendant had, by judgment of the court, a writ to the bishop; and the incumbent that cometh in by that writ shall never be removed, which is a flat bar to that presentation.

2. Nonsuit in an appeal of murder, rape, robbery, &c. after appearance was peremptory, and this *in favorem vita*, but the nonsuit of the plaintiff in an appeal was not such an acquittal on which the defendant should recover damages against the abettors, by *Westm.* 2. 13 *Edm.* 1. st. 1. c. 12; unless after the nonsuit he were arraigned at the king's suit, and acquitted.

3. So if the plaintiff, in an appeal of maihem, were nonsuit after appearance, it was peremptory, for the words thereat were *felonice maihemavit*. Appeals, however, in criminal cases, were abolished by the 59 Geo. 3. c. 46.

4. A nonsuit after appearance is also peremptory in a writ of *nativo habendo*, and the nonsuit of one plaintiff in that action nonsuits both *in favorem libertatis*; for in a *liberate proband* such nonsuit is not peremptory, neither is the nonsuit of one plaintiff the nonsuit of both. Co. Lit. 139, a. Cro. Eliz. 881.

5. Such nonsuit was also peremptory in attaint (abolished by the 6 Geo. 4. c. 50. § 60), but a discontinuance in an attaint was not, because there was a judgment given upon the nonsuit, but not upon the discontinuance. Co. Lit. 139, a.

If a record be ever so erroneous, the plaintiff who has made default by suffering a nonsuit, cannot have a judgment afterwards in his favour. 4 T. R. 436.

IV. THE delay and expense attending the trial by provision (see *Trial*), gave rise to the 14 Geo. 2. c. 17. which enacted, that where any issue is joined in an action in the courts at Westminster, and the plaintiff hath neglected to bring such issue on to be tried, according to the practice of the said courts, the judges of the said courts respectively may, at any time after such neglect, upon motion in open court, and notice having been given thereof, give the like judgment for the defendant as in cases of nonsuit; unless the said court shall, upon just cause and reasonable terms, allow any further time for the trial of such issue; and if the plaintiff shall neglect to try such issue within the time so allowed, then the said court shall proceed to give such judgment as aforesaid. Provided that all judgments, given by virtue of this act shall be of the like force and effect as judgments upon nonsuit. Provided also, that the defendants shall upon such judgment be awarded their costs in any action or suit where they were upon nonsuit be entitled to the same.

This statute has been held to extend to *qui tam* actions as well as others. *Barnes*, 315. And also to a traverse or return of a mandamus. *Say. Rep.* 110; *Say. Costs*, 166; 4 T. R. 689. And to a writ of right, in which it may be entered against the demandant. 1 *Bos. & Pull.* 103.

But it does not extend any more than the trial by provision to actions of *replevin*, &c. in which the defendant is considered as an actor, and may therefore enter the issue and carry down the cause to trial himself. 1 *Black. Rep.* 375; *Say. Costs*, 168; 3 T. R. 661; 5 T. R. 400; but see *Barnes*, 317. And where there are two defendants, one of whom lets judgment go by default, the other cannot have judgment as in case of a non-

suit. *Say. Rep.* 22, 103; *Say. Costs*, 163, 164, 168; 1 *Wils.* 325; 1 *Burr.* 358. Also, where the cause has been once carried down to trial, the defendant cannot have such judgment for not carrying it down again. 1 *T. R.* 492; 3 *T. R.* 1; 1 *H. Black.* 101.

The course and practice of the court, referred to by the statute, is that which before regulated the trial by *proesso* (see *Trial*); and as the defendant could not have such trial until the plaintiff had been guilty of laches, nor until after the issue was entered on record, so neither till then is he entitled to judgment as in case of a nonsuit. If the action be laid in London or Middlesex, the defendant ought not to give a rule for the plaintiff to enter his issue the same term in which it is joined, unless notice of trial hath been given; and accordingly it is held, that in a town cause, unless notice of trial has been given, the defendant cannot move for judgment as in case of a nonsuit the next term after that in which issue was joined, although it was joined early enough to enable the plaintiff to give notice of trial for the sittings after that term; the plaintiff in such case having the whole of the next term to enter the issue, and no laches can be imputed to him till the term after. 1 *T. R.* 557; 1 *H. Black.* 67, *contra*; and see 1 *H. Black.* 129, 282. But if notice of trial has been given, in a town cause, for a sitting in term, the plaintiff may move for judgment as in case of a nonsuit, the next term, being the term after that in which the issue ought to be entered. To support a rule for judgment as in case of a nonsuit in the next term after that in which issue was joined, the affidavit must state that notice of trial was given for a sitting in the preceding term; but in the third or other subsequent term, a general affidavit, stating the term when the issue was joined, is deemed sufficient. 1 *H. Black.* 282. In a country cause, where notice of trial is given for the assizes, the defendant may move for judgment as in case of a nonsuit the next term; but the plaintiff is not bound to give notice of trial till the term succeeding that in which issue was joined. And if he do not, the plaintiff cannot move for judgment as in case of a nonsuit till after the next assizes. 2 *T. R.* 734.

The rule for judgment as in case of a nonsuit is a rule to slow cause, founded on an affidavit of the state of the proceedings, and of the plaintiff's default in not proceeding to trial; which rule has been held sufficient notice of motion within the act. *Lofft*, 265; 1 *H. Black.* 527, *contra*.

Now by the rules *H. T.* 2 *W. L.* a rule not for judgment as in case of a nonsuit may be obtained on motion without previous notice, but in that case it shall not operate as a stay of proceedings.

No motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default, but such costs may be moved for separately, i. e. without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of; or the court, on discharging a rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs of not proceeding to trial, but the payment of such costs shall not be made a condition of discharging the rule.

The roll must formerly have been in court at the time the motion was made.

But by one of the above rules, no entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit.

The rule is made absolute of course, on an affidavit of service, unless the plaintiff show some cause to the contrary; as the absence of a material witness, &c. But a slight cause in general is deemed sufficient, if the plaintiff will undertake pre-emptorily to try at the next sittings or assizes. The insolvency of the defendant, after the action brought, is good cause against judgment as in case of a nonsuit. *Doug.* 671.

But unless the plaintiff will consent to stay all further proceedings, and enter a *cesset processus*, the court will send him down to a pre-emptory undertaking. Where the

rule to show cause was discharged, on an affidavit which contained an answer false in itself, the court would not afterwards open the matter, on an affidavit which disproved the contents of the former one. 3 *T. R.* 405. See *Tidd's Pract.* See further *Costs, Damages, Process, Trial, &c.*

NON SUM INFORMATUS. A formal answer made of course by an attorney, that he is not instructed or informed to say any thing material in defence of his client; by which he is deemed to leave it undefended, and so judgment passeth against his client. See *Judgments acknowledged for Debts*.

NON-TENURE. Was a plea in bar to a real action, by saying, that he (the defendant) held not the land mentioned in the plaintiff's count or declaration, or at least some part thereof. See 25 *E. 3. c.* 16; 1 *Mod. Rep.* 250. And our books mention non-tenure general and special; general, where one denied ever to have been tenant of the land in question; and special was an exception, alleging that he was not tenant on the day whereon the writ was purchased. *West. Synb. par.* 2. When the tenant or defendant pleaded non-tenure of the whole, he need not have said who was tenant; but if he pleaded non-tenure as to part, he must have set the tenant forth. 1 *Mod.* 181. Non-tenure in part, or in the whole, was not pleadable after imparlance. 3 *Lev.* 55. See *Pleading*.

NON-TERM, non terminus.] The vacation between term and term; formerly called the time or days of the king's peace. *Lamb. Arch.* 126.

NON-USER. Of offices concerning the public, is cause of forfeiture. 9 *Rep.* 50. And if one have a franchise, and do not use it, he shall forfeit the same; which likewise may be lost by default, as well as non-user. See *Condition*, I. 1, *Office*.

NOOK OF LAND, *nocata terræ.* In an old deed of Sir Walter de Pedwardyn, twelve acres and a half of land were called a nook of land; but the quantity is generally uncertain. *Dugd. Warwick*, p. 685.

NORRY, *quasi North Roy.* The Northern King at Arms, 14 *Car. 2. c.* 33. See *Herald*.

NORTHAMPTON. The statute named from this place was made there, anno 2 *E. 3.*

NORTHERN BORDERS, NORTHUMBERLAND AND NORTHERN COUNTIES. Provisions for preventing theft and rapine upon the northern borders were made by numerous statutes, which are now repealed by the 7 & 8 *Geo.* 4. c. 27.

NORTH WALES. See *Wales*.

NORTH-WEST PASSAGE. Various rewards for the discovery of a passage from the Atlantic to the Pacific ocean, were offered by the 16 *Geo.* 3. c. 6. and the 58 *Geo.* 3. c. 20. both of which statutes were repealed by the 9 *Geo.* 4. c. 66. The same act also repealed the statutes proposing rewards for the discovery of the longitude at sea. See *Longitude*; under which head it should have been stated that these latter statutes are now no longer in force.

NORWICH. See 9 *Geo.* 1. c. 9; and *Wool, Woollen Manufactures*.

NOTARY, or NOTARY-PUBLIC, *notarius.* A person who takes notes, or makes a short draught of contracts, obligations, or other writings and instruments. 27 *Ed. 3. st.* 1. c. 1. At this time a notary-public is one who publicly attests deeds or writings, to make them authentic in another country; but principally in business relating to merchants; they make protests of foreign bills of exchange, &c.

The 41 *Geo.* 3. c. 79. was passed for regulating public notaries in England. By this act no person shall act as a notary unless duly admitted, nor shall he be admitted as a notary unless he shall have served seven years' apprenticeship to a notary, on penalty of 50*l.* Notaries shall not permit unqualified persons to act in their names. Persons applying to become notaries within the jurisdiction of the Company of Scriveners in London, shall be free of the said company.

By the 3 & 4 W. 4. c. 70. the clause in the above act requiring persons to serve a seven years' clerkship before they can be admitted notaries, is limited to London and a circuit of ten miles from the Royal Exchange.

§ 2. empowers the master of the Court of Faculties of the Archbishop of Canterbury to appoint and admit as notaries, attornies, solicitors, or proctors, residing beyond, but who (§ 3.) are not to practise within the above limits. By § 4. notaries admitted under the act, practising out of the district specified in their faculties, are to be struck off the roll, and disabled from performing any notarial act.

NOTE OF A FINE. Was a brief of the fine made by the chirographer before it was engrossed. *West. Symb.*

NOTES PROMISSORY. See *Bills of Exchange*.

NOT GUILTY, IN CRIMINAL CASES. The general issue or plea of the defendant in any criminal action or prosecution.

By the 7 & 8 Geo. 4. c. 28. § 1. if any person, not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto "not guilty," he shall by such plea, without any further form, be deemed to have put himself upon the country for trial, and the court shall in the usual manner order a jury for the trial of such person accordingly.

By § 2. if any person arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, the court may, if it think fit, order a plea of not guilty to be entered on behalf of such person, which shall have the same effect as if such person had pleaded.

NOT GUILTY, IN CIVIL ACTIONS. The general issue in trespass and actions on the case. Not guilty is a good issue in actions of trespass, and upon the case for deceipts or wrongs: but not on a promise, &c. *Palm. 393.* If one have just cause of justification in trespass, and plead not guilty, he cannot give the special matter in evidence, but must confess the fact, and plead the special matter, &c. *5 Rep. 119.* Unless where it is otherwise provided for by statute; as in the case of justices of the peace, peace-officers, church-wardens, and overseers of the poor, &c.

By the rules of H. T. 4 W. 4. in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the indictment, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

See the instances subjoined of the above rule by way of example. See further *Nuisance, Pleading, Slander, Way.*

NOTICE. The making something known, that a man was or might be ignorant of before. And it produces divers effects; for by it the party who gives the same shall have some benefit, which otherwise he should not have had; by this means, the party to whom the notice is given is made subject to some action or charge that otherwise he had not been liable to, and his estate in danger of prejudice. *Co. Lit. 309.*

Notice is required to be given in many cases by law to justify proceedings where any thing is to be done or demanded, &c. But none is bound by law to give notice to another person of that which such other may otherwise inform himself, except in cases where notice is directed by act of parliament.

Generally speaking, where it is required by law that notice shall be given to a party before he shall be affected by any act, leaving it at his dwelling-house is sufficient. But it is otherwise in the case of process to bring a party into contempt; there personal notice is necessary.

It is impossible in the present work to enumerate the various cases in which a notice is necessary or advisable; many of which will be found enumerated in 1 *Chitty's*

General Practice of the Law. And see further *Action, Award, Condition, Covenant, Justice, Lease, Mortgage, Motion, Trial, &c.*

NOTICE TO QUIT. See *Ejectment, V., Lease, I. 4.*

NOVALE. Land newly ploughed or converted into tillage, that had not been tilled within time of memory; and sometimes it is taken for ground which hath been ploughed for two years, and afterwards lies fallow for one year; or that which lies fallow every other year; it is called *novale*, because the earth *novè culturâ proscinditur.* *Cartular. Abbat. de Furnesse in Com. Lac. in Officio Ducat. Lanc. fol. 41.*

NOVA OBLATA. See *Oblata.*

NOVEL ASSIGNMENT, nova assignatio.] See *New Assignment, Trespass.*

NOVEL DISSEISIN, nova disseisina.] Now abolished. See *Assise of Novel Disseisin, Disseisin.*

NOVELLÆ. Those constitutions of the civil law which were made after the publication of the *Theodosian code*, were called *novellæ* by the Emperors who ordained them; but some writers call the *Justinian* edition only by that name. See *Civil Law.*

NOYLES. By the 21 Jac. 1. c. 18. no person should put any flocks, noyles, thrums, &c. or other deceivable thing into any broad woollen cloth; but this statute was repealed by the 49 Geo. 3. c. 109.

NUCES COLLIGERE. To gather hazle-nuts; this was formerly one of the works or services imposed by lords upon their inferior tenants. *Paroch. Antiq. 495.*

NUDE CONTRACT. See *Nudum Pactum.*

NUDE MATTER. A bare allegation of a thing done, &c. See *Matter.*

NUDUM PACTUM. Is a bare naked contract without a consideration. If a man bargains or sells goods, &c. and there is no recompence made or given for the doing thereof, as if one say to another, I sell you all my lands or goods, &c. nothing is agreed upon what the other shall give or pay for the same, so that there is not a *quid pro quo* of one thing for another; this is a nude contract, and void in law, and for the non-performance thereof, no action will lie; for the maxim in law is *ex nudo pacto non oritur actio.* *Terms de Leg.* 111. law, in fact, supposes error in making these contracts; thereby being as it were of one side only. See *Assumpsit, 111. Consideration.*

NUISANCE (anciently spelled) NUSANCE.

NOCUMENTUM, from the Fr. *nuire*, i. e. *nocere.*] Annoyance any thing that worketh hurt, inconvenience, or damage.

Nuisances are of two kinds; public or common, which affect the public, and are an annoyance to all the king's subjects, and private nuisances, which may be defined to be any thing done to the hurt or annoyance of the lands, tenements, &c. hereditaments of another. *Finch, L. 188.*

I. Common or public Nuisances; what shall be considered such.

II. What are private Nuisances.

III. Of the remedy for public Nuisances.

IV. Of the remedy for Private Nuisances.

I. COMMON NUISANCES are a species of offences against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires. *1 Hawk. P. C. c. 75. § 1.*

Of this nature are - 1. Annoyances in the highways, bridges, and the public rivers, by rendering the same inconvenient or dangerous to pass, either positively by actual obstruction, or negatively by want of reparations. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large may be indicted, distrained to repair and

amend them, and in some cases fined. And a presentment thereof by a judge of assize, &c. or a justice of the peace, shall be in all respects equivalent to an indictment. 7 Geo. 3. c. 42.

Where there is an house erected, or an inclosure made on any part of the king's demesnes, or of an highway, or common street, or public river, or such like public things, it is called a *perpresture*, from the French *pourpris*, an inclosure. 1 Inst. 277; and see *Way*.

A bridge built in a public highway without public utility, is indictable as a nuisance; and so it is if built colorably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county. 2 East, 342.

In a late case, the defendant being proprietor of a colliery, made a rail-road from it to a sea-port town. The rail-road was 400 yards long, and laid upon a turnpike-road, which it narrowed so far, that in some places there was not a clear space for two carriages to pass. Defendant allowed the public to use the rail-road, paying a toll. Held, that the facility thereby given to the general traffic with the sea-port, and particularly to the conveyance of coals there, was not such a convenience as justified the obstruction of the highway. 1 B. & Adol. 441.

The defendants, for the preservation of their lands had severally raised banks or fenders, which occasioned the water of a brook to flow in much greater quantities to the conduit of a canal than otherwise would be the case, and thereby greatly endangered the canal. The canal had been constructed under an act of parliament before the embankments of the defendants were made, and had not been the cause of a greater flow of water on the defendants' lands. Held, that the defendants were indictable as for a nuisance, in turning the water from its natural course to the injury of the canal, (which was regarded as a public highway,) though so doing they protected their own lands from injury. *The King v. Trafford*, 1 B. & Ad. 874; and see 6 B. & C. 317; 8 B. & C. 355.

Under acts of parliament empowering a company to make a railway between certain points, (reciting that it would be of great public utility, and materially assist the general traffic of the country), and to use locomotive engines upon it; the railway was made parallel to an ancient highway, and in some places within a few yards of it. The locomotive engines frightened the horses of persons using the highway. On an indictment against the company for a nuisance, it was held that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, the words authorising the use of the engines being regulated; and the public benefit derived from the railway showed that there was nothing unreasonable in the clause which gave such an authority to the company. *Rex v. Pease*, 1 B. & Ad. 30.

A common waggoner, who continually obstructs the passage of a street by the exercise of his business, may be indicted for a nuisance. 6 East, 427. See 3 Camp. 226.

If a ship be sunk in a port or haven, and it is not removed by the owner, he may be indicted for it as a common nuisance, because it is prejudicial to the commonwealth in hindering navigation and trade. 2 Lil. 244.

So it is a nuisance to lay timber in a public river, although the soil on which it is laid belong to the party; provided it obstructs the necessary intercourse. 3 Bac. Abr.; *Stra.* 1247. Or to place a floating dock in the river, although beneficial for repairing ships. 2 Hank. P. C. c. 75. § 11. in n.

So indictment lies for laying logs, &c. in the stream of a public navigable river; it is a common nuisance to divert part of a public navigable river whereby the current is weakened, and made unable to carry vessels of the same burden it could bear; and if a river be stopped to the nuisance of the country, and none appear bound by prescription to cleanse it, those who have the piscary, and the neighbouring towns

that have a common passage and easement therein, may be compelled to do the same. 1 Hank. P. C. c. 75. §§ 11, 13.

In a late important case the law respecting nuisances in navigable rivers was fully considered, and led to a difference of opinion on the bench. On the trial of an indictment for a nuisance in the river at Newcastle by erecting staiths there for loading ships with coals, the jury were directed by *Bayley, J.* to acquit the defendants if they thought that the abridgment of the right of passage occasioned by these erections was for a public purpose, and produced a public benefit; and if the erections were in a reasonable situation, and a reasonable space was left for passage of vessels on the river; and he pointed out to the jury that by means of the staiths coals were supplied at a cheaper rate, and in better condition than they otherwise could be, which was a public benefit. Held by *Bayley* and *Hobroyd, Justices*, that this direction to the jury was proper. Lord *Tenterden, C. J. dissente.*; *Rex v. Russell*, 7 Barn. & C.; and see *Rex v. Grosvenor*, 2 Stark. 511.

2. All those kinds of nuisances (such as offensive trades and manufactures) which, when injurious to a private man, are actionable, are, when detrimental to the public, punishable by public prosecutions, and subject to fine according to the quantity of the misdemeanor; and particularly the keeping of any hogs in any city or market-town is indictable as a public nuisance. *Salk.* 460.

A brew-house erected in such an inconvenient place, wherein the business cannot be carried on without incommoding the neighbourhood, may be indicted as a common nuisance; and so in the like case may a glass-house, &c. 1 Hank. P. C. c. 75. § 10. Where there hath been an ancient brew-house time out of mind, although in a most public street of a city, this is not any nuisance, because it shall be supposed to be erected when there were no buildings near it; but if a brew-house should be now built in any of the high streets of London, or trading places, it will be a nuisance, and action on the case lies for whomsoever receives any damage thereby, 2 Lil. Abr. 246; *Palm.* 53.

So it was decided in a recent case, that where a person sets up a noxious trade remote from human habitations and public roads, and new houses are afterwards built, and new roads constructed near it; the party in this case is not guilty of a nuisance for continuing his trade, although it be a nuisance to the new inhabitants, and to persons passing along the new constructed road; for they cannot by their own act of coming to settle in the neighbourhood, make that a nuisance which was not so before, on the principle of *volenti non fit injuria*. 2 C. & P. 483.

It is a nuisance to manufacture acid spirit of sulphur, vitrol, or *aqua fortis* in the vicinity of dwelling-houses, 1 Burr. 339; and see *Peake's Ca.* 90; 1 Mod. & Malk.; and it is not necessary that the smell should be unwholesome, it is enough if it renders the enjoyment of life uncomfortable; 1 Burr. 337; and it seems to be immaterial how long an offensive manufacture or other nuisance has been carried on, since no length of time can legitimate a nuisance; 3 Camp. 227; 7 East, 199; and at all events a party increasing the nuisance of an offensive trade may be indicted for the increase, even though the original establishment of it may have become legal by lapse of time. 1 Mod. & Malk. 281.

In judging whether a particular trade is a public nuisance or not, the public good may in some cases—when the public health is not concerned—be taken into consideration to see if it outweighs the public annoyance. And with respect to offensive works, though they may have been originally established under circumstances which would *prima facie* protect them against a prosecution for a nuisance, yet it seems, that a wilful neglect to adopt established improvements which would make them less offensive may be indictable. 1 Russ. 297.

3. All disorderly inns or ale-houses, bawdy-houses, gaming-houses, stage plays unlicensed, bootles and stages for rope-dancers, mountebanks, and the like, are public nuisances, and

may upon indictment be suppressed and fined. 1 *Hawk. P. C. c. 75. § 6.*

Inns in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveller, without a very sufficient cause; for thus to frustrate the end of their institution is held to be disorderly behaviour. 1 *Hawk. P. C. c. 78. § 2.* See *Inns.*

4. By the 10 & 11 *W. 3. c. 17.* all lotteries are declared to be public nuisances; and all grants, patents, or licenses for the same to be contrary to law. See further *Lotteries.*

As to the statute 6 *Geo. 1. c. 18.* (now repealed), which rendered certain advertising stock companies, with transferable shares, public nuisances, and the cases decided on the act, see *Bac. Abr. Nuisance, A. 7th edit.*

5. The making and selling of fire-works and squibs, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common nuisance, 9 & 10 *W. 3. c. 7.* and therefore is punishable by fine. See title *Fire-works.* To this head also may be referred (though not declared a common nuisance) the making, keeping, or carriage of too large a quantity of gunpowder at one time, or in one place, or vehicle, which is prohibited by 12 *Geo. 3. c. 61.* under heavy penalties and penalties and forfeiture. See title *Gunpowder.*

6. Eaves-droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at the court-leet. *Kitch. of Courts, 20.* Or are indictable at the sessions, and punishable by fine, and finding sureties for their good behaviour. *Ibid.*; 1 *Hawk. P. C. c. 61. § 4.*

Lastly, a common scold is a public nuisance to her neighbourhood. For which offence she may be indicted. 6 *Mod. 213.* And, if convicted, shall be sentenced to be placed in a certain engine of correction, called the trebucket, castigatory, or cuck-stool. 3 *Inst. 219.* See *Castigatory, Scold.*

It is a common nuisance indictable to divide a house in a town for poor people to inhabit in, by reason whereof it will be more dangerous in the time of sickness and infection of the plague. 2 *Roll. Abr. 139.*

So it is a nuisance for persons afflicted with infectious disorders to go about in the highways and other places of resort. See 4 *M. & S. 73; Ib. 272.*

A common playhouse, if it draws together such number of coaches and people as incommode and disturb the neighbourhood, may be a nuisance; but these places are not naturally nuisances, but become so by accident. 1 *Roll. Rep. 109;* 1 *Hawk. P. C. c. 75. § 7.*

A prohibitory writ was issued out of B. R. against Betterton and other actors, for erecting a new playhouse in Little Lincoln's Inn Fields, reciting that it was a nuisance to the neighbourhood; and they not obeying the writ, an attachment was granted against them; but it was objected that an attachment could not be issued, and that the most proper method was to proceed by indictment, and then the jury would consider whether it were a nuisance or not; and this was the better opinion. 5 *Mod. 142;* 2 *Nels. Abr. 1192.*

One Hall having begun to build a booth near Charing-Cross, for rope-dancing, which drew together many idle people, was ordered by the lord chief justice not to proceed: he proceeded, notwithstanding, affirming, that he had the king's warrant and promise to hear him harmless; but being required to give a recognizance of three hundred pounds that he would not go on with the building, and he refusing, he was committed, and a record was made of this nuisance, as upon the court's own view, it being in their way to Westminster, and a writ issued to the sheriff of Middlesex to prostrate it. 1 *Vent. 169;* 1 *Mod. 96.*

And it has lately been held that keeping a pigeon-shooting-ground at Bayswater for rifle-shooting, whereby idle and

disorderly persons are collected in the neighbourhood outside the ground to shoot the strayed pigeons, is an indictable nuisance. 3 *B. & Adol. 184.*

It hath been holden to be a common nuisance to make great noises in the night with a speaking trumpet. *Str. 704.* Or to permit a house near the highway to continue in a ruinous condition. *Salk. 357.* Or to travel with a cart on a common pack-way or horse-way, and by thus ploughing it up to render the use of it inconvenient. 6 *Mod. 145.* Or to put a ship of three hundred tons into Billingsgate dock, for although it is a common dock, it is only for the reception of small vessels freighted with provisions for the London market. 1 *Hawk. P. C. c. 75. § 11.*

So it is an indictable nuisance to keep a fierce dog and to bite mankind, to go at large unmuzzled; 4 *Burn's J. 578;* and the like for permitting a savage bull to go about the public thoroughfares.

So it is a public nuisance to sell unwholesome food, or to mix noxious ingredients in any thing made and supplied for the food of man. See 3 *M. & S. 11.*

So whatever openly outrages decency, and is injurious to public morals, is a common nuisance, and indictable as a misdemeanor. 1 *Hawk. c. 5. § 4;* 4 *Comm. 65, n.* And see *Indecency, &c.*

But erecting a dove-cote is not a common nuisance; though action on the case will lie at the suit of the lord of the manor for erecting it without his license. 1 *Hawk. P. C. c. 75. § 8.* It was anciently held, that if a man erected a dove-cote it was punishable at the leet; but it has been since adjudged not to be punishable in the leet as a common nuisance, it that the lord for this particular nuisance should have an action on the case, or an assize of nuisance: as he may for building an house to the nuisance of his mill. 5 *Rep. 101;* 3 *Salk. 248.*

And the annoyance proceeding from a public nuisance must be of a real and substantial nature; for the fears of mankind, however reasonable, will not create a nuisance; therefore it is no nuisance to erect a building for the purpose of inoculation. 3 *Atk. 21, 726, 750.*

Neither the king, nor lord of a manor, may license any man to make or commit a nuisance. 1 *Roll. Abr. 138.*

Generally speaking, no length of time will legalise a public nuisance. See 7 *East, 195;* 3 *Camp. 227;* 2 *B. & 4. c. 8.*

See also 13 *E. 1. c. 24;* 12 *R. 2. c. 18;* 2 *W. & M. st. 2. c. 8;* 30 *Geo. 2. c. 22* (repealed in part by the 7 *Geo. 3. c. 42. § 57;* 31 *Geo. 2. c. 17.* respecting nuisances in the cities of London and Westminster.

A nuisance in a church-yard is, properly, of ecclesiastical cognizance. *Carth. 152.*

II. PRIVATE NUISANCES are such as affect either the corporeal or incorporeal hereditaments of an individual.

First, As to corporeal hereditaments. If a man builds a house so close to mine that his roof overhangs my roof, or throws the water off his roof upon mine, this is a nuisance for which an action will lie. *F. N. B. 184.*

So if a man have a spout falling down from his house, and another person erect any thing above it, that the water cannot fall as it did, but is forced into the house of the plaintiff, and rots the timber, it is a nuisance actionable. 18 *E. 3;* 2 *Roll. Abr. 140.* And in trespass for a nuisance, in causing stinking water in the defendant's yard to run to the walls of the plaintiff's house, and piercing them so that it ran into his cellar. See judgment was given for the plaintiff. *Hard. 60.*

Likewise to erect a house or other building so near to mine that it obstructs my ancient lights and windows, is a nuisance of a similar nature. 9 *Rep. 58.* But in this latter case it is necessary that the windows be ancient; that is, have existed a long time without interruption, otherwise there is no injury done, (but see the recent statute under tit. *Lights*.) For he hath as much right to build a new edifice upon

ground as I have upon mine, since every man may erect what he pleases upon the upright or perpendicular of his own soil, so as not to prejudice what has long been enjoyed by another; and it was my folly to set so near another's ground. *Cro. Eliz.* 118; *Salk.* 459.

Also if a person keeps his hogs, or other noisome animals, so near the house of another that the stench of them incommodates him, and make the air unwholesome (or renders the enjoyment of life or property uncomfortable,) this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. 9 *Rep.* 58; 1 *Burr.* 337.

So where a person kept a hog-sty near a man's parlour, whereby he lost the benefit of it. 2 *Roll. Abr.* 140.

A like injury is, if one's neighbour sets up and exercises any offensive trade; as a tanner's, a tallow chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, *sic utere tuo, ut alienum non lædas*; this therefore is an actionable nuisance. *Cro. Car.* 510.

An inn-keeper brought an action on the case against a person for erecting a tallow furnace, and melting stinking tallow so near his house, that it annoyed his guests, and his family became unhealthy; and adjudged that the action lay. *Cro. Car.* 367.

So that the nuisances which affect a man's dwelling may be reduced to these three: 1. Overhanging it, which is also a species of trespass, for, *cujus est solum, ejus est usque ad medium*. 2. Stopping lights; and 3. Corrupting the air with noisome smells; for light and air are two indispensable requisites to every dwelling. But depriving one of a mere matter of pleasure, as of a fine prospect, by building a wall, or the like; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance. 9 *Rep.* 58; *Cro. Eliz.* 118; 3 *Salk.* 459.

As to nuisance to one's lands, if one erects a smelting-house for lead so near the land of another, that the vapour and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance. 1 *Roll. Abr.* 89.

If a person melt lead so near the close of another that it scorches his grass there, whereby cattle are lost; notwithstanding this is a lawful trade, and for the benefit of the nation, action lies against him, for he ought to use his trade in a proper place, so as no damage may happen to the proprietors of the land adjoining. 2 *Roll. Abr.* 141.

A plaintiff was possessed of an house wherein he dwelled, and the defendant built a brew-house, &c. in which he burnt coal so near the house that by the stink and smoke he could not dwell there without danger of his health; and it was adjudged that the action lay, though a brew-house is necessary, when he is burning coal in it. *Hutton*, 195.

And by consequence it follows, that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to that act where it will be less offensive. So also if my neighbour ought to scour a ditch, and does not, whereby the ditch is overflowed, this is an actionable nuisance. *Hale* on *F. N. B.* 427.

With regard to other corporeal hereditaments; it is a nuisance to stop or divert water that used to run to another's mill or pond. *F. N. B.* 184. To corrupt or poison a stream of course, by erecting a dye-house, or a lime-pit, for the exercise of trade, in the upper part of the stream. 9 *Rep.* 59; 2 *Roll. Abr.* 141. Or, in short, to do any act therein, that in its consequences must necessarily tend to the prejudice of one's neighbour. 3 *Comm. c.* 13.

Building a smith's forge near a man's house, and making a noise with hammers, so that he could not sleep, was held a nuisance for which action lies, although the smith pleaded that he and his servants worked at seasonable times; that he

had been a blacksmith and used the trade above twenty years in that place, and set up his forge in an old room, &c. For though a smith is a necessary trade, and so is a lime-burner and a hog-merchant, yet these trades must be used so as not to be injurious to the neighbours. 1 *Lutw.* 69.

But if a schoolmaster keeps a school so near the study of a lawyer by profession, that it is a disturbance to him, this is not a nuisance for which action may be brought. *Wood's Inst.* 538.

Where two houses, one whereof is a nuisance to the other, come both into one and the same hand, the wrong is purged. See *Hob.* 131.

Secondly, As to incorporeal hereditaments. If I have a way annexed to my estate, across another's lands, and he obstructs me in the use of it either by totally stopping it or putting logs across it, or ploughing over it, it is a nuisance; for in the first case I cannot enjoy my right at all, and in the latter I cannot enjoy it so commodiously as I ought. *F. N. B.* 183; 2 *Roll. Abr.* 140.

Also if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does me a prejudice, it is a nuisance to the freehold which I have in my market or fair. *F. N. B.* 148; 2 *Roll. Abr.* 140. See *Market*.

If a ferry is erected on a river so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the king's subjects: otherwise he may be grievously amerced: it would therefore, be extremely hard if a new ferry were suffered to share its profits, which does not also share his burden. 2 *Roll. Abr.* 140.

But where the reason ceases, the law also ceases with it; therefore it is no nuisance to erect a mill so near mine as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade, or a school, in a neighbourhood, in rivalry with another; for by such emulation the public are like to be gainers; and if the new mill or school occasion a damage to the old one, it is *damnum absque injuriâ*. *Hale* on *F. N. B.* 184.

The stopping up a way leading from houses to lands, suffering the next house to decay, to the damage of my house (but see *contra*, *Page v. Mayor of London*, 9 B. & C. 725), and setting up or making a house of office, lime-pit, dye-house, tan-house, or butcher's shop, &c. and using them so near my house that the smell annoys me, or is infectious; or if they hurt my lands or trees, or the corruption of the water of lime-pits spoils my water or destroys fish in a river, &c.; these and the other evils already enumerated, are in general private nuisances. 3 *Inst.* 231; 5 *Rep.* 101; 9 *Rep.* 54; 1 *Roll. Abr.* 88; 2 *Roll.* 140; 1 *Dunw. Abr.* 173.

III. The proceeding in the case of a public nuisance is by indictment or presentment, which should charge the offence to be done to the common nuisance of all the large subjects, &c. *Cro. Eliz.* 148; 1 *Hack.* c. 7, §. 1.

By an old statute, 12 R. 2. c. 13, which if not actually obsolete is now entirely disregarded, none shall cast any garbage, dung, or filth, into ditches, waters, or other places within or near any city or town, on pain of punishment by the Lord Chancellor, at discretion, as a nuisance.

Where a statute makes an act "a common nuisance," an indictment lies against the offender, although a summary remedy is also given by proceedings before justices. 2 *N. & M.* 478.

The punishment imposed by the law on a person convicted of a nuisance, is fine and imprisonment; but as the removal of the nuisance is of course the object of the indictment, the court will adapt the judgment to the circumstances of the case.

On an indictment for a nuisance in erecting a wall across a

road (not for continuing the nuisance), it is not necessary to adjudge that the nuisance be abated. But where it is stated in the indictment to be an existing nuisance, there must be judgment to abate it. 7 T. R. 467; 8 T. R. 148.

By 1 & 2 Geo. 4. c. 41, the court by which judgment ought to be pronounced on conviction for any public nuisance, is authorized to award such costs to the prosecutor as shall be deemed proper and reasonable, to be paid by the party convicted. By § 2, such court, without the consent of the prosecutor, may make order to remedy the grievance by altering the construction of the furnace, where the nuisance arises from furnaces used in the working of steam-engines: but by § 3, the act as to costs and alterations is not to extend to the furnaces of steam-engines used solely for sinking mines or smelting ores, &c. And see *post*, IV.

IV. As common or public nuisances are such inconvenient or troublesome offences which annoy the whole community in general, and not merely some particular person, they are therefore indictable only, and not actionable; as it would be unreasonable to multiply suits by giving every man a separate right of action for what damns him in common only with the rest of his fellow-subjects. 4 Comm. c. 13, p. 167; 5 Rep. 73; 1 Inst. 56; 1 Vent. 208. And as the law gives no private remedy for any thing but a private wrong, therefore no action lies for a public or common nuisance, but an indictment only, because the damage being common to all the king's subjects, no one can assign his particular proportion of it. 3 Comm. c. 13, p. 119. For this reason no person natural or corporate can have an action for a public nuisance, or nuisance, it, but only the king in his public capacity of supreme governor and *pater familias* of the kingdom. Vaugh. 341, 2. Yet this rule admits of one exception; where a private person suffers some extraordinary damage beyond the rest of the king's subjects by a public nuisance, in which case he shall have a private satisfaction by action. As if by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer an injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action. 1 Inst. 56; 5 Rep. 73. So if by reason of a pit dug in a highway, a man for whose life I held lands, is drowned; or my servant falling into it receives injury, whereby I lose his service, &c.; for this special damage, which is not common to other persons, action lies. 4 Rep. 18; 5 Rep. 73; Cro. Car. 448; Vaugh. 341; 4 Bulst. 344. But a modern authority says, the injury must be direct, and not consequential, as by being delayed in a journey of importance. Bull. N. P. c. 5, p. 26; but see c. 7, p. 78. And where the inhabitants of a town had, by custom, a watering place for their cattle, which was stopped by another, it has been held that any inhabitant might have an action against him, otherwise they would be without remedy, because such a nuisance is not common to all the king's subjects, and presentable in the leet, or to be redressed by presentment or indictment in the quarter sessions. 5 Rep. 73; 9 Rep. 103.

It is said both of a common and private nuisance, that they may be abated or removed by those who are prejudiced by them, and they need not stay to prosecute for their removal. 2 Lil. Abr. 244; Wood's Inst. 443. Also if a house be on the highway, or a house hang over the ground of another, they may be pulled down; but no man can justify the doing more damage than is necessary, or removing the materials farther than requisite. 1 Hawk. P. C. c. 75, 76; Stra. 680.

Also, if a man hath abated or removed a nuisance which offended him, in this case he is entitled to no action, for he had choice of two remedies; but having made his election of one remedy, he is totally precluded from the other. 3 Comm. c. 13, p. 220, cites 9 Rep. 55. See also F. N. B. 185; 2 Rol. Abr. 745. But this apparently admits of some qualification; for the party's right of action might attach before

the removal; and in another case it is said, there is a difference between an assize for a nuisance (now abolished), and an action on the case (see *post*); for the first was to abate the nuisance, but the last is not to abate it, but to recover damages; therefore if the nuisance be removed, the plaintiff is entitled to his damages which accrued before; and though it is laid with a *continuando* for a longer time than the plaintiff can prove, he shall have damages for what he can prove before the nuisance was removed. 2 Mod. 253.

This abatement or removal of nuisances is classed by Blackstone among the species of remedy, allowed by law, through the mere act of the party injured. 3 Comm. c. 1. This abatement, removing, or taking away, may be performed by the party aggrieved by the nuisance, so as he commits no riot in the doing it. 5 Rep. 101; 9 Rep. 55. If a house or wall is erected so near to mine that it stops my ancient lights which is a private nuisance, I may enter my neighbour's lands and peaceably pull it down. Salk. 459. Or if a new gate be erected across the public highway, which is a common nuisance, any of the king's subjects passing that way may cut it down and destroy it. Cro. Car. 184. And the reason why the law allows this private and summary method of doing oneself justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice. 3 Comm. c. 1.

When the nuisance is caused by the misfeasance or nonfeasance of another, the party injured may in general abate it immediately, and without any previous notice or request, but if the nuisance be merely continued by a party who does not erect it, or when it consists of omission, he should be requested to remove it before the injured party can himself abate. 2 B. & C. 302; 3 D. & R. 556, S. C. And see *supra* as to the abating of private nuisances, 1 Chitty's Gen. Principles of the Law, 619.

With respect to the redressing of private nuisances by due course of law, the remedy by suit is by action on the case for damages, in which the party injured shall only recover satisfaction for the injury sustained, but cannot thereby remove the nuisance. However, every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie, and very exemplary damages will probably be given, if after our verdict against him the defendant has the hardiness to continue it. 2 Leon. pl. 129; Cro. Eliz. 402.

On the principle that the continuation of a nuisance is, it were, a new nuisance, where a nuisance is erected in the time of the deviser, and continued afterwards by the devisee, an action may be maintained against the latter. 2 Leon. pl. 129; Cro. Car. 231. But a plaintiff may declare both *vi et contra* for erecting and continuing, the other for continuing only, though the latter method is sufficient in any case.

If one hath freehold land adjoining to the highway, and he encroach part of the way, and lay lands to it, and then dying, it comes to his heir, if he continues it, though he does nothing else, he may be indicted for the continuance of the nuisance. Rol. Abr. 137. So where a man erects a nuisance, and then lets it, the continuance by the lessee has been held to be a nuisance, and an action lies against him. Cro. Jac. 87; Moor, 353. And see 1 Mod. 54; 3 Salk. 248.

Also if a person assigns his lease with a nuisance, action lies against him for continuing it, because the lease was transferred with the original wrong, and his assignment continues the continuance; besides he hath a rent as consideration for the continuance; therefore he ought to answer the damages occasioned by it. 2 Salk. 460; 2 Cro. 272, 555.

The law, in order to give relief to the injured, formerly provided two other actions, the assize of nuisance and the writ of *quod permittat prosternere*; which not only gave the plaintiff satisfaction for his injury past, but also struck at the root, and removed the cause itself, the nuisance that occasioned the injury. These two actions, however, could only be

brought by the tenant of the freehold, so that a lessee for years was confined to his action upon the case. *Finch's L.* 289.

An assize of nuisance was a writ wherein it was stated that the party injured complained of some particular fact done *ad nocumentum liberi tenementi sui*; and therefore commanding the sheriff to summon an assize, that is, a jury, and view the premises, and have them at the next commission of assizes, that justice may be done therein. *F. N. B.* 183. And if the assize was found for the plaintiff, he should have judgment of two things, 1st, to have the nuisance abated, and 2d, to recover damages. *9 Rep.* 55. An assize of nuisance lay against the very wrong-doer himself who levied or did the nuisance, and did not lie against any person to whom he had aliened the tenements whereon the nuisance was situated. This was the immediate reason for making that equitable provision in stat. *West. 2.* 13 *Edw. 1.* c. 24, for granting a similar writ in *casu consimili*, where no former precedent was to be found. The statute gave the form of a new writ in this case, which only differed from the old one in stating that the wrong-doer and the alienee both raised the nuisance; for every continuation, as was before said, is a fresh nuisance.

Before this statute, the party injured, upon any alienation of the land wherein the nuisance was set up, was driven to his *quod permittit prosterne*, which was in the nature of a writ of right, and therefore subject to greater delays. *2 Inst.* 105. This was a writ commanding the defendant to permit the plaintiff to abate the nuisance complained of, and unless he so permitted, to summon him to appear in court, and show cause why he would not. *F. N. B.* 121. And this writ lay as well for the alienee of the party first injured, as against the alienee of the party first injuring. *5 Rep.* 100. And the plaintiff should have judgment therein to abate the nuisance, and to recover damages against the defendant.

Both these actions of assize of nuisance and of *quod permittit prosterne* have long been obsolete, having given way to the action on the case; and by the 3 & 4 *Wm. 4.* c. 27. § 36, they are abolished.

In an action on the case, as was before observed, no judgment can be had to abate the nuisance, but only to recover damages; and there is therefore now no proceeding at law whereby a man may obtain a judgment to abate a nuisance; but as a man is liable to a fresh suit for a continuance of a nuisance, the remedy afforded by an action on the case seems sufficient, as the damages awarded in repeated actions will at length compel the most obstinate man to remove the cause of complaint.

Where a party cannot himself, or with the assistance of others, abate a private nuisance, and in an action on the case fails in procuring him the desired relief, his only course to get rid of it seems to be by an application to a court of equity, which after a verdict at law finding the nuisance, and before, will cause it to be removed. *1 Cor.* 102; *2 Ves.* 299.

See further, *Imposition, Eights, Mines, Prescription.*

NULL DISSISIN. Plea of. A plea in real actions, that there was no dissisin, and it was one species of the general plea. See *Dissisin*.

NULL TIEL RECORD. The plea of a plaintiff that there is no such record, on the defendant's alleging matter of

record, in bar of the plaintiff's action. See *Failure of Record*.

It is sometimes the plea of a defendant, as in action on a judgment, &c.

If a record be asserted on one side to exist, and which is denied by the opposite party under the form of traverse, that there is no such a record remaining in court as alleged, the issue thus raised is called an issue of *null tiel record*, and the court awards in such case a trial by inspection and examination of the record. See further *Record*.

NULL TORT. Plea of. A plea in a real action, *i. e.* that no wrong was done, and a species of the general issue. See *Pleading*.

NULLUM ARBITRIUM. The usual plea of the defendant prosecuted on an arbitration bond, for not abiding by an award; that there was no award made. See *Award*.

NULLITY. Is where a thing is null and void, or of no force. *Lit. Dict.*

NUMERUM. *Civitas Cant' reddit 24l. ad numerum, i. e.* by number or tale, as we call it. *Domesday.*

NUMMATA. The price of any thing, generally by money; as *denariata* denoteth the price of a thing by computation of pence, and *librata* by computation of pounds.

NUMMATA TERRÆ. Is the same with *denariatus terræ*, and thought to contain an acre. *Spelman.*

NUMMUS. A piece of money or coin among the Romans; and it is a penny according to *Matth. Westm. sub anno 1095.*

NUN, nunna.] A consecrated virgin or woman, who by vow has bound herself to a single and chaste life, in some place or company of other women, separated from the world, and devoted to the service of God by prayer, fasting, and such like holy exercises; it is an Egyptian word, St. Jerome says.

By *Westm. 2.* 13 *Ed. 2.* c. 34. the punishment of three years' imprisonment, &c. was imposed for taking a nun from her convent.

NUNCIUS. A nuncio, or messenger, servant, &c. The Pope's nuncio was termed *legatus pontificis*; a *legate*. See *Legate*.

NUCUPATIVE WILL. See *Will*.

NUPER OBIT. Was a writ that lay for a sister and co-heir, deforced by her coparcener of lands or tenements, whereof their father, brother, or any other common ancestor died seised of an estate in fee-simple; for if one sister deforced another of land held in fee-tail, her sister and co-heir should have a formedon against her, &c. and not a *nuper obit*; and where the ancestor, being once seised, died seised, not of the possession, but the reversion, in such a case a writ of *rationabili parte* lay. *Reg. Orig.* 226; *F. N. B.* 107; *Terms de Ley*; *Finch. L.*

This writ of *nuper obit* is now abolished. See *Limitation of Actions*, III. See also *Assize of Mort d'Ancestor*; which is likewise abolished.

NURSERY GROUND. See *Gardens*.

NURTURE. Guardian for. This is, of course, the father or mother, until the infant attains the age of fourteen years; and in default of father or mother, the ordinary usually assigns some proper person. *Co. Lit.* 88; *Moor.* 738; *3 Rep.* 38; *2 Jones.* 90; *2 Lev.* 163. See further *Guardian*, I. 2.

NYAS, Nidarius accipiter.] A hawk or bird of prey. *Litt. Dict.*

OATH.

O. The seven Antiphones, or alternate hymn of seven verses, &c. sung by the choir in the time of Advent, was called O, from beginning with such exclamation. In the statutes of St. Paul's church in London, there is one chapter *De faciendo O. Liber Statut. MS. f. 86.*

[OATH, Sax. *soth*, Lat. *juramentum*.] An affirmation or denial of any thing before one or more persons who have authority to administer the same, for the discovery and advancement of truth and right, calling God to witness that the testimony is true; therefore it is termed *sacramentum*, a holy band or tie: it is called a *corporal oath*, because the witness when he swears lays his right hand on the Holy Evangelists, or New Testament. 3 *Inst.* 165.

There are several sorts of oaths in our law; viz. *Juramentum promissionis*, where oath is made either to do, or not to do such a thing. *Juramentum purgationis*, when a person is charged with any matter by bill in Chancery, &c.: *Juramentum probationis*, where any one is produced as a witness, to prove or disprove a thing: and *Juramentum triationis*, when any persons are sworn to try an issue, &c. 2 *Nels.* 1181.

All oaths must be lawful, allowed by the common law, or some statute; if they are administered by persons in a private capacity, or not duly authorized, they are *coram non judice*, and void; and those administering them are guilty of a high contempt, for doing it without warrant of law, and punishable by fine and imprisonment. 3 *Inst.* 165; 4 *Inst.* 278; 2 *Roll. Abr.* 277.

One who was to testify on behalf of a felon, or person indicted of treason, or other capital offence, upon an indictment at the king's suit, could not formerly be examined on his oath for the prisoner against the king, though he might be examined without oath; but by the 1 *Ann.* 2. c. 9. witnesses on behalf of the prisoner upon indictments are to be sworn to depose the truth in such manner as witnesses for the king; and if convicted of wilful perjury, shall suffer the punishment inflicted for such offences.

The evidence for the defendant in an appeal (now abolished), whether capital or not, or on indictment or information for a misdemeanor, was to be on oath before this statute. 2 *Hawk. P. C.*

A person who is to be a witness in a cause may have two oaths given him, one to speak the truth to such things as the court shall ask him concerning himself, or other things which are not evidence in the cause; the other, to give testimony in the cause in which he is produced as a witness; the former is called the oath upon a *voir (vrai) dire*.

If oath be made against oath in a cause, it is a *non liquet* to the court which oath is true; and in such case the court will take that oath to be true which is to affirm a verdict, judgment, &c. as it tends to the expediting of justice. 2 *Lil. Abr.* 247.

A voluntary oath, by consent and agreement of the parties, is lawful as well as a compulsory oath; and in such case, if it is do a spiritual thing, and the party fail, he is suable in the ecclesiastical court, *pro læsione fidei*; if to do a temporal thing, and he fail therein, he may be punished in *B. R.* Ad-

OATHS.

judged on *assumpsit*, where, if the defendant would make oath before such a person, the plaintiff promised, &c. *Cro. Car.* 488; 3 *Sulk.* 248.

By the common law, officers of justice are bound to take an oath for the due execution of justice. *Trin.* 22 *Car.* 1. *B. R.* Though if promissory oaths of officers are broken, they are not punished as perjuries, like unto the breach of assertory oaths; but their offences ought to be punished with a severe fine, &c. *Wood's Inst.* 412.

Anciently, at the end of a legal oath, was added, *So help me God at his holy dome*, i. e. judgment; and our ancestors did believe that a man could not be so wicked as to call God to witness any thing which was not true; but that if any one should be perjured, he must continually expect that God would be the revenger; and thence probably purgations of criminals by their own oaths, and for great offences by the oaths of others, were allowed. *Malmsh. lib.* 2. c. 6; *Leg. Hen.* 1. c. 64.

By the 6 *Geo.* 4. c. 87. § 20. consuls at foreign parts may administer oaths or take affirmations, and do all acts which may be performed by notaries.

By 1 & 2 *Will.* 4. c. 4. a great variety of oaths and affirmations in the customs and excise departments were abolished, and declarations substituted. But this act was repealed as to the customs by the 3 & 4 *Will.* 4. c. 50.

Quakers, Moravians, and Separatists, are now in all cases relieved from the necessity of taking oaths. See *Quakers, Separatists*.

For the offence of uttering profane oaths, see *Swearing*. And see further, *Evidence, Nonjurors*, &c.

OATHS, UNLAWFUL. In 1797, in consequence of the alarm excited by the mutiny at the Nore, and with a view to check the attempts then made to induce the soldiery as well as sailors to enter into seditious conspiracies, the 37 *Geo.* 3. c. 123. was passed. By this statute persons administering or aiding, or present at and consenting to the administering of any oath or engagement purporting or intended to bind the person taking the same to engage in any mutinous or seditious purpose; or to disturb the public peace; or being of any association, society or confederacy for any such purpose; or obeying the orders or commands of any committee or body of men not lawfully constituted; or of any leader or commander, or other person not having authority by law for that purpose; or not informing or giving evidence against any associate, confederate, or other person; or not revealing or discovering any illegal act done or to be done; or any illegal oath or engagement which may have been administered or tendered or taken; are declared guilty of felony, punishable with transportation for seven years.

And every person who shall take any such oath or engagement, not being compelled thereto, is also declared guilty of felony, and subject to the same punishment.

By § 5. any engagement or obligation whatsoever shall be deemed an oath within the act, and whether the same shall be actually administered by any person, or taken by any person without administration.

By the 52 Geo. 3. c. 104. the provisions of the 37 Geo. 3. c. 123. were extended, and it was made a capital felony for any person to administer, &c. any oath binding the person taking it to commit treason, murder, or any capital felony; and the person taking such oath is declared guilty of felony, and is liable to be transported for life.

By § 5. any engagement or obligation in the nature of an oath, is to be deemed an oath within the act.

By the 39 Geo. 3. c. 79. and the 57 Geo. 3. c. 19. enactments were made against unlawful combinations and seditious assemblies, the members whereof were required to bind themselves by oaths, and such oaths were declared to be unlawful within the 37 Geo. 3. c. 123. See these statutes more fully stated under the title of *Seditious Societies*.

Although the preamble of the 37 Geo. 3. c. 123. is mainly directed against combinations for purposes of sedition and mutiny, yet the enacting part extends to all illegal associations in which oaths are administered of the nature described in that act. Therefore, where an associated body of men conspired together to raise the price of wages, and to make regulations in a particular trade (which was then an illegal act), and administered an oath binding the individual not to reveal such conspiracy, the offence was held to be within the above statute. 6 East, 419.

So in the recent case of the Dorsetshire Labourers, where the prisoners were charged in the indictment with administering an oath not to reveal an unlawful combination; an oath not to reveal an illegal oath; and an oath to obey the orders of a body of men not lawfully constituted; they were found guilty under the same act, and were sentenced to seven years' transportation.

By 50 Geo. 3. c. 102. persons in Ireland administering or tendering any oath for various unlawful purposes (stated in the act), are declared felons, punishable by transportation for life, and persons taking any such oath felons transportable for seven years.

By the above acts, persons compelled to take such oaths, &c. are not justified or excused, unless they declare the same (within fourteen days in England, and ten in Ireland) to some Justice of peace, &c. All aiders and abettors are declared principals.

OATHS TO THE GOVERNMENT. As to the oaths of the Chancellor, Judges of both benches, Barons of the Exchequer, &c. Clerks in Chancery, and the Cursitors, see 14 Edw. 3. st. 1. c. 5; 18 Edw. 3. st. 4. c. 5; 20 Edw. 3. c. 1, 2, 3.

Ecclesiastical persons are required to take the oaths of supremacy, &c. And clergymen not taking the oaths, on their refusal being certified into B. R. &c. do, for a second offence, incur the penalties of *præmunire*. See 1 Edw. c. 1; and *tit. Person*. Officers and ecclesiastical persons, members of parliament, lawyers, &c. are to take the oath of allegiance, or be liable to penalties and disabilities. 7 Jac. 1. c. 6.

By 1 H. & M. st. 1. c. 6. the coronation oath was altered and regulated. See *King*. The oaths of allegiance and supremacy were abrogated, and others appointed to be taken and enforced, on pain of disability, &c. by 1 W. & M. c. 8; 7 & 8 W. 3. c. 27.

By 13 W. 3. c. 6. all that bear offices in the government, peers, and members of the House of Commons, ecclesiastical persons, members of colleges, school-masters, preachers, serjeants at law, counsellors, attornies, solicitors, advocates, proctors, &c. are enjoined to take the oaths of allegiance; and persons neglecting or refusing are declared incapable to execute their offices and employments, disabled to sue in law or equity, to be guardian, executor, &c. or to receive any legacy or deed of gift, to be in any office, &c. and to forfeit five hundred pounds.

This extends not to constables, and other parish officers, nor to bailiffs of manors, &c.

The 1 Ann. c. 22. obliges the receiving the abjuration oath, with alterations.

The oath of allegiance, as administered for upwards of six hundred years, contained a promise "to be true and faithful to the king and his heirs, and truth and faith to bear of life and limb and terrene honour, and not to know or hear of any ill or damage intended him, without defending him therefrom." See *Mirr.* c. 3. § 35; *Fleta*, 3. 16; *Britt.* c. 29; 7 *Rep. Calvin's Ca.* 6. Upon which Sir M. Hale makes this remark: that it was short and plain, not entangled with long and intricate clauses or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. 1 *Hal. P. C.* 63. But at the Revolution, the terms of this oath being thought perhaps to favour too much the notion of non-resistance, the present form was introduced by the convention parliament, which is more general and indeterminate than the former; the subject only promising "that he will be faithful, and bear true allegiance to the king," without mentioning "his heirs," or specifying the least wherein that allegiance consists. The oath of supremacy is principally calculated as a renunciation of the pope's pretended authority; and the Oath of Abjuration, as introduced by 13 *Will.* 3. c. c. and regulated by 6 Geo. 3. c. 58. very amply supplies the loose and general texture of the oath of allegiance; it recognizing the right of majesty, derived under the Act of Settlement; engaging to support him to the utmost of the juror's power; promising to disclose all traitorous conspiracies against him, and expressly renouncing any claim of the descendants of the late Pretender, in as clear and explicit terms as the English language can furnish. This oath must be taken by all persons in any office, trust, or employment; and may be tendered by two justices of the peace to any person whom they shall suspect of disaffection. 1 *Geo.* 1. st. 2. c. 13; 6 Geo. 3. c. 58. And the oath of allegiance may be tendered to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet of the manor, or in the sheriff's tourn, which is the court-leet of the county. 2 *Inst.* 121; 1 *Hal. P. C.* 64; and see 1 *Comm.* 367, 368.

By 1 W. & M. c. 8. persons of eighteen years of age refusing to take the new oaths of allegiance on tender by the proper magistrate, are subject to the penalties of a *præmunire*. And by 7 & 8 W. 3. c. 24. serjeants, counsellors, proctors, attornies, and all officers of courts practising without having taken the oaths of allegiance, are guilty of a *præmunire*, whether the oaths be tendered or not. See 4 *Comm.* 116, 117.

By the 10 Geo. 4. c. 7. § 10. Roman Catholics may hold any offices, civil or military, and places of trust or profit under his majesty, and exercise any other franchise (except as therein mentioned), on taking the oath therein given instead of the oaths of allegiance, supremacy, and abjuration, and instead of such other oaths as were then by law required to be taken for the purpose aforesaid by Roman Catholics. See this act more fully stated under the title *Roman Catholics*.

By several acts of *Eliz.*, *Jac.* 1. and *Will. & Mary*, the oaths of allegiance and supremacy were required to be taken by all members of parliament, before the lord steward or his deputy, before they took their seats. And by the 30 *Car.* 2. c. 1. the same oaths were required to be taken at the table in the house before any member should sit or vote. This needless repetition of the same oaths is now put an end to by the 1 & 2 *Will.* 4. c. 9. by which the acts requiring the said oaths to be taken before the lord steward or his deputy, are repealed. See further, *Parliament*.

In every session of parliament acts are passed for indemnifying persons who have omitted to qualify themselves for offices and promotions within the time limited by law, and for allowing further time for that purpose.

These annual indemnity acts are prospective as well as retrospective, and extend to those who may be in default during the time for which they are made, as well as those who have incurred penalties before they passed. 2 *B & C.* 34.

See further on the subject of oaths, tithes. *Nonconformist, Nonjuror, Parliament, Quakers, Roman Catholics, Separatists, &c.*

OBEDIENTIA. In the canon law is used for an office, or the administration of it; whereupon the word *obedientiales*, in the provincial constitutions, is taken for officers under their superiors. *Can. Law*, c. 1. And as some of these offices consisted in the collection of rents or pensions, rents were called *obedientie*: *quia colligebantur ab obedientibus*. But though *obedientia* was a rent, as appears by *Hoveden*, in a general acceptance of this word, it extended to whatever was enjoined the monks by the abbot; and in a more restrained sense, to the cells or farms which belonged to the abbey to which the monks were sent, *vi ejusdem obedientie*, either to look after the farms, or to collect the rents, &c. See *Mat. Paris, Ann.* 1218.

OBIT, Lat.] Signifies a funeral solemnity or office for the dead, most commonly performed when the corpse lies in the church uninterred: also the anniversary office. 2 *Cro.* 51; *Dyer*, 343. The anniversary of any person's death was called the obit; and to observe such day with prayers and alms, or other commemoration, was the keeping of the obit. In religious houses they had a register wherein they entered the obits or obitual days of their founders or benefactors, which was thence termed the obituary. The tenure of obit, or obituary, or chantry lands, is taken away and extinct by 1 *Edw.* 1. 6. c. 4.

OBJURGATRICES. Scolds, or unquiet women, punished with the cucking-stool. *MS. LL. Lib. Burg. Villæ de Montgomery temp. Hen. II.* See *Castigatory*.

OBLATA. Gifts or offerings made to the king by any of his subjects, which in the reigns of King John and King Henry III. were so carefully heeded, that they were entered into the Fine Rolls under the title of Oblata; and if not paid, esteemed a duty, and put in charge to the sheriff. *Philips of Purveyance*.

In the Exchequer it signifies old debts, brought as it were together from precedent years, and put on the present sheriff's charge. *Pract. Excheg.* 78.

OBLATIONS, oblationes.] Offerings to God and the church. See *Spelm. de Concil. tom.* 1. p. 393.

The word is often mentioned in our law books; and formerly there were several sorts of oblations; viz. *oblationes altaris*, which the priest had for saying mass; *oblationes defunctorum*, which were given by the last wills and testaments of persons dying to the church; *oblationes mortuorum*, or *funerales*, given at burials; *oblationes penitentium*, which were given by persons penitent; and *oblationes pentecostales*, &c.

The chief or principal feasts for the oblations of the altar were All Saints, Christmas, Candlemas, and Easter, which were called *oblationes quatuor principales*; and of the customary offerings from the parishioners to the parish priest, solemnly laid on the altar, the mass or sacrament offerings were usually three-pence at Christmas, two-pence at Easter, and a penny at the two other principal feasts. Under this title of oblations were comprehended all the accustomed dues for sacramentalia or Christian offices; and also the little sums paid for saying masses and prayers for the deceased. *Kennett's Gloss.* See *Offerings*.

Oblationes funerales were often the best horse of the defunct, delivered at the church gate or grave to the priest of the parish; to which old custom we owe the origin of mortuaries, &c. And at the burial of the dead, it was usual for the surviving friends to offer liberally at the altar for the pious use of the priest, and the good estate of the soul deceased, being called the *soul-scent*. In North Wales this usage still prevails, where at the rails of the communion-table in churches is a tablet conveniently fixed to receive the money offered at funerals according to the quality of the deceased; which has been observed to be a providential augmentation to some of those poor churches. *Kennett's Gloss.* At first the church had no other revenues beside these obla-

tions, till in the fourth century it was enriched with lands and other possessions. *Blount.* See *Mortuary*.

Oblations, &c. are in the nature of tithes, and may be sued for in the ecclesiastical courts, and it is said are included in the act 7 & 8 *Will.* 3. c. 6. for recovery of small tithes under 40s. by the determination of justices of peace, &c. See *Tithes*.

OBLIGATION, Obligatio.] A bond, containing a penalty, with a condition annexed for payment of money, performance of covenants, or the like; it differs from a bill, which is generally without a penalty or condition, though a bill may be obligatory. *Co. Lit.* 172. See *Bond*.

Obligations may also be by matter of record; as statutes and recognizances, to which there are sometimes added defeasances, like the condition of an obligation; but when the obligation is simple, or single, without any defeasance or condition, it is most properly called so. 2 *Shep. Abr.* 475.

OBLIGOR. He who enters into an obligation; as obligee is the person to whom it is entered into.

Before the coming in of the Normans, writings obligatory were made firm with golden crosses, or other small signs or marks. But the Normans began the making such bills and obligations with a print or seal in wax, impressed with every one's special signet, attested by three or four witnesses. In former times many houses and lands thereto passed by grant and bargain, without script, charter or deed, only with the landlord's sword or helmet, with his horn or cup; and many tenements were demised with a spur or currycomb, with a bow or with an arrow. *Comell.* See *Bond, Deed*, II. 6, *Horn*.

OBLATA TERRÆ. According to some accounts, an acre of land; but others hold it to be only half a perch. *Spelm. Gloss.*

OBREPTION. The obtaining a gift of the king by a false suggestion. *Scotch Dict.*

OBVENTIONS, Obventiones.] Offerings or tithes; and oblations, obventions, and offerings are generally the same thing, though obvention has been esteemed the most comprehensive. See *Oblations, Tithes*.

OCCASIO. Is taken for a tribute which the lord imposed on his vassals or tenants; *propter occasiones bellorum et aliarum necessitatum.* *Fleta*, lib. 1. c. 24. Rather the cause or pretext of such imposition.

OCCASIONARI. To be charged or loaded with payments, or occasional penalties. *Edw.* 2. anno 21. See *3 Fleta*, Ita quod ipsi vigilatores non occasionentur, lib. 1. c. 4. par. 7.

OCCASIONES. Assarts, whereof *Manwood* speaks at large, the word is derived ab *occando*, i. e. throwing or breaking clods. See *Spelman's Glossary*, v. *Assartum*. *Niger Scac.* par. 1. cap. 13. and ante, *Assart*.

OCCUPANT. He who first gets possession of a thing. An island in the sea, precious stones on the sea-shore, and treasure discovered in a ground that has no particular own by the law of nations belong to him who finds them and makes the first occupation of them. *Treat. Laws*, 342.

THE LAW OF OCCUPANCY is founded upon the law of nature, viz. *Quod terra manens vacua occupanti conceditur*. So as, upon the first coming of the inhabitants to a new country, he who first enters upon such part of it and manures it gains the property; (as is now used in Cornwall, &c. by the laws of the Stannaries, under certain regulations;) so that it is the actual possession and manurance of the land which was the first cause of occupancy, and consequently is to be gained by actual entry. *Sid.* 347.

Where a man finds a piece of land which no other person possesses, or hath title unto, and enters upon the same, he gains a property, and a title by occupancy; but this manner of gaining property of lands has long since been out of use in England; for lands now possessed without any title are a crown, and not in him who first enters. *Sid.* 218.

However, the mere prior occupancy of land, however re-

cent, gives a good title to the occupier, whereupon he may recover as plaintiff against all the world, except such as can prove an older and better title in themselves. 4 Taunt. 547; see also 2 Savind. 111; and 8 East, 356.

The true ground of occupancy is, that anciently all titles of titles were by real actions, therefore he who had the freehold was one to whom the law had a special regard. The ancient law, for many reasons, did not allow leases for above forty years, till the 21 Hen. 8. c. 15. Besides, there was reason too, that not only he who had right paramount, might know how to try his action, but that the lord might know how to avow for his services (which were considerable things formerly); he ought to know who was his tenant, therefore the law provided there should be a person on whom he should avow. See Cart. 57; 1 Sid. 346; 1 Lev. 202. Gray v. Beaufort.

An estate for another's life, by our ancient laws, might be gotten by occupancy, as, for example, suppose A. had lands granted to him for the life of B. and died without making any estate of it, in such case, whoever first entered into the land after the death of A. got the property for the remainder of the estate granted to A. for the life of B. For to the heir of A. it could not go, not being an estate of inheritance, but only an estate for another man's life; which was not descendible to the heir unless he were specially named in the grant; and the executors of A. could not have it as it was not an estate testamentary, that it should go to the executor as goods and chattels; so that in truth no man could entitle himself unto those lands; therefore the law preferred him who first entered, and he was called *occupans*, and should hold the land during the life of B. paying the rent, and performing the covenants, &c. Bac. Elem. 1. And not only if tenant *pur terme d'autre vie* died, living *cestui que vie*; but if tenant for his own life granted over his estate to another, and the grantee died before him, there should be an occupant. Co. Lit. 41, 388.

The title by general occupancy of estates *pur autre vie* is now universally prevented by 29 Car. 2. c. 3. § 12; 4 Geo. 2. c. 20. § 9. The first statute enacts, that estates *pur autre vie* shall be devisable; and if not devised, chargeable in the hands of the heir as assets by descent where the estate falls on him as special occupant; and if he is not entitled as such, shall go to the grantee's executors or administrators, and be assets. On this statute a doubt arose whether it operated further than by making such estate devisable, and a contrary rights, and in the latter was a ground, that the grantee took the profits of such estate after payment of debts, if not devised, for his own benefit, as in the case of a general occupant. See 12 Mod. 103. This gave occasion to the second statute, which expressly makes the surplus, in case of intestacy, distributable as personal estate. See further as to occupancy, 2 Comm. 258; Vaugh. 187; Vin. title *Occupancy and Estates*, R. 2, 3; Com. Dig. *Estates*, F.

By the old law no right of occupancy was allowed where the king had the reversion of the lands; for the reversioner had an equal right with any other man to enter upon the land in possession; and where the king's title and a subject's title, the king's shall be always preferred; against the king, therefore, there could be no prior occupant, for *nullum tempus occurrat regi*. 1 Inst. 111. And even the case of a subject, had the estate *pur autre vie* been granted to a man and his heirs during the life of *cestui que vie*, there the heir might and still may enter and hold possession, and is called by the law a *special occupant*; as having a special exclusive right, by the terms of the original grant, to enter upon and occupy the *hereditas jacens* during the residue of the estate granted. Though some have thought him so called with no very great propriety, and that such estate is rather a descendible freehold. Vaugh. 201. See 2 Comm. c. 16. p. 259.

By the statutes above mentioned, though the title of com-

mon or general occupancy is utterly extinct and abolished, yet that of special occupancy by the heir at law continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance; but as an occupant specially marked out and appointed by the original grant. And it seems (notwithstanding the opinion of Blackstone to the contrary) that these statutes extend to cases of incorporeal hereditaments; although, as has been already noticed, before the statute no common occupancy could be had of such incorporeal hereditaments. See 2 Comm. c. 16. p. 260; and Christian's note there; and 3 P. Wms. 264—6, with Cox's notes.

Thus in a recent case it was held, that a rent charge *pur autre vie*, if the grantee die, living the *cestui que vie*, goes to the grantee's executor, although not named in the grant. 7 Bing. 178.

Where the tenant of lands granted to him and his heirs *pur autre vie* devised them to A. B. without saying more, and A. B. died in the lifetime of the *cestui que vie*, it was held that the heir of the devisor took the lands as special occupant. 8 B. & C. 296.

As to the occupancy of leaseholds for lives limited to executors, administrators, and assigns, see 7 Ves. 425.

A man cannot, however, be an occupant but of a void possession; and it is not every possession of a person entering that can make an occupancy, for it must be such as would maintain trespass without farther entry. Vaugh. 191, 192; Carter, 65; 2 Keb. 250.

It has also been held, that there could be no occupancy by any person of what another has a present right to possess; and there cannot be an occupant of a copyhold estate. Vaugh. 190; Mod. Ca. 66; 1 Inst. 41. So in a recent case it was decided that there can be no general occupancy of copyholds, since the freehold is always in the lord, and the 29 Car. 2. c. 3. and 14 Geo. 2. c. 20. do not apply to copyholds. 1 East, 80.

But there may be a special occupancy by the heirs of a copyholder, if he died, before the limitation in the deed, the lord has expressly excluded himself during the life of the *cestui que vie*. Co. Lit. 111; 1 Black. 1118.

On the *Forfeiture*, to which a claim may be made by an occupant, among several things enumerated, the goods of alien enemies, captured and brought to England, and by public authority, and to goods brought into the country by an alien enemy after a declaration of war without a safe conduct. See *Alien*, and also *Insurance*, II. 2. The persons of prisoners till their ransom is paid; and perhaps in some cases negro slaves. See *Slaves*, 2. Any thing found which does not come under the description of *waifs*, *estrays*, *wreck*, or *treasure-trove*. See those titles. 3. The benefit of the elements of light, air, and water, as far as they are previously unoccupied, or as they may be occupied without injury to another. See *Nuisance*. 4. Animals *feræ naturæ*, under the restrictions of the *Game Laws*. See that title. 5. A special personal property in corn growing on the ground, or other emblements; though the title to these, as Mr. Christian observes, is rather the continuation of an inchoate, than the acquisition of an original right. See *Emblements*. 6, 7. Property arising by accession and confusion of goods; as to the former of which a little shall be said presently. As to the latter, see *Confusion, property by*. 8. *Literary property*; see that title.

In some cases where the laws of other nations give a right by occupancy, as in lands newly created by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters; in these instances the law of England assigns them an immediate owner. For Bracton says, that if an island arise in the middle of a river, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than another, it belongs only to him who is proprietor of the nearest shore. Bract. l. 2. c. 2.

Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores; for if the whole soil is the freehold of any one man, as it usually is whenever a several fishery is claimed, there it seems just (and so is the constant practice) that the eyotts or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and soil. *Salk. 637.* However, in case a new island rise in the sea, though the civil law gave it to the occupant, yet ours gives it to the king. *Bract. l. 2. c. 2; Callis of Sewers, 22.* And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth so as in time to make *terra firma*; or by dereliction, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. *2 Roll. Abr. 170; Dyer, 326.* For *de minimis non curat lex*; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry. *Callis, 24, 28.* So that the quantity of ground gained, and the time during which it is being gained, are what make it either the king's or the subject's property. See *Smart v. Dundee Corporation, Cases in Parliament.*

If a river running between two lordships by degrees gains upon the one, and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy; but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in any other place as a recompence for this sudden loss. *Callis, 28.*

Where the lord of a manor acquired a piece of land which had been formed gradually by ooze and soil deposited by the sea upon the extremity of his demesne lands, and it appeared that the increase could not be observed when actually going on, although a visible increase took place every year, and in the course of fifty years a large piece of land had been thus formed; upon an inquest finding that the land had been lost by the seas, and in an issue taken upon a traverse to that finding, the verdict was for the defendant; it was held that the crown was not entitled to judgment. *R. v. Lord Yarborough, 4 D. & R. 790; and see the Sixth Report of the Commissioners of Land Revenue, &c. June, 1829; and 5 Bingh. 193, Dom. Proc.*

The principle decided is, that land gradually and imperceptibly added by alluvion to the demesne lands of a manor, belongs not to the crown but to the owner of the demesne lands. As to the proceedings in this case, see *2 Blgh. 147.*

The lord of a manor by lease and release bargained and sold certain sea-grounds, oyster-layings, shores, and fisheries, extending from the south at low-water-mark, to north at high-water-mark, and containing in the whole by estimation 800 acres of land covered with water, or thereabouts, as the same were beaconed, marked, and stobbed out. After the date of the deed, the sea imperceptibly encroached on the land, and the high and low-water-marks had varied in the same proportion; held, that so much of the soil of the shore as from time to time lay between high and low-water-mark passed to the grantee under this deed. *Scrafton v. Brown, 6 D. & R. 536; 4 B. & C. 485.*

As to property arising from *accession*.—By the Roman laws, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the em-

broidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement. This has also long been the law of England; for it is laid down in the Year Books, that whatever alteration of form any property has undergone the owner may seize it in its new shape, if he can prove the identity of the original materials; as if leather be made into gloves, cloth into a coat; or if a tree be squared into timber, or silver melted or beat into a different figure. *5 Hen. 7. c. 15; 12 Hen. 8. c. 10.* But if the thing itself by such operation were changed into a different species, as by making wine, oil, or bread, from another's grapes, olives, or wheat, the civil law held, that it belonged to the new operator, who was only to make a satisfaction to the former proprietor for the materials which he had so converted. These doctrines are implicitly copied and adopted by Bracton, and have since been confirmed by many resolutions of the courts. *Bract. l. 2. c. 2, 3; Bro. Ab. title Property, 23; Moor, 20; Poph. 28.* It hath even been held, that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman. *Moor, 214. See 2 Comm. c. 26.*

OCCUPATION, occupatio.] Use or tenure; as we say such land is in the tenure or occupation of such a man, that is, in his possession or management. Also it is used for a trade or mystery. See the repealed stat. *12 Car. 2. c. 18.*

Occupations at large are taken for purprestures, intrusions, and usurpations, and particularly for usurpations upon the king, by the stat. *de Bigamus, c. 4; 2 Inst. 272.*

OCCUPAVIT. A writ that lay for him who was ejected out of his freehold in time of war; as the writ of *novel disseisin* lay for one disseised in time of peace. *Ingham.*

OCHIERN. The chief of a branch of a great family. *Scotch Dict.*

OCTAVE. The eighth day after any feast, inclusive. See *Utas.*

ODHAL RIGHT. See *Tenure, l. 1.*

ODIO ET ATIA. Was a writ anciently called *breve de bono et malo*, directed to the sheriff to inquire whether a man committed to prison upon suspicion of murder, were committed on just cause of suspicion, or only upon malice and ill-will; and if upon the inquisition it were found that he was not guilty, then there issued another writ to the sheriff to bail him. See *Reg. Orig. 133; Bract. lib. 3. cap. 20; 3 Edw. 1. c. 11; 28 Edw. 3. c. 9; S. P. C. 77; 2 Inst. 42. 9 Rep. 506.*

The party committed, if entitled to be bailed, may now have the cause of his commitment inquired into, and be discharged on bail, by suing out an *habeas corpus*. See *Habeas Corpus.*

Blackstone remarks, that according to Bracton, lib. 3. c. 8, this writ ought not to be denied to any man, it being expressly ordered to be made out gratis, without any denial, by *Magna Carta, c. 26.* and stat. *West. 2. 13 Edw. 1. c. 29.* but the statute of Gloucester, 6 Edw. 1. c. 9, took it away in the case of killing by misadventure or self-defence; and the 28 Edw. 3. c. 9, abolished it in all cases whatsoever; but the 42 Edw. 3. c. 1, repealed all the statutes then in being contrary to the Great Charter, Sir Edward Coke is of opinion that the writ *de odio et atia* was thereby revived. *2 Inst. 43, 55, 315. See 2 Comm. c. 8. p. 129.*

OECONOMUS. Is sometimes taken for an advocate or defender; as *summus secularium oeconomus et protector ecclesiarum.* *Matt. Par. anno 1245.*

OECONOMICUS. A word used for the executor of a last will and testament, as the person who had the economy or fiduciary disposal of the goods of the deceased. *Hut Dunelm. apud Wharton Angl. Sac. par. 1. page 784.*

OFFENCE, Delictum.] An act committed against a law, or omitted where the law requires it, and punishable by it. *West. Symb.*

Offences are capital or not; capital those for which the offender shall lose his life; not capital where an offender may forfeit his lands and goods, be fined, or suffer corporal punishment, or both; but not loss of life. *H. P. C.* 2, 126, 134.

Under capital offences were formerly comprehended treason and felony; but the greater number of felonies are now not visited with death.

Offences not capital include the remaining part of the pleas of the crown, and come under the title of misdemeanors.

An offence may be greater or less according to the place wherein it is done. *Finch*, 25. But the offence will be in equal degree in them who are equally tainted with it; and those who act and consent thereto are alike offenders. *5 Rep.* 80. See *Misdemeanor*.

The term "offence" is usually, by itself, understood to be a crime not indictable but punishable summarily, or by the forfeiture of a penalty. If one statute make the doing an act felonious, and a subsequent act make it only penal, the latter is considered as a virtual repeal of the former. *1 Hawk.* c. 20, § 5. These distinctions will be found highly important in their consequences. Private remedies are, in the case of felonies, suspended until after conviction or acquittal of the felon, but not so in general in the case of misdemeanors or minor offences. *1 Chitty's Prac. of the Law*, 15.

OFFERINGS. Are reckoned among personal tithes payable by custom to the parson or vicar of the parish, either occasionally, as at sacraments, marriages, christenings, church-funerals, burials, &c.; or at constant times, as at Easter, Christmas. See *2 & 3 Edw. 6. c. 13, 20, 21. Stat. 32 Hen. 8. c. 7, § 2*, enforces the payment of offerings according to the custom and place where they grow due. See *Oblations*.

By *2 & 3 Edw. 6. c. 13, § 10*, all persons who ought to pay offerings, shall yearly pay to the parson, vicar, proprietors or their deputies, or farmers of the parishes where they dwell, at such four offering days as heretofore, within the space of four last years past, hath been accustomed, and in default thereof shall pay for their said offerings at Easter the next.

The four offering days are Christmas, Easter, Whitsuntide, and the feast of the dedication of the parish church. *Gibbs*.

OFFERINGS OF THE KING. All offerings made at the holy altar by the king and queen are distributed amongst the poor by the dean of the chapel; there are twelve days in the year called offering days, as to these offerings, viz. Christmas, Easter, Whitsunday, All Saints, New Year's-day, Candlemas, Annunciation, Ascension, Trinity Sunday, St. John Baptist, and Michaelmas-day; all which are, at festivals. See *Constitutionis*, 184.

The offering commonly made by James I. was a piece of gold, having on one side the portrait of the king kneeling before the altar, with four crowns before him, and circumscribed with this motto—"Quod retribuam Domino pro omnibus que tribuit mihi;" and on the other side, a lamb lying near a lion, with this inscription—"Cor contritum et humiliatum non despicit Deus." *Ibid.*

OFFERTORIUM. A piece of silk or fine linen used to cover and wrap up the offerings or occasional oblations in church. *Statut. Eccl. S. Pauli, London, MS. folio, 39.* Sometimes this word signifies the offerings of the faithful, the place where they are made or kept; sometimes the time at the time of sacrament, the offertory, &c. See *Common Prayer, in the Communion Service*.

OFFICE.

OFFICIUM.] That function by virtue whereof a man hath

some employment in the affairs of another, as of the king, or of another person. *Cowell*.

Offices are classed by *Blackstone* among incorporeal hereditaments; and an office is defined to be a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, whether public as those of magistrates, or private, as of bailiffs, receivers, or the like. *2 Comm. c. 2. p. 36.*

It is said that the word *officium* principally implies a duty, and in the next place the charge of such duty; and that it is a rule, that where one man hath to do with another's affairs against his will, and without his leave, that this is an office, and he who is in it is an officer. *Carth.* 478.

There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination of offices, such as an agreement to make hay, plough land, herd a flock, &c. which differ widely from that of steward of a manor, &c. *2 Sid.* 142.

By the ancient common law, officers ought to be honest men, legal and sage, *et qui melius sciant et possint officio illi intendere*; and this, says Lord Coke, was the policy of prudent antiquity, that officers did ever give grace to the place, and not the place grace the officer. *2 Inst.* 32, 456.

Officers are distinguished into civil and military, according to the nature of their several trusts. *Carth.* 479.

So officers are public or private; and it is said that every man is a public officer who hath any duty concerning the public; and he is not the less a public officer where his authority is confined to narrow limits; because it is the duty of his office, and the nature of that duty, which makes him a public officer, and not the extent of his authority. *Carth.* 479.

Also offices are distinguished into ancient offices, and those which are of a new creation; and herein it is observable, that constant usage hath not only sanctioned the first establishment of such ancient offices as have existed time out of mind, but also hath prescribed and settled the manner in which they have existed and are to continue to exist, in what manner to be exercised, how to be disposed, &c. *9 Co.* 97; *Cro. Eliz.* 636; *2 Rol. Abr.* 182; *Cro. Car.* 513; *1 Show.* 436.

There is likewise another distinction of offices into judicial and ministerial; the first, relating to the administration of justice or the actual exercise thereof, must be executed by persons of sufficient capacity, and by the persons themselves to whom they are granted; and herein also ancient usage and custom must govern. *1 Jon.* 109; *Dav.* 35; *9 Co.* 97.

- I. Who has a right to create and grant or assign an Office; and how and to whom; and of one Office being incident to or compatible with another.
- II. Of the Offence of buying and selling an Office, and what Offices are prohibited to be thus disposed of.
- III. What Remedies a person having a right to an Office must pursue to be let into the enjoyment of it, and how a disturbance is punishable.
- IV. Of the Forfeiture of an Office; and where, for corruption, bribery, extortion, and oppressive proceedings, Officers are punishable.

I. The king is the universal officer and disposer of justice within this realm, from whom all others are said to be derived; yet he cannot create a new office inconsistent with our constitution, or prejudicial to the subject. *12 Co.* 116; *1 Rol. Rep.* 206; *Carth.* 478. See *King*.

A man may have an estate in offices either to him and his heirs, or for life, or for a term of years, or during pleasure only, save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators. *9 Rep.* 97. Neither can any ju-

dicial office be granted in reversion, because though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and insufficient; but ministerial offices may be so granted, for these may be executed by deputy. 11 Rep. 4.

There are three things, says Lord Coke, which have fair pretences, yet are mischievous; 1st, new courts; 2d, new offices; 3d, new corporations for trade. And as to new offices, either in courts or out of them, these cannot be erected without act of parliament; for that under the pretence of common good, they are exercised to the intolerable grievance of the subject. 2 Inst. 540.

An office granted by letters-patent for the sole making of all bills, informations, and letters missive in the council of York, was held unreasonable and void. 1 Jon. 281.

One Chute petitioned the king to erect a new office for registering all strangers within the realm, except merchant strangers, and to grant the office to the petitioner with or without a fee; and it was resolved by all the judges, that the erection of such new office for the benefit of a private person was against all law of what nature soever. 1 Co. 116, and several cases there cited to this purpose.

The king cannot grant to any person to hold a court of equity, though he may grant *tenere placita*; for the dispensation of equity is a special trust committed to the king, and not by him to be intrusted with any other, except his chancellor. Hob. 65.

As to the alienation of an office by the crown, see 1 B. & Ad. 761.

The grant of an office, generally, may be made to any person whom the king pleases, for the king has an interest in his subject, and a right to his service; and therefore an information lies against him who refuses an office being duly elected; and he shall not be excused for his neglect to qualify himself according to law. 1 Salk. 168.

A woman may be an officer. Thus the grant of any office of government which may be exercised by deputy, is good, as regent of the kingdom; so of the keeper of a castle, forester, gaoler, commissioner of sewers, sexton, and overseer of the poor. See *Comm. Dig. tit. Officer (B)*. So an office of inheritance may descend or be granted to a woman, as the office of earl marshal. *Com. Dig.* Or lord great chamberlain of England. *Bro. P. C.*

Wherever one office is incident to another, such incident office is regularly grantable by him who hath the principal office; and on this foundation it hath been held, that the king's grant of the office of county clerk was void, it being inseparably incident to the office of sheriff, and could not be by any law or contrivance be taken away from him. 4 Co. 32, *Milton's case*.

So an office of chamberlain of the King's Bench prison is inseparably incident to the office of marshal; therefore a grant of the office of marshal, with a reservation of the office of chamberlain, is void. 1 Salk. 489; 1 Leon. 310, 321.

So it hath been resolved, that the office of exigenter of London and other counties in England, is incident to the office of chief justice of C. B., and therefore a grant thereof by the king, though in the vacancy of a chief justice, is null and void. *Dyer*, 175, a. pl. 25; 1 And. 162; and see *Shom. P. C.*, *Sir Rowland Holt's case*.

Lord Coke says, that the justices of courts did ever appoint their clerks, some of which after, by prescription, grew to be officers in their courts; and this right which they had of constituting their own officers is further confirmed to them by stat. *West. 2. 13 Edw. 1. st. 1. c. 30*. The reasons are, 1st, that the law ever appoints those who have the greatest knowledge and skill to perform that which is to be done; 2dly, the officers and clerks are but to enter, inrol, or effect that which the justices adjudge, award, or order; the insufficient doing whereof maketh the proceeding of the justices erroneous, than which nothing can be more dishonour-

able and grievous to the justices, and prejudicial to the party. 2 Inst. 435, 4 Mod. 179.

If two offices are incompatible, by the acceptance of the latter the first is relinquished and vacant, even though it should be a superior office. 2 T. R. 81. See also *ibid.* 777; and *Dougl.* 298, in note, *Rex v. Godwin*.

By 50 Geo. 3. c. 85; 52 Geo. 3. c. 66. (which do not extend to offices under the government in Ireland) provisions are made for taking security for all persons employed in situations of public trust, and concerned in the receipt or distribution of public money. And see 50 Geo. 3. c. 59. amended and rendered more effectual by the 2 W. 4. c. 4. for preventing the embezzlement of public money by collectors, receivers, &c. throughout the United Kingdom.

By the 1 Will. 4. c. 42. the acts relating to the office of the treasurer of the navy were consolidated and amended.

See also the 50 Geo. 3. c. 117. for regulating the granting of salaries and pensions, and directing accounts of the payment thereof to be laid before parliament. This act applies to the minor officers in the various public departments in Great Britain and Ireland.

By 57 Geo. 3. c. 60. 61. 62. 63. 64. 67. and 84. various offices were abolished, and others regulated; as to which see the titles of the several offices.

By the 2 & 3 Wm. 4. c. 111. certain offices connected with the Court of Chancery were abolished, and the performence of the duties attached thereto, and the practice of other offices in that court, regulated by the 3 & 4 Wm. 4. c. 31 & 54.

By the 2 & 3 Wm. 4. c. 116. provision was made for the payment of the salaries of the judges in England and Ireland of the lord lieutenant of the latter country, and for increasing diplomatic salaries and pensions, all of which are now charged on the consolidated fund instead of the civil list.

By the 4 & 5 Wm. 4. c. 15. the office of the receipt of his majesty's Exchequer is regulated, various offices therein abolished, and new arrangements made with respect to the post.

By the 4 & 5 Wm. 4. c. 24. itself amended by c. 45. the laws regulating the pensions, compensations, and allowances to be made to persons holding civil offices under his majesty, are amended and consolidated.

By the 4 & 5 Wm. 4. c. 70. the salaries of the officers of the House of Commons are regulated, and several offices therein abolished.

For the act of the present reign, abolishing all stamp duties, and fees, formerly payable on the renewal of appointments consequent on the demise of the crown, see *Fees, I.*

II. The taking or giving a reward for offices of a public nature is said to be bribery; and nothing can be more prejudicial to the good of the public, than to have places of the highest concern, (on the due execution whereof the happiness of both king and people depends,) disposed of, not to those who are most able to execute, but to those who are most anxious to pay for them; nor can any thing be a greater discount to industry and virtue, than to see those places of trust and honour, which ought to be the rewards of those who by their industry have qualified themselves for them, conferred on such who have no other recommendation but that of being the highest bidders: neither can any thing be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expenses they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectations. 2 Inst. 148; 1 Hawk. P. C. It is said to be *malum in se*, and indictable at common law. *Noy.* 102; *Moor.* 781.

For which reasons, among many others, it is expressly enacted by 12 R. 2. c. 2. that the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls of the justices of the Bench and of the other, barons of the Exchequer, and a

others who shall be called to ordain, name, or make justices of the peace, sheriffs, escheators, customers, comptrollers, or any other officer or minister of the king, shall be firmly sworn that they shall not ordain, name, or make any of the above-mentioned officers for any gift or brokerage, favour or affection; nor that none who sueth by himself, or by others, privily or openly, to be in any manner of office, shall be put in the same office, or in any other; but that they make all such officers and ministers of the best and most lawful men, and sufficient, to their estimation and knowledge.

And by 4 H. 4. c. 5. it is enacted, that no sheriff shall let his bailiwick to farm to any man for the time he occupieth such office.

But the principal statute relating to this matter is 5 & 6 Ed. 6. c. 16; whereby it is enacted, "That if any person bargain or sell any office, or deputation of any office, or any part of any of them, or receive any money, fee, &c. directly or indirectly, or take any promise, &c. to receive any money, &c. directly or indirectly, for any office, or for the deputation of any office, or any part of any of them; or to the intent that any person should have, exercise, or enjoy any office, or the deputation of any office, or any part of any of them, which shall in anywise concern the administration or execution of justice, or the receipt, &c. of any of the king's treasure, &c. or the keeping of any of the king's towns, &c. being for a place of strength and defence; or which shall concern or touch any clerkship to be occupied in any manner of Court of Record wherein justice is to be ministered; that then every person that shall so offend shall not only lose and forfeit all his and their right, interest, and estate, in or to any of the said office or offices, &c. but also persons who shall give or pay any sum of money, &c. or shall make any promise, &c. shall immediately be adjudged a disabled person in the law to all intents and purposes to have, &c. the said office, &c."

"It is further enacted, that bargains, sales, promises, bonds, agreements, covenants, and assurances shall be void to and against him and them by whom any such bargain, &c. shall be made."

"Provided always, that this act shall not extend to any office whereof any person is seized of any estate of inheritance, nor to any office of parkership, or of the keeping of any park-house, manor, garden, chase, or forest, or to any of them."

"It is also provided, that this act shall not be prejudicial to the chief justices of the King's Bench or Common Pleas, or the justices of assize; but that they may do in every behalf, concerning any office to be given or granted by them, as they might have done before the making this act."

In the construction of the 5 & 6 Ed. 6. the following opinions have been holden.

The office of chancellor, registrar, and commissary in ecclesiastical Courts are within the meaning of the statute, inasmuch as those courts do not only determine matters which are brought before them *pro salute anime*, but also have the decision of disputes concerning the lawfulness of matrimony, and legitimation of children, which touch the inheritance of the subject; and also hold plea of legacies and tithes, &c. in which respects they are courts of justice. *Cro. Jac.* 293; *1 Inst.* 148; 12 *Co.* 78; *Salk.* 468; 3 *Lev.* 287; 2 *Vent.* 87, 97.

That the office of clerk to the deputy registrar in the Prerogative Court of Canterbury has been held not to be an office within the meaning of the statute, so as to prevent its being aliened or charged; nor is such alienation or charge contrary to the general policy of the law as to offices. 3 *L. & J.* 150.

Offices in fee are out of the statute: for if the king be seized in fee of a bailiwick, and he demise the same to A. who demises it to B., rendering, &c. the demise to B. is not within the statute; for offices in fee being excepted out of the statute under-leases of such offices are also excepted inclusively. 2 *Lev.* 151.

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The place of cofferer is within this statute, and a person having once purchased this place is for ever disabled to enjoy the same; and the king is bound by this statute, and could not dispense with it by any *non obstante*. 3 *Bulst.* 91; *Co. Lit.* 234; *Cro. Jac.* 385.

The sale of a bailiwick of a hundred is not within the statute; for such an offence doth not concern the administration of justice, nor is it an office of trust. 4 *Leon.* 38; 3 *Mod.* 223.

A seat in the six-clerks' office is not within the statute, being a ministerial office only; and they are but under clerks, who have so much a sheet for copying, &c.; but one judge held it not saleable at common law, for the following reasons: 1st. Discouragement of merit and industry. 2dly. It occasions extortion and exaction of excessive fees. 3dly. From its being a great charge to suitors. 4thly. It exempts the persons who enter, by these means, in a great measure, from the due regulations under which they ought to be; for they are not so easily removed as if they were at the will of him who had the disposal of them. *Pasch.* 26 *Car.* 2. in *C. B. Sparrow v. Reynolds*.

An assignment of all the emoluments of the office of clerk of the peace for Westminster is invalid, though the assignment is expressly subject to the deduction of the salary or allowance of the deputy. 2 *Brod. & Bing.* 673; 6 *Moo.* 28.

It is illegal to sell many offices not within the 5 & 6 Ed. 6. c. 16. Thus the appointment of captain of an East Indiaman cannot be legally sold (although not within the statute) without the consent of the East India Company, such a sale being contrary to a bye-law of the Company, a fraud on the Company, and contrary to the principles of public policy. But many offices, not within that statute, may be sold, provided the sale takes place with the consent of those who have the power of appointment. 8 *T. R.* 94. And see 2 *Barn. & C.* 661.

One who makes a contract for an office, contrary to the purport of this statute, is so far disabled to hold the same, that he cannot at any time during life be restored to a capacity of holding it by any grant or dispensation whatsoever. *Hob.* 75; *Co. Lit.* 234; *Cro. Car.* 361; *Cro. Jac.* 386.

Where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, it is good; so if the profits be uncertain arising from fees, if the principal make a deputation, reserving a certain sum out of the fees and profits of the office, it is good; for in these cases the deputy by his constitution is in place of his principal, yet he has no right to his fees, they still continue to be the principal's, so that as to him it is only reserving a part of his own, and giving away the rest to another; but where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and a bond of performance of such agreement is void by the statute. *Salk.* 468; 6 *Mod.* 234; *Comb.* 356.

This being a public law, the judges *ex officio* are to take notice of it; but yet it seems the more regular and safe way to plead it; but it hath been resolved, that a person in pleading this statute need not allege that the party against whom it is pleaded is not within any of the provisos or exceptions in the statute; but that if he be, it must come on his side to show it. *Trin.* 9 *Geo.* 2. in *B. R. Maccarty v. Wickford*. *Sed quære?* Also vide 2 *And.* 55. 107; *Ld. Raym.* 1245.

By 49 *Geo.* 3. c. 126. the 5 & 6 Ed. 6. c. 16. is extended to Scotland and Ireland, and to all offices in the gift of the crown, and to all civil, naval, and military commissions, employments, and appointments under government, in the United Kingdom or in the colonies, or under the East India Company.

By § 3. persons buying or selling, or receiving and paying money, reward, or profit for buying or selling, any office, commission or employment mentioned in this act, or 5 & 6 Ed. 6. or any deputation thereto, or any participation in the

profits thereof, or for consenting to any resignation, are declared guilty of a misdemeanor, § 3. As are also persons receiving or paying any money or profit for soliciting or obtaining offices, § 4. Like penalty on persons opening or keeping any place for soliciting for any such offices, or negotiating for the same, § 5. Penalty 50*l.* on persons advertising for like purposes, § 6. Officers in the army giving more than regulated prices shall forfeit their commissions, and be cashiered, § 8.

By 53 Geo. 3. c. 54. the battle-axe guards in Ireland, and by 53 Geo. 3. c. 129. the six clerks in Chancery there, are exempt from the operation of this act.

A bond was given by A. B. to C. D. colonial secretary of Tobago, reciting that C. D. had appointed A. B. his deputy, and to receive the fees of office in consideration of his paying him 450*l.* per annum thereout, and the condition was for punctual payment of that sum, without saying "out of the fees." To an action on the bond, A. B. pleaded that the bond was given in pursuance of a corrupt agreement against the statute, that A. B. should pay 450*l.* per annum at all events to C. D. Issue was taken on the plea and found for A. B. The court held that the fact showed the bond to be illegal and void by the 49 Geo. 3. c. 126; and that the plea showing the illegal agreement was good. *Grenville v. Atkins*, 9 Barn. & C. 462. And see 2 Balk. 468; 1 Bro. P. C. 135.

Offices in the gift of the chief justices of the King's Bench and the Common Pleas, were expressly excepted out of the 5 & 6 Edw. 6. c. 16, and continued saleable down to the passing of the 6 Geo. 4. c. 82 and 83, whereby the sale of offices in both courts was abolished, and a compensation provided for the chief justices in lieu of the emoluments formerly derivable by them from disposing of such offices. These statutes enact, that all appointments by the two chief justices shall be without fee, and *quam diu se bene gesserint*.

III. It was held clearly, that an assize lay at common law for an office, and that therefore though the statute of *Westminst.* 2. 13 Ed. 1. st. 1. c. 25. speaks only of offices in fee, yet an assize lay for an office in tail, or for life; but this is to be understood of offices of profit, for of an office of charge and no profit an assize did not lie. 8 Co. 47*a*; 2 Inst. 412.

But a man should not have an assize of the whole office, unless he were disseised of the whole; yet if a man were disseised of parcel of the profits of an office, he may have had an assize for that parcel only. 8 Co. 49*b*; 2 Inst. 412.

In an assize for an office newly erected and constituted, the demandant in his plaint must have shown what fee or profit is granted for the exercise thereof; for this office could not have a fee or profit appurtenant to it, as an ancient office might, and for an office without fee or profit no assize lay. 8 Co. 49.

But in assize for an ancient office, the demandant in his plaint need have shown what fee or profit was belonging to it, for it should be intended there is some fee or profit. 8 Co. 49.

In an assize for an office, the demandant must have shown a seisin; but it was held, that taking 8*d.* for a *capias* against B. was sufficient seisin of the office of *filacer de banco*. 1 Roll. Abr. 270.

Also in an assize for an office, the demandant in his patent must have set forth a title. 3 Mod. 273.

An assize lay for the office of registrar of the admiralty; for though their proceedings are according to the civil law, yet the right of their office is determinable at the common law; so of the mastership of an hospital, being a lay fee. 8 Co. 47; 2 Inst. 412; 11 Co. 99*b*; *Dyer*, 152.

Now by the 2 & 3 W. 4. c. 27. all real actions are, with one or two exceptions, abolished; and among them that of an assize for an office which had long been obsolete.

A man may bring an action on the case for the profits

of an office, though he never had seisin. 1 Mod. 122. Where a person has usurped an office belonging to another, and taken the known and accustomed fees of office, or where two persons claim title to an office, and one receive the profits, either by himself or his collector, the other may bring *indebitatus assumpsit* for money had and received, wherein the title must be proved. 2 Mod. 260, 263; 3 Lev. 262; 2 T. Jon. 127. But such action must be brought against the principal, and not against the collector. 4 Burr. 1984; *Bul. N. P.* 133.

If the king grant the office of comptroller of the customs to A. and B. *durante beneplacito*, and A. dies, and afterwards the king grants the said office to C., and yet B. under pretence of survivorship, exercises the said office, and receives the profits thereof; C. may have an *indebitatus assumpsit* for so much money had and received to his use. 2 Mod. 260. See 2 Lee. to try the question of right.

So where a person is entitled to an office, with fees annexed, and a stranger intrudes into the office and receives the fees, this form of action lies to recover them; but they must be certain, known, and accustomed fees annexed to the office, and such as the legal officer could himself recover in a court of law from the persons of whom they are claimed and received. See 6 T. R. 681; *Peake's N. P. C.* 182. Where fees of office are demanded and received, but the party paying them disputes the receiver's right to them, or his own liability to be charged, an action of *indebitatus assumpsit* for money had and received will lie to try the question between them. See *Wilkes*, 536.

And in general, an action by a person claiming an office against the person in actual possession, and receiving the fees, is now perhaps the most eligible method that can be pursued. 108; 1 Mod. 122.

The most usual remedy, however, for a party to be admitted or restored to an office is by *mandamus*. See that title and *Quo Warranto*.

IV. It is laid down in general, that if an officer acts contrary to the nature and duty of his office, or if he refuses to act at all, that in these cases the office is forfeited. 11 Ed. 4. 1*b*; 2 Roll. Abr. 155.

There are, says Lord Coke, three causes of forfeiture or seizure of offices by matter in deed. 1st. By abuser; 2dly. Non-user; 3dly. Refusal.

1st. Abuser; as by a marshal or other gaoler's permitting escapes.

2dly. By Non-user; in which there is this difference, when the office concerns the administration of justice or the commonwealth, the officer *ex officio* ought to attend without request, there by non-user or non-attendance the office is forfeited; but where an officer is not obliged to attend, but upon demand or request made by him whose officer he is, there without such demand or request there can be no forfeiture; and herein also Lord Coke in another place takes the following diversity, viz. that non-user, of itself, without some special damage, is no forfeiture of private offices, but that it is otherwise of a public one, which concerns the administration of justice.

3dly. As to refusal, he says, that in all cases where an officer is bound upon request to exercise his office, if he does not do it upon request, he forfeits it; as if the steward of a manor be requested by the lord to hold a court, if he does not do it, it is a forfeiture. 6 Co. 50; *Co. Litt.* 233*b*.

But herein it will be necessary to consider more minutely what shall be said to be such acts as are contrary to the duty of his office; and how far the same (whether they are acts of omission or commission) amount to a forfeiture; where, as hath been clearly agreed, that a gaoler by suffering voluntary escapes, by abusing his prisoners, by extorting unreasonable fees from them, or by detaining them in gaol after having been legally discharged and paid their just fees, forfeits his

office; for that in the grant of every office it is implied that the grantee execute it faithfully and diligently. *Co. Litt.* 233; 9 *Co.* 50; 3 *Mod.* 143.

If a gaoler leave his prison door unlocked, and the prisoners escape, it is not only a negligent, but a voluntary escape. *Cro. Car.* 492.

But it is held, that one negligent escape is not a forfeiture, though a voluntary one is, but that two negligent escapes amount to a forfeiture. 39 *Hen.* 6, 33; 2 *Roll. Abr.* 197; 2 *Jern.* 173; and see 8 & 9 *Wm.* 3, c. 27; and *tit.* *Escape, Gaoler*.

If conditions in law, which are annexed to offices, be not observed and fulfilled, the office is lost for ever, for these conditions are as strong and binding as express conditions; therefore if the office of forester, &c. descend to an infant or feme-covert, (where by law they may so descend,) and these are not exercised by sufficient deputies, they become forfeited. *Co. Litt.* 233 b.; 8 *Co.* 44; *Cro. Car.* 556; *Hard* 11.

Insufficiency is an original incapacity which creates the forfeiture of an office; so if a superior puts in a deputy into an office, which may be exercised by a deputy, who is ignorant and unskilful, this is a forfeiture of the office. 4 *Mod.* 29. *arguendo*.

If the king grants an office in any of the courts at Westminster, the judges may remove an officer for insufficiency, and they are the proper judges of his abilities. 4 *Mod.* 30. *arguendo*. Where an officer may be removed, but not abridged of his fee, see 1 *Roll. Rep.* 82, 83.

A Mace of C. B. being absent two years, and having farmed out his office from year to year, without licence of a court, was discharged by the chief justice, *ex assensu sociorum suorum*, by word, spoken openly in court; and there was no record made of the discharge, nor legal summons for him to answer to any accusation, yet the discharge was held good. *Dyer*, 114 b. pl. 64; 1 *Roll. Abr.* 155.

The clerk of the papers, in the King's Bench prison, cannot act by deputy, but must himself reside within the prison. Clerk of the papers, and clerk of the day-rules in the King's Bench prison, was removed by the Court of K. B. for non-residence. 4 *T. R.* 716; 5 *T. R.* 511.

An officer was turned out because that he *spoliavit quædam recorda contra officii sui debitum*; and it was objected, 1st, That it was not certain enough, because not shown what records: to which the court answered, that it would be proved, and then he having spoiled the records, they are not perhaps to be had. 2dly, That it may be he did it by force, and not wilfully; to which the court said, that the conclusion *contra officii sui debitum* includes that. 1 *Keb.* 597.

But if the king grants an office which concerns trust and allegiance to two, and one is attainted, the entire office is forfeited to the king; for he cannot make one occupy in common with another. *Plow.* 180.

Wherever an officer, who holds his office by patent, commits a forfeiture, he cannot regularly be turned out without a *seque facias*, nor can he be said to be completely ousted or discharged without a writ of discharge; for his right appearance of record, the same must be defeated by matter of fact, and not of nature. But for this see *Dyer*, 155, 198, 211; 9 *Co.* 58; *Co. Litt.* 233; *Cro. Car.* 60, 61; 1 *Sid.* 81, 134; 8 *Co.* 44 b.; 1 *Roll. Abr.* 580; 3 *Mod.* 335; 3 *Lev.* 238.

All officers are punishable for corruption and oppressive proceedings, according to the nature of the offence, either by indictment, attachment, action at the suit of the party injured, loss of their office, &c. 6 *Mod.* 96.

In addition to the punishment by indictment, &c. all courts are to have a discretionary power over their officers, and are to see that no abuse is committed by them, which may bring disgrace on the courts themselves: the Court of King's Bench, by the plenitude of its power, exercises a superin-

tendency over all inferior courts; and may grant an attachment against the judges of such courts for oppressive, unjust, or irregular practice, contrary to the obvious rules of natural justice. *Dyer*, 218; *Palm.* 564; 1 *Salk.* 210.

As to extortion by officers, it is so odious, (being more heinous, as Lord Coke says, than robbery, as it is usually attended with the aggravating sin of perjury,) that it is punishable at common law by fine and imprisonment, and also by removal from the office in the execution whereof it was committed; and is defined to be, the taking of money by any officer, by colour of his office, either where none is due, or not so much is due, or where it is not yet due. *Co. Litt.* 368 b.; 2 *Inst.* 209; 10 *Co.* 102; 2 *Roll. Abr.* 32, 57; *Cro. Car.* 438, 448; *Raym.* 315.

But the stated and known fees allowed by the courts of justice to their respective officers, for their labour and trouble, are not restrained by the common law, or by the statute of *Westm.* 1. Therefore such fees may be legally demanded, without danger of extortion. 21 *Hen.* 7, 17; *Co. Litt.* 368. See further *Bribery, Extortion, Fees*.

In general, all wilful breaches of the duty of an office are forfeitures of it, and punishable by fine, &c.; for since every office is instituted, not for the sake of the officer, but for the good of some other, nothing can be more just than that he, who either neglects or refuses to answer the end for which his office was ordained, should give way to others who are both able and willing to take care of it, and that he should be punished for his neglect or oppressive execution; but the particular instances wherein a man may be said to act contrary to the duty of his office, though various, are yet so generally obvious, that it is needless to enumerate them. *Co. Litt.* 233, 234.

By the 50 *Geo.* 3, c. 85, and 52 *Geo.* 3, c. 66, all persons appointed to any office or commission civil or military, in any public department, or to any office of public trust under the crown, or wherein he shall be concerned in the receipt or disbursement of any public monies, shall give security by bond with sufficient surety to be approved of by the lords of the treasury, or the principal officer in the department, for due performance of his office, and for duly accounting for all public money received by him. These acts extend to Scotland, but not to Ireland. See 50 *Geo.* 3, c. 59, as to collectors and receivers, &c. in Ireland, and *ante*, 1.

For further matter connected with this title, see *Mandamus, Quo Warranto*, &c.

OFFICE FOUND. Is where an inquisition is made to the king's use, of any thing by virtue of his office who inquireth, and it is found by the inquisition. In this signification it is used in 38 *H.* 8, c. 20; where to traverse an office, is to traverse an inquisition taken of office; and to return an office, is to return that which is found by virtue of the office. *Kitch.* 177.

There are two kinds of offices issuing out of the exchequer by commission, viz. an office to entitle the king in the thing inquired of, and an office of instruction. 6 *Rep.* 52. The office of entitling doth vest the estate and possession of the land, &c. in the king, who had therein before only a right or title; as where an alien purchases lands, a person is attaint of felony, or the like; and the other office is where land is vested and settled before in the king, but the particulars thereof do not appear upon record. 4 *Rep.* 58; *Plowd.* 484. The effect of this office is, that the king, from the time of finding, shall be answered the profits without entry, &c. 5 *Rep.* 32; 10 *Rep.* 115. If any office be wrongfully found, those who are grieved may be relieved by a traverse, or *monstrans de droit*, by pleading or petition; for every office is in nature of a declaration, to which any man may plead, and either deny or confess, &c. *Plowd.* 448; *Bro.* 506. Where offices are found before the escheators, they must be delivered by indenture under the hands and seals of the jurors. *Dyer* 170. See *Inquest of Office, Monstrans de droit*.

OFFICIAL, officialis.] In the ancient civil law signifies him who is the minister of, or attendant upon, a magistrate. In the canon law, it is he to whom any bishop generally commits the charge of his spiritual jurisdiction; and in this sense there is one in every diocese called *officialis principalis*, whom the law styles chancellor; and the rest, if there are more, are by the canonists termed *officiales foranei*, but by us commissaries. In our statutes, this word signified properly him whom the archdeacon substitutes for the executing his jurisdiction. The archdeacon hath an official or church-lawyer to assist him, who is judge of the archdeacon's court. *Wood's Inst.* 30, 505.

OFFICIARIIS NON FACIENDIS VEL AMOVENDIS. A writ directed to the magistrates of a corporation, requiring them not to make such a man an officer, or to put one out of the office he hath, until inquiry is made of his manners, &c. *Reg. Orig.* 126.

OFFICIUM CURTAGII PANNORUM. Granted to William Osborne, anno 2 Ed. 2. *Extract. Fin. Cancell.*

OIL. The lord mayor of London, and the master and wardens of the tallow-chandlers' company, are to search all oils brought to London; and if any is deceitfully mixed, they may throw it away, and punish the offenders: and head officers in corporations have like power. 3 Hen. 8, cap. 14.

No lamps to be used in private houses but of fish oil. 8 Ann. c. 9, § 18. See *Candles*.

OLD JEWRY, *Vetus Judæismus*.] The place or street where the Jews lived in London. See *Jews*.

OLD STYLE. See *Year*.

OLERON LAWS, *Uliarenses Leges*.] Laws relating to maritime affairs, so called because said to be made by king Richard I. when he was at Oleron, an island lying in the bay of Aquitaine, at the mouth of the river Charent. *Co. Litt.* 260.

These laws are recorded in the black-book of the admiralty, and are accounted the most excellent composition of sea laws in the world. See *Selden's Mare Clausum*, 222, 254; 1 *Comm.* 413; 4 *Comm.* 423; *Luder's Tracts*. See *Navy*.

OLYMPIAD, *Olympias*.] An account of time among the Greeks, consisting of four complete years, having its name from the Olympic games, which were kept every fourth year, in honour of Jupiter Olympius, near the city of Olympia; when they entered the names of the conquerors on public records. The first Olympiad began in the year 3938 of the Julian period, 505 years after the taking of Troy, 776 before the birth of Christ, and 21 years before the founding of Rome. Æthelred, king of the English Saxons, computed his reign by Olympiads. *Spelm.*

OMISSIONS. Are placed among crimes and offences; and omission to hold a court-leet, or not swearing officers therein, &c. is a cause of forfeiture. Omissions in law proceedings render them vicious and defective. See *Amendment, Office*.

OMNIUM. A term used at the Stock Exchange, to express the aggregate value of the different stocks in which a loan is usually funded.

Thus in the loan of 36,000,000*l.* contracted for in June 1815, the omnium consisted of 130*l.* 3 per cent. reduced annuities, 44*l.* 3 per cent. consols, and 10*l.* 4 per cent. annuities for each 100*l.* subscribed.

The loan was contracted for on the 14th June, when the prices of the above stocks were—3 per cents. reduced 54, 3 per cent. consols 55, 4 per cents. 70; hence the parcels of stock given for 100*l.* advanced, were worth—

	£	s.	d.
130 <i>l.</i> reduced at 54	70	4	0
44 <i>l.</i> consols at 55	24	4	0
10 <i>l.</i> 4 per cents. at 70	7	0	0

Together £101 8 0

which would be the value of the omnium, or 1*l.* 8*s.* per cent.

premium, independently of any discount for prompt payment. *McCulloch's Comm. Dic.*

ONCUNNE, Sax. *On Cunnan, accusatus*.] *Leg. Alf. c. 29*
ONERANDO PRO RATA PORTIONIS. A writ that lies for a joint-tenant, or tenant in common, who is distrained for more rent than his proportion of the land comes to. *Reg. Orig.* 182. See *Joint-tenants*.

ONEROUS CAUSE. The Scotch phrase for a good and legal consideration. See *Assumpsit*.

O. NI. It was the course of the exchequer, as soon as the sheriff entered into and made up his account for issues, amerciements, and mean profits, to mark upon each head *O. Ni*; which denoted *oneratur nisi habeat sufficientem exonerationem*, and presently he became the king's debtor, and a debt was set upon his head; whereupon the parties *paravale* became debtors to the sheriff, and were discharged against the king, &c. 4 *Inst.* 116.

By a recent act sheriffs are now to account to the commissioners for auditing the public accounts. See *Sheriff*.

ONUS EPISCOPALE. Ancient customary payments from the clergy to their diocesan bishop, of synodals, pentecostals, &c. See *Episcopalia*.

ONUS IMPORTANDI. The charge or burden of importing merchandise, mentioned in 13 Car. 2.

ONUS PROBANDI. The burden of proving: upon whom it shall be imposed. See *Evidence*.

OPEN LAW, *lex manifesta*.] The making or waging of law; which bailiffs might not put men to, upon the bare assertion, except they had witnesses to prove the truth of it. *Magna Carta, c. 21.*

OPEN THEFT, Sax. *Opentheof*.] A theft that is manifest. *Leg. Hen. 1. c. 13.*

OPEN TIDE. The time after corn is carried out of the common fields. *Brit.*

OPERARIL. Such tenants, under feudal tenures, who had some little portions of land by the duty of performing many bodily labours and servile works for their lord, being no other than the *servi* and bondmen: they are mentioned in several ancient surveys of manors.

OPERATIO. One day's work performed by a tenant for his lord. *Paroch. Antig.* 320.

OPPOSER. An officer formerly belonging to the Green Wax in the Exchequer. See *Exchequer*.

OPPRESSION. In a private sense, is the trampling upon or bearing down one, on pretence of law, which is unjust; but where the law is known and clear, though it appear hard or unequitable, the judges must determine according to the law. *Vaugh.* 37. As to the remedy for the oppression of the crown, see *King, V. 2.*

OPTION. When a new suffragan bishop is consecrated by the archbishop of the province, by a customary prerogative the archbishop claims the collation of the first vacant dignity or benefice in that see, at his own choice; which is called his option. *Cowel.* See *Bishops*.

OPTIONAL WRIT. A *præcipe* was an optional writ, i. e. it was in the alternative, commanding the defendant to do the thing required, or show the reason wherefore he had not done it. There was another species of original writ called peremptory or a *si fecerit te securum*, from the words of the writ, which directed the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gave the sheriff security effectually to prosecute his claim. 3 *Comm.* 274. See *Original Writ*.

ORA. A Saxon money or coin, valued at sixteen pence, and sometimes, according to variation of the standard, at twenty pence. The word often occurs in *Domesday*, and in laws of King Canute.

ORANDO PRO REGE ET REGNO. An ancient writ before the Reformation, while there was no standing council for a sitting parliament, when the houses of parliament were met, they petitioned the king that he would require the

bishops and clergy to pray for the peace and good government of the realm, and for a continuance of the good understanding between his majesty and the estates of the kingdom; and accordingly the writ *de orando pro rege et regno* was issued, which was common in the time of King Edw. III. *Nichols. Engl. Hist. par. 3. p. 66.*

ORBIS. A bonney; a swelling or knot in the flesh, caused by a blow. *Bract. lib. 3. tit. De Coronâ, c. 28. num. 2.*

ORCHARDS. See *Gardens.*

ORCHEL or ORCHAL. Mentioned in 1 *Rich. 3. c. 8*; 3 & 4 *Edw. 6. c. 2.* A kind of stone like alum, which dyes use in their colours. It is among the articles liable to a duty on importation.

ORDEAL or ORDAL, Sax. compounded of *or*, *magnum*, and *deal*, or *dele*, *judicium*; or as others, from *or*, privative, and *del*, part; that is, *expers criminis*, or not guilty.] See 4 *Comm. 343. n.* An ancient manner of trial in criminal cases; for when an offender, being arraigned, pleaded not guilty, he might choose whether he would put himself for trial upon God and the country, by twelve men, as at this day, or upon God only; and then it was called the judgment of God, presuming that he would deliver the innocent. *Terms de Leg. 9 Rep. 32.*

This trial, according to *Blackstone*, arose from the superstition of our Saxon ancestors, who, like other northern nations, were extremely addicted to divination; they therefore invented this among the methods of purgation or trial to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously to vindicate the guiltless. 4 *Comm. 342.*

According to *Meyer*, the word *ordal* is from the same origin as *ordeul* in Dutch, and *urtheil* in German, and signified judgment, so that the term was used to denominate the highest form of trial. He deduces the practice from a still earlier mode of trying offences by lots, which itself is referable to that partiality for *auspicia* and *sortes*, mentioned by *Tacitus* as remarkable among the ancient Germans, and which, with many other similar feelings and habits, they carried with them and retained, under a modified form, after their conversion to Christianity.

There were two sorts of ordeal; one by fire, another by water. Of these see *Lambard*, in his *Explication of Saxon Words*, verbo *Ordalium*; *Holingshed*, fol. 98, and *Hotoman*, especially *Disput. de Feud. p. 41.* See *Skene de verbor. Significat. verbo Machinam.*

This seems to have been in use in the time of Henry the Second, as appears by *Glanv. lib. 14. c. 1. 2.* See also *Forstegan*, c. 3. p. 63, &c. and *Hoveden*, 566. This ordalian was condemned by Pope Stephen the Second, and afterwards totally abolished here by parliament, as appears by *Rel. Patr. d. anno 2 Hen. 3. mod. 5. Coroll. P. 1. leg. 1. de Confess. c. 9.* *Blackstone* says, Ordeal was abolished in our courts of justice by an act of parliament in 3 Hen. 3. according to *Coke*, or rather by an order of the king in council. See 4 *Comm. 343. 15*; and 9 *Rep. 32. 1 Rep. Inst. 283*; *Specim. Gloss. 320*; 2 *P. q. R. 1. 1. 20*; *Sold. Edm. fol. 48.* According to the record in *Specimen*, it appears that the order of council alluded to the trial by ordeal as continued by the church of Rome, and substituted the punishment of imprisonment, abjuration of the realm, and security for good behaviour in the case of suspicion of certain crimes committed.

As late as King John's time, we find grants to the bishops and clergy to use the *judicium ferri, aquæ et ignis.* *Specim. Gloss. 1. 1.* And both in England and in Sweden the clergy presided at this trial, and it was only performed in the churches or in other consecrated ground. 4 *Comm. 345.*

The water ordeal was performed either in hot or cold; in cold water, the parties suspected were adjudged innocent if their bones were not borne up by the water contrary to the course of nature: in hot water, they were to put their

bare arms or legs into scalding water, which, if they brought out without hurt, they were taken to be innocent of the crime.

It is easy, says *Blackstone*, to trace out the traditional relics of this water ordeal in the ignorant barbarity still practised in many counties to discover witches by casting them into a pool of water and drowning them to prove their innocence. 4 *Comm. 343.*

Those that were tried by the fire ordeal passed barefooted and blindfold over nine hot glowing ploughshares; or were to carry burning irons in their hands, usually of one pound weight, which was called *simple ordeal*; or of two pounds, which was *duplex*; or of three pounds' weight, which was *triplex ordalium*; and accordingly as they escaped they were judged innocent or guilty, acquitted or condemned. This fire ordeal was for freemen, and persons of better condition; and the water ordeal for bondmen and rustics. *Glanv. lib. 4. c. 1.*

And the horrible trial by fire ordeal, in the first degree, Queen Emma, mother of Edward the Confessor, is said to have undergone on a suspicion of her chastity; though the truth of the story is now, we believe, nearly exploded.

Both sorts of ordeal might be performed by deputy, but the principal was to answer for the success of the trial; the deputy only venturing some corporal pain for hire, or perhaps for friendship. 4 *Comm. 342, 343.*

For another species of purgation, see *Corsned Bread.*

ORDEFFE, or ORDELFE, *effossio metalli*, from the Sax. *ore*, *metallum*, and *delfan*, *effodere*.] A word often used in charters of privileges; signifying a liberty whereby a man claims the ore found in his own ground; but properly is the ore lying under ground. A delfe of coal, is coal lying in veins under ground, before it is dug up. *Cowell.*

ORDELS. Oaths and ordels were part of the privileges and immunities granted in old charters; meaning the right of administering oaths and adjudging ordeal trials within such a precinct or liberty. *Cowell.*

ORDER FOR THE PAYMENT OF MONEY, &c. See *Larceny, l.*

ORDERS. Are of several sorts, and by divers courts; as of the Chancery, King's Bench, &c.

ORDERS OF THE COURT OF CHANCERY. Either of course or otherwise, are obtained on the petition or motion of one of the parties in a cause, or of some other interested in or affected by it; and they are sometimes made on hearings, sometimes by consent of parties. They are to be pronounced in open court, and drawn up by the registrar from his notes; and if there be any difficulty in adjusting the notes, a summons is given by the registrar for the clerk or solicitor of the other side to attend, whereupon they are settled, or the court is applied to if it cannot be otherwise done. Before the orders are entered and passed by the registrar, the other side has four days allowed to object against them, for which purpose copies are delivered; and when they are perfected, they are to be served on the parties, or the clerk or solicitor employed by them. If an order is of course, the solicitor usually draws up the notes or minutes, and gives them to the registrar's clerk to draw up the order from; and when the order is drawn up, it is to be entered by the entering clerk, which must be within eight days from the pronouncing; then the registrar passes and signs it, after which is the service, &c. For not obeying an order, personally served, a party may be committed. See the Books of Practice.

A variety of orders have recently been issued by the lord chancellor, with the concurrence of the master of the rolls and the vice-chancellor, making extensive alterations in the practice of the Court of Chancery. See *Equity.*

ORDERS OF THE COURT OF KING'S BENCH. Rules made by the court in causes there depending, which, when drawn up and entered by the clerk of the rules, become orders of the court. 2 *Lill. 261.* See further, *Motion, Rules.*

ORDERS OF JUSTICES OF PEACE, or of the Sessions. See *Justices of the Peace, Sessions*.

ORDERS of the Clergy, or HOLY ORDERS. See *Clergy, Ordination*.

ORDINALE. A book which contains the manner of performing divine offices, *in quo ordinatur modus, &c.*

ORDINANCE, *ordinatio*.] A law, decree, or statute, variously used.

ORDINANCE OF THE FOREST, *ordinatio forestarum*.] A statute made touching matters and causes of the forest. See 33 & 34 *Edw. 1*.

ORDINANCE OF PARLIAMENT. Acts of parliament are often called ordinances, and ordinances acts; but originally there seems to be this difference between them—that an ordinance was but a temporary act, not introducing any new law, but founded on acts formerly made; and such ordinances might be altered by subsequent ordinances; but an act of parliament is a perpetual law, not to be altered but by king, lords, and commons. *Rot. Parl. 37 Edw. 3*; *Pryn. on 4 Inst. 13*. See *Statute*.

ORDINARY, *ordinarius*.] A civil law term for any judge who hath authority to take cognizance of causes in his own right, and not by deputation: by the common law it is taken for him who hath ordinary or exempt and immediate jurisdiction in causes ecclesiastical. *Co. Litt. 344*; *Stat. Westm. 2. 13 Edw. 1. st. 1. c. 19*.

This name is applied to a bishop who hath original jurisdiction; and an archbishop is the ordinary of the whole province, to visit and receive appeals from inferior jurisdictions, &c. *2 Inst. 398*; *9 Rep. 41*; *Wood's Inst. 25*. The word ordinary is also used for every commissary or official of the bishop, or other ecclesiastical judge having judicial power: an archdeacon is an ordinary; and ordinaries may grant administration of intestates' estates, &c. *31 Edw. 3. c. 11*; *9 Rep. 96*. But the bishop of the diocese is the true and only ordinary to certify excommunications, lawfulness of marriage, and such ecclesiastical and spiritual acts, to the judges of the common law, for he is the person to whom the court is to write in such things. *2 Shep. Abr. 472*.

For the ordinary's power, it is declared by many statutes: as relating to visiting hospitals, by *2 Hen. 5. st. 1. c. 1*; the certifying of bastardy, &c. *9 Hen. 6. c. 11*; concerning questions of tithes that shall come in debate before him, *27 Hen. 8. c. 20*; allowance of school-masters, &c. *23 Eliz. c. 1*; *1 Jac. 1. c. 4*. If a man may keep a school without licence of the ordinary, see *Ld. Raym. 603*; and *post*, tit. *School master*. And the authority of ordinaries in general is restored by the *13 Car. 2. st. 1. c. 12*.

The ordinary's power and interest in a church is of admitting, instituting, and inducting parsons; of seeing and taking care that it be provided with a pastor by the patron who has the right of presenting; or in his default to bestow the church on some proper person to serve the cure, &c. *1 Roll. Rep. 453*. Before presentation to a church, the ordinary may sequester the profits; and during the vacation, it is said, he may make a lease. *1 Keb. 370*. When the ordinaries or their ministers have committed extortion or oppression, they may be indicted, putting the things in certain, and in what manner, &c. *25 Edw. 3. st. 3. c. 9*.

Formerly clerks accused of crimes were delivered to the ordinary, and the bodies of such clerks kept in the ordinary's prison until tried before him by a jury of twelve clerks; and if condemned, they were liable to no greater punishment than degradation, loss of goods, and the profits of their lands; unless they had been guilty of apostacy, &c. This was when they had the privilege of being tried only by ecclesiastical judges; which was so far indulged them, that after they had been once delivered to the ordinary, they could not be remanded to any temporal court, until the *8 Eliz. c. 4*. See *Clergy, Benefit of*.

No ornaments can be set up in a church without the con-

sent of the ordinary *1 Stran. 576*; see *9 Co. 36*; and *Stats. Westm. 2. c. 19*; *31 Edw. 3. c. 11*; *21 Hen. 8. c. 5*; *2 Inst. c. 19*. See further, *Brooke*, tit. *Ordinary*; *Landmode in cap. de Constitutionibus verbo Ordinarii*; and *ante*, tit. *Administrator, Bishop, Clergy*.

ORDINARY OF NEWGATE. The clergyman who is attendant in ordinary upon condemned malefactors in that prison, to prepare them for death; and who records the behaviour of those unhappy culprits.

ORDINATIONE CONTRA SERVIENTES. A writ that lay against a servant for leaving his master contrary to the ordinance or statute *23 & 25 Edw. 3*; *Reg. Orig. 180*.

ORDINATION OF THE CLERGY. By common law, a deacon of any age might be instituted and inducted to a parsonage or vicarage; but now, by statute, no man is capable of taking any ecclesiastical benefice with cure, promotion, or dignity, unless he be ordained a priest, to qualify him for the same. A clerk is to be twenty-three years old, and have deacon's orders, before he can be admitted into any share of the ministry; and the priest must be twenty-four years of age before he shall be admitted into orders to preach, or to administer the sacraments, or to hold any ecclesiastical benefice; but the archbishop may dispense with one to be made deacon at what age he pleases, though he cannot with one who is to be made a priest. See *13 Eliz. c. 12*; *13 & 14 Car. 2. c. 4*, extended to Ireland by *44 Geo. 3. c. 43*. By the latter statute, the granting faculties of dispensation appears to be confined to the archbishops of Canterbury and Armagh.

Deacons and priests are to be ordained only on the four Sundays immediately following the Ember Weeks, except on urgent occasions; and it is to be done in the cathedral or parish church where the bishop resides, in time of divine service, and in the presence of the archdeacon, dean, and two prebendaries, or of four other grave divines. And no bishop shall admit any person into orders without a title or assurance of being provided for; and before any are admitted, the bishop shall examine them in the presence of the ministers, who assist him at the imposition of hands; on pain, if he admits any not qualified, &c. of being suspended by the archbishop from making either deacons or priests for two years. *Can. 31, 34*.

If any impediment be objected against one who is to be made either priest or deacon at the time he is to be ordained, the bishop is bound to surcease from ordaining him, until he shall be found clear of that impediment; and it is generally held, that whatever are good causes of deprivation are also sufficient causes to deny admission to orders; as incompetency, drunkenness, illiterature, perjury, forgery, simony, heresy, outlawry, bastardy, &c. *2 Inst. 631*; *5 Rep. 4*. A person to be ordained priest must bring a testimonial of four persons, known to the bishop, of his life and doctrine; and be able to give an account of his faith in Latin: and a deacon is not to be made a priest unless he produce to the bishop such a testimonial of his life, &c., and that he hath been found faithful and diligent in executing the office of a deacon.

A bishop shall not make any one deacon and minister on the same day; for there must be some time to try the behaviour of a deacon in his office before he is admitted to the order of priesthood, which time is generally a year, but it may be shorter on reasonable cause allowed by the bishop. Priests and deacons are not only to subscribe the thirty-nine articles, but take the oath of the king's supremacy, &c. as directed and altered by *1 W. & M. st. 1. c. 1, 8*. A priest by his ordination receives authority to preach the word and administer the holy sacraments, &c. But he may not preach without licence from the bishop, archbishop, or one of the universities.

The *31 Eliz. c. 6*, punishes corrupt ordination of priests, &c. (which, says *Blackstone*, seems to be the true, though not the common notion of simony.) If any persons shall take any reward or other profit to make and ordain a minister, or

to license him to preach, they shall by this statute forfeit 40*l.*, and the party so ordained, &c. 10*l.*, and be incapable of any ecclesiastical preferment for seven years afterwards.

By 59 Geo. 3. c. 60. the archbishop of Canterbury or York, or the bishop of London, or any bishop specially authorized by either of them for the purpose, may ordain any person for the express purpose of officiating in any of his majesty's colonies or foreign possessions which shall be stated in the letters of ordination; but no person so ordained shall be capable of holding any living in Great Britain or Ireland without the consent of the bishop of the diocese; and the like restraint is extended to persons ordained by the bishops of Quebec, Nova Scotia, &c. See *Bishops*. It is also expressly provided, that no persons ordained by a colonial bishop, not actually resident in his diocese, shall be capable of holding any preferment, or officiating in any manner as a minister of the church of England or Ireland. See further, *tit. Clergy, Person, Simony*.

ORDINES. A general chapter or other solemn convention of the religious of such a particular order. *Paroch. Antiq. p. 576.*

ORDINES MAJORES ET MINORES. The holy orders of priest, deacon, and subdeacon, any of which did qualify for presentation and admission to an ecclesiastical dignity or cure, were called *ordines majores*; and the inferior orders of chanter, psalmist, ostiary, reader, exorcist, and acolyte, were called *ordines minores*; for which the person so ordained had their *prima tonsura* different from the *tonsura clericorum*. *Comell.*

The deacons, priests, and deacons, the church of Rome had five orders; viz. subdeacons, acolytes, exorcists, readers, and ostiaries. 1. The subdeacon is he who delivereth the vessels to the deacon, and assisteth him in the administration of the sacrament of the Lord's supper; 2. The acolyte is he who bears the lighted candle whilst the Gospel is in reading, or whilst the priest consecrateth the host; 3. The exorcist is he who abjureth evil spirits, in the name of Almighty God, to go out of persons troubled therewith; 4. The reader is he who readeth in the church of God, being also ordained to this, that he may preach the word of God to the people; 5. The ostiary is he who keepeth the doors of the church, and tolleth the bell. These, though some of them ancient, were a Roman institutions, and such as come not under the institution which immediately precedes (from the apostle's time) for which reason, and because they were evidently instituted for convenience only, and were not immediately concerned in the sacred offices of the church, they were abolished by our first reformers. *Cole's 9.*

ORDINUM TERTIUM. Signified those of the religious who dedicated their houses; and, throwing off their habits, received their particular order, in contempt of their oath and other obligations. *Paroch. Antiq. 388.*

ORDNANCE. Letters patent for making it are not now in the statute of monopolies, 21 Jac. 1. c. 3. § 10. See 4 Geo. 3. c. 89; 43 Geo. 3. c. 35, 65, 66; 44 Geo. 3. c. 78, § 107, for transferring lands for the service of the Board of Ordnance.

As to pension to the clerk of the ordinance after ten years' service, see 4 & 5 Wm. 4. c. 24. s. 4. *non. types.*

ORDO. That rule which the monks were obliged to observe. *Labaur, Ludo S. Augustini.*

ORDO ALBUS. The White Friars, or Augustines; the Carthusians also wore white.

ORDO NIGER. The Black Friars. *Ingulphus, p. 851.* The Cistercians likewise wore black. *Mat. Paris, 321, 514.*

ORFGILD, or CHEAPGELD, from Sax. *orf, pecus*, and *ald, solutio vel redemptio*. A delivery or restitution of cattle. But Lambard says, it is a restitution made by the hundred, or county, for any wrong done by one who was in the age; or rather a penalty for taking away cattle. *Lamb. Arch. 125.*

ORFRAIES, aurifrisum. A sort of cloth of gold, frizzed or embroidered, formerly made and used in England, worn by our kings and nobility; and the clothes of the king's guards were called orfraies, because adorned with such works of gold. Mention is made of these orfraies in the *Records of the Tower*.

ORGEYS. Mentioned in 31 E. 3. st. 3. c. 2. is the greatest sort of North-sea fish (for the statute says they are greater than lob-fish); which we call organ-ling, corruptly from Orkney-ling, because the best are near that island. *Comell.*

ORGILD, sine compensatione. Without recompense; as where no satisfaction was to be made for the death of a man killed, so that he was judged lawfully slain. *Spelman.*

ORIGINAL CHARTER. That which is granted first to the vassal by the superior. *Scotch Dict.*

ORIGINAL, or ORIGINAL WRIT. The beginning or foundation of a suit. When a person has received an injury, and thinks it worth his while to demand a satisfaction for it, he must apply for that specific remedy which he is advised or determined to pursue. To this end he is to sue out an original, or original writ, from the Court of Chancery, the *officina justitiæ*, wherein all the king's writs are framed.

This original writ is a mandatory letter from the king in Chancery, sealed with his great seal; and, until recently, it lay, in all personal actions, against every person not privileged as an attorney, officer, or prisoner of the court. Formerly, indeed, it was not usual to proceed in the King's Bench by original writ, in debt, detain, or other action of a mere civil nature. But the modern practice was different; and where the defendant pleaded to the jurisdiction, in an action of debt commenced by original writ, the court gave judgment on demurrer for the plaintiff; and declared that if such a plea should come before them again they would inquire by whom it was signed. See *Hardw. 317*. On the other hand, an original writ was formerly the most common, if not the only ground of proceeding against peers, and members of the House of Commons; but by the 12 & 13 Wm. 3. c. 3. § 2. they might also be sued by original bill and summons, attachment and distress infinite. Still, however, an original writ was the only ground of proceeding against a corporation or hundredors on the statutes of hue and cry, &c.; or where, by reason of the defendant's being abroad, or by keeping out of the way, he would not be arrested, or served with process; (and it was intended to sue him to outlawry.)

Original writs are calculated for the commencement or removal of actions. And they are either *de cursu*, or *magistralia*; the former were framed in the king's court, before the division of it; the latter were made out by the masters in Chancery, pursuant to the stat. *Westm. 2. 13 E. 1. st. 1. c. 24*. In personal actions, they were *ex contractu, vel ex delicto*, upon contracts, or for wrongs immediate and consequential. See *Tidd's Pract.* and the authorities there cited.

In actions of covenant, debt, and detain, the original writ was called a *præcipe*, by which the defendant had an option given him, either to do what he was required, or show cause to the contrary: but in *assumpsit*, and actions for wrongs, it was called a *pone*, or *si te fecerit securum*; by which the defendant was peremptorily required to show cause in the first instance. *Finch, L. 357.*

The use of the *præcipe* was, where something certain was demanded by the plaintiff, which it was incumbent on the defendant himself to perform; as to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like: in all which cases the writ was drawn up in the form of a command, to do thus, or show cause to the contrary; giving the defendant his choice to redress the injury, or to stand the suit. The other sort of original was in use where nothing is specifically demanded, but only a satisfaction in general; to obtain which, and administer complete redress, the intervention of some judicature is necessary. Such were writs of trespass, or on

the case, wherein no debt or specific thing is sued for in certain, but only damages to be assessed by a jury. For this end the defendant was immediately called upon to appear in court, provided the plaintiff gives good security of prosecuting his claim. 3 Comm. c. 18, p. 274.

In point of form, the original writ was special or general; *nommatim vel innominatim*. 1 Bac. Abr. 29; Gilb. C. P. 3. The former contained the time, place, and other circumstances of the demand, very particularly; the latter only a general complaint, without expressing the particulars, as the writ of trespass, *quare clausum fregit*, &c.

The original writ, issuing out of Chancery, was teste'd, (that is witnessed) in the king's name at Westminster, or wherever else the Chancery was holden; and as that court is supposed to be always open, it might have been teste'd in vacation as well as in term-time. It was teste'd after the cause of action accrued, and made returnable on a general return day in term-time, *ubicunque*, i. e. wheresoever the king was then in England. There must have been fifteen days at least between the teste and return of an original; the law requiring that distance of time, between the service and return of it, to enable the defendant to come from any part of the kingdom, though if there were less, it was aided by the defendant's appearing and pleading in chief.

Now, by the uniformity of process act, 2 Wm. 4. c. 39. the proceeding by original, in personal actions, is, in effect, abolished, and the only process, in all the courts, by and against all persons, and whether such persons have privilege of peerage or of parliament or otherwise, including corporations or hundredors, where the suit is not bailable, is a writ of summons, and in all actions where bail is required, a writ of *caapias*. See the forms in the schedules of the act. Proceedings to outlawry may be had under the act in the same manner as formerly, on an original writ; and a filacer, exigenter, and clerk of outlawries, is for that purpose to be appointed in the Court of Exchequer. This alteration considerably simplifies and cheapens the procedure of the courts at Westminster.

By the 3 & 4 Wm. 4. c. 27. s. 36. all real and mixed actions are abolished, except the writ of right of dower; writ of dower, under *nil habet, quare impedit*, and ejectment, which excepted actions may still be commenced by original writ.

Replevin, and other personal actions, commenced in inferior courts, and removed to the superior courts, do not seem within the 2 Wm. 4. c. 39.

See further titles *Latitat, Practice, Privilege, Process*, &c.

ORIGINALIA. In the treasurer's remembrancer's office in the Exchequer, the transcripts, &c. sent thither out of the Chancery are called by this name, and distinguished from *recorda*, which contain the judgments and pleadings in suits tried before the barons.

These transcripts contain extracts of all grants of the crown inrolled on the patent and other rolls in Chancery, wherein any rent is received, any salary payable, or any service to be performed. They commence *temp. Hen. 3.* and are continued to a late period. *Report on Records, 1800.*

ORPED. Some orped knight, i. e. a knight whose clothes shone with gold. *Blount.*

ORPHAN, orphanus.] A fatherless child: and in the city of London there is a court of record established for the care and government of orphans. 4 Inst. 248.

The lord mayor and aldermen of London had the custody of orphans under age and unmarried, of freemen that died, and the keeping of their lands and goods; and if they committed the custody of an orphan to any man, he should have the writ of ravishment of ward, if the orphan were taken away; or the mayor and aldermen might imprison the offender until he produced the infant. 2 Danv. Abr. 311. If any one, without consent of the court of aldermen, marries

such an orphan under the age of twenty-one years, though out of the city, they may fine, and imprison him until the fine is paid. 1 Lev. 32; 1 Vent. 178. Executors and administrators of freemen dying, are to exhibit true inventories of their estates before the lord mayor and aldermen in the Court of Orphans, and must give security to the chamberlain of London, and his successors, by recognizance, for the orphan's part; which if they refuse to do, they may be committed to prison until they obey. *Wood's Inst. 522.* If any orphan who, by the custom of London, is under the government of the lord mayor and aldermen, sue in the spiritual court for any legacy, &c. a prohibition shall be granted; because the lord mayor and aldermen only have jurisdiction of them. 5 Rep. 73. But an orphan may waive the benefit of suing in the Court of Orphans, and file a bill in equity for discovery of the personal estate, &c.

The lord mayor and commonalty of London being answerable for the orphan's money paid into the chamber of the city, and having become indebted to the orphans and their creditors, in a greater sum than they could pay, it was enacted, by the 5 & 6 W. & M. c. 10, that the lands, markets, fairs, &c. belonging to the city of London, should be chargeable for raising 8,000*l.* per annum, to be appropriated for a perpetual fund for orphans; and, towards raising such a fund, the mayor and commonalty might assess 2,000*l.* yearly upon the personal estates of inhabitants of the city, and levy the same by distress, &c. Also a duty was granted of 4*s.* per ton on wines imported, and on coals; and every apprentice should pay 2*s.* 6*d.* when bound, and 5*s.* when admitted a freeman, for raising the fund; the fund was to be applied for payment of the debts due to orphans, by interest, after the rate of 4*l.* per cent., &c. And by § 18 of the said statute, no person should be compelled, by virtue of any custom in the city, to pay into the chamber of London any sum of money, or personal estate, belonging to an orphan of any freeman, for the future. By the 21 Geo. 2. c. 29 the duty of 6*d.* per chaldron on coals, given by the 5 & 6 H. 8. M. c. 10. towards the orphan's debt, was continued for three years; and by the 7 Geo. 3. c. 37. for forty-six years more; and various provisions were made for the security and application of the orphan's fund. See also the local act 39 Geo. 3. c. 69. and the several acts for improving the port of London.

ORTELLI, Fr.] A forest word, signifying the claws on a dog's foot. *Kitch. See Carta de Foresta, c. 6.*

ORTOLOGUM. A garden plot, or hortilage. *Angl. tom. 1.*

ORYAL, oriolum.] A room, or cloister, of a monastery priory, &c.; whence it is presumed that Oriel, or Orve College, in Oxford, took its name. *Matt. Paris, in Vit. Abb. St. Alban.*

OSCULATORY. Was a tablet or board, with the picture of Christ, or the blessed Virgin, or of some saint: where after the consecration of the elements in the eucharist, the priest first kissed himself, and then delivered to the people for the same purpose. 3 Burn's Ecclesiast. Law, 58.

OSCULUM PACIS. A custom formerly of the church that in the celebration of the mass, after the priest had spoke these words, viz. *pax domini vobiscum*, the people kissed him; other, was called *osculum pacis*; afterwards, when this custom was abrogated, another was introduced; which whilst the priest spoke the aforementioned words, a deacon offered the people on image to kiss, which was common; called *pacem*. *Matt. Paris, anno 1100.*

OSMONDS. A kind of iron ore, anciently brought into England. See the 32 H. 8. c. 14, repealed by 3 Geo. 4. c. 41 § 2.

OSTENSIO. A tribute anciently paid by merchants, for leave to expose their goods for sale in markets. *Leg. Ethelred, c. 23.*

OSTIARY. See *Ordines Majores*.

OSWALD'S LAW, *Lex Oswaldi*.] The law by which was effected the ejecting married priests, and introducing monks into churches, by Oswald, bishop of Worcester, about the year 964.

OSWALD'S LAW HUNDRED. An ancient hundred in Worcestershire, so called from Bishop Oswald, who obtained it of King Edgar, to be given to St. Mary's church in Worcester; it is exempt from the jurisdiction of the sheriff, and comprehends 800 hides of lands. *Camd. Brit.*

OTHO. Was a deacon cardinal of St. Nicholas, in *carcere Tulliano*, a legate for the pope here in England, 22 Hen. 3, whose constitutions we have at this day. *Stowe's Annals*, 30. *Cowell*.

OTHOBONUS. Was a deacon cardinal of St. Adrian, and the pope's legate here in England, 15 Hen. 3, as appeareth by the award made between the said king and his commons at Kenilworth. His constitutions we have at this day in use. *Cowell*.

OUCH. A collar of gold or such like ornament worn by women about their necks. See the old statute 24 Hen. 8. c. 13. *Cowell*.

OVEALTY. Equality. See *Onctly*.

OVER, *Sax. ofer, rapt.*] In the beginning or ending of the names of places, signifies a situation near the bank of some river, as St. Maryover, in Southwark, Andover, in Hampshire, &c.

OVERCYTED or OVERCYHSED, from the *Sax. ofer, c. cyper and cythan, offendere*.] Proved guilty or convicted. Is said where a person is convicted of any crime; that it is found upon the offender; this word is mentioned in the laws of Edward, apud Brompton, p. 836. *Blount; Cowell*.

OVERHERNISA. Contumacy, or contempt of court. In the laws of *Æthelstan*, cap. 25, it is used for contumacy; but in a council held at Winchester, anno 1027, it signifies a censure paid to the bishop by one who came in after excommunication. See *Spelman*, and *ante*, tit. *Laghalite*.

OVERSAMESSA. Seems to have been an ancient fine before the statute for hue and cry, laid upon those who, hearing of a murder or robbery, did not pursue the malefactor. *1 Inst.* 116; *Lib. Rub. cap. 36*. See *Cowell*, who says it is lawfully written *oversegenesse* and *overseeness*. It appears confounded with the preceding word *overhernissa*, and that all the terms signify a forfeiture for contempt or neglect.

OVERSEERS OF THE POOR. Public officers created by the 43 *Edw. c. 2*, to provide for the poor of every parish, and are sometimes two, three, or four, according to the extent of parishes. Churchwardens by this statute are called overseers of the poor, and they join with the overseers in making a poor's-rate, &c.; but the churchwardens having their net business of their own, usually leave the care of the poor to the overseers only, though anciently they were the overseers of the poor. *Dalt. ch. 27; Wood's Inst.* 98.

OVERSEWENESSE. See *Overhernissa*.

OVERT, *Fr.*; open, overture, an opening; also a proposal. *Law Fr. Dict.*

OVERT-ACT, *opertum factum*.] An open act, which by law must be manifestly proved. *3 Inst.* 12. Some overt-act is to be alleged in every indictment for high treason; such as for treason in compassing the death of the king, the procuring arms to effect it, &c. *3 Inst.* 6, 12. And no evidence may be admitted of any overt-act, that is not expressly laid in the indictment, by 7 *Wm. 3. c. 3*. See *Treason*.

OVERT-WORD. An open plain word, not to be mistaken. *Stat. 1 Mar. sess. 2. c. 3*.

OVRES, *Fr.*] Acts, deeds, or works; *ovrages* or *ouvrages* are days' works. *8 Rep.* 131.

OURLOP. The lierwite or fine paid to the lord by the inferior tenant, when his daughter was corrupted or debauched. *Petr. Bles. Contin. Hist. Croyland*, 115.

OUSTED, from the French *ouster*, to put out.] As ousted

out of possession is where one is removed or put out of possession. *3 Cro.* 349.

OUSTER LE MAIN, *amovere manum*.] A livery of land out of the king's hand, on a judgment given for him that sued a *monstrans de droit*; for when it appeared upon the matter that the king had no title to the land he seized, judgment was given in the chancery that the king's hands be removed; and thereupon an *amoveas manus* was awarded to the escheator to restore the land, it being as much as if the judgment were given that the party should have his land again. *Staundf. Prærog. cap. 24*; see 28 *Edw. 1. st. 3. c. 19*. It was also taken for the writ granted upon a petition for this purpose. *F. N. B.* 256. But now all wardships, liveries, and ouster le mains, &c. are taken away by 12 *Car. 2. c. 24*. See *Monstrans de Droit, Tenures*.

OUSTER LE MER, *oultre, i. e. ultra, and le mer, marc.*] One cause ofessoign or excuse, if a man appeared not in court on summons, for that he was then beyond the seas. See *Essoign*.

OUTFANGTHEF, from the Saxon *ut, i. e. extra, fang, captus, and theaf, fur*.] A liberty or privilege, as used in the ancient common law, whereby a lord was enabled to call any man dwelling in his manor, and taken for felony in another place out of his fee, to judgment in his own court. *Rustal; Bract. lib. 2. tract. 2. cap. 35*; 1 & 2 *P. & M. c. 15*.

OUTHEST or OUTHORN. A calling men out to the army, by the sound of an horn.

OUTHOUSES. Are the buildings belonging and adjoining to dwelling-houses. See *Burglary, Curtilage, Larceny, II*.

OUTLAND. The Saxon thanes divided their hereditary lands into inland, such as lay nearest their dwelling, which they kept to their own use; and outland, which lay beyond the demesnes, and was granted out to tenants, at the will of the lord, like copyhold estates. This outland they subdivided into two parts, one part they disposed amongst those who attended their persons, called *theodans* or lesser thanes; the other part they allotted to their husbandmen or churls. *Spelm. de Feud. cap. 5*.

OUTLAW, Saxon, *utlaghe*; Latin, *utlagatus*.] One deprived of the benefit of the law, and out of the king's protection. *Fleta, lib. 1. cap. 47*. When a person is restored to the king's protection, he is inlawed again. See *Outlawry*.

OUTLAWRY.

UTLAGAMA.] The being put out of the law. The loss of the benefit of a subject, that is, of the king's protection. *Cowell*.

Outlawry is a punishment inflicted for a contempt, in refusing to be amenable to the justice of that court, which hath authority to call a defendant before them; and as this is a crime of the highest nature, being an act of rebellion against that state or community of which he is a member, so it subjects the party to forfeitures and disabilities; for he loseth his *liberam legem*, is out of the king's protection, &c. *Co. Lit.* 128; *Doct. & Stud. dial. 2. cap. 3*; 1 *Roll. Abr.* 802.

And as to forfeitures for refusing to appear, the law distinguishes between outlawries in capital cases, and those of an inferior nature; for as to outlawries in treason and felony, the law interprets the party's absence a sufficient evidence of his guilt, and without requiring further proof, accounts him guilty of the fact, on which issues corruption of blood and forfeiture of his estate, real and personal. *Co. Lit.* 128; *3 Inst.* 161. See further, *Forfeiture, II*.

But outlawry in personal actions does not occasion the party to be looked on as guilty of the fact, nor does it occasion an entire forfeiture of his real estate, yet it is very fatal and penal in its consequences; for hereby he is restrained of his liberty, if he can be found; forfeits his goods and chattels, and the profits of his lands, while the outlawry remains in force. *Plowd.* 541; 9 *Hen. 6.* 20 b; *Shon. Parl. Ca.* 73.

Outlawry in civil actions is putting a man out of the protection of the law, so that he is not only incapable of suing for the redress of injuries, but may be imprisoned, and forfeits all his goods and chattels, and the profits of his lands; his *personal* chattels immediately upon the outlawry, and his chattels real, and the profits of his lands, when found by inquisition. 1 Salk. 395.

So penal were the consequences of an outlawry, that until some time after the Conquest, no man could have been outlawed except for felony, the punishment whereof was death; but in Bracton's time, and somewhat earlier, process of outlawry was ordained to lie in all actions *vi et armis*. Bract. lib. 5. p. 425. And since, by a variety of statutes (the same as introduced the *capias*), process of outlawry lies in account, debt, detinue, and divers other common or civil actions. See post, I.

Anciently outlawry was looked upon as so horrid a crime, that any one might as lawfully kill a person outlawed, as he might a wolf or other noxious animal; but it is now holden that no man is entitled to kill an outlaw wantonly or wilfully, but in so doing is guilty of murder; 1 Hale, P. C. 497; unless it happens in the endeavour to apprehend him. Bract. fol. 125. See post, IV.

Also, from the heinousness of the offence, the sheriff may, on a *capias utlagatum*, break open the house of the person outlawed; for it would be unreasonable that the protection allowed in other cases should extend to him who is declared a contemner and violator of the law; therefore the seizing him as an outlaw implies the liberty of entering and seizing him wherever he lies hid. 2 Hale's Hist. P. C. 202; 9 Co. 91; 1 Bulst. 146; Cro. Eliz. 908; Moor, 606, 668; Yelv. 28; Cro. Car. 537; 4 Leon. 41; 2 Jon. 233.

If the defendant be a woman, the proceeding is called a *waiver*; for as women were not sworn to the law by taking the oath of allegiance in theleet (as men anciently were when of the age of twelve years or upwards), they could not properly be outlawed or put out of the law, but were said to be waived, that is, *derelecta*, left out, or not regarded. Litt. § 186; Co. Litt. 122 b. And for this same reason an infant cannot be outlawed under the age of twelve years. Co. Litt. 128 a. See post, div. II.

- I. In what Cases Process of Outlawry lies; and by what Jurisdiction such Processes are to issue.
- II. Against whom Process of Outlawry may be awarded; whether it may be awarded against a Peer, an Infant, Feme Sole or Covert, several Defendants, and Principal and Accessory.
- III. To what place Process of Outlawry is to issue; of the quinto exactus, and Proclamations on an Outlawry.
- IV. Of the Effect of and Process consequent on Outlawry in criminal as well as civil Cases. See Process.
- V. What the Party must do in order to entitle him to a Reversal; and of the Effects and Consequences of a Reversal.

I. WHERE the defendant is abroad, or keeps out of the way, so that he cannot be arrested or served with process, the plaintiff, on the return of *non est inventus* to the *pluries capias* (see post), may have a writ of *exigi facias* (see post, III.), and proceed to outlawry; or if there be several defendants in a joint action, and one of them be abroad or keep out of the way, the plaintiff may have a writ of *exigi facias* against that defendant, and must proceed to outlawry against him before he can go on against the others. 1 Stra. 173; 1 Wils. 78; 2 Stra. 1269; 1 Bla. Rep. 20.

Process of outlawry lay in all appeals until they were abolished, and it now lies in all indictments of conspiracy and deceit, or other crimes of a higher nature than trespass *vi et armis*; but it lies not in an action, nor, as some say, on an indictment on a statute, unless it be given by such statute,

either expressly, as in the case of *preconjurare*; or impliedly, as in cases made treason or felony by statute; or where a recovery is given by an action in which such process lay before, as in case of forcible entry. Staundf. 192; Bro. tit. Outlawry, 26, 36, 59; Co. Litt. 128 b; Dyer, 213, 314; 2 Hawk. P. C. c. 27. § 113, and several authorities there cited.

So process of outlawry lies in replevin, and is given by the 25 Edw. 3. st. 5. cap. 17, which gives the *capias* in this manner; when on the *pluries replegiari facias* the sheriff return *averia elongata*, then a *capias* in *withernam* issues, and on that being returned *nulla bond*, a *capias* issues, and so to outlawry; but it does not lie on the original writ of replevin, which is *vicontiel* and determined; therefore as no addition is required in such original writ, so neither ought there to be any in the second writ; for where a writ or process is founded on a former, it must pursue the former, and cannot vary from it. 6 Mod. 84; 1 Salk. 5.

By the common law, in all actions of trespass *quare vi et armis*, and in which there is a fine to the king, a *capias* was the process; and herein process of outlawry lay by the common law. 35 H. 6. 6 b; 22 H. 6. 13; Rast. Ent. 239; 10 Co. 72; 2 Rol. Abr. 805.

But in account, debt, detinue, annuity, covenant, and such actions as are grounded upon negligence or laches merely, no *capias* lay at common law, but only summons and distress infinite; therefore the *capias* and outlawry in these actions were introduced by acts of parliament. Co. Litt. 128 b; 3 Co. 12; 2 Bulst. 63; 2 Inst. 143; Cro. Jac. 222, 231; Yelv. 158; Raym. 128; 1 Keb. 890, 908; 1 Sid. 248, 258; of detinue of charters, Dyer, 223 a, dubitatur.

By the statute of Marlbridge, (52 H. 3.) cap. 23. the writ of *monstravit de complo* was given, where before the process in account was summons, attachment, and distress infinite; and by stat. West. 2. (13 Edw. 1. st. 1.) cap. 11, process of outlawry is given in account. 2 Inst. 145, 380; F. N. B. 259.

By 25 Edw. 3. stat. 5. c. 17. such process shall be made in a writ of debt and detinue of chattels, and taking of debts by writ of *capias* and by process of *exigent*, by the sheriff's return, as is used in a writ of account. 3 Co. 12; 2 Roll. Rep. 295; 2 Bulst. 63.

And by 19 H. 7. c. 9. it is enacted, that like process be had in actions upon the case, as in actions of trespass or debt.

The 25 Edw. 3. st. 5. c. 14. as to process of outlawry against persons indicted for felony, does not apply to a court ofoyer and terminer and gaol delivery. 4 T. R. 521.

Outlawry is either upon *mesne* process before, or upon *final* process after judgment. Formerly, upon *mesne* process the plaintiff could not proceed to outlawry, unless the action were commenced by original writ. 1 Sid. 159. Nor could the defendant be outlawed after judgment, unless the action were so commenced; for where the defendant was outlawed after judgment, in an action commenced by *habeas corpus*, it was holden that process of outlawry did not lie, as there was no *capias* in the original action. 1 Leon. 325. See tit. Original.

Now, by the Uniformity of Process Act, 2 Wm. 4. c. 39. the proceedings in personal actions by original are in effect abolished; and it is provided that in all courts all actions not bailable shall be commenced by a writ of summons, and actions bailable by a writ of *capias*; and where the writ of summons cannot be served on a defendant, his appearance may be enforced by a *distringas* against his goods. By § 5 it is enacted, that "upon the return of *non est inventus* as to any defendant against whom such writ of *exigent* shall have been issued, and also upon the return of *non est inventus* and *nulla bond* as to any defendant against whom such writ of *distringas* as hereinbefore shall have issued, whether such writ of *capias* or *distringas* shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, with other wise provided, to proceed to outlaw or waive such defendant

by writs of *exigi facias* and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of *non est inventus* to a *plures* writ of *capias ad respondendum* issued after an original writ provided always, that every such writ of *exigent*, proclamation, and other writ subsequent to the writ of *capias* or *distringas*, shall be made returnable on a day certain in term; and every such first writ of *exigent* and proclamation shall bear teste on the day of the return of the writ of *capias* or *distringas*, whether such writ be returned in term or vacation; and every subsequent writ of *exigent* and proclamation shall bear teste on the day of the return of the next preceding writ; and no such writ of *capias* or *distringas* shall be sufficient for the purpose of outlawry or waiver, if the same be returned within less than fifteen days after the delivery thereof to the sheriff or other officer to whom the same shall be directed." This act does not affect any real or mixed actions, but by the 3 & 4 Wm. 4. c. 27. § 50. real and mixed actions, with two or three exceptions, are abolished.

After judgment the plaintiff may have an *exigi facias*, and proceed to outlawry, upon a *capias ad satisfactionem* without an *alias* or *plures*; because the defendant having been already in a court before judgment, and having cognizance of the debt, ought to pay it on the first strong out of the *capias*, and has not performing the judgment is a contumacy, for which he is put out of the king's protection. *Idib. C. P. 17.* And no writ of proclamation is required upon an *exigent* after judgment, but only upon mesne process. *Cro. Jac. 577.* See post, div. III.

By 2 Wm. 4. c. 39. § 6. after judgment given in any action commenced by writ of summons or *capias* under the act, proceedings to outlawry or waiver may be taken, and judgment of outlawry or waiver given, in such manner and in such cases as may now be done after judgment in an action commenced by original writ: provided that every outlawry or waiver had under the act, may be vacated or set aside by writ of error or motion, in like manner as outlawry or waiver founded on an original writ may now be vacated or set aside.

It is clear that the courts at Westminster may issue process of outlawry, and that the Court of King's Bench, either upon an indictment originally taken there, or removed thither by *certiorari*, may issue process of *capias* and *exigent* into any county of England, upon a *non est inventus* returned by the sheriff of the county where he is indicted, and a *testatum* that he is in some other county. 2 *Hale's Hist. P. C. 198.*

In the Exchequer the defendant could not formerly be outlawed, as the plaintiff could not proceed there by original writ, but this may now be done by 2 Wm. 4. c. 39. § 4; and for the purpose of proceeding to outlawry there, the lord chief baron is to appoint some fit person holding some other office in that court to execute the duties of filacer, exigenter, and clerk of outlawries in the same court.

Also justices of oyer and terminer may issue a *capias* or *exigent*, and so proceed to the outlawry of any person indicted before them, directed to the sheriff of the same county where they held their sessions at common law; and by the 15 Edm. 3. c. 11. they may issue process of *capias* and *exigent* to all the counties of England, against persons indicted or outlawed of felony before them. 2 *Hale's Hist. P. C. 31, 198.*

But justices of gaol delivery regularly cannot issue a *capias* or *exigent*; because their commission is to deliver the gaol *de prisonibus in custodia*, so that those whom they have to do with, are always intended in custody already. 2 *Hale's Hist. P. C. 199.*

Justices of the peace may make out process of outlawry upon indictments taken before themselves, or upon indictments taken before the sheriff, and returned to the justices of the peace, by the 1 Edm. 4. c. 2; but the power of the sheriff, to make any process upon indictments, taken before him, is taken away by that statute. 2 *Hale's Hist. 199.*

It is made a *quære* by *Hale*, whether a coroner can by law

make out process of outlawry against a man indicted by inquisition before him. 2 *Hale's Hist. P. C. 199.* See 4 *T. R. 521.*

It hath been held, that though the process in inferior courts be a *capias*, yet they cannot proceed to outlaw the party. *Yelv. 158; Cro. Jac. 222, 261; Raym. 128; 1 Sid. 248, 259; 1 Keb. 890, 908.*

The process to the outlawry, viz. the *capias* and *exigent*, must be in the king's name, and under the judicial seal of the king, appointed to that court, which issues that process, and with the teste of the chief justice or chief judge of that court or sessions. 2 *Hale's Hist. P. C. 199.*

II. If a peer of the realm be indicted, and cannot be found, process of outlawry shall be awarded against him, and he shall be outlawed *per judicium coronatorum*. 2 *Inst. 49; 3 Inst. 31; Staundf. 180; 2 Hawk. P. C. c. 44. § 16.*

But in civil actions, between party and party, regularly a *capias* or *exigent* lies not against a peer; yet in case of an indictment for treason or felony, or for trespass *vi et armis*, as an assault or riot, process of outlawry shall issue against a peer; for the suit is for the king, and the offence a contempt against him; therefore, if a rescue be returned against a peer; or if a peer be convict of a disseisin with force, or denies his deed, and it be found against him, a *capias pro fine* and *exigent* shall issue, for the king is to have a fine; and the same reason holds upon an indictment of trespass or riot, much more in the case of felony. 2 *Hale's Hist. P. C. 199, 200; Cro. Eliz. 170, 508; 5 Co. 54; 1 Rol. Abr. 220.*

An infant above the age of fourteen may be outlawed, and the outlawry is not erroneous; but an infant under the age of fourteen cannot be outlawed; if he be, it is erroneous. 3 *Hen. 5. Utlagat.; Fitz. tit. Outlawry, 11; 2 Rol. Abr. 805; Dyer, 104; 2 Hale's Hist. P. C. 207, 208.* Lord Coke says, within the age of twelve years. 1 *Inst. 128 a.*

But the outlawry of such infant is not void, it being of record, but is voidable only by writ of error. *Dyer, 239 a; 2 Rol. Abr. 805.*

A woman, it has been already remarked, is said to be waived and not outlawed; therefore where a *capias* and *exigent* were awarded against three men and two women, and the return was *utlagat. existunt*, where, as to the women, it ought to have been *navitata existunt*, this was held to be error. *Cro. Jac. 358; 1 Rol. Rep. 407; 1 Rol. Abr. 804.*

If in an action against husband and wife, the husband is outlawed, and the wife waived, and she is taken upon the *capias utlagat.*, though she is to be discharged of the imprisonment, (because the plaintiff cannot proceed against her alone,) yet she still remains waived, and when her husband is taken he must bring her in. See *Dyer, 271 b; Cro. Jac. 445; Cro. Eliz. 370; Hut. 86; 1 Sid. 21; Cro. Car. 58, 59; Hut. 86.*

If two are sued in a joint action, and neither of them will appear, process of outlawry must be taken out against both. *Cro. Eliz. 648.*

If an *exigent* be awarded against two, and the return *primo exacti fuerunt et non comparuerunt*, without saying *nec eorum aliquis comparuit*, it is erroneous. 2 *Rol. Abr. 802.*

As to outlawry in action of account, see 41 *Edm. 3. 3; 1 Rol. Abr. 127; 1 Brownl. 25; 41 Edm. 3. 13 b; Moor, 188; 2 Leon. 76; Dyer, 239. pl. 203; N. Bendl. 148. pl. 205; Moor, 74. pl. 203; 1 And. 10; 1 Sid. 173; 1 Keb. 642.*

As to awarding outlawry against principal and accessory, by the stat. of Westm. 1. 3 *Edm. 1. c. 14.* which was passed to remedy an abuse then prevailing of outlawing accessories on appeals of felony, it is provided, that none be outlawed upon appeal of commandment, force, aid, or receipt, unless he who is appealed of the deed be attainted, so that one like law be used therein through this realm; nevertheless he that will so appeal, shall not, by reason of this, intermit or leave off to commence his appeal at the next county, against them, no more than against their principals which he appealed of

the deed; but their *exigent* shall remain, until such as be appealed of the deed be attained of outlawry or otherwise.

For the construction of this statute, which has been held to extend to indictments as well as appeals, (the latter of which are now abolished,) see 2 *Hawk. P. C. c. 27*; 2 *Hale's Hist. P. C. 220*.

If one *exigent* be awarded against the principal and accessory together, it is error only as to the latter. 4 *T. R. 521*.

With respect to accessories, it was formerly held, that as the guilt of the accessory was purely derivative, and no accessory could be convicted before the conviction of his principal, so, in no case could process of outlawry issue against any accessory either before or after the fact, previous to the outlawry of the principal. 1 *Star. Cr. Pl. 260*. But as the recent statutes of 7 *Geo. 4. c. 64. § 9*, and 7 & 8 *Geo. 4. c. 29. § 54, 55*, have enacted, that accessories before the fact and receivers of stolen goods may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted; it seems to follow that they may now also be outlawed, independently of any process of outlawry against the principal. Accessories after the fact however, except receivers of stolen goods, can still only be indicted either along with, or after the conviction of, the principal; and therefore in favour of these, the former practice of proceeding to outlawry against an accessory still prevails.

In treason all are principals; therefore process of outlawry may go against him who receives, at the same time, as against him that did the fact. 1 *Hale's Hist. P. C. 238*. See *Process*.

III. FORMERLY the *exigent* must have been sued in the county where the party really resided, for there all actions were originally laid; and because outlawries were at first only for treason, felony, or very enormous trespasses, the process was to be executed at the *torn*, which is the sheriff's criminal court; and this held not only before the sheriff, but before the coroners, who were ancient conservators of the peace, being the best men in each county, to preside with the sheriff in his court, and who pronounced the outlawry in the county court on the party's being *quinto exactus*; therefore anciently there was no occasion for any process to any other county than that in which the party actually resided. *Fitz. Exigent, 26*; *Dyer, 295*.

By the 6 *Hen. 6. c. 1*. "before any *exigents* be awarded against persons indicted in the King's Bench of treason or felony, writs of *capias* shall be directed as well to the sheriff of the county in which they are indicted, as to the sheriff of the county whereof they may be named in the indictments; the *capias* having at least six weeks before the return thereof."

And by the 8 *Hen. 6. c. 10*. "upon every indictment, before any *exigent* awarded, presently after the first writ of *capias* returned, another writ of *capias* shall be awarded, directed to the sheriff of the county, whereof he who is indicted is or was supposed to be conversant, by the same indictment, containing, according to the circumstances, three or four months from the date to the return; by which second writ of *capias*, the sheriff shall be commanded to take him, if he can be found within his bailiwick; and if he cannot, to make proclamation in two counties, before the return of the same writ; after which writ so served and returned, if he which is so indicted or appealed come not at the day of such writ returned, the *exigent* shall be awarded."

This statute not to extend to indictments taken within the county of Chester.

By the 10 *Hen. 6. c. 6*. "such second *capias* as is required by 8 *Hen. 6. c. 10*. shall be awarded upon indictments removed into the King's Bench, or elsewhere, by *certiorari*, or otherwise."

In the construction of these statutes, the following opinions have been holden:—

That though the words are express, that any outlawry pronounced contrary to the directions of the statute shall be void, yet it is not to be taken as if such outlawries were absolutely void, but only voidable by writ of error. *Cro. Eliz. 179*; 3 *Co. 59*; *Plowd. 137*; *Hob. 166*.

If a defendant be expressly named of the same county wherein he is indicted, or appealed, and be also named under an *alias dictus* of another, it hath been adjudged that there is no need of any *capias*, with a command for proclamation according to 8 *Hen. 6. c. 10*. because that which comes under the *alias dictus* is not traversable nor material; also if a defendant be named of B. and late of D. there is no need of any *capias* to the sheriff of the county wherein D. lies; because it appears, the defendant is at present conversant at B.; but if a defendant be named of no certain place at present, but only late of B. and late of D. and late of E., &c. being all in different counties from that in which the prosecution is commenced, a *capias* shall go to the sheriff of each county. 2 *Hawk. P. C. c. 27. § 126*; 2 *Hale's Hist. P. C. 195, 196*; *Cro. Jac. 167*.

Upon the issuing of the *exigent* before judgment or conviction, the 4 & 5 *W. & M. c. 22. § 4*. directs, that there shall also issue a writ of proclamation (bearing the same teste and return with the *exigent*) to the sheriff of the county where the defendant is mentioned to inhabit, according to the form of the 31 *Eliz. c. 3*. (see this statute, which relates to proceedings in civil actions, *post*); which writ of proclamation must be delivered to the sheriff before the return.

The 4 & 5 *W. & M. c. 22*. does not apply to an outlaw after conviction. *Burr. 2559*; 3 *T. R. 501*.

The return of outlawry upon the *exigent* must be certain as to the time and place of exacting the defendant and other necessary particulars.

In the return to the writ of proclamation, it is not necessary that the sheriff should allege, that the person procured did not render himself, though this is essential in his return to the *exigent*: but he must specially show how the proclamations were made, to enable the court to judge whether they were properly made or not. 4 *T. R. 521*; and see 3 *T. R. 499, post*.

The course of proceeding to outlaw a person indicted for a misdemeanor differs from the process in cases of felony. In cases of misdemeanor, the first step after the finding of the indictment is, to issue a *venire facias ad respondendum*. There must be fifteen days between the teste and return of this writ, on indictments before justices of peace at the sessions, or before justices of oyer and terminer. But before justices of oyer and terminer and gaol delivery, it may be made returnable immediately; and the like, where the indictment is before the Court of King's Bench for an offence done in Middlesex, that being the county in which the court sits: but not, where the offence is committed out of that county. 3 *Salk. 371*.

On the issuing of the *venire facias*, the defendant is summoned, and if he do not appear, and the sheriff return that he has land in the county whereby he may be restrained, a *distringas* is awarded, and is repeated from time to time, whereby he forfeits, on every default, the issues returned by the sheriff. But if upon the *venire*, the sheriff return, that the defendant has nothing whereby he can be distrained, a *capias* issues, and then an *alias*, and then a *pluries*, and afterwards the *exigent*; upon which the defendant may be outlawed. 2 *Hawk. c. 27. § 10*. But if the prosecutor proceed to outlawry after judgment, then only one *capias* is necessary. *Id. § 11*.

In civil cases, the writ of *exigi facias* (see *Exigent*) is a judicial writ made out by the filicer, as clerk of the *exigents*.

and directed to the sheriff of the county where the action is laid, commanding him to cause the defendant to be required or exacted from county court to county court, or from hustings to hustings, if in London; that is, at five successive county courts or hustings, until he be outlawed, if he do not appear; and if he appear, to take him, &c. This writ should be tested on the *quarto de post* of the return of the *plures capias* before, or of the *capias* after judgment; and if there be not five county courts between the teste and the return of it, there issues an *exigent de novo*, grounded upon the sheriff's return to the former writ with a clause (from whence it is called an *allocatus exigent*, directing the sheriff to allow the several county courts at which the defendant has already been required. 1 *Plowd* 371. In London the hustings are holden once every fortnight; on which account the action is generally laid there, when the plaintiff intends to proceed to outlawry. See *Fidd's Pract.*

It hath been holden, that in London, where the holding of the hustings is uncertain, an *exigent facias* shall issue with an *allocatus* hustings; because the court cannot take notice of the set times of holding it, as they may of the times of holding the county courts; but it is now agreed, that if an *exigent* issues in London, and they begin "husting de placito terre," (as they may,) they shall proceed along at that hustings to the outlawry, without mingling their husting de communibus *placitis*; but if an *allocatus* husting comes, they shall proceed without omitting any husting. *Palm.* 287; 2 *Leon.* 14; 2 *Hab. & Hist. P. C.* 202.

In addition to the *exigent*, a writ of proclamation was introduced by 6 *Hen. 8. c. 4.* which requires it to be directed to the sheriff of the county of which the defendant is called, or described in the original; for there he was supposed to dwell; and if he did not in fact dwell there, he might have avoided the outlawry, by the statute of additions. *Dyer*, 211. See *Gilb. C. P.* 19; *Theat. Brev.* 88.

But the writ of proclamation is at present governed by 31 *Edw. c. 8. § 1.* which enacts, that, "in every action personal, wherein any writ of *exigent* shall be awarded out of any court, a writ of proclamation shall be awarded and made out of the same court, having day of teste and return as the said writ of *exigent* shall have directed, and delivered of record to the sheriff of the county where the defendant at the time of the *exigent* shall contain the effect of the same action; and that the sheriff of the county unto whom any such writ of proclamation shall be delivered, shall make three proclamations, one in the open county court, another at the general quarter sessions of the peace, in those parts where the defendant at the time of the *exigent* awarded shall be dwelling, and the third, one month at the least before the *quinto exactus* by virtue of the said writ of *exigent*, at or near the most usual door of the church or chapel of that town or parish where the defendant shall be so dwelling; and if the defendant shall be dwelling out of any parish (i. e. in any extra-parochial place), then in such place as aforesaid of the next adjoining parish in the same county, and upon a Sunday immediately after divine service, and sermon, (if there be one,) and if there be no sermon, then forthwith after divine service; and that all outlawries had and pronounced, whereupon no writs of proclamations shall be awarded and returned according to the form of this statute, shall be utterly void and of none effect."

On outlawry in felony reversed because it appeared on the writ of proclamation and the return to it that the person indicted was outlawed after a day had been given him in court, and before such day arrived. 3 *T. R.* 499.

IV. Upon the defendant's being put in *exigent*, he is either taken, by the sheriff, appears voluntarily, or makes default. If he be taken, he either remains in custody of the sheriff, or gives bail, &c. as upon a common arrest. Formerly, if the

defendant had appeared voluntarily, at any time before the return of the *exigent*, he might have obtained a writ of *supersedeas* from the filacer, as clerk of the *supersedeas*, on entering a common appearance of the term in which the *exigent* issued, and he may still do so where the action does not require special bail. But upon a question, whether in a case originally requiring special bail, if the defendant stand out to an *exigent*, he can come in and appear to the *exigent* without putting in special bail; it was ruled by the Court of K. B. that there ought to be special bail. It would be very unreasonable, they said, that the defendant should gain an advantage, by standing out till process of outlawry; he certainly ought not to be in a better condition then than if he had appeared at first. And accordingly the direction given was, that the filacer should not issue a *supersedeas* till the defendant should put in special bail. 3 *Burr.* 1920.

If the defendant be neither arrested nor appear, but make default at five successive county courts or hustings, he is outlawed if a man, or if a woman, she is waived, by the judgment of the coroners, or of the recorder in London; and the judgment of outlawry being returned by the sheriff upon the *exigent*, the filacer, as clerk of the outlawries, will make out a writ of *capias utlagatum*, which is either general or special, and may be issued into any county, without a *testatum*; nor is there any occasion upon an outlawry after judgment, to revive the judgment by *scire facias*, after a year and a day.

By the general writ of *capias utlagatum*, the sheriff is commanded "that he do not omit by reason of any liberty of his county, but that he take the defendant, if he be found in his bailiwick, and him safely keep, so that he may have his body in court on a general return day, &c. wheresoever, &c. to do and receive what the court shall consider of him." The defendant, being taken by the sheriff on this writ, either gives bail to appear and reverse the outlawry, or remains in custody until he actually reverse it, or obtain a charter of pardon, or be relieved under an insolvent act.

At common law the defendant could not have been bailed when taken by the sheriff on a *capias utlagatum*. 3 *Burr.* 1484; 4 *Burr.* 2540. And this case is particularly excepted out of the 23 *H. 6. c. 9*; 13 *Car. 2. st. 2. c. 2. § 4*; by the latter of which statutes it is expressly declared that "no sheriff, &c. shall discharge any person or persons taken upon any writ of *capias utlagatum* out of custody without a lawful *supersedeas* first had and received for the same." But now by the 4 & 5 *W. & M. c. 18. § 1. 5.* if any person outlawed in the Court of King's Bench, other than for treason or felony, shall be arrested upon any *capias utlagatum* out of the said court, the sheriff making the arrest may, in all cases where special bail is not required by the said court, take an attorney's engagement under his hand to appear for the defendant, and reverse the outlawry, and discharge the defendant from such arrest; and in those cases where special bail is required by the said court, the said sheriff shall take security of the defendant by bond, with one or more sufficient surety or sureties in the penalty of double the sum for which special bail is required, and no more, for his appearance by attorney in court, at the return of the writ, and to perform such things as shall be required by the said court; and after such bond taken may discharge the defendant from the said arrest. Or if the defendant shall not be able to give security as aforesaid, before the return of the writ, he shall be discharged, whenever he shall find sufficient security to the sheriff for his appearance by attorney in the said court, at some return in the ensuing term, to reverse the outlawry, and to do such other things as shall be required by the said court.

This statute has been construed not to extend to criminal cases, at least not to misdemeanors after conviction. 4 *Burr.* 2539. And even in civil cases the defendant cannot be bailed where he was not bailable upon the process to outlawry. *Id.* 2540. For it was the design of the statute to put him in the same condition as if he had not been outlawed; and therefore

he is not bailable when taken upon an outlawry after judgment; neither upon this statute will the court restore goods taken upon a special *capias utlagatum*, but they will of course be restored upon the reversal of the outlawry. *Carth.* 459; 1 *Ld. Raym.* 349.

When there is no affidavit of a bailable cause of action, the sheriff is authorized by the statute to discharge the defendant on an attorney's undertaking to appear and reverse the outlawry; but when an affidavit has been made, he ought not to be discharged without giving the security required by the statute; which is not a common bail bond, but a bond with one or more sufficient surety or sureties for appearance by attorney at the return of the writ, and to do and perform such things as shall be required by the court, that is, to put in bail to a new action, plead within a limited time, put the plaintiff in the same condition, and such like matters. 3 *Burr.* 1483; 4 *Burr.* 2540. And it is not necessary that the affidavit should be made before the outlawry; 2 *Sira.* 1178, 9; 1 *Wils.* 8; *Fort.* 89; or the sum sworn to be indorsed on the *capias utlagatum*. 2 *Burr.* 1482. But it is sufficient if there be an affidavit before the defendant is discharged; the court having determined that process of outlawry is not within the statute for preventing frivolous and vexatious arrests. See 3 *Burr.* 1483. And see as to *Bail*, post, V.

By the special writ of *capias utlagatum*, the sheriff is commanded not only to take the defendant, as by the general writ, but also "to inquire by the oath of honest and lawful men of his county, what goods and chattels, lands and tenements, he hath or had on the day of his outlawry, or at any time afterwards; and by their oath to extend and appraise the same according to the true value, and to take them into the king's hands, and safely keep them, so that he may answer to the king for the true value and issues of the same, making known what he shall do thereupon to the court, on the return day." *Off. Brev.* 35; *Thess. Brev.* 59. Upon this writ the sheriff is to empanel a jury, who are to make inquiry of the goods and chattels of the defendant, including his debts. *Co.* 95; *Lane*, 23; *Eutw.* 329, 1519; *Gilb. C. P.* 200. And also of his leasehold and freehold lands and tenements; to appraise the goods, and to extend or value the lands, &c. but they are not to inquire of his copyholds; *Parker*, 190; or trust property. *Cro. Jac.* 518; *Sty.* 41. But see the *Statute of Frauds*, 29 *Car.* 2. c. 8. § 10.

Witnesses may be subpoenaed to attend the execution of the inquiry, and when made, the sheriff is to take possession of the goods and chattels of the defendant, and of the leasehold tenements in his own occupation. 9 *Hen.* 6. c. 20, 21. But he must not oust or disturb the possession of his tenants. *Id.* 21 *H.* 7. 7. And can only take the issues or profits of his freehold tenements. *Id.* *Plowd.* 541; *Hardr.* 106, 176; *Bunb.* 103, 105. The inquisition should set forth, with convenient certainty, the appraised value of the goods; the particulars of the debts; of what lands, &c. the defendant is seised or possessed; the different parcels; in whose tenure; and of what annual value beyond reprises. But the inquisition being merely an office of instruction or information, does not require so much certainty as an office of entitling. 2 *Salk.* 469; *Bunb.* 103. And if the lands, &c. be undervalued, there may be a *melius inquirendum*. *Hard.* 106. See that title, and *Forfeiture*.

When the special writ of *capias utlagatum* is returned, it should be delivered, with the inquisition annexed, to the filacor, as clerk of the *exigents* and outlawries, and afterwards filed in the office of the *custos breviarum*, 3 *T. R.* 578, 9; from whence a transcript is sent into the Exchequer. *Gilb. C. P.* 16. Out of this court there issues a *venditioni exponas* to sell the goods, a *seire facias* to recover the debts, and a *levari facias* to levy the issues and profits; under which latter writ the sheriff may not only take the rent and moveables of the party outlawed, but also the cattle of a stranger *levant* and *couchant* on the lands extended. 1 *Ld. Raym.* 305, and the

cases there cited in the last edition. In aid of these writs a bill may be exhibited in the Exchequer against the outlaw to compel a discovery of his real and personal estate, &c. either by the plaintiff to enable him to take out execution, or by the attorney-general on behalf of the crown. *Hardr.* 22. And it is said to be the course of that court, upon an outlawry, to prefer an information in the nature of an action of trover and conversion against him who hath the goods of the party outlawed. 1 *Mod.* 90.

The money raised by the sheriff under these writs belongs to the crown, but the plaintiff may have it paid to him in satisfaction of his debt and costs by applying to the Court of Exchequer, or lords of the treasury; and he may also obtain a lease or grant of the custody of the lands, &c. under the Exchequer seal; *Hardr.* 106, 422; *T. Raym.* 17; 1 *Lev.* 38; or a grant of the king's right to levy the profits. 9 *H.* 6. 20; 2 *Roll. Abr.* 808; *Gilb. C. P.* 17; 4 *Inst.* c. 11; and see title *Custodiam*.

If the money raised by the sheriff do not exceed the sum of fifty pounds, the Court of Exchequer, on motion, will order it to be paid to the plaintiff; but if it exceed that sum, the plaintiff must petition for it to the lords of the treasury, stating the amount of his debt, a short abstract of the proceedings, with the expenses he has been put to, and praying in respect thereof, that the attorney-general may be authorized to consent, on behalf of the crown, that the money remaining in the sheriff's hands may be paid over to the petitioner. The petition is referred by the lords of the treasury to their solicitor, who should be furnished with an affidavit, sworn before a baron, of the amount of the debt and costs, and a certificate of the proceedings from the clerk in court, whereupon he will make his report, which should be filed with the clerk of the treasury. A warrant is then issued under the king's sign manual for the attorney-general to give his consent to an order pursuant to the prayer of the petition; upon which a motion is made in the Court of Exchequer, and the attorney-general consenting, an order is framed accordingly; this order must be engrossed, and put under seal, with a subpoena annexed to perform it: and the sheriff being served therewith, must pay over the money, or will be liable to an attachment. 2 *Crompt.* 47. See *Tidd's Pract.* c. 4. and the authorities there cited.

V. THERE are two ways of reversing an outlawry; first, by writ of error returnable *coram nobis*. *Co. Litt.* 296 *b*; *Fort.* 88. 2dly. By motion founded on a plea, averment, or suggestion of some matter apparent; as in respect of a *superseas*, omission of process, variance, or other matter apparent on the record; and yet in these cases some have held that in another term the defendant is driven to his writ of error. But for any matter of fact, as death, imprisonment beyond sea at the time of the *exigent* awarded (*Carth.* 25; 1 *Ld. Raym.* 349; 2 *Sira.* 1178; 1 *Wils.* 8), service of the king, &c. he is driven to his writ of error, unless it be in the case of felony, and there in *favorem vite* he may plead to it. It seems, however, to be discretionary in the court to relieve by motion, or put the parties to a writ of error; and of late years they have gone farther than heretofore upon motion, the more effectually to expedite justice, save expense, and preserve the credit and character of the defendant. *Tidd's Pract.* c. 4.

By 5 & 6 *Ed.* 6. c. 11. § 7. all process of outlawry against offenders in treason being *resant* or inhabitant out of the limits of the realm, or in any parts beyond the sea at the time of the outlawry pronounced against him, shall be good and effectual in law to all intents and purposes as if such offenders had been within the realm at the time of such process awarded and outlawry pronounced. But by § 8. if the party outlawed shall within one year next after outlawry pronounced or judgment given thereon, yield himself to the chief justice of England, and offer to traverse the indictment, or appeal whenever

the said outlawry shall have been pronounced, he shall be received to such traverse, and being thereupon found not guilty by the verdict of twelve men, he shall be clearly acquitted and discharged of the said outlawry, and of all penalties and forfeitures by reason of the same, as fully as though no such outlawry had taken place.

A prisoner outlawed, and afterwards in custody thereon, shall be admitted to surrender and traverse at any time within the year. See the case of *Sir Thomas Armstrong*, where such traverse was denied, and he was executed, and the words thereon. *Phillipp's State Trials* reviewed, ii. 153, 161. But *Armstrong's* case was declared an unfit precedent to be followed, and his execution was, in 1689, resolved by the commons to be illegal, and a murder by pretence of justice. Sir Robert Sawyer, the attorney-general who prosecuted him, was expelled the house of commons. The survivors of the judges who decided against him, and the executors of Jefferies, who was dead, were summoned to the bar of the house, and it was resolved that 5000*l.* should be paid by the judges and prosecutors to *Armstrong's* lady and children for their losses by the attainder. The bill for reversing the attainder, however, did not pass, and it was only reversed on error. 6 *W. & M.* 4 *Mod.* 366; *Sta. Tri.* vol. x. 117, notes (oct. ed.); and see *La. v. Shr. Treason*, E. (edited by Gullim and Dodd.)

Reversing, in all outlawries, as well personal as criminal, the party, in order to reverse the same, was to appear in person, and could not appear by attorney. 2 *Leon.* 22; *Cro. Jac.* 462; 2 *Salk.* 496.

But by 4 & 5 *W. & M.* c. 18. already referred to, no person outlawed in the Court of B. R. for any cause whatsoever, (treason and felony only excepted,) shall be compelled to appear in person in the said court to reverse such outlawry; but may appear by attorney and reverse the same without bail in all cases, except where special bail shall be ordered by the said court.

By *Westm.* 1. (3 E. 1.) c. 3. it is expressly provided, that those who are outlawed, have abjured the realm, &c. shall be excluded the benefit of replevin, yet it has been always held that the Court of King's Bench may in their discretion, in special cases, bail a person upon an outlawry of felony: as where he pleads that he is not of the same name, and therefore not the same person with him that was outlawed, or alleges any other error in the proceedings. 2 *Hunk. P. C.* c. 25. § 40.

By the 1 *Eliz.* c. 3. § 3. before allowance of any writ of error, or reversing of any outlawry by plea or otherwise, the want of any proclamation made according to the statute, the defendants in the original action shall put in bail, not only to appear and answer to the plaintiff in the former suit, but also to answer to the plaintiff in the new action to be commenced by the said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of the term next after the allowing the writ of error, or otherwise avoiding of the said outlawry.

On reversing the outlawry for any other error in law, besides the want of proclamations, it was long unsettled whether the defendant should be obliged to put in special bail. In the earliest cases upon the subject, it was determined that he should. *Litt. Rep.* 301; *Carth.* 459; 1 *Ld. Raym.* 349; *Gith. v. P.* 19. But there are cases to the contrary in the 12 *Mod.* 545; 1 *Ld. Raym.* 605; 2 *Salk.* 496. And in one of them (2 *Salk.* 496) it is said that if the party outlawed come in *gratis*, upon the return of the writ, &c. he may be admitted, by motion, to reverse the outlawry for any other cause but want of proclamations, without putting in bail; but if he come in by *cepi corpus*, he shall not be admitted to reverse it without appearing in person, as he was obliged to do at common law; or putting in bail with the sheriff for his appearance upon the return of *cepi corpus*, and for doing what the court shall order. In two subsequent cases, however, special bail was put in upon

reversing the outlawry for errors in law, though it does not appear the party came in *gratis*. *Wall v. Walton*, E. 12 *Geo.* 1, cited 1 *Wils.* 4; 2 *Str.* 951; 2 *Barn. K. B.* 298. At length, in the case of *Serecold v. Hampson*, the court, upon considering the words of 4 & 5 *W. & M.* c. 18. § 3. which empowers the outlaw to appear by attorney, and says, "the outlawry shall be reversed without bail in all cases, except where special bail shall be ordered by the court," declared they were of opinion they had a discretionary power to require it or not; and that the want of an affidavit before the outlawry was no objection, because that is only requisite to warrant an arrest; and though the 31 *Eliz.* c. 3. § 3. be the only act that expressly requires bail, it is not to be inferred from thence that in other cases it ought not to be insisted on; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation money. 2 *Str.* 1178, 9; 1 *Wils.* 3. And it is now settled, that on reversing an outlawry for any other error in law besides the want of proclamations, the bail is common or special, in like manner as upon the arrest. Where special bail is required, it need not be put in before the allowance of the writ of error, but it is well enough if put in at any time before the reversal. 1 *Ld. Raym.* 605; 2 *Str.* 951; 2 *Barn. K. B.* 928. The recognizance, in such case, is usually taken in the common form; but see 12 *Mod.* 545, per *Holt*, and 2 *Salk.* 496. And it is settled that the bail may render the defendant, and are not, at all events, answerable for the debt. *Tidd's Pract.* and the authorities there cited.

In general, an outlawry can only be reversed upon payment of costs; but if the process have been abused, and made subservient to purposes of oppression, as where a man has been outlawed, who was already in prison at the plaintiff's suit, or being at large did not abscond but appeared publicly, and might have been arrested or served with process, the court on motion will order the plaintiff to reverse the outlawry at his own expense. 2 *Vent.* 46; 2 *Salk.* 495; *Barnes*, 921; *T. Jon.* 221; *Comb.* 11; 12 *Mod.* 413.

Upon a writ of error prosecuted by the party in person, to reverse an outlawry in a civil action for a common-law error, the recognizance of bail is to be taken in the common alternative form, to pay the condemnation money, or to render the principal; and not absolutely to pay the condemnation money, as in case of reversal of outlawry upon 31 *Eliz.* c. 3. for want of proclamations; or upon 4 & 5 *W. & M.* c. 18. § 3. on appearance by attorney and by motion. *Havelock v. Geddes*, 12 *East*, 622.

A bankrupt, who has been waved (or outlawed) and her person arrested, and goods taken by the sheriff under a writ of *capias utlagatum*, is not entitled to be relieved on summary motion from such arrest and levy, except upon the terms of appearing to the action, and putting in and perfecting special bail, although the plaintiff had also proved her debt under the commission, and received a dividend, after which the action was commenced for the balance. 14 *East*, 530.

The court upon motion reversed the outlawry in a civil suit upon the defendant's putting in bail in the alternative to satisfy the condemnation money, or to render the principal, paying all costs, including those, if any, in the Court of Exchequer, without requiring the recognizance of bail to be for the payment of the condemnation money absolutely. 1 *M. & S.* 409.

The court of C. P. reversed an outlawry in a civil suit on motion, upon error in fact sworn to. 3 *Taunt.* 141.

It is clearly agreed, that an attainder of felony of a person who had any lands shall never be reversed by writ of error, without a *scire facias* against all the tenants and lords mediate and immediate; but it is settled, that such *scire facias* is not necessary in the case of high treason. *Dyer*, 31. pl. 20; *Cro. Eliz.* 235; 1 *Keb.* 141; 1 *Sid.* 316; 3 *Keb.* 39; 3 *Mod.* 42, 47; 4 *Mod.* 366; *Ld. Raym.* 154.

Also it is said, that it is not necessary in the case of felony,

when it is suggested on the roll that the party had no lands, and the attorney-general confesses it. 2 Salk. 495.

It is agreed, that after an outlawry of treason or felony is reversed, the party shall be put to plead to the indictment, for that still remains good, and he may be tried at the King's Bench bar; or the record may be remitted into the country, if it were removed into the King's Bench by *certiorari*, with a command to the justices below to proceed by the 6 Hen. 6. c. 1; Cro. Jac. 648; Cro. Car. 365; 3 Mod. 42; 6 Mod. 115; 2 Hale's Hist. P. C. 209.

So if a man be outlawed by process in an information, and comes in and reverses the outlawry, he must plead *instantly* to the information. 1 Salk. 371; 5 Mod. 141.

The law is the same in civil cases, and therefore, if an outlawry in a personal action be reversed, the original remains. March. 9; 3 Lev. 245.

Generally speaking, when the outlawry is reversed, or the defendant has obtained a charter of pardon, he may be discharged, if in custody, by writ of *supersedeas*. See 13 Car. st. 2. c. 2. § 4. And his property, if taken into the king's hands, shall be restored to him by writ of *amoveas manus*, or otherwise, according to the course of the exchequer. As to chattels real, see Cro. Eliz. 278; 2 Vern. 312; Bunt. 105. And as to chattels personal, see 5 Mod. 61, *post*.

Where he has obtained a charter of pardon, he must sue out a *scire facias* to give notice thereof to the plaintiff, in order that he may further prosecute his action, if he think proper. See Tidd's Prac. c. 4.

It hath been adjudged, that if the king grant over the lands of a person outlawed for treason or felony, and afterwards the outlawry be reversed, the party may enter on the patentee, and need neither sue a petition to the king, nor a *scire facias* against the patentee. 1 And. 188. A person shall, after outlawry reversed, be restored to his law, and be of ability to sue. Co. Litt. 288 b.

If the goods of a person outlawed are sold by the sheriff upon a *capias utlagatum*, and after the outlawry is reversed by writ of error, he shall be restored to the goods themselves; because the sheriff was not compellable to sell these goods, but only to keep them to the use of the king. 5 Co. 90; 1 Roll. Abr. 778.

If an advowson come to the king, by forfeiture upon an outlawry, and the church becoming void, the king presents, and then the outlawry is reversed; yet the king shall enjoy that presentment, because the presentment there came to the king as the profit of the advowson. Moor, 269.

But if the church be void at the time of the outlawry, and the presentation is thereby forfeited as a chattel principally and distinct of itself, there, upon reversal of the outlawry, the party shall be restored to the presentation. Cro. Eliz. 170.

If a termor being outlawed for felony, grants over his term, after the outlawry is reversed, the grantee may have trespass for the profits taken between the reversal of the outlawry and the assignment; for by the reversal it is as if no outlawry had been, and there is no record of it. Cro. Eliz. 170; 13 Co. 20, 22.

It is said, that if a man be outlawed in the King's Bench, and the party's goods are seized into the king's hands, and then the outlawry is reversed, there can be no restitution; the reason whereof is, for that the Court of King's Bench cannot send a writ to the treasurer; and the Court of Exchequer have no record before them to issue out a warrant for restitution. 5 Mod. 61. See 2 Vern. 2, 3; 2 Lev. 49.

For more learning on this subject, see 3 New Abr. and 22 Vin. Abr. title Outlawry.

OUTPARTERS, mentioned in 9 H. 5. st. 1. c. 7. A kind of thieves in Riddesdale, that stole cattle, or other things without that liberty. Some are of opinion, that those which in the fore-named statute are termed outparters, are now

called *outputers*, being such as set matches for the robbing any man or house. Cowell. See *Intakers*.

OUTRIDERS. Bailiffs errant, employed by the sheriffs, or their deputies, to ride to the farthest place of their counties or hundreds, with the more speed to summon such as they thought good to their county or hundred courts. See 14 E. 3. st. 1. c. 9.

OUTSUCKEN MULTURES. Quantities of corn paid by persons voluntarily grinding corn at any mill, to which they are not thirled or bound by tenure. See *Thirlage, Multurers*.

OWEL. An old French word for equal. Law Fr. Dict. OWELTY, equality. Co. Litt. 169. When there is lord, mesne, and tenant, and the tenant holds of the mesne by the same service that the mesne hold over of the lord above him, this is called owelty of services. F. N. B. 136.

OWLERS. Persons that carried wool, &c. to the seaside by night, in order to be shipped off contrary to law. See *Wool*.

OWLING. Was the offence of exporting, &c. wool by night. See *Wool*.

OXEN. See *Cattle*.

OXFILD. A restitution anciently made by a hundred or county, for any wrong done by one that was within the same. Lamb. Archaion, 125.

OXGANG, from Ox. i. e. *bos*, and gang, or gate, iter.] Is commonly taken for fifteen acres of land, or as much as one ox can plough in a year. Skene says 18 acres. See *Spelman*.

Six oxgangs of land is so much as six oxen can plough. *Crompt. Jurisd.* 220. But an oxgang seemeth properly to be spoken of such land as lieth in *gaynour*. *Old Nat. Br. fol.* 117. See *Co. Litt.* 69. *Cowell*.

OYER. This word was anciently used for what we now call *assizes*. *Anno 13 Ed. 1.* See *Assizes, Oyer & Terminer*.

OYER, Fr.; *Audire*, Lat. To hear.] Previous and preparatory to pleading in bar, the defendant may crave ver of the writ, or bond, or other specialty upon which the action is brought, that is, to hear it read to him; the generality of defendants in the times of ancient simplicity being supposed incapable to read it themselves; where upon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition or other part of it, not stated in the plaintiff's declaration. 3 Comm. c. 21. p. 299.

1. By whom, and how to be made, and of what demandable. Oyer of deeds, &c. is demandable by the plaintiff, or by the defendant. If the plaintiff in his declaration necessarily makes a *profert in curid* of any deed, writing, letters of administration, or the like, the defendant may pray oyer, and must have a copy thereof delivered to him, if demanded. 2 Salk. 497; R. T. 5 & 6 Geo. 2.

To demand oyer of an obligation, is not only to desire the plaintiff's attorney to read the same; but to have a copy thereof, that the defendant may consider what to plead to the action. *Hob.* 217.

So likewise if the defendant in his plea make a necessary *profert in curid* of any deed, &c. the plaintiff may pray oyer, and shall have a copy. *Id.* 6 Mod. 122. And the party of whom oyer is demanded, is bound to carry it to the adverse party. 2 T. R. 40.

Although oyer can be only demanded where *profert* is made, yet if it be unnecessarily made, this does not entitle to oyer. On the other hand, if *profert* be omitted when it ought to have been made, the opposite party cannot have oyer, but must demur. 1 Saund. 9 a. n. (d.)

But though oyer be not in strictness demandable, yet, if it be given, the party demanding has a right to make use of it. *Dougl.* 476, 477. If the defendant would insist upon the demand of oyer, he should move the court to have it entered

upon record. 6 Mod. 28. If the plaintiff, on the other land, would contest the oyer, he may either counterplead it or strike out the rest of the pleading, and demur. 2 Lev. 142; 2 Salk. 497; and see 2 Ld. Raym. 970. Upon which the judgment of the court is, either that the defendant have oyer, or that he answer without it. 2 Lev. 142. On the latter judgment, the defendant may bring a writ of error, for to deny oyer where it ought to be granted is error, but not *conversus*. 2 Salk. 497; 6 Mod. 28; 2 Ld. Raym. 970; 2 Stra. 1186; 1 Wils. 16.

Though oyer is not, in strictness, demandable of a record, (1 Ld. Raym. 347, 4th edit. note (a); Dougl. 476, 477; 1 T. R. 11; 150), yet if a judgment or other matter of record in the same court be pleaded, the parties pleading it must give a note in writing of the term and number-roll whereon such judgment or matter of record is entered and filed; or in default thereof the plea is not to be received. Keitw. 96; Carth. 454; 1 Ld. Raym. 347; Carth. 517; 1 Ld. Raym. 347; 2 Stra. 823; R. T. 5 & 6 Geo. 2 (b). And probably on this account the party was not anciently permitted to plead *nul tiel record*, of a judgment or matter of record in the same court. 5 Hen. 7, 24, per Brian; 3 Keb. 76. But where a judgment or matter of record is pleaded in a different court, the party not being entitled to an account of the term and number-roll, must plead *nul tiel record*. And it seems that oyer is not demandable of an act of parliament. Dougl. 476; Godb. 186, *contra*.

Formerly the defendant was allowed oyer of the original writ, in order to demur or plead in abatement, for any apparent insufficiency or variance. Gilb. C. P. 52; 12 Mod. 25, 189; 2 Lutw. 1644; 6 Mod. 27; 2 Salk. 498; 2 Ld. Raym. 971; R. T. 5 & 6 Geo. 2 (b); 2 Wils. 97; Co. Ent. 20. But this indulgence having been abused and made an instrument of delay, the Courts of B. R. and C. P. established a rule that oyer should not be granted of the original writ, which had the effect of abolishing pleas in abatement founded on facts that could only be ascertained by examination of the writ itself. And it was afterwards held, that if the defendant demanded oyer of the original writ, the plaintiff might proceed as if no such demand had been made. Dougl. 227, 228; Barnes, 540; and see Bro. Abr. tit. Oyer, pl. 19.

Where the plaintiff is entitled to have oyer of a deed, it cannot be dispensed with by the court, nor can the defendant be compelled to plead without it, even though the deed be lost. 2 Lill. P. R. title Oyer, 266; 2 Keb. 274; 6 Mod. 28; 2 Str. 1186; 1 Wils. 16. But where the deed is in the hands of a third person, the court will oblige him to give oyer, and produce it. 2 Str. 1188.

A party having a right to demand oyer, is not obliged in all cases to exercise that right, neither is he compelled in all cases, after demanding it, to notice it in the pleading, that he afterwards files and delivers. Sometimes, however, he is obliged to do both, viz. where he has occasion to found his answer upon any matter contained in the deed, of which proof it is in fact, and not set forth by his adversary. In these cases the only admissible method of making such matter appear to the court is to demand oyer, and from the copy given set forth the whole deed in the pleading. Stephen on Pleading, 70, 3rd edit.

The plaintiff may either set forth the oyer in his plea or not, at his election. 2 Str. 1241; 1 Wils. 97. If he set it forth, the court must adjudge upon it as parcel of the record, though it was not strictly demandable at the time of granting it. 3 Salk. 119; Carth. 513; 6 Mod. 27; Dougl. 150. But the defendant is not bound to set it forth in his plea. 2 Str. 1241; 1 Wils. 97; Barnes, 127, *contra*; and if he do not, the plaintiff may pray an inrolment, and so make it part of his replication.

But if the defendant, after craving oyer of a deed, set forth only a part, and not the whole of it, the plaintiff may judgment as for want of a plea. 4 T. R. 370.

By the rules of Hilary Term, 2 Wm. 4, if a defendant, after craving oyer of a deed, omit to insert at the head of his plea, the plaintiff, on making up the issue or demurrer-book, may, if he think fit, insert it for him: but the costs of such insertion shall be in the discretion of the taxing officer.

Where there may be oyer, the party demanding it is not bound to plead without it, but defendant may plead without it if he will, on taking upon him to remember the bond or deed; though if he plead without oyer, he cannot after waive his plea, and demand oyer. Mod. Cas. 28; 3 Salk. 119. After a plea in abatement, oyer may not be had the same term to plead another dilatory plea. Mod. Cas. 27.

When on oyer of a deed it is entered, the whole case appears to the court as if the deed were in the plea, and the deed is become parcel of the record, though oyer of a deed can only be demanded during the time it is produced in court; and then it may be entered *in hæc verba*, and there may be a demurrer or issue upon it, &c. 5 Rep. 76; Lutw. 1644; 3 Salk. 119.

A defendant ought to crave oyer of the plaintiff's deed, on which he hath declared; and cannot set forth another to plead performance thereof. Mod. Cas. 154.

So where a deed is pleaded, the other party cannot allege that there is other matter contained in the deed, but must set it forth on oyer. Str. 227.

If there is misnomer in a bond, &c. the defendant is to plead the misnomer, and that he made no such deed without craving oyer; for if he doth, he admits his name to be right. 1 Salk. 7.

When oyer is demanded, and the deed set forth, the effect is as if it had been set forth in the first instance by the opposite party, and the tenor of the deed, as it appears upon oyer, is consequently considered as forming part of the preceding pleading. Therefore if the deed, when so set forth in the plea, be found to contain in itself matter of objection in answer to the plaintiff's case as stated in the declaration, the defendant's course is to demur; as for matter apparent on the face of the declaration; Dougl. 475; 4 B. & C. 741; and it would be improper to make the objection the subject of plea. Steph. on Pl. 72, 3rd ed.

Formerly, all demands of oyer were made in court, (as it is now in case of criminal appeals, where the deed is by indictment of law, when it is pleaded with a *profert in curia*. 12 Mod. 598; 3 Salk. 119. And therefore when oyer is craved, it is to be supposed to be of the court, and not of the party; and the words *ei legitur in hæc verba*, &c. are the act of the court. Id.; 1 Sid. 108. But see 2 Lutw. 1644, *contra*. In practice, however, oyer is now usually demanded, and granted by the attornies. 6 Mod. 28.

2. When it must be demanded and granted.—When a deed is shown in court, it remains there in contemplation of law, all the term in which it is shown; for all the term is considered in law but as one day; and at the end of the term, if the deed be not denied, the law doth adjudge it to be in the custody of the party to whom it belongs; but if it be denied, then it shall remain in court till the plea is determined, and if it eventually turn out not to be the plaintiff's deed, it shall be destroyed. Co. Litt. 231, b; 5 Co. 74, b; 2 Lutw. 1644. But letters testamentary, or of administration, are not supposed to remain in court all the term, for the plaintiff may have occasion to produce them elsewhere. 2 Salk. 497; 12 Mod. 598. Hence it is, that oyer of a deed cannot, in strictness, be demanded but during the same term it is pleaded. 5 Co. 74, b; 2 Lutw. 1644; 1 T. R. 149. And as a general imparlance is always to a subsequent term (but see now *Imparlance*), it follows that oyer of a deed cannot be demanded after such imparlance. 1 Keb. 32; 2 Lev. 142; Freem. 400; 3 Keb. 480, 491; 6 Mod. 28.

The demand of oyer is a kind of plea, and should regularly be made before the time of pleading is expired. If it be not made till after that time, the plaintiff may con-

sider the demand as a nullity, and sign judgment. *Tidd's Prac.*

There is no settled time prescribed for the plaintiff to give oyer, though if not given when demanded, the defendant shall have the same time to plead after oyer given, as he had at the time of demanding it. 1 *Str.* 705; *R. T.* 5 & 6 *Geo.* 2 (b).

The time allowed for the defendant to give oyer of a deed, &c. to the plaintiff, is two days exclusive after it is demanded. *Carth.* 454; 2 *T. R.* 40. And if it be not given in that time, the plaintiff may sign judgment as for want of a plea. 6 *Mod.* 122. If given, the plaintiff shall have the same time to reply after oyer given him by the defendant, as he had at the time of demanding it. *R. T.* 5 & 6 *Geo.* 2 (b).

OYER DE RECORD, *audire recordum*.] A petition made in court that the judges, for better proof sake, will hear or look upon any record. See the preceding title *Oyer*.

OYER AND TERMINER, *Fr. oïr et terminer*; Latin, *audiendo et terminando*.] A commission directed to the judges and other gentlemen of the county to which it is issued, by virtue whereof they have power to hear and determine treasons, and all manner of felonies and trespasses. *Crompt. Juris.* 121; 2 *Inst.* 419; 4 *Inst.* 152. In our statutes the term is often printed oyer and determiner. 4 *Inst.* 162. See *Justices of Oyer*, &c. and the references there.

The usual commission of oyer and terminer to the judges of assize is general; but when any sudden insurrection takes place, or any public outrage is committed, which requires speedy reformation, then a special commission is immediately granted. *F. N. B.* 110; and see stat. *West.* 2. 13 *Edw.* 1. c. 29.

A man may have a special commission of oyer and terminer (but this has long been obsolete) to inquire of extortions and oppressions of under-sheriffs, bailiffs, clerks of the markets, and all other officers, &c., on the complaint and suit of any one who will sue it out; and the king may make a writ of association unto the justices of oyer and terminer, to admit those into their company whom he hath associated unto them; also another writ may be sent to the judges to proceed, although all the justices do not come at the day of the sessions; and this writ is called the writ of *si non omnes*, &c. *New Nat. Brev.* See *Reg. Orig.* 126; *F. N. B.* 112.

As to these commissions it is said, that if a commission of oyer and terminer, &c. be awarded to certain persons to inquire at such a place, they can neither open their commission at another, nor adjourn it thither, or give judgment there;

if they do, all their proceedings are as *coram non judge*. But it is held, that justices appointed *pro hac vice* may adjourn their commission from one day to another, though there be no words in their commission to such purpose; for a general commission authorizing persons to do a thing, implicitly allows them convenient time for the doing it. 2 *Hawk. P. C.* c. 5. § 14.

Upon the general commission of oyer and terminer, there should issue a precept to the sheriff in the name of the commissioners, bearing date fifteen days before their sessions, that he return twenty-four persons for a grand jury *ad inquirendum*, &c. on such a day, and the sheriff is to return his panel annexed to the precept.

As the same justices at the same time may execute the commission of oyer and terminer, and also that of gaol delivery, they may proceed, by virtue of the one, in those cases where they have no jurisdiction by the other, and make up their records accordingly. 2 *Hale, P. C.* 20; and see 2 *Hawk. P. C.* c. 5.

On indictments found before the justices of oyer and terminer, they may proceed the same day against the parties indicted. See further, *Assize, Circuits, Justices*, &c.

O YES. A corruption of the French *oyez*, i. e. *audite*, hear ye. The term used by a public crier to enjoin silence.

OYSTER-FISHERY (in the river Medway), is regulated by 2 *Geo.* 2. c. 19; and a court is kept for that purpose at Rochester yearly, where, by a jury of free dredgemen of the oyster-fishery, the same is to be inquired into; and they may make rules and orders when oysters shall be taken, what quantities in a day, and to preserve the brood of oysters &c.; and may impose penalties not exceeding 5*l.*; also water-bailiffs shall be appointed to examine boats, &c.

By the 7 & 8 *Geo.* 4. c. 29. § 36, stealing oysters or oyster-brood from any oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known, is declared to be a larceny; and persons unlawfully and wilfully using any dredge, net, instrument, or engine for taking oysters or oyster-brood, although none be actually taken, or with any net, instrument, or engine dragging on the ground of such fishery, are guilty of a misdemeanor, and may be fined not exceeding 20*l.* and imprisoned not exceeding three calendar months.

OZE or **OZY GROUND**, *solum uliginosum*.] Moist, wet and marshy land. *Lit. Dict.*

P.

PAC

PAGE *pagum.* The same with *passagium*. *Mat. Paris*, 767. See *Passagium*.

PACARE To pay; as *tolutum pacare*, is to pay toll. *Mon. Angl. tom. 1. p. 384.* Hence *pacatio*, payment. *Mat. Paris, sub ann. 1258.*

PACE, *passus*.] A step in going, containing two feet and a half, the distance from the heel of the hinder foot to the toe of the fore-foot; and there is a pace of five feet, which contains two steps, a thousand whereof make a mile; but this is called *passus major*.

PACEATUR. *Et recipiet Agenfrida corium ejus, et car-nem, et paceatur de cetero*; i. e. Let him be free, or discharged, for the time to come. *Ll. Ine, c. 45.*

PACIFICATION, *pacificatio*.] A peace-making, quiet-ing, or appeasing; relating to the wars between England and Scotland, anno 1638, mentioned in the statute 17 Car. 1. c. 17.

PACK OF WOOL. A horse-load, which consists of seventeen stone and two pounds, or 240 pounds weight. *Merch. D. c. 1.* *Fleta, lib. 2. c. 12.*

PACKAGE AND SCAVAGE. Package, scavage, bail-lage, and portorage, were duties charged in the port of Lon-don on the goods imported and exported by aliens or by denizens, being the sons of aliens.

In former times higher duties were imposed upon the goods imported or exported by aliens, whether in British or foreign ships, than were laid on similar goods when imported or ex-ported by natives. But when sounder and more enlarged principles began to prevail, this illiberal distinction was gra-dually modified, and was at length wholly abolished, in so far at least as it was of a public character, by the 24 Geo. 3. c. 10. This act, after reciting that "the several duties and restrictions imposed by various acts of parliament upon mer-chantize, are, by the alterations of the trade now carried on between this kingdom and foreign states, in some cases be-come an unnecessary burden upon commerce, without pro-viding any real advantage to the public revenue, and that it is expedient they should no longer continue," enacted that the duty commonly called "the petty customs," imposed by the 12 Car. 2. and all other additional duties imposed by any act upon the goods of aliens above those payable by natural-born subjects, should be no longer payable. The act provided that nothing contained in it should "alter the duties due and payable upon goods imported into or exported from this kingdom in any foreign ship, nor the duties of package and scavage, or any duties granted by charter to the city of London."

The duties of package, scavage, baillage, and portorage, preserved to the city of London by the above statute, con-tinued to exist down to a recent period, when they were pur-chased of the corporation, under the authority of an act passed for that purpose, (3 & 4 Will. 4. c. 66.) by the commission-ers of the treasury, for about the sum of 140,000*l.* and wholly abolished. See *Scavage*.

PACKERS. Persons appointed and sworn duly to pack herring. See *Herrings*.

PAL

PACKETS. Packet vessels, prohibited from exporting or importing goods. 13 & 14 Car. 2. c. 11. § 22.

PACKING WHITES. A kind of cloth so called, men-tioned in 1 Rich. 3. c. 8.

PACT, Fr.] A contract or agreement. *Law French Dictionary.*

PAGUS. A county: *Alfred Rex Anglo-Saxorum natus est in Villa Regia quae dicitur Wantage in illa pagi, quae nomi-natur Berksh. &c.*

PAIN, or PEINE, FORT ET DURE, Fr.—Lat. poena fortis et dura.] A special punishment formerly inflicted on those who, being arraigned of felony, refused to put them-selves on the ordinary trial, but stubbornly stood mute: vulgarly called *pressing to death*. See *Mute*.

PAINS AND PENALTIES. Acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, are to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being. 4 Comm. c. 19. § 1. See *Attainder*.

PAIS. A county or region, *pagus*; *g, in i vel y converso. Spelm.]* Trial *per pais*, by the country, i. e. a jury.

PAISSO. *Passage*, or liberty for hogs to run in forests or woods to feed on mast. *Mon. Angl. i. 682.* See *Passure*.

PALACES. The limits of the palace of Westminster. 28 Hen. 8. c. 12. See *Marshal, Murder, Striking*.

PALAGIUM. A duty to lords of manors for exporting and importing vessels of wine in any of their ports.

PALATINE. County. See *County*.

PALE. Breaking or throwing down a pale, post, or rail of wood used as a fence, is by 7 & 8 Geo. 1. c. 2. § 40. punishable summarily by justices of the peace. See *Fence*.

PALFREY, palfredus, palafredus, palefredus, palfredus.] One of the better sorts of horses used by noblemen or others for state; and sometimes of old taken for a horse fit for a woman to ride. Camden says that William Fauconberg held the manor of Cukeny, in the county of Nottingham, in ser-jeanty, by the service of shoeing the king's palfrey when the king should come to Mansfield. See 1 *Inst.* 149.

PALINGMAN. A seller of eels. 22 Edw. 4. c. 2; *Rot. Parl.* 22 Edw. 2.

PALLA. A canopy; also often used for an altar-cloth. *Matt. Paris, sub ann. 1236.*

PALLIO COOPERIRE. It was anciently a custom where children were born out of wedlock, and their parents afterwards intermarried, that those children, together with the father and mother, stood under a cloth extended while the marriage was solemnizing, which was in the nature of adoption; and by such custom the children were taken to be legitimate. *Epist. Rob. Grosthead, Episc. Lincoln.*

Such children, however, were never legitimate in this country at common law, though the clergy wanted to have a law pass to render them legitimate. See *Bastard*.

PALL, PALLIUM. The pontifical vesture made of lambs' wool, in breadth not exceeding three fingers, cut

round that it may cover the shoulders: it has two labels or strings on each side, before and behind, and likewise four purple crosses on the right and left, fastened with pins of gold, whose heads are sapphire: these vestments the pope gives or sends to archbishops and metropolitans, and upon extraordinary occasions to other bishops, who wear them about their necks at the altar, above their other ornaments. The pall was first given to the bishop of Ostia by pope Marcus the Second, anno 336.

Durandus, in his *Rationale*, tells us that it is made after the following manner; viz. The nuns of St. Agnes, every year, on the feast-day of their saint, offer two white lambs on the altar of their church, during the time they sing *Agnus Dei* in a solemn mass; which lambs are afterwards taken by two of the canons of the Lateran church, and by them given to the pope's subdeacons, who put them to pasture till shearing time, and then they are shorn, and the pall is made of their wool, mixed with other white wool: the pall being thus made is carried to the Lateran church, and there placed on the high altar by the deacons of that church on the bodies of St. Peter and St. Paul; and after the usual watching, it is carried away in the night and delivered to the subdeacons, who lay it up safe. *Seiden's Hist. Tithe*, 227. See also *Cressy's Church Hist.* 972.

PALMISTRY. A kind of divination, practised by looking upon the lines and marks of the hands and fingers; being a deceitful art used by Egyptians, prohibited by the 1 & 2 *Phil. & Mary*, c. 4.

That statute has been repealed. Persons pretending to tell fortunes by palmistry, or otherwise, are now punishable as vagrants under the 5 *Geo. 4.* c. 83. § 2. See *Egyptians*.

PAMPHLETS. By the 10 *Ann.* c. 19. § 113. no person shall sell or expose for sale any pamphlet without the name and place of abode of some known person by or for whom it was printed or published thereon, under a penalty of 20*l.* and costs.

By the Stamp Act, 55 *Geo. 3.* c. 185. every book containing one whole sheet and not exceeding eight sheets in octavo, or any lesser size, or not exceeding twelve sheets in quarto, or twenty sheets in folio, shall be deemed a pamphlet.

This act imposed a duty on pamphlets, which however was repealed by the 3 & 4 *Will. 4.* c. 23.

As to what pamphlets shall be deemed newspapers within the 60 *Geo. 3.* c. 9. and subjected to the same duties, see *Newspapers*. See also *Printers*.

PANDECTS. The books of the civil law, compiled by Justinian. See *Civil Law*.

PANDOXATRIX. An ale-wife, who both brews and sells ale or beer; from *pandoxatorium*, a brewhouse. *Statut. et consuetud. burgi villæ de Montgom. temp. Hen. 2.*

PANEL, *panella*, *pannellum*.] According to Sir Edward Coke denotes a little part; but Spelman says that it signifies *schedula vel pagina*, a schedule or page; as a panel of parchment, or a counterpane of an indenture; but it is used more particularly for a schedule or roll containing the names of such jurors as the sheriff returns to pass upon any trial. *Kitch. 226*; *Reg. Orig. 223*.

For the provisions of the 6 *Geo. 4.* c. 50. with respect to panels of jurors, see *Jury*.

As to stealing of panels, see *Larceny*.

PANES DE MANDATO. See *Mandato*.

PANETIA. A pantry or place to set up cold victuals. *Cowell*.

PANIS ARMIGERORUM. The bread distributed to servants. *Mon. Angl. i.* 240.

PANIS BISUS. Coarse bread. *Mon. Angl. i.* 240.

PANIS BLACKWHYTLOP. Bread of a middle sort, between white and brown, such as in Kent is called *ravel-bread*. In religious houses it was their coarser bread made for ordinary guests, and distinguished from their household loaf, or *panis conventualis*, which was pure manchet or white bread. *Cowell*.

PANIS MILITARIS. Hard biscuit, brown George, camp bread, coarse and black. The prior and convent of E., grant to John Grove a corody or allowance, - *Ad suum victum. quilibet die unum panem monachalem*, i. e. a white loaf; and to his servant *unum panem nigrum militare*, i. e. a little brown loaf or biscuit. *Cartular. Ely. MS. f.* 47.

PANNAGE or **PAWNAGE**, *pannagium*; [Fr. *pasnage*.] That food which the swine feed upon in the woods, as mast of beech, acorns, &c. Also it is the money taken by the agistors for the food of hogs in the king's forests. *Crompt. Jurisd. 155*; *Stat. West. 2.* 13 *Edm. 1.* st. 1. c. 25.

Pannage had this double acceptation in Domesday Book. it meant, first, the running and feeding of hogs in the woods; and, in a secondary sense, the price or rate of their running. *Ellis's Introd. to Domesd.*

Manwood says *pannage* signifies most properly the mast of the woods or hedge-rows. And see *Linwood*. It is mentioned in the 20 *Car. 2.* c. 3. In ancient charters this word is variously written; as *pannagium*, *pasnagium*, *pathnug*, *pannagium*, and *passona*. See 8 *Rep.* 17. And in one or two entries in Domesday Book it is termed *pastio*.

PANNUS. A garment made with skins. *Fleta, lib. 2.* c. 14.

PANTILES. Are among the articles liable to certain duties of excise.

PAPER. The manufacturers are subjected to a variety of minute and vexatious regulations in the making of paper the duties on which, varying from 30 to 200 per cent. according to the class or description of paper produced, form a productive branch of the public revenue, and are under the survey of the commissioners of excise.

To steal any paper or parchment, written or printed, being evidence of the title to any real estate, is, by 7 & 8 *Geo. 4.* c. 29. § 23. a misdemeanor, and the offender may be transported for seven years, &c.

PAPER BOOK. See *Issue Book*.

PAPER-OFFICE. An ancient office within the palace of Whitehall, wherein all the public papers, writings, matters of state and council, letters, intelligences, negotiations of the king's ministers abroad, and generally all the papers and despatches that pass through the offices of the two principal secretaries of state, are lodged and transmitted, and there remain disposed in the way of library. There is also an office belonging to the Court of King's Bench so called. *Diet*

PAPISTS. Persons professing the popish religion, otherwise distinguished by the denomination of *ROMAN CATHOLICS*. The word papist seems to be considered by the Roman Catholics themselves as a name of reproach, originating in their maintaining the supreme ecclesiastical (and heretofore temporal) power of the pope, *papa*. For this reason, probably, the word papist is not to be found in the index to a most valuable production by a gentleman of that persuasion; though in one of the notes on the work he gave perhaps a more clear and explicit summary of the then existing law on this subject than had any where else appeared. See 1 *Inst.* 391, a, in the notes, and the word *Roman Catholics* in the Index to the Notes. See also 4 *Comm.* c. 4. and Mr. Christian's Notes there.

For the act by which the disabilities of the Roman Catholics has been removed, see *Roman Catholics*.

PAR. A term in exchange, where a man to whom a bill is payable receives of the acceptor just so much in value, &c. as was paid to the drawer by the remitter. *Merch. Diet* And in exchange of money, par is defined to be a certain number of the pieces of coin of one country, containing them an equal quantity of silver to that of another number of pieces of the coin of some other country; as where 3*l.* of the money of Holland have just as much silver as 20*s.* English money; and bills of exchange drawn from England to Holland, at the rate of 3*l.* Dutch, for each 1*l.* sterling, is according to the par. *Lock's Consid. of Money*, 18.

The par of the currency of any two countries means, among merchants, the equivalency of a certain amount of the

currency of the one in the currency of the other, supposing the currencies of both to be of the precise weight and purity fixed by their respective mints. Thus, according to the mint regulations of Great Britain and France, 1*l.* sterling is equal to 25*fr.* 20 cent.; which is said to be the par between London and Paris. And the exchange between the two countries is said to be at par when bills are negotiated on this footing; that is, for example, when a bill for 100*l.*, drawn in London, is worth 2,520*fr.* in Paris, and conversely. When 1*l.* in London buys a bill on Paris for more than 25*fr.* 20 cent., the exchange is said to be in favour of London, and against Paris; and when, on the other hand, 1*l.* in London will not buy a bill on Paris for 25*fr.* 20 cent., the exchange is against London, and in favour of Paris. *McCulloch's Com. Dict.*

PARACIUM The tenure between parceners, viz. that which the youngest oweth to the oldest. *Domesday.*

PARAGE, paragium. Equality of name, blood, or dignity; but more especially of land, in the partition of an inheritance between coheirs: hence comes to disparage and disparagement. *Co. Litt.* 166. Paragium was also commonly taken for the equal condition betwixt two parties, to be contracted in marriage; for the old laws did strictly provide, that young heirs should be disposed in matrimony, *con paragio*, with persons of equal birth and fortune, *sine disparagione*. See *Tenure*.

PARAMOUNT, from the French *par*, i. e. *per*, and *monter*, *ascendere*.] Signifies in our law the highest lord of the fee, of lands, tenements, or hereditaments. *F. N. B.* 27. As there may be a lord meane, where lands are held of an inferior lord, who holds them of a superior under certain service; so this superior lord is lord paramount; and all holders, which have minors under them, have lords paramount. The king is said to be chief lord, or lord paramount of all the lands in the kingdom. *Co. Litt.* 1. See *Mean Tenure*.

PARAPHARNALIA, or **PARAPHERNALIA**, from the Greek *Παρερ*, *Patris*, and *Φερν*, *Don*.] Those goods which a wife is entitled to, *secum ferre*, over and above her dowry or jointure, after her husband's death. See *Baron and Feme*, IV. 7.

PARASITUS. A domestic servant. *Blount*.

PARAVAH, par-wah. Tenant paravah is the lowest tenant of the fee, or he who is named the tenant to one who holds over of another, and he is called tenant paravah, because it is presumed he hath profit and advantage by the land. *F. N. B.* 7, 2 *Inst.* 230; 9 *Rep.* See *Tenure*.

PARCELLA TERRAE. A parcel of land: used in some ancient charters.

PARCELL MAKERS. Two officers in the Exchequer, who formerly made the parcels of the escheators' accounts, and they charged them with every thing they have levied for the king's use within the time of their being in office, and delivered the same to the auditors to make up their accounts therewith. *Practice Excheq.* 99.

PARCELS, BILL OF. An account of the items composing a parcel or package of goods, transmitted with them to the purchaser.

PARCENERS

Quasi parceners i. e. *rem in parcellas dividentes*.] Persons holding lands in co-partnership, and who may be compelled to make division. See *Litt.* § 241. These are of two sorts; viz. parceners according to the course of the common law, and parceners according to custom.

- I. *Of the Nature of an Estate in Parcenary, or Coparcenary.*
- II. *How such Estate may be parted or dissolved, and the consequences thereof.*

I. PARCENERS by the common law, are where a man or woman seised of lands or tenements in fee-simple or fee-tail hath no issue but daughters, and dieth, and the tenements descend to such daughters, who enter into the lands descended to them, then they are called parceners, and are but as one heir to their ancestor; and they are termed parceners, because by the writ *de partitione faciendâ* the law will constrain them to make partition; though they may do it by consent, &c. *Litt.* 213; 1 *Inst.* 161. And if a man seised of lands in fee-simple, or in tail, dieth without issue of his body begotten, and the lands descend to his sisters, they also are parceners; and in the same manner where he hath no sisters, but the lands descend to his aunts, or other females of kin, in equal degree, they are also parceners; but where a person hath but one daughter she shall not be called parcener, but daughter and heir, &c. *Litt.* § 242.

If a man hath issue two daughters, and the eldest hath issue divers sons and daughters, and the youngest hath issue divers daughters; the eldest son of the eldest daughter shall not inherit alone, but all the daughters of the youngest shall inherit, and the eldest son is coparcener with the daughters of the youngest sister, and shall have one moiety, viz. his mother's part; so that men descending of daughters may be parceners, as well as women, and shall jointly plead and be impleaded, &c. 1 *Inst.* 164. None are parceners by the common law, but either females, or the heirs of females, who come to lands or tenements by descent. *Litt.* 254.

Parceners by custom is, where a person seised in fee-simple, or in fee-tail, of lands or tenements of the tenure called gavelkind, hath issue divers sons, and dies; such lands shall descend to all the sons as parceners by the custom, who shall equally inherit, and make partition as females do, and writ of partition lies in this case, as between females, &c. *Litt.* § 265.

Women parceners make but one heir, and have but one freehold; but between themselves they have in judgment of law several freeholds to many purposes; for one of them may enfeof the other of her part; and the parcenary is not severed by the death of any of them; but if one dies, her part shall descend to her issue, &c. 1 *Inst.* 164, 165.

In the case of coparceners of a title of honour, the king may direct which one of them and her issue shall bear it; and if the issue of that one become extinct, it will again be in abeyance, if there are descendants of more than one sister remaining. But upon the failure of the issue of all, except one, the descendant of that one being the sole heir, will have a right to claim, and to assume the dignity.

There are instances of a title, on account of a descent to females, being dormant, or in abeyance, for many centuries. *Harg. Co. Litt.* 165.

Lord Coke says there is a difference in an office of honour, which shall be executed by the husband or deputy of the eldest. *Ibid.* Yet when the office of great chamberlain had descended to two sisters, coheirresses of the duke of Lancaster, one of whom was married to Peter Burrell, Esq., the judges gave it as their opinion in the House of Lords, "that the office belongs to both sisters; that the husband of the eldest is not of right entitled to execute it; and that both sisters may execute it by deputy, to be approved of by them; such deputy not being of a degree inferior to a knight, and to be approved of by the king." See *Bro. P. C.*

The properties of parceners are in some respects like those of joint-tenants; they having the same unities of interest, title, and possession. They may sue and be sued jointly for matters relating to their own lands. *Co. Litt.* 164. And the entry of one of them, until the passing of the 3 & 4 *W. 4. c. 27.* § 12. in some cases enured as the entry of them all. *Co. Litt.* 188, 243; 6 *East*, 173. They cannot have an action of trespass against each other; but they differ from joint-tenants, in that they are also excluded from maintaining an

action of waste, 2 *Inst.* 403; for coparceners could at all times put a stop to any waste by writ of partition; but till the statute of *Hen. 8.* joint-tenants had no such power. See *Joint-Tenants*.

Parceners also differ materially from joint-tenants in four other points:—1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-tenants. *Litt.* § 254. And hence it likewise follows, that no lands can be held in coparcenary but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy.

2. There is no unity of time necessary to an estate in coparcenary: for if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or when both are dead, their two heirs are still parceners; the estate vesting in them each at different times, though it be the same quantity of interest, and held by the same title. *Co. Litt.* 164, 174.

3. Parceners, though they have an unity, have not an entirety of interest. They are properly entitled each to the whole of a distinct moiety; *Co. Litt.* 163, 164; and of course there is no *jus accrescendi*, or survivorship, between them, for each part descends severally to their respective heirs, though the unity of possession continues; and as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if the possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener aliens her share, though no partition be made, then no longer are the lands held in coparcenary, but in common. *Litt.* § 309; and see 2 *Comm. c.* 12. p. 187, 188.

The possession of one parcener, &c. of land, without an actual ouster, until recently, gave possession to the other of them. *Hob.* 120; *Dyer*, 128. But this rule of law is altered by the 3 & 4 *W. 4. c.* 27. § 12. See *Limitation of Actions*, II.

One parcener may justify detaining the deeds, concerning the lands, against another, as they belong to one as well as the other. 2 *Roll. Abr.* 31.

II. If one parcener make a feoffment in fee of her part, this is a severance of the coparcenary. 1 *Inst.* 167. Though if two coparceners by deed alien both their parts to another in fee, rendering to them two, and their heirs, a rent out of the land, they shall have the rent in course of parcenary; because their right in the land out of which the rent is reserved was in parcenary. *Ibid.* 160.

If there be two parceners, and each of them taketh husband, and have issue, and the wives die, the parcenary is divided, and here is a partition in law. 1 *Inst.* 160. Partition of lands held in tail, by the death of one sister without issue is made void, and the other sister, as heir in tail, will be entitled to the whole land, and she might have had a writ of *formedon*, where the other parcener had aliened. *New Nat. Br.* 476. And a writ of *nuper obiit* formerly lay for one parcener deformed by another, &c. *F. N. B.* 197.

Parceners are to make partition of the lands descended; and estates of coparcenary at common law are applicable only to inheritances: partition may be made between parceners of inheritances which are entire and divisible, as of an advowson, rent-charge, or such like; but it is otherwise of inheritances which are not entire and indivisible, as of a piscary, common without number, or such uncertain profits out of lands; for in such case the eldest parcener shall have them, and the others have contribution from her out of some other inheritance left by the ancestor; but if there be no such inheritances, then the eldest shall have these uncertain

profits for one time, and the youngest for another time. *Dyer*, 153.

Parceners cannot make partition so as for one to have the land for one time and another for another, &c., for each is to have her part absolutely; but if an advowson descend to them, they may present by turns; and if there be a common, &c. which may not be divided, one may have it for one year, and another for another year, &c. 1 *Inst.* 164.

An advowson is an entire thing, and yet, in effect, the same may be divided betwixt parceners, for they may present by turns; and if there be coparceners of an advowson appendant to a manor, and they make partition of the manor, without mentioning the advowson, the same is still appendant, and they may present by turns. 8 *Rep.* 79. If two parceners be of an advowson, and they agree to present by turns, this is a good partition as to the possession: but it is not a severance of the estate of inheritance. 1 *Rep.* 87.

If three coparceners of an advowson do not agree to present on a vacancy, the eldest, or her assigns, may present on the first turn; and the second and third, or their assigns, to the next turns, according to the order of the birth of the coparceners. 1 *H. Bl.* 412.

In pleading a right in coparcener to present to an advowson by turns, it is good to state that the right arose because they did not agree to present, which is synonymous to saying they could not agree. 1 *H. Bl.* 376.

If one parcener hath a rent granted to her upon a partition made to make her part equal with the other, she may distrain for the arrears of common right; and so shall the grantee of the rent, because it is not annexed to her person only, but to her estate. 3 *Rep.* 32.

Partition between parceners may be made four ways; viz. first, when they themselves divide the lands equally into as many parts as there are parceners, and each chooses one share or part, the eldest first, and so one after another, &c.

Secondly, When they agree to choose certain friends to make division for them.

Thirdly, Partition by drawing lots: where, having divided the lands into as many parts as there are parceners, and written every part in a distinct scroll, being wrapt up, they each draw one.

And fourthly, partition by writ *de partitione faciendâ*, which is by compulsion, where some agree to partition, and others do not; and when judgment is given on a writ of partition, it is that the sheriff shall go to the land, and by the oaths of twelve men make partition between the parties, to hold to them in severalty, without any mention of preference to the eldest sister, &c. *Litt.* 248; 1 *Inst.* 161. But if there be a capital messuage on the land to be divided, the sheriff may allot that wholly to the eldest of the parceners. 1 *Inst.* 165. The partition made and delivered by the sheriff and jurors ought to be returned into court under the seal of the sheriff and the seals of the twelve jurors; for the words of the judicial writ of partition, which command the sheriff to make partition, are *assumpsis tecum duodecim, &c. et partitionem inde scire facias justiciariis, &c. sub sigillo tuo et sigillis eorum per quorum sacramentum partitionem illam feceris, &c.* If partition be made by force of the king's writ, and judgment thereof given, it shall be binding to all parties, because it is made by the sheriff, by the oath of twelve men, by authority of law; and the judgment is, that the partition shall remain firm and stable for ever. 1 *Inst.* 171.

Blackstone says, there are many methods of making partition, four of which are by consent, and one by compulsion to which latter may now be added, or indeed for which may be substituted, the proceedings in a court of equity to obtain a decree for partition. See *Joint-tenants*, III. 2.

The four modes of partition by consent are thus stated by Blackstone: the first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part.

The second is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part, according to seniority of age, or otherwise, as shall be agreed. The privilege of seniority is in this case personal, for if the eldest sister be dead, her issue shall not choose first, but the next sister. But if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay, her husband or her assigns, shall present alone, before the younger. *Co. Litt.* 166; *3 Rep.* 22. And the reason given is that the former privilege of priority in choice upon a division, arises from an act of her own, the agreement to make partition, and therefore is merely personal; the latter, of presenting to the living, arises from the act of law, and is annexed not only to her person, but to her estate also. It has been doubted whether the grantee of the eldest sister shall have the first and sole presentation after her death. *Harg. Co. Litt.* 166. But it was expressly determined in favour of such a grantee in *1 Ves.* 340; and see *1 H. Bla.* 412.

A third method of partition is where the eldest divides, and then she shall choose last; for the rule of law is *cujus est divisio alterius est electio*.

The fourth method is, where the sisters agree to cast lots for their shares.

But there are some things which are in their nature unpartitionable. The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance; or if that cannot be, then they shall have the profit of the thing by turns, in the same manner as they take the advowson. *Co. Litt.* 164, 165.

There is yet another consideration attending the estate in coparcenary, that if one of the daughters has had an estate given with her in frankmarriage by her ancestor which is a species of estate-tail, freely given by a relation for advancement of his kinswomen in marriage, in this case, if lands descend from the same ancestor to her and her sisters, in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frankmarriage in equal proportion with the rest of the lands descending. *Bract.* 1. 2. c. 34; *Litt.* § 266-273. This is denominated bringing the lands into hotch-pot. *Brutton*, c. 74. Which term *Lathton*, § 267, 268, thus explains. "It seemeth that this word hotch-pot is, in English, a pudding; for in a pudding is not commonly put one thing alone, but one thing with over things together." By this housewifely metaphor our ancestors meant to inform us that the lands, both those given in frankmarriage and those descending in fee-simple, should be mixed and blended together, and then divided in equal proportions among all the daughters; but this was left to the choice of the donee in frankmarriage; and if she did not choose to put her lands into hotch-pot, she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her other sisters. The law of hotch-pot took place then only when the other lands descending from the ancestor were fee-simple; for if they descended in fee-simple, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotch-pot. *Litt.* § 271. And the reason is, because lands descending in fee-simple are distributed by the policy of law, for the maintenance of all the daughters, and if one has a sufficient portion out of the same inheritance equal to the rest, it is not required that she should have more; but lands descending in fee-simple are not distributed by the operation of the law, but by the designation of the giver, *per formam doni*; it matters not therefore how unequal this distribution may be. Also no lands but such as are given in frankmarriage shall be brought into hotch-pot, for no others are looked upon in

law as given for the advancement of the woman, or by way of marriage portion. *Litt.* § 275. And therefore, as gifts in frankmarriage are fallen into disuse, the law of hotch-pot would not now deserve much notice, had not this method of division been revived and copied by the statute for distribution of personal estates. See *Executor*, V. 9.

The estate in coparcenary may be dissolved either by partition, which disunites the possession; by alienation of one parcener, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty. See *2 Comm. c.* 12. p. 189, &c.

In a writ of partition the judgment was *quod partitio fiat*, and before it was executed by the sheriff, a writ of error was brought; and it was adjudged that a writ of error doth not lie upon this first judgment, because this is not like other actions, where error lies before the *habere facias seisinam* is returned, and the judgment is final; but it is not so in this case, as there must be another judgment, i. e. *quod partitio stabilis maneat*, which cannot be till the partition is made and returned by the sheriff. *Holley*, 36; *Dyer*, 67.

If there are two parceners of a manor, and on partition made, each hath demesnes and services allotted, in this case each is said to have a manor. *1 Leon.* 20; *Davis*, 61. A partition may not be made of franchises, as goods of felons, waifs, estrays, &c. which are casual. *5 Rep.* 8.

Where two persons hold lands *pro indiviso*, and one would have his part in severalty, and the other refuseth to make partition by deed; there the writ *de partitione faciendi* lies against him who refuses, directed to the sheriff, and he must be present when the partition is made; and if it is objected before the return of the writ, that he was not present, he may be examined by the court; but after the writ is returned and filed, it is too late. *Cro. Eliz.* 9.

A writ of partition was taken forth, and the sheriff made partition, but was not upon the land; and on motion that the return might not be filed, but that a new writ might be awarded, because the sheriff was not on the land, the court staid the filing, and on examining the sheriff, ordered a new writ. *Cro. Car.* 9, 10.

On writ of partition to the sheriff to make partition of lands, part of the lands were allotted to one, and the jury would not assist the sheriff to make partition of the other part; which appearing on the return of the writ, the court was moved for an attachment against the jury, and a new writ to the sheriff. *Godb.* 265. The ancient proceedings on a writ of partition were in some degree varied by the *31 H. 8. c. 1*; *32 H. 8. c. 32*; and the *8 & 9 Wm. 3. c. 31*.

Partition was brought by tenant in fee of one moiety, against tenant for life of the other moiety, on the *32 Hen. 8. c. 32*. And though it has been resolved, if partition be made between one who hath an estate of inheritance, and another who hath a particular estate for life, that the writ ought to be framed upon the statute, and to be made special, setting forth the particular estate, yet it was held to be good where the writ was general. *Goldsb.* 84; *2 Lutw.* 1015.

By *8 & 9 Wm. 3. c. 31*, a partition may be made of any estate of freehold or for term of years, &c. of manors, lands, tenements, and hereditaments, whereof the partition is demanded; and if after process of *pone* returned upon a writ of partition and affidavit of notice given of the writ to the tenant to the action, and a copy left with the tenant in possession at least forty days before the return of the said *pone*, &c. there be no appearance entered in fifteen days, the demandant having entered his declaration, the court may give judgment by default, and award a writ to make partition, whereby the demandant's part or purpart will be set out severally; which writ being executed after eight days' notice, and returned, and thereupon final judgment entered, shall conclude all persons, &c. But the court may suspend or

set aside the judgment, if the party concerned move the court in a year, and show good matter in bar. And by this statute, if the high sheriff, by reason of distance, &c. cannot be present at the execution of any judgment in partition, then the under-sheriff, in the presence of two justices of peace of the county, shall proceed to the execution of the writ by inquisition, and the high-sheriff is to make the return, &c. When the partition is made and returned, the persons who were tenants of the lands or any part thereof before divided, shall continue tenants of the lands they held to their respective owners, under such conditions and rents as before; and no plea in abatement shall be admitted or received in any suit of partition, nor shall the same be abated by the death of any tenant, &c.

Customary tenements in the north of England, being parcels of the respective manors in which they are situate, and descendible from ancestor to heir, by the hereditary right called tenant-right, and held of the lord, according to the custom, are not within this statute of partition. 3 B. & P. 378.

In a writ of partition the defendant pleaded that he formerly brought writ of partition against the plaintiff, and had judgment to have partition; and held a good plea; but it was a question whether it should be pleaded in bar or abatement, or by way of estoppel. *Dyer*, 92. No damages can be recovered on a writ of partition, though the writ and declaration conclude *ad damnum*. *Hell*, 35; *Noy*, 149.

Where judgment for debt is had against one parcener, the lands, &c. of both may be taken in execution; and the moiety undivided is to be sold, and then the vendee will be tenant in common with the other coparcener; if the sheriff seize only a moiety and sell it, the other parcener will have a right to a moiety of that money. 1 *Salk*, 392.

All partitions ought to be according to the quality and true value of the lands, and be equal in value; but if partition be made by parceners of full age, and unmarried, and *sane memorie*, it binds them for ever, although the value be unequal, if it be made of lands in fee; and if it be of lands intailed, it shall bind the parties themselves for their lives, but not their issue, unless it be equal; if it be unequal, the issue of her who hath the lesser part, may, after her decease, disagree, and enter and occupy in common with the aunt; also if any be covert, it shall bind the husband but not the wife or her heirs; or if any be within age, it shall not bind the infant, but she may at her full age disagree, &c. 1 *Inst*, 166, 170; 2 *Lit. Abr.* 283. Though if a wife, after coverture, or the infant at her age, accept of the unequal part, they are concluded for ever. 1 *Inst*, 170. And where there be two coparceners, and one hath seven daughters, and dieth, if the other parcener releaseth to any one of the daughters her whole part, here, although she to whom the release is made, have not an equal part, the release is good. *Ibid*, 193. It hath been adjudged, that notwithstanding a partition is unequal, if it be by writ it cannot be avoided; but if it be by deed, it may be avoided by entry. 1 *Inst*, 171.

If the estate of a parcener be in part evicted, that shall defeat the whole partition; partition implying a warranty and condition in law to enter upon the whole on eviction, as in case of exchange of lands. 1 *Inst*, 173; 1 *Rep*, 87. And if after partition one of the parts is recovered from a parcener by lawful title, she shall compel the others to make a new partition. *Cro. Eliz.* 902. But as to eviction of parceners, if one sell her part, and then the part which the other parcener hath, is evicted, in this case she who loseth her part, cannot enter on the alienee, for by alienation the privity is destroyed. 1 *Inst*, 173.

Previous to the Statute of Frauds, among parceners a partition upon the land was good without deed, but not among joint-tenants, &c. *Dyer*, 29, 194. See *Joint-tenants*.

The common law mode of making a partition is, in a great measure, superseded, by filing a bill in Chancery, praying a

partition; in which case the court will issue a commission to persons, who proceed to make a partition without the aid of a jury, which may be prayed for as a matter of right, where the applicant has a clear title; *Ambl*, 286; but not otherwise. 1 *Ves. & B.* 536.

FORM OF A COMMON WRIT OF PARTITION.

William the Fourth, &c. to the sheriff of S. greeting: If A. B. make you secure, &c. then summon E. B. that she be before, &c. to show wherefore, whereas the said A. B. and E. B. together and undivided hold the manor of, &c. with the appurtenances, twenty messuages, one mill, one dove-house, twenty gardens, three hundred acres of land, two hundred acres of meadow, a hundred and fifty acres of pastures, one hundred acres of wood, two hundred acres of furze and heath, and twenty shillings rent, with the appurtenances, of the inheritance which was of N. B. father of the said A. B. and E. B. whose heirs they are, in, &c.; the said E. B. doth deny partition thereof to be made between them, according to the law and custom of England; and unjustly will not permit that to be done, as it is said. And have you there the summons and this writ. Witness, &c.

PARCENARY. The holding of lands jointly by parceners when the common inheritance is not divided. *Litt* 56.

PARCO FRACTO. A writ against him who violently breaks a pound, and takes out beasts from thence, which for some trespass done, &c. were lawfully impounded. *Reg. Orig.* 166. If a person hath authority to take beasts out of the pound, if he breaks the pound before he demands the cattle of the keeper thereof, and he refuseth or interrupts him in the taking of them, &c. the writ *parco fracto* lies. *Doct. & Stud.* 112. Damages are recoverable in this writ and the party may be punished as for a pound-breach in the court-leet. 1 *Inst.* 47; *F. N. B.* 100. The word *parco* was frequently used for a pound to confine trespassing or straying cattle; whence *imparcare*, to impound; *imparcare*, pouncing, and *imparcamentum*, right of pouncing, &c.

PARDON,

PARDONATIO; VENIA.] The remitting or forgiving of an offence committed against the king; and is either *ex gratia Regis*, or by course of law. *Stamf. Pl. Cor.* 17. Pardon *ex gratia Regis* is that which the king affords by virtue of his prerogative. See *Judges*.

Pardon by course of law is that which the law in effect affords for a light offence; as casual homicide, when one killeth a man, having no such meaning. *West. Symbol.* part 2. tit. *Indictments*, § 46. See *Homicide*, II. 2.

The power of pardoning offences is inseparably incident to, and is the most amiable prerogative of the crown, and this high prerogative the king is entrusted with upon a special confidence, that he will spare those only whose case could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man cannot possibly make so perfect as to suit every particular case. 1 *Show*, 284.

Anciently the right of pardoning offences within certain districts was claimed by lords who had *jura regalia* by ancient grants from the crown, or by prescription. But by the 27 *Hen. 8. c. 24.* it was enacted, "That no person shall have power to pardon any treasons or felonies, nor any accessories, nor outlawries; but that the king shall have the authority thereof united to the crown of this realm, as of right it appertaineth." *Co. Litt.* 114; 3 *Inst.* 233. And this power belongs only to a king *de facto*, and not to a king *de jure*, during the term of usurpation. *Bro. Abr.* ut *Chanc. ber de Pardon*, 22.

The power of pardoning offences is stated by Blackstone to be one of the great advantages of monarchy in general above every other form of government, and which cannot subsist in democracies. Its utility and necessity are defended by him on all those principles which do honour to human nature. See 4 *Comm. c. 31. p. 396, 397.*

He then proceeds to consider pardons under the following heads, a distribution here adopted as most convenient :

- I. The object of Pardon; that is, in what cases and for what offences a Pardon may be granted, or not.
- II. The manner of Pardoning; wherein how far a Pardon is grantable of common right; and by what words offences may be pardoned.
- III. The method of allowing a Pardon.
- IV. The effect of such Pardon when allowed.

I. The king may pardon all offences merely against the crown or the public, excepting, 1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm is by the habers corpus act, 31 *Car. 2. c. 10*, made a pardonable even by the king. Nor, 2. Can the king pardon where private justice is principally concerned in the prosecution of offenders: "*non potest in gratiam facere cum injuria et damno alterius*" 3 *Inst. 200*. The crown in criminal appeals of all kinds (which were the suit, not of the king, but of the party injured,) the prosecutor might have released, but the king could not pardon. *Ibid. 237*. Neither can he pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it, though afterwards he may remit the fine; because, though the prosecution is vested in the king, to avoid multiplicity of suits, yet, on account of its continuance, this offence savours more of the nature of a private injury to each individual in the neighbourhood, than of a public wrong. 2 *Hawk. P. C. c. 37. § 33*. Neither, lastly, can the king pardon an offence against a popular or penal statute, after information brought; for thereby the informer hath acquired a private property in his part of the penalty. 3 *Inst. 338*.

There is also a restriction of a peculiar nature that affects the prerogative of pardoning, in case of parliamentary impeachments; viz. that the king's pardon cannot be pleaded to any such impeachment, so as to wipe the injury, and stop the prosecution of great and notorious offenders. Therefore, when, in the reign of Charles II. the Earl of Danby was impeached by the House of Commons of high treason, and other misdemeanors, and pleaded the king's pardon in bar of the same, the Commons alleged, "that there was no precedent that ever any pardon was granted to any person impeached by the Commons of high treason, or other crimes against the impeachment;" and thereupon resolved, "that the pardon so pleaded was illegal and void; and ought not to be allowed in bar of the impeachment of the Commons of England," for which resolution they assigned this reason to the House of Lords: "that the setting up a pardon to be a bar of an impeachment, defeats the whole use and effect of impeachments; for should this point be admitted, or stand the future; it would totally discourage the exhibiting any for the government would be destroyed." *Com. Journ. 28th Apr. 1679; 5th May, 1679; 26th May, 1679*. Soon after the Revolution the Commons renewed the same claim, and voted "that a pardon is not pleadable in bar of an impeachment." And at length it was enacted by the Act of Settlement, 2 & 3 *Will. 3. c. 2*, "that no pardon under the great seal of England shall be pleadable to an impeachment by the Commons in parliament." But after the impeachment of England shall be solemnly heard and determined, it is not understood that the king's royal grace is further restrained or abridged; for after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit

of the king's most gracious pardon; and a remarkable record is cited by Mr. Christian, *Rot. Parl. 50 Edm. 3. n. 188*, in which it is asserted by the king, and acknowledged by the Commons, that the king's prerogative to pardon delinquents convicted on impeachment, is as ancient as the constitution itself. See *Impeachment*.

It is laid down in general that the king may pardon any offence, so far as the public is concerned in it, after it is over, consequently may prevent a popular action on a statute by pardoning the offence before the suit is commenced; but it seems that he cannot wholly pardon a public nuisance while it continues such, because such pardon would take away the only means of compelling a redress; yet it is said that such a pardon will save the party from any fine to the time of the pardon. *Plowd. 487; Keilm. 134; 12 Co. 29, 30; 3 Inst. 237; Vaugh. 333*.

The king cannot by any charter bar any right of entry or action, real or personal, on contract, or for wrong done, or any legal interest or benefit before vested in the subject; therefore it seems clear that he cannot bar any action on a statute by the party grieved, nor even a popular action commenced before his pardon, nor a recognizance of the peace before it is forfeited. *Plowd. 487; 2 Roll. Abr. 178; Cro. Car. 199; Keilm. 134; Moor, 863*.

The power of the crown to pardon a forfeiture, and to grant restitution, can only be exercised when things remain in *statu quo*, but not so as to affect legal rights vested in third persons. *Rea v. Amery, 2 T. R. 569*.

It seems agreed that the king can by no previous licence, pardon, or dispensation, make an offence dispunishable, which is *malum in se*; as being either against the law of nature, or so far against the public good as to be indictable at common law; and that a grant of this kind, tending to encourage the doing of evil, which it is the chief end of government to prevent, is against the common good, therefore void. *Dar. 75; 5 Co. 35; 12 Co. 29; see 2 Hawk. P. C. c. 37; 3 Hen. 7. 16. pl. 30*.

Where a thing, in its own nature lawful, was made unlawful by parliament, it was formerly taken as a general rule, that the king might dispense with it, as to a particular time or place, or person, so far as the public was concerned in it; unless such dispensation could not but be attended with an inconvenience, as the introducing a monopoly; or frustrating the end for which the law was made; as the licensing a particular person to import foreign cards or wines, &c. in which case it was commonly taken to be void; also, where a statute gave a particular interest or right of action to the party grieved, it was always agreed that no charter from the king could bar the right of the party, grounded on such statute; also where a statute was express, that the king's charter against the purport of it, though with the clause of *non obstante*, should be void; it seems to have been always generally agreed that regularly no such clause could dispense with it. 2 *Hawk. P. C. c. 37. § 28*.

It seems to have been agreed that no dispensation of any statute, except the statutes of mortmain, was of any force without a clause of *non obstante*; neither is such clause now of any effect, for it is declared and enacted by 1 *W. & M. st. 2. c. 2*, that no dispensation by *non obstante* of or to any statute, or any part thereof, be allowed; but that the same shall be held void, except a dispensation be allowed in such statute; but it is provided that no charter, grant, or pardon, granted before the 23d of October, 1689, shall be any ways invalidated by that act, but that the same shall be and remain of the same force, and no other, as if the said act had never been made. See *King, V. 3*.

But there is no need of any *scire facias* against the lord by escheat; because the pardon no way tends to reverse the attainder whereon the title of escheat is founded. 2 *Hawk. P. C. c. 37. § 37*.

II. FORMERLY a pardon must have been under the great seal; and, if pleaded, must have been averred to be under the great seal, except a statute pardon, or what amounted thereto. 1 B. & P. 199.

A warrant under the privy seal, or sign manual, though a sufficient authority to admit the party to bail, in order to plead the king's pardon, when obtained in proper form, yet was not of itself a complete irrevocable pardon. 5 St. Tr. 166, 173.

Under two modern statutes the king may grant a free or conditional pardon by sign manual. See *post*, IV.

It is a general rule that wherever it may reasonably be presumed that the king is deceived, the pardon is void. 2 Hawk. P. C. c. 37. § 8. Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole, for the king was misinformed. 3 Inst. 238.

And this is in conformity with the 27 Edw. 3. c. 2. which directs that in every charter of the pardon of felony, the suggestion, and the name of him that maketh the suggestion, shall be comprised; and if it be found untrue, the charter shall be disallowed.

General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony; for it is presumed the king knew not of those proceedings; but the conviction or attainder must be particularly mentioned. 2 Hawk. P. C. c. 37. § 8. And a pardon of felonies will not include piracies; for that is no felony punishable at the common law. 1 Hawk. P. C. c. 37. § 6, &c.

It has been also held, that the king's grant of a protection, or of a place of trust to a traitor or a felon, does not carry with it an implied pardon of his crime. See Cro. Jac. 494; 1 St. Tr. 187, 877; 2 Hawk. c. 37. § 25.

By the statute of Gloucester, 6 Edw. 1. c. 9. it was enacted, "That if it be found by the country that a person tried for the death of a man, did it in his defence, or by misfortune, then, by the report of the justices to the king, the king shall take him to his grace, if it please him." 2 Inst. 316.

And it was settled, agreeably to the ancient common law, in affirmance whereof this statute was made, that in such a case, or where one indicted of homicide *se defendendo* confesses the indictment, if the party caused the record to come into Chancery, the chancellor would of course make him a pardon, without speaking to the king, and that by such pardon the forfeiture of goods would be saved; for these words, "if it shall please the king," should be taken as spoken only by way of reverence to him, and not intended to make such a pardon discretionary.

Now, by the 9 Geo. 4. c. 31. whereby the 6 Edw. 1. c. 9. was repealed, it is enacted (§ 10.) that no punishment or forfeiture shall be incurred by any person killing another by misfortune, or in his own defence, or in any other manner without felony.

By the 13 Rich. 2. st. 2. c. 1. no pardon for treason, murder, or rape, shall be allowed, unless the offence be particularly specified therein; and particularly in murder it shall be expressed whether it was committed by laying in wait, assault, or malice prepense. Upon which Coke observes, that it was not the intention of parliament that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions; because they did not conceive it possible that the king would ever excuse an offence by name, which was attended with such high aggravations. 3 Inst. 236. And it is remarkable enough that there is no precedent of a pardon in the register for any other homicide than that which happens *se defendendo* or *per infortunium*; to which two species the king's pardon was expressly confined by the 2 Edw. 3. c. 2. and 14 Edw. 3. c. 15. which declare that no pardon of homicide shall be granted but only where the king may do it by the oath of his

crown; that is to say, where a man slayeth another in his own defence, or by misfortune. But the 13 Rich. 2. st. 2. c. 1. before mentioned, enlarges by implication the royal power, provided the king is not deceived in the intended object of his mercy. And therefore pardons of murder were always granted with a *non obstante* of the statute of King Richard till the time of the Revolution, when the doctrine of *non obstantes* ceasing, it was doubted whether murder could be pardoned generally; but it was determined by the Court of King's Bench that the king may pardon on an indictment of murder, as well as a subject may discharge an appeal. Salt. 499. Under these and a few other restrictions it is a general rule that a pardon shall be taken most beneficially for the subject, and most strongly against the king.

It has been already mentioned as a general rule, that wherever it appears by the recital of the pardon that the king was misinformed, or not rightly apprised, both of the heinousness of the crime, and also how far the party stands convicted upon record, the pardon is void, upon a presumption that it was gained from the king by imposition. See also 1 L. 43, 47; Cro. Jac. 18, 34, 548; 2 Roll. Abr. 188. Dyer, 352, pl. 26; Raym. 13; 1 Sid. 41; 3 Inst. 438. And on this ground it hath been holden, that the pardon of a person convicted by verdict of felony, is void unless it recite the indictment and conviction; also it hath been questioned if the pardon of a person barely indicted of felony be good, without mentioning the indictment; but it hath been adjudged that such a defect is saved by the words *ave indictum sine non*. 2 Hawk. P. C. c. 37. § 8.

Anciently a pardon of all felonies included all treasons as well as felonies; and it seems to be taken for granted in many books that such a general pardon is, even at this day, pleadable to any felony, except murder, rape, and piracy; and that the only reason why it may not also be pleaded to murder and rape is, because the 13 Rich. 2. st. 2. c. 1. requires an express mention of them; and that the only reason why it is not pleadable to piracy is because it is a felony by the civil law. 1 Hale's Hist. P. C. 466; 2 Hale's Hist. P. C. 45; see *ante*; and 2 Hawk. P. C. c. 37. § 9.

No pardon of felony shall be carried beyond the express purport of it; therefore if the king, reciting an attainder of robbery, pardon the execution, he thereby neither pardons the felony itself, nor any other consequence of it, besides the execution. 6 Co. 13; 2 Hawk. P. C. c. 37. § 12.

It was formerly adjudged that murder might be pardoned under the general description of a felonious killing, with a clause of *non obstante*. 1 Sid. 266; 1 Show. 283; Kelng. 24. 3 Mod. 37. And pardons of manslaughter still remain as they were at common law before the doctrine of *non obstante* was exploded; therefore the pardon of the felonious killing of J. S. may be pleaded to an indictment of manslaughter killing him; but where such a pardon is pleaded to a coroner's inquest of manslaughter, the court may refuse to allow it till the fact be found manslaughter by a jury directed by a higher court. 2 Keb. 363, 415; Kelng. 24; 2 Jon. 56.

The exception of murder, in a general act of pardon of all felonies, does not extend to *felo de se*; for though this offence be in strictness murder, yet in common speech, according to which statutes are commonly expounded, it is generally understood as a distinct offence, the word murder seeming *prima facie* to import the murder of another. 1 Lev. 8, 12. 1 Sid. 150; 1 Keb. 66, 548.

It is said that a general act of pardon of all felonies, misdemeanors, and other things done before such a day, pardons a homicide from a wound before the day, whereof the party died not till after; because the stroke being pardoned the effects of it are consequently pardoned. Plowd. 401, *Coke's case*; 1 Hale's Hist. P. C. 426; Dyer, 99, pl. 65.

It is said that a pardon of all misprisions, trespasses, offences, and contempts, will pardon a contempt in making a false return, and a striking in Westminster Hall, and barratry.

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try, and even a *præmunire*; also it is laid down in general that it will pardon any crime not capital. 1 *Lev.* 106; 1 *Sid.* 211; 2 *Mod.* 52; see 2 *Hule's Hist. P. C.* 252; *Dyer*, 308 a.

A pardon may also be conditional; that is, the king may extend his mercy upon what terms he pleases, and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend; and this by the common law. 2 *Hawk. P. C. c.* 37. § 45. And the power of the king to grant a conditional pardon is recognized in two recent statutes. See *post*, IV. This royal prerogative is daily exerted in the pardon of felons, on condition of being confined to hard labour for a stated time; or of transportation to some foreign country for life, or for a term of years; such transportation or banishment being allowed and warranted by the habeas corpus act, 31 *Car. 2. c.* 2. § 14. See *Transportation*.

As to persons entitled to pardons on discovering their accomplices, see 4 & 5 *W. & M. c.* 8; 6 & 7 *W. & M. c.* 17; and *tit. Accessories, Receivers*.

III. A PARDON by act of parliament is more beneficial than by the king's charter; for a man is not bound to plead it, but the court must, *ex officio*, take notice of it. *Post.* 48. Neither can a man lose the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon. 2 *Hawk. P. C. c.* 37. § 64. The king's charter of pardon must be specially pleaded, and that at a proper time; for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon. *Ibid.* § 59. But if a man avails himself thereof, as soon as by course of law he may, a pardon may either be pleaded upon arraignment, or in arrest of judgment, or, in the present stage of the proceedings, in bar of execution.

By the 10 *Edw. 3. c.* 2. no pardon of felony could be allowed, unless the parties found six sureties for the good behaviour, before the sheriff and coroners of the county. *Sate.* 499. But that statute was repealed by the 5 & 6 *W. & M. c.* 1. which, instead thereof, gives the judges of the court a discretionary power to bind the criminal pleading such pardon to his good behaviour, with two sureties, for any term not exceeding seven years.

But these sureties, it would appear, are only required where the party is a person of ill fame. 2 *Str.* 1203.

By the 6 *Geo. 4. c.* 25. § 3. in case of free or conditional pardon granted to an offender convicted of a capital felony, the discharge of the offender in the one case, and the performance of the condition in the other, shall have the effect of a pardon under the great seal. And by the 7 & 8 *Geo. 4. c.* 27. § 13. this enactment is extended to all cases of felony.

By the 1 *Geo. 4. c.* 31. § 3. where offenders convicted of a felony, not being capital, have endured the punishment adjudged for that offence, the endurance thereof shall have the effect of a pardon under the great seal; but this shall not prevent or mitigate the punishment consequent upon a subsequent conviction for any other felony.

Where a man was convicted of grand larceny, sentenced to transportation for seven years, and confined in the hulks for that time, and then discharged, it was held, that his suffering seven years aboard the hulks in execution of the sentence of seven years' transportation, operated as a statute pardon; and that his having escaped twice during the confinement, for a few hours each time, did not destroy the effect of it. *Russ. & Ry. Cro. Cas.* 248.

Where a copyholder was convicted of a capital felony, and pardoned upon condition of remaining two years in prison, and the lord did not do any act towards seizing the copyhold, it was held, that at the expiration of the two years the copyholder might maintain ejectment against one who had ousted him, inasmuch as the pardon restored his competency, and

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the estate did not vest in the lord without some act done by him. 5 *B. & C.* 584.

By the 8 *Geo. 3. c.* 15. (one of the statutes providing for the transportation of offenders,) it was provided that "such transportation" should have the effect of a pardon under the great seal. To an action on a bill of exchange of the defendant, pleaded in bar that the plaintiff, before the date of the bill, had been convicted of felony, and sentenced to death; that his majesty had extended his mercy to the plaintiff, on condition of his being transported for life; whereupon the court gave judgment according to the form of the statute. Replication,—that before the cause of action accrued the plaintiff was in due manner transported. Rejoinder,—that after the plaintiff was so transported, he was unlawfully at large in England. Sur-rejoinder,—that before the cause of action accrued, the governor of New South Wales (being duly authorized) had remitted the remainder of the plaintiff's term of transportation, whereby the plaintiff was lawfully at large, and traversing that he was unlawfully at large. The defendant demurred to the sur-rejoinder, and on argument the case turned principally on the meaning of the word "transportation" in the clause of the statute which gives it the effect of a pardon. And the court held, that the word meant, not merely the conveying the party to the place of transportation, but also the remaining there during the period mentioned in the sentence; and therefore the plaintiff, not having fulfilled this condition, was still in the situation of an attainted felon, and had not regained his civil rights either by merely being transported, or by the remission of the governor, which had not the effect of a general pardon: and judgment was given for the defendant. 2 *B. & A.* 258.

By the 58 *Geo. 3. c.* 29. no fee, &c., payable in respect of any pardon, or for any letters-patent, charter, warrant, bill, docket, or other instrument appertaining thereto, or the transcript of any such instrument, shall be paid by the party pardoned; but all fees on such pardons shall be paid by the treasury. And the letters-patent and other instruments of pardon are exempted from stamp-duty.

IV. THE effect of such pardon by the king is to make the offender a new man; to acquit him of all corporeal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new credit and capacity. But nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, except the high and transcendent power of parliament. Yet if a person attainted receives the king's pardon, and afterwards hath a son, that son may be heir to his father, because the father, being made a new man, might transmit new inheritable blood; though had he been born before the pardon, he could never have inherited at all. See *Attainder, Escheat*.

A pardon will not only discharge any suit in the spiritual court *ex officio*, but also any suit in such court *ad instantiam partis pro reformatione morum*, or *salute animæ*; as for defamation, or laying violent hands on a clerk, &c. See 5 *Co.* 51; *Litch.* 190; *Cro. Eliz.* 684; *Hob.* 81; *Cro. Jac.* 335; 2 *Hawk. P. C. c.* 37. § 41, &c.

If a person be imprisoned on an *excommunicato capiendo* for non-payment of costs, and the king pardons all contempts, it is said, that he shall be discharged without any *seire facias* against the party, and that the party must begin anew to compel payment of costs; because the imprisonment was grounded on the contempt, which is wholly pardoned. 1 *Jon.* 227; 2 *Roll. Abr.* 178; *Cro. Jac.* 159; 8 *Co.* 68, 69.

But no pardon will discharge a suit in the spiritual court any more than in a temporal, for a matter of interest or property in the plaintiff; as for tithes, legacies, matrimonial contracts, and such like; also it is agreed, that after costs are taxed in a suit, in such court, at the prosecution of the party,

whether for a matter of private interest, or *pro reformatione morum*, or *pro salute anime*, or for defamation, &c. they shall not be discharged by a subsequent pardon. 5 Co. 51; *Latch.* 190; *Cro. Car.* 46, 47. And with respect to costs, see 2 *Roll. Abr.* 304; *Noy*, 85; *Latch.* 155.

With regard to the effect of a pardon in restoring the party's competency as a witness, see *Evidence*, II.

For more learning on this subject, see 3 *New Abr.* tit. *Pardon*.

PARDONERS. Persons who carried about the pope's indulgences, and sold them to any who would buy them. *An.* 22 Hen. 8.

PARENT, *parens*.] A father or mother, but generally applied to the father; parents have power over their children by the law of nature, and the divine law; and by those laws they must educate, maintain, and defend their children. *Wood's Inst.* 63. The parent or father hath an interest in the profits of the children's labour while they are under age, if they live with and are maintained by him; but the father hath no interest in the estate of a child, otherwise than as his guardian. *Ibid.* The eldest son is heir to his father's estate at common law; and if there are no sons, but daughters, the daughters shall be heirs, &c. And there being a reciprocal interest in each other, parents and children may maintain the suits of each other, and justify the defence of each other's person. 2 *Inst.* 564.

A parent may lawfully correct his child being under age in a reasonable manner; for this is for the benefit of his education. So he may justify an assault and battery in its defence.

A parent may be indicted for not providing sufficient food and necessities for his child while unable to provide for, and take care of, itself. *R. & R.* 20. And by the vagrant act, 5 Geo. 4, c. 83, § 4. a man deserting his wife and children, and leaving them chargeable to the parish, is declared a rogue and vagabond, and punishable with three months' imprisonment to hard labour.

The consent or concurrence of the parent to the marriage of a child under age is necessary by the marriage act; but these and all other powers of a parent cease in law, when a child arrives at the age of twenty-one. See 1 *Comm.* c. 16; this Dictionary, *Age*, *Bastard*, *Guardian*, *Infant*, *Marriage*, *Poor*, and other apposite titles.

PARENTELA, or DE PARENTELA SE TOLLERE. To renounce his kindred, which was done in open court before the judge and in the presence of twelve men, who made oath, that they believed it was done lawfully, and for a just cause. We read it in the laws of Hen. 1. c. 88. See *Vill.*

PARISH, *parochia*.] Did anciently signify what we now call the diocese of a bishop; but at this day it is the circuit of ground in which the people who belong to one church do inhabit, and the particular charge of a secular priest. It is derived from the Saxon *Preost-scýre*, *Preost scyre*; which signifies the precinct of which the priest had the care, in English priest-shire.

How ancient the division of parishes is, may at present be difficult to ascertain; for it seems to be agreed on all hands, that in the early ages of Christianity in this island, parishes were unknown, or at least signified the same that a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or, if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion. 1 *Comm. Introd.* § 4.

Camden (in his *Britannia*) says, England was divided into parishes by Archbishop Honorius about the year 630. Sir *Henry Hobart* lays it down, that parishes were first erected by the council of Lateran, which was held *anno Domini* 1179.

Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. *Selden* has clearly shown, (of *Tithes*, c. 9.) that the clergy lived in common without any division of parishes, long after the time mentioned by *Camden*. And it appears from the Saxon laws that parishes were in being long before the date of that council of Lateran, to which they are ascribed by *Hobart*. 1 *Comm. ubi sup.*

We find the distinction of parishes, nay, even of mother churches, so early as in the laws of King Edgar, about the year 970. Before that time the consecration of titles was in general arbitrary; that is, every man paid his own as before observed to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying, and with either jealousies or mean compliances in such as were competitors for receiving them; it was ordered by the law of King Edgar, (c. 1.) that "*dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet.*" However, if anythane, or great lord, had a church within his own demesnes, distinct from the mother church, in the nature of a private chapel; then, provided such church had a cemetery or consecrated place of burial belonging to it, he might allot one-third of his tithes for the maintenance of the officiating minister; but, if it had no cemetery, the same must himself have maintained his chaplain by some other means; for in such case all his tithes were ordained to be paid to the *primariæ ecclesiæ*, or mother church. 1 *Comm. ubi sup.*

This proves that the kingdom was then universally divided into parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor or manors; since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. But it present the boundaries of the one afford no inference or evidence whatever of the boundaries of the other. The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish; which will account well enough for the frequent intermixture of parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself with the natural for him to endow his newly-erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those outlying parcels. Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned.

But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forests and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extra-parochial; and their tithes are now by immemorial custom payable to the king instead of the bishop, in trust and confidence that he will distribute them for the general good of the church. 2 *Inst.* 647. 2 *Rep.* 44; *Cro. Eliz.* 512. Yet extra parochial wastes and marsh lands, when improved and drained, are by the 17 Geo. 2, c. 37, to be assessed to all parochial rates in the parish next adjoining. 1 *Comm. ubi sup.* and see 1 *Wils.* 182.

Lord *Holt* held, that parishes were instituted for the ease and benefit of the people, not of the parson; and the reason why parishioners must come to their parish church is, because

having charged himself with the cure of their souls, he might be enabled to take care of that charge. 3 Salk. 88, 89. A parish may comprise many vills; but generally it shall not be accounted to contain more than one, except the contrary be shown, because most parishes have but one vill within them. *11th, 23 Car. 1. B. R.* And it shall not be intended that there is more than one parish in a city, if it be not made to appear; for some cities have but one parish. *Ibid.* Where there are several vills in a parish, they may have peace-officers, and overseers of the poor, for every particular vill; and an ancient vill in a parish, that time out of mind hath had a church of its own, and churchwardens and parochial rights, being reputed a parish, is a parish within the *1. Eliz. c. 2.* to provide for its own poor; and shall not pay to the poor of the parish wherein it lies. *11th, 23 Car. 1. B. R.* But to make a vill a reputed parish within *43 Eliz. c. 2.* it must have a parochial chapel, chapelwardens, and sacraments, at the time that statute was made. 2 Salk. 501. Parishes in reputation are within that statute, especially when it has been the constant usage of such parishes to choose their own overseers; who may distrain for a poor-tax, &c. 2 Roll. Rep. 160; 2 Nels. Abr. 1255. See further *Poor, Overseers, Vill.*

The settling the bounds of parishes depends upon ancient and immemorial custom. For they have not been limited by any act of parliament, or set forth by special commissioners, but have been established as the circumstances of times, and places, and persons did happen to make them greater or lesser. 1 Still. 243.

Formerly the boundaries of parishes were preserved by annual perambulations, which, being performed in rogation week, the rogation days were on that account anciently called *gange-days*, from the Saxon *gan* or *gangan* to go.

These perambulations (though of great use in order to preserve the bounds of parishes,) were, in the times of popery, accompanied with great abuses; viz. with forstings and with superstition, being performed in the nature of processions, with banners, hand-bells, lights, staying at crosses, and the like; and, therefore, when processions were forbidden, the useful and innocent part of perambulations was retained, in the conjunctions of Queen Elizabeth, wherein it was required, that, for the retaining of the perambulation of the circuits of parishes, the people should once in the year, at the time accustomed, with the curate and the substantial men of the parish, walk about the parishes, as they were accustomed, and at their return to the church make their common prayers. And the curate in their said common perambulations, was at certain convenient places to admonish the people, to give thanks to God (in the beholding of his benefits), and for the increase and abundance of his fruits upon the face of the earth, with the saying of the 103d psalm: at which time also the said minister was required to recite these or such like sentences, *Cursed be he which translateth the bounds and dolles of his neighbour*, or such other order of prayers as should be lawfully appointed. *Giba. 213.*

The bounds of parishes though coming in question in a spiritual matter, shall be tried in the temporal court. This is a maxim, in which all the books of common law are unanimous; although our provincial institutions do mention the bounds of parishes amongst the matters which merely belong to the ecclesiastical court, and cannot belong to any other. *Giba. 212.*

The bounds of a parish may be tried in an action at law, if it a bill will not lie for an issue or commission to ascertain the boundaries of two parishes. See 1 Bro. C. C. 40; 2 Anstr. 80. 395.

By the general inclosure act, 41 Geo. 3. c. 109. the commissioners are empowered to examine witnesses on oath as to the boundaries of parishes, &c.; and where not sufficiently ascertained, they are to ascertain and fix such boundaries. Persons dissatisfied with their decisions may appeal to the sessions.

By the 3 Geo. 4. c. 72. § 26. land purchased by parishes, under that act, for additional burial grounds, is to be deemed part of such parishes.

By the last act for the building of additional churches, 1 & 2 Wm. 4. c. 38. § 23. if any person is willing to endow any existing chapels of ease having a chapelry or district belonging thereto, the bishop of the diocese may, with the consent of the patron and incumbent of the parish, declare such chapelry a distinct parish for all spiritual purposes. And by § 25. two churchwardens are to be chosen for such new parish.

The districts assigned to the new churches or chapels built in pursuance of the above act, and former statutes, are to be under the immediate care of the minister of such churches or chapels, so far as regards the visitation of the sick, and other pastoral offices, and are to be under churchwardens, but they are not to be deemed districts for any other purposes.

With respect to the liability of parishes to repair all roads lying within them, see *Way.*

PARISH CLERK. In every parish the parson, vicar, &c. hath a parish clerk under him, who is the lowest officer of the church. They were formerly clerks in orders, and their business was at first to officiate at the altar, for which they had a competent maintenance by offerings; but now they are laymen, and have certain fees with the parson, on christenings, marriages, burials, &c. besides wages, for their maintenance. *Count. Pars. Compan. 83, 84.* They are to be twenty years of age at least, and known to be of honest conversation, sufficient for their reading, singing, &c. And their business consists chiefly in responses to the minister, reading lessons, singing psalms, &c. And in the large parishes of London some of them have deputies, to despatch the business of their places, which are more gainful than common rectories. The law looks upon them as officers for life; they are regarded by the common law as persons who have freeholds in their offices; and, therefore, though they may be punished, yet they cannot be deprived, by ecclesiastical censures. 1 Comm. 395.

A mandamus lies to restore a parish clerk who has been improperly deprived of his office. In a case in *Comp. 370*, Lord Mansfield said, it was settled, that a parish clerk was a temporal officer, and the minister must show ground for turning him out.

Parish clerks are generally appointed by the minister, unless there is a custom for the parishioners or churchwardens to choose them; in which case the canon cannot abrogate such custom; and when chosen it is to be signified to, and they are to be sworn into their office by, the archdeacon. *Cro. Cur. 589; Can. 91.* And if such custom appears, the Court of B. R. will grant a mandamus to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right. 1 Comm. 395. A parish clerk may make a deputy without licence of the ordinary; *Strange, 942*; but he cannot sue in the spiritual court for fees as being a temporal officer. 2 *Strange, 1108.*

By the 59 Geo. 3. c. 134. § 29. the parish clerks of churches or chapels built under that statute or the 58 Geo. 3. c. 45. are to be annually appointed by the ministers, but the subsequent acts for the building of additional churches do not contain any provision on the subject.

PARISHIONER, parochianus.] An inhabitant of or belonging to any parish, lawfully settled therein. Parishioners are compellable to put things in decent order; but the judgment of the majority is the only rule for the degrees of that decency; and the court inclined that a rate for that purpose is binding; as for moving the communion-table out of the body of the church into the chancel, or raising it higher, &c. 7 Mod. 70.

Parishioners have a right to view parish books. 11 Mod. 134. Parishioners are a body politic to many purposes; as to

vote at a vestry if they pay scot and lot; and they have a sole right to raise taxes for their own relief, without the interposition of any superior court; may make by-laws to mend the highways, and to make banks to keep out the sea, and for repairing the church, and making a bridge, &c. or any such thing for the public good; and by 3 & 4 Wm. 8. c. 11. to tax and levy poor-rates, and to make and maintain fire-engines; and by 9 Geo. 1. c. 28. for purchasing workhouses for the poor. *Arg. 8 Mod. 354.* See further *Churchwardens, Overseers, Poor, Vestry.*

With respect to the testimony of parishioners, see *Evidence, II.*

PARISH OFFICERS. Divers persons are exempted from serving parish offices on account of their professions, viz. physicians and surgeons, apothecaries, dissenting ministers, &c. See *Churchwarden, Constable.*

PARK, Lat. *parcus*, Fr. *parque*, i. e. *locus inclusus*.] A large quantity of ground inclosed and privileged for wild beasts of chase, by the king's grant or by prescription. 1 *Inst.* 283.

Manwood defines a park to be a privileged place for beasts of venery, and other wild beasts of the forest and chase, *tam sylvestres, quam campestres*; and differs from a chase or warren, in that it must be inclosed; for if it lies open, it is good cause of seizure into the king's hands, as a thing forfeited; as a free chase is, if it be inclosed; besides, the owner cannot have an action against such as hunt in his park, if it lies open. *Manw. Forest Laws; Crompt. Jurisd.* 148.

To a park three things are required: 1. A grant thereof; 2. Inclosures by pale, wall, or hedge; 3. Beasts of a park, such as the buck, doe, &c. And where all the deer are destroyed, it shall no more be accounted a park; for a park consists of vert, venison, and inclosure; and if it is determined in any of them, it is a total disparking. *Cro. Car.* 59, 60.

No man can erect a park without licence under the broad seal; for the common law does not encourage matter of pleasure, which brings no profit to the commonwealth. But there may be a park in reputation, erected without lawful warrant; and the owner may bring his action against persons killing his deer. *Wood's Inst.* 207.

The king may by letters-patent dissolve his park. 2 *Lit. Abr.* 273.

Parks as well as chases are subject to the common law, and are not to be governed by the forest laws. 4 *Inst.* 314.

A park, says *Blackstone*, is an inclosed chase extending only over a man's own grounds. The word park, indeed, properly signifies an inclosure; but yet it is not every field or common which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park; for the king's grant, or at least immemorial prescription, is necessary to make it so. 1 *Inst.* 283; 2 *Inst.* 199; 11 *Rep.* 86. Though now the difference between a real park, and such inclosed grounds, is, in many respects, not very material; only that it is unlawful at common law for any person to kill any beasts of park or chase, except such as possess the franchises of forest, chase, or park. 2 *Comm. c.* 3. p. 38. But this latter doctrine is strenuously combated by Mr. Christian in his Annotations on the Commentaries. See further, *Game*; also *Chase, Forest, Warren, &c.*

It is said, there are only 781 parks in England. *Bro. Abr. tit. Action sur Statute, pl.* 48; *Co. Lit.* 223; 2 *Inst.* 199; 11 *Co. Rep.* 86. Though no information or criminal proceeding can be instituted for assuming to make a new park. 2 *Ld. Raym.* 1409; 1 *Str.* 637.

The ancient statutes relating to offences committed in parks, were all repealed by the 7 & 8 Geo. 4. c. 27. preparatory to the new enactments of the 7 & 8 Geo. 4. c. 29. the provisions of which will be found under tit. *Deer-Stealers.*

PARK-BOTE. Signifies to be quit of inclosing a park, or any part thereof. 4 *Inst.* 308.

PARLE HILL. *Spelman* gives this description of it. *Collis vallo plerumque munitus, in loco campestri, ne insidus exponatur; ubi convenire olim solebant centuriæ aut vicine incolæ ad lites inter se tractandas et terminandas* Scotts reor Grith hail, q. *Mons pacificationis, cui asyli privilegia concedebantur et in Hiberniâ frequenter videmus, the Parle and Parling Hills.* *Spelm. Gloss.*

PARLIAMENT.

PARLIAMENTUM. The derivation of the word is uncertain and its *etymon*, if we were to follow the imaginations of various authors, subject even to some degree of ridicule. It seems properly to be derived from the French *parler*, to speak. Freedom of speech being of the essence of representation, and without which such a national council can have no effect. The word (which was first applied to general assemblies of the states under Louis VII. in France, about A. D. 1150,) was not used in England till the reign of Henry III. and the first mention of it in our statute law is in the preamble to *stat. Westm.* 1. 3 Ed. 1. A. D. 1272. When therefore it is said parliaments met before that era, it is by a licence of speech considering every national assembly as a parliament. See 1 *Comm. c.* 2. p. 147; and the notes there. Parliament may be defined to be

THE LEGISLATIVE BRANCH of the supreme power of GREAT BRITAIN; consisting of the king, the lords spiritual and temporal; and the knights, citizens, and burgesses, representatives of the commons of the realm; in parliament assembled.

- I. *Of the Antiquity and Origin of Parliament.*
- II. *The Manner and Time of its assembling.* And see VIII.
- III. *Its constituent Parts.*
- IV. *The Laws and Customs of Parliament as an aggregate Body.*
 1. *As relates to its Power and Jurisdiction.*
 2. *As relates to the Privileges of its Members; and see tit. Peers, Privileges.*
- V. *The Laws and Customs and particular Privileges of the House of LORDS.*
 1. *As Members of Parliament.*
 2. *In their Judicial Capacity; and see ante, IV. 1; and tit. Peers, Privilege.*
- VI. *The Laws and Customs of the House of COMMONS.*
 - (A.) *As relates to levying Taxes.*
 - (B.) *As relates to the Election of Members to serve in Parliament.*

And herein,

1. *Of the Qualifications and Registration of Electors for Counties, Cities, &c.*
2. *Of the Qualifications of the Elected.*
3. *Proceedings at Elections; wherein of the Duty of returning Officers, and Proceedings before Election-Committees.*
- VII. *The Method of Business, and particularly in the passing of Acts in both Houses; and see tit. Statute.*
- VIII. *Of the Adjournment, Prorogation, and Dissolution of Parliaments.*

I. SOME authors say that the ancient Britons had no such assemblies, but that the Saxons had; which may be collected from the laws of King Ina, who lived about the year 712. And William the First, called the Conqueror, having divided this land among his followers, so that every one of them should hold their lands of him in *capite*, the chief of these were called barons, who thrice every year assembled at the

king's court, viz. at Christmas, Easter, and Whitsuntide, among whom the king used to come in his royal robes, to consult about the public affairs of the kingdom. This king called several parliaments, wherein it appears that the free-men or commons of England were also there, and had a share in making laws; he, by settling the court of parliament, so established his throne, that neither Briton, Dane, nor Saxon could disturb his tranquillity. The making of his laws were by act of parliament, and the accord between Stephen and Henry II. was made by parliament; though all the times since have not kept the same form of assembling the states. *Doddridge's Antiq. Parliament.*

There was a parliament before there were any barons; and if the commons do not appear, there can be no parliament; for the knights, citizens, and burgesses represent the whole commons of England, but the peers only are present for themselves, and none others. *Doddr.*

Coke affirms that many parliaments were held before the Conquest; and produces an instance of one held in the reign of Alfred; he likewise gives us a conclusion of a parliament held by Athelstan, where mention is made that all things were enacted in the great synod, or council at Grately, whereat was Archbishop Wulfhelme, with all the noblemen or wise men, whom the king called together. 1 *Inst.* 110. It is apparent, (says Mr. Prynne,) from all the precedents before the time of the Conquest, that our pristine synods and councils were nothing else but parliaments; that our kings, nobles, senators, aldermen, wise men, knights and commons, were present and voting in them as members and judges; and Sir Henry Spelman, Camden, and other writers, prove the commons to be a part of the parliament in the time of the Saxons, but not by that name, or elected as consisting of knights, citizens, and burgesses. *Pryn. Sovereign Pow. Parliament.*

As to the origin of the present House of Commons, our authors of antiquity vary very much; many are of opinion that the commons began not to be admitted as part of the parliament, upon the footing they are now, until the 40 H. 3. because the first writ of summons of any knights, citizens, and burgesses, is of no ancients date than that time. But the great charter, in the 17th year of King John, (about which time the sanction of *barones majores et minores* is supposed to have been made *per regem, barones, et liberos homines totius regni.*)

Selden says, that the borough of St. Albans claimed by prescription in the parliament 8 Ed. 2. to send two burgesses to all parliaments, as in the reigns of Edward I. and his predecessors, which must be the time of King John; and so before the reign of King Henry III. And in the reign of Henry V. it was declared and admitted, that the commons of the land were ever a part of the parliament. *Selden's Tit. Hon.* 709. Poynore Virgil, Hollinshed, Speed, and others mention that the commons were first summoned at a parliament held at Salisbury, 16 H. 1.; Sir Walter Raleigh, in his treatise of the *Prærogative of Parliaments*, thinks it was anno 18 H. 1. And Mr. Hallam finds another beginning for them, viz. in the reign of King Henry II.

In this part of the subject Blackstone thus expresses himself: and in his commentaries will be found, as on other subjects, the summary of former opinions, illuminated by the powerful mind of that great commentator. See 1 *Comm.* c. 2.

The original, or first institution of parliaments, is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. But it is certain that long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm; a practice which seems to have been universal among the northern nations; particularly the Germans, and carried by them into all the countries of Europe, which they overran at the dissolution of the Roman empire.

With us in England this general council hath been held immemorially, under the several names of *Michel Synoth*, or great council; *Michel Gemote*, or great meeting; and more frequently *Wittena Gemote*, or the meeting of wise men. It was also styled in Latin, *Commune concilium regni*; *Magnum concilium*; *Regis curia magna*; *Conventus magnatum, vel procerum*; *Assisa generalis*; and sometimes *Communitas regni Anglorum*. *Glanv. l. 13. c. 32*; *l. 9. c. 10*; *Pref. 9 Rep.*; 2 *Inst.* 526. We have instances of its meeting to order the affairs of the kingdom, to make new laws, and to mend the old; or, as *Fleta, l. 2. c. 2.* expresses it, "*novis injuriis emeris nova constituere remedia*;" so early as the reign of Ina, king of the West Saxons; Offa, king of the Mercians; and Ethelbert, king of Kent, in the several realms of the heptarchy. And, after their union, the *Mirror*, c. 1. § 3. informs us, that King Alfred ordained for a perpetual usage, that these councils should meet twice in the year, or oftener, if need be, to treat of the government of God's people; how they should keep themselves from sin, should live in quiet, and should receive right. Our succeeding Saxon and Danish monarchs held frequently councils of this sort, as appears from their respective codes of laws; the titles whereof usually speak them to be enacted either by the king with the advice of his *Wittena-gemote*, or wise men, as, "*hæc sunt instituta, quæ Edgarus rex consilio sapientum suorum instituit*;" or to be enacted by these sages with advice of the king, as, "*hæc sunt judicia, quæ sapientes consilio regis Ethelstani instituerunt*;" or lastly, to be enacted by them both together, as, "*hæc sunt institutiones, quas rex Edmundus, et episcopi sui, cum sapientibus suis, instituerunt.*"

There is also no doubt but these great councils were occasionally held under the first princes of the Norman line. *Glanvil*, who wrote in the reign of Henry II. speaking of a particular amount of an amercement in the sheriff's court, says, it had never yet been ascertained by the general assizes or assembly, but was left to the custom of particular counties. *Glanv. l. 9. c. 10.* Here the general assize is spoken of as a meeting well known, and its statutes or decisions are put in a manifest contradistinction to custom or the common law. And in Edward III's time, an act of parliament, made in the reign of William the Conqueror, was pleaded in the case of the abbey of St. Edmund's Bury, and judicially allowed by the court. *Year-Book*, 21 E. 3. c. 60.

Hence it indisputably appears, that parliaments or general councils are coeval with the kingdom itself. How those parliaments were constituted and composed is another question, which has been matter of great dispute among our learned antiquaries; and particularly whether the commons were summoned at all; or if summoned, at what period they began to form a distinct assembly. It is however generally agreed, that in the main the constitution of parliament, as it now stands, was marked out so long ago as the seventeenth year of King John, A. D. 1215, in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally, and all other tenants in chief under the crown, by the sheriff and bailiffs; to meet at a certain place, with forty days' notice, to assess aids and scutages, when necessary. And this constitution has subsisted, in fact, at least from the year 1266, 49 Henry III.; there being still extant writs of that date to summon knights, citizens, and burgesses to parliament; the former of which may be seen in *Elysinge*, c. 1. § 2. Mr. Hallam says these writs are not extant, but agrees that this is the undoubted origin of popular representation. See *Hallam's Middle Ages*, vol. iii. 40; and see *Littleton's Hist. of Hen. II.* vol. ii. p. 276; vol. iv. p. 79, 106.

In fine, parliament is the highest and most honourable, and absolute court of justice in England; consisting of the king, the lords of parliament, and the commons; the lords being divided into spiritual and temporal; and the commons

divided into knights of shires or counties: citizens out of cities; and burgesses from boroughs; the words of the old Latin writ to the sheriff for the election being—*Duos milites gladiis cinctos magis idoneos et discretos comitatûs tui; et de quolibet civitate comitatûs tui duos civis; et de quolibet burgo duos burgenses, de discretioribus et magis sufficientibus, &c.* 1 Inst. 109.

II. The parliament is to be summoned by the king's writ or letter issued out of Chancery, by advice of the privy council, at least forty days before it begins to sit.

This is a provision of the *Magna Charta* of King John; *Faciemus summoneri, &c. ad certum diem, scilicet ad terminum quadraginta dierum, ad minus; et ad certum locum.* Black. Mag. Ch. Joh. c. 14. It is enforced by the 7 & 8 W. 3. c. 25. which enacts that there shall be forty days between the teste and the return of the writ of summons.

This time is now, by practice, generally extended to fifty days or more, in consequence of the union with Scotland and Ireland. The term of fifty days is mentioned in the act of union with Scotland (5 Ann. c. 8. art. 22.) as the period to be allowed by proclamation for assembling the first parliament of Great Britain. See 2 Hats. 235.

By the 53 Geo. 3. c. 89. for the more regular conveyance of writs for the election of members of parliament, it is enacted, that when any new parliament shall be called, as also in all cases of vacancy of seats, the messenger of the great seal shall carry the writs directed to the sheriff of London and Middlesex, to the office of such sheriff; and all other writs to the general post-office in London, for which the post-master (or his deputy) shall give receipts, and shall despatch such writs free of postage, by the first post or mail after the receipt, under cover to the officer to whom the writs shall be directed, and to no other person whatever; with directions to the post-master in the country to deliver such writs to such officer, and take receipt for the same, and transmit such receipt to the post-master general. Sheriffs, &c. shall give notice, to the post-master general, of the town or place where their office is held; and where such place is within London, Westminster, or Southwark, an account thereof shall be sent to the messenger of the great seal, who shall carry the writs to such office, as in the case of the writs to the sheriffs of London, &c. Persons neglecting to comply with the directions of the act, are declared guilty of a misdemeanor.

Before this act, several irregularities and inconveniences had occurred by the delay or corruption of the officer concerned in conveying the writs.

It is a branch of the royal prerogative that no parliament can be convened by its own authority; meaning by the authority of the lords and commons only, who in common parlance, though not in strictness of law, are considered as the parliament; or by the authority of any, except the king alone. And this prerogative is founded upon a very good reason; for supposing the lords and commons had a right to meet spontaneously without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met, and half absented themselves, who shall determine which is really the legislative body, the part assembled, or that which stays away? It is therefore necessary that the parliament should be called together at a determinate time and place; and highly becoming its dignity and independence that it should be called together by none but one of its own constituent parts; and of the three constituent parts, this office can only appertain to the king, as he is a single person, whose will may be uniform and steady; the first person in the nation being superior to both houses in dignity; and the only branch of the legislature that has a separate existence, and is capable of performing any act at a time when no parliament is in being. Nor is it an exception to this rule, that by some modern statutes, on the demise of a king or queen, if there be then no parlia-

ment in being, the last parliament revives, and it is to sit again for six months, unless dissolved by the successor; for this revived parliament must have been originally summoned by the crown.

It is true that by the 16 Car. 1. c. 1. it was enacted, that if the king neglected to call a parliament for three years, the peers might assemble and issue out writs for choosing one, and, in case of neglect of the peers, the constituents might meet and elect one themselves. But this, if ever put in practice, would have been liable to all the inconveniences just stated; and this act itself was deemed so highly detrimental and injurious to the royal prerogative, that it was repealed by the 16 Car. 2. c. 1. From thence therefore no precedent can be drawn; and in fact it is an exception which fully proves the rule.

It is also true that the Convention Parliament, which restored King Charles the Second, met above a month before his return; the lords by their own authority, and the commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of parliament; and that the said parliament sat till the twenty-ninth of December, full seven months after the Restoration, and enacted many laws, several of which are still in force. But this was for the necessity of the thing, which supersedes all law; for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. And the first thing done after the king's return was to pass an act declaring this to be a good parliament, notwithstanding the want of the king's writs. See 12 Car. 2. c. 1. So that as the royal prerogative was chiefly wounded by their so meeting, and as the king himself, who alone had a right to object, consented to waive the objection, this cannot be drawn into an example in prejudice of the rights of the crown. Besides, we should also remember, that it was at that time a great doubt among the lawyers, whether even this healing act made it a good parliament; and held by very many in the negative; though it seems to have been too nice a scruple. 1 Sid. 1. And, perhaps out of abundant caution, it was thought necessary to confirm its acts in the next parliament, by 13 Car. 2. c. 7, 14.

It is likewise true, that at the time of the Revolution, A.D. 1688, the lords and commons, by their own authority, and upon the summons of the Prince of Orange, (afterwards King William,) met in a convention, and therein disposed of the crown and kingdom. But it must be remembered that this assembling was upon a like principle of necessity as at the Restoration; that is, upon a full conviction that King James II. had abdicated the government, and that the throne was thereby vacant; which supposition of the individual members was confirmed by their concurrent resolutions when they actually came together. And in such a case as the palpable vacancy of the throne, it follows *ex necessitate rei*, that the form of the royal writs must be laid aside, otherwise no parliament can ever meet again. For let us put another possible case, for the sake of argument, that the whole royal line should at any time fail and become extinct, which would indisputably vacate the throne; in this situation it seems reasonable to presume that the body of the nation, consisting of lords and commons, would have a right to meet and settle the government; otherwise there must be no government at all. And upon this, and no other principle, did the convention in 1688 assemble. The vacancy of the throne was precedent to their meeting without any royal summons, not a consequence of it. They did not assemble without writ, and then make the throne vacant by the king's abdication; but the throne being previously vacant by the king's abdication, they assembled without writ, as they must do, if they assembled at all. Had the throne been full, their meeting would not have been regular; but, as it was really empty, such meeting became absolutely necessary. And accordingly it is declared by 1 W. & M. st. 1. c. 1. that this convention was really the two houses of parliament, notwithstanding the want of writs or other de-

fects of form. So that notwithstanding these two capital exceptions, which were justifiable only on a principle of necessity, (and each of which, by the way, induced a revolution in the government,) the rule laid down is, in general, certain, that the king only can convoke a parliament.

And this by the ancient statutes of the realm, 4 E. 3. c. 14; 36 E. 3. c. 10. he is bound to do every year, or oftener if need be. Not that he is, or ever was, obliged by these statutes to call a new parliament every year, but only to permit a parliament to sit annually for the redress of grievances, and despatch of business, if need be. These last words are so loose and vague, that such of our monarchs as were inclined to govern without parliaments, neglected the convoking them sometimes for a very considerable period, under pretence that there was no need for them.

Mr. *Greenwell Sharp*, in a treatise published some years ago, argued ingeniously against this construction of the 4 E. 3. c. 14, and maintained that the words if need be, referred only to the preceding word oftener: so that the true signification was, that a parliament should be held once every year at all events; and, if there should be any need to hold it oftener, then more than once. The contemporary records of parliament, in some of which it is so expressed without any ambiguity, prove beyond all controversy that this is the true construction. See *Christian's* note on 1 Comm. c. 2. p. 153.

To remedy the evil of discontinuing parliaments it was enacted, that the sitting and holding of them shall not be intermitted above three years at the most. And by the 1 W. & M. st. 2 c. 2. it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held frequently. This indefinite frequency is again reduced to a certainty by the 6 W. & M. c. 2; which enacts, as the statute of Charles the Second had done before, that a new parliament shall be called within three years after the determination of the former.

Though the 6 W. & M. c. 2. confirms the 16 Car. 2. c. 1. in declaring that there shall not be a longer interval than three years after a dissolution; yet the 16 Car. 2. seems to be more extensive in its operation, by providing that there shall not be an intermission of more than three years after any sitting of parliament, which will extend also to a prorogation. But as the mutiny-act, and the land-tax and malt-tax acts, are passed for one year only, the statutes enforcing the meeting of parliament are now of little avail; for the parliament must necessarily be summoned, for the despatch of business, once every year. In ancient times, indeed, especially before the abolition of the feudal tenures at the restoration of Charles II. our kings had such a revenue, independent of parliament, that they were enabled to reign many years together without the assistance of parliament, and in defiance of the statutes made to compel their calling it together. 1 Comm. 153. in n.

By statute, 5 R. 2. st. 2 c. 4. every person and community, having summons to parliament, shall come thither, on pain to be amerced, or otherwise punished: and if the sheriff do not summon the cities and boroughs as usual, he shall likewise be punished.

III. THE constituent parts of a parliament are, the king's majesty, sitting there in his royal political capacity; and the three estates of the realm, the lords spiritual, the lords temporal, (who sit together with the king in one house,) and the commons, who sit by themselves in another. Others however, more consonantly with the common understanding of the nature and powers of parliament, consider the three estates of the realm to be king, lords, and commons. See *post*. And the king, and these three estates together, form the great corporation or body politic of the kingdom, of which the king is said to be *caput, principium, et finis*. 4 Inst. 1, 2; *Eliz. c. 3*; *Hale of Parl.* 1. For, upon their coming to-

gether, the king meets them either in person or by representation, without which there can be no beginning of a parliament; and he also has alone the power of dissolving them. 4 Inst. 6; 1 Comm. c. 2. p. 153.

The learned commentator then proceeds to show how highly necessary it is, for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative; and how each branch of our civil polity supports and is supported, regulates and is regulated, by the rest. See 1 Comm. p. 153—155; and as to the general extent of the king's power, prerogative, &c. title *King*.

On holding a parliament, the king, the first day, sits in the upper house, and by himself, or the lord chancellor, shows the reason of their meeting; then the commons are commanded to choose their speaker; which done, two or three days afterwards he is presented to the king, and after some speeches is allowed and sent down to the House of Commons; when the business of parliament proceeds. 12 Rep. 115. See *post*, VI.

A parliament cannot begin, on return of the writs, without the king in person, or by representation; and by representation two ways, either by a guardian of England, by letters-patent under the great seal, when the king is out of the realm; or by commission, to certain lords in case of indisposition, &c. when his majesty is at home. 4 Inst. 6, 7. And if any parliament is to be holden before a guardian of the realm, there must be a special commission to begin the parliament; but the teste of the writs of summons is to be in the guardian's name: and by an ancient law, 8 Hen. 5. c. 1. if the king, being beyond sea, cause a parliament to be summoned in this kingdom, by writ under the teste of his lieutenant, and after the king returns hither, the parliament shall proceed without any new summons.

In the 5th year of Henry V. a parliament was holden before John Duke of Bedford, brother to the king, and guardian of the kingdom. Anno 3 Ed. 4. a parliament was begun in the presence of the king, and prorogued to a further day; and then William Archbishop of York, the king's commissary by letters-patent, held the same parliament, and made an adjournment, &c. And 28 Eliz. the queen by commission under the great seal, (reciting, that for urgent occasions she could not be present in her royal person,) did authorize John Whitgift, Archbishop of Canterbury, William Lord Burleigh, Lord Treasurer of England, and Henry Earl of Derby, Lord Steward, to hold a parliament, &c. *Ad faciendum omnia et singula, &c. necnon ad parlamentum adjournand. et prorogand., &c.* And in the upper part of the page, above the beginning of the commission, is written, *Domina Regina representatur per commissionarios, viz. &c.* These commissioners sat on a form before the cloth of state, and after the commission read, the parliament proceeded.

A parliament may be holden at any place the king shall assign. See 1 Comm. p. 153. in n.

The constituent parts of parliament, next in order, are the spiritual lords. These consist of two archbishops, and twenty-four bishops for England. At the dissolution of monasteries by Henry VIII. twenty-six mitred abbots, and two priors, were likewise comprised among them; *Seld. Title Hon.* 2. 2, 27; a very considerable body, and in those times equal to half the number of the temporal nobility; *Co. Litt.* 97; see 4 Inst. 1; by which it appears, that the number of the temporal nobility was then one hundred and six.

All these prelates hold, or are supposed to hold, certain ancient baronies, under the king: for William the Conqueror thought proper to change the spiritual tenure of frankalmoign or free alms, under which the bishops held their lands during the Saxon government, into the feudal or Norman tenure by barony; which subjected their estates to all civil charges and assessments, from which they were before exempt; *Gillb. Hist. Exch.* 55; *Spelm. W.* 1. 291; and in right of succes-

sion to those baronies, which were unalienable from their respective dignities, the bishops and abbots were allowed their seats in the House of Lords. *Glanv.* 7. 1; *Co. Litt.* 97; *Sel. Title Hon.* 2, 5, 19.

Upon the curious question of the right under which the bishops sit in the House of Peers, whether in respect of their baronies, or by usage and custom, see a learned note by *Hargrave*, *Co. Litt.* 134 b, n. 1; and also one by *Hallam* (*Middle Ages*, chap. viii.) and the authorities cited by them. Names of the greatest weight will be found on both sides of the question: upon one side it is clear that bishops sat in the Wittenagemote, under the Anglo-Saxon monarchs; and also that the bishops of the sees erected by Henry VIII. sit now in parliament, though neither did the former, nor do the latter, hold their lands by baronial tenure. *Coleridge's note to 1 Comm.* 156.

Four have been added to the spiritual lords since the union with Ireland, viz. one archbishop and three bishops from that country, who sit by rotation of session. See 40 *Geo.* 3. c. 29. § 1. (Irish); and also 3 & 4 *W.* 4. c. 37. § 52, 55.

But though these lords spiritual are, in the eye of the law, a distinct estate from the lords temporal, and are so distinguished in most of our acts of parliament, yet in practice they are usually blended together under the one name of the lords; they intermix in their votes, and the majority of such intermixture binds both estates. And from this want of a separate assembly, and separate negative, of the prelates, some writers have argued (*Whitelocke on Parl.* c. 72; *Warburt. Alliance*, b. 2 c. 3.) very cogently, that the lords spiritual and temporal are now in reality only one estate; *Dyer*, 60; which is unquestionably true in every effectual sense; though the ancient distinction between them still nominally continues. For if a bill should pass their house there is no doubt of its validity, though every lord spiritual should vote against it; of which *Selden* and *Sir E. Coke* give many instances; as on the other hand, it seems that it would be equally good, if the lords temporal present were inferior to the bishops in number, and every one of those temporal lords gave his vote to reject the bill; though *Sir E. Coke* seems to doubt whether this would not be an ordinance, rather than an act of parliament. 4 *Inst.* 25; see *Selden's Barrenage*, p. 1. c. 6; *Gibbs. Cod.* 286. See also 2 *Inst.* 585, 6, 7; and *Keilw.* 184; where it is holden by the judges, 7 Henry VIII. that the king may hold a parliament without any spiritual lords. This was also exemplified, in fact, in the first two parliaments of Charles II. wherein no bishops were summoned; till after the repeal of the 16 *Car.* 1. c. 27. by 13 *Car.* 2. st. 1. c. 2.

No rational or ancient principle can perhaps be suggested, why the bishops should not have exactly the same legislative functions as the other peers of parliament; the style of the house of lords, viz. the lords spiritual and temporal, was probably intended as a compliment to the bishops; to express the precedence that they are entitled to, before all the temporal barons; which originally was the only character that gave a claim to a seat in the house of lords. Unless precedents could be found to the contrary, there seems to be no reason to doubt, but that any act at this day would be valid, though all the temporal lords or all the spiritual lords were absent. 1 *Comm.* 156. n.

In the 1 *Eliz.* c. 2. the style of the parliament is, the lords and commons in parliament assembled; and the same style was also used in the 1 *Eliz.* c. 11. a revenue act.

On the 18th of February, 1641, a motion was made in the Irish house of lords, "that as all the bishops were against a representation about certain grievances, the lords spiritual should not be named;" upon which the judges were consulted; and their opinion was, that in any act or order which passed, it must be entered "by the lords spiritual and temporal." 1 *Mountm.* 344.

The lords temporal consist of all the peers of the realm, (the bishops not being in strictness held to be such, but

merely lords of parliament, *Staundf. P. C.* 153,) by whatever title of nobility distinguished; dukes, marquesses, earls, viscounts, or barons; as to which dignities, see this Dictionary, under those titles, and title *Peers*. Some of these sit by descent, as do all ancient peers; some by creation, as do all new-made ones; others, since the union with Scotland and Ireland, by election; which is the case of the sixteen peers, who represent the body of the Scotch nobility, and are only chosen for one parliament, and the twenty-eight temporal lords, elected for life by the peers of Ireland. See *Ireland*.

The number of lords temporal is indefinite, and may be increased, at will, by the power of the crown; and once, in the reign of queen Anne, there was an instance of creating no less than twelve together; in contemplation of which, in the reign of George I. a bill passed the House of Lords, and was countenanced by the then ministry, for limiting the number of the peerage. This was thought by some to promise a great acquisition to the constitution; by restraining the prerogative from gaining the ascendant in that august assembly, by pouring in at pleasure an unlimited number of new-created lords. But the bill was ill relished, and miscarried in the House of Commons, whose leading members were then desirous to keep the avenues to the other house as open and as easy as possible.

This bill was twice tried in the lords in 1718 and 1719. On the first occasion, part of the measure was that Scotland should have 25 hereditary, instead of 15 elective peers; the number 25, on failure of heirs-male, to be supplied from the other members of the Scotch peerage. It excited considerable ferment; and though supported by the ministers, and even by the irregular proceeding of a direct message from the king, it was found expedient to withdraw it. On the second occasion it passed the lords, but was thrown out in the commons by a majority against the administration of 269 to 177. See the *Histories of Tindal, Smollet, and Bolshan*. Walpole opposed the measure very ably; see his life by Cox. It was supported by Addison in *The Old Whig*; and opposed by Steele in *The Plebeian*. See 1 *Comm.* 157, and *Coleridge's note* there.

The commons, according to the present ordinary acceptation of the term, consist of all such men of property in the kingdom as have not seats in the House of Lords: indeed, in its largest sense, the word comprehends all who are not peers of the realm, but it appears, in its original signification, to have been confined to those only who had a right to sit, or had a right to vote for representatives in the House of Commons; and in its strict parliamentary sense, in which alone it ought to be here understood, it means the knights, citizens, and burgesses who are the representatives in the House of Commons, of the various counties, cities, and boroughs in the kingdom. In a free state, every man who is supposed a free agent ought to be in some measure his own governor; and therefore a branch, at least, of the legislative power should reside in the whole body of the people. In the state of Great Britain it is wisely contrived, that the people should do that by their representatives, which it is impracticable to perform in person; representatives chosen by a number of minor and separate districts, wherein all the voters are, or easily may be, distinguished. The counties are therefore represented by knights, elected by the proprietors and occupiers of lands; the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part, or supposed traders and interest, of the nation. Previous to the Reform Act the number of English representatives was five hundred and thirteen; Scotch forty-five, and of Irish one hundred; in all, six hundred and fifty-eight. Now the English members (including those for Wales) amount to 500, the Scotch to 69, and those for Ireland to one hundred and four. See *post*.

Every member, though chosen by one particular district when elected and returned, serves for the whole realm, at the end of his coming thither is not particular, but general, not barely to advantage his constituents, but the common-

wealth; to advise his majesty (as appears from the writ of summons) "*de communi consilio, super negotiis quibusdam arduis et urgentibus, regem, statum, et defensionem regni Angliæ, et ecclesiæ Anglicanæ, concernentibus.*" 1 Inst. 14. And therefore (says Blackstone) he is not bound to consult with, or take the advice of, his constituents upon any particular point, unless he himself thinks it proper or prudent so to do. See 1 Comm. 157, 159.

These are the constituent parts of a parliament; the king, the lords spiritual and temporal, and the commons; parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two only of the three, is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though, in times of madness and anarchy, the House of Commons once passed a vote (which, as has been well observed, was a natural prologue to the tragic drama immediately afterwards performed), "that whatsoever is enacted or declared for law, by the commons in parliament assembled, hath the force of law; and all the people of this nation are concluded thereby, although the consent and concurrence of the king or House of Peers be not had thereto," yet, when the constitution was restored in all its forms, it was particularly enacted by the 13 Car. 2. c. 1. that if any person shall maliciously or advisedly affirm, that both or either of the houses of parliament have any legislative authority, without the king, such person shall incur all the penalties of a *premeditated*. We must, however, remark the exceptions to this rule; arising, as has been already mentioned, from state necessity.

IV. 1. The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. 1 Inst. 86. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws; concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the power where that absolute despotic power, which must in all governments reside somewhere, is intrusted, by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown; as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land; as was done, in a variety of instances, in the reigns of King Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom, and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do every thing that is not naturally impossible; and therefore some are not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament; an expression, however, which in fact seems to signify nothing more than the supreme sovereign power of the state, or a power of action uncontrollable by any superior. In this sense, the king, in the exercise of his prerogatives, and the House of Lords, in the interpretation of laws, are also omnipotent; that is, free from the control of any superior provided by the constitution. It is, that what the parliament doth, no authority upon earth can undo. So that it is a matter most essential to the peace of this kingdom, that such members be delegated to this important trust as are most eminent for their probity, their fortitude, and their knowledge; for it was a known maxim of the great lord treasurer, Burleigh, "that England could never be ruined but by a parliament;" and as Mr. Matthew Hale observes, this being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way

fall upon it, the subjects of this kingdom are left without all manner of remedy of parliament. Hale, of Parl. 49. To the same purpose, Montesquieu (though it is earnestly to be hoped too hastily), presages, that as Rome, Sparta, and Carthage have lost their liberty, and perished, so the constitution of England will, in time, lose its liberty, will perish; it will perish whenever the legislative power shall become more corrupt than the executive. Sp. L. l. 11. c. 6.

It must be owned that Mr. Locke, and other theoretical writers have held, that "there remains still inherent in the people a supreme power to remove or alter the legislature, when they find that legislature act contrary to the trust reposed in them; for when such trust is abused, it is thereby forfeited, and devolves to those who gave it." Locke on Gov. part 2. § 149, 227. But, however just this conclusion may be in theory, we cannot practically adopt it: nor take any legal steps to carry it into execution, under any dispensation of government at present actually existing. For this devolution of power to the people at large includes in it a dissolution of the whole form of government established by that people: reduces all the members to their original state of equality; and, by annihilating the sovereign power, repeals all positive laws whatsoever, before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for such a desperate event, as must render all legal provision ineffectual. So long, therefore, as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute, and without control.

In order to prevent the mischiefs that might arise, by placing this extensive authority in hands, either incapable or improper to manage it, it is provided by custom and the law of parliament, that no one shall sit or vote in either house unless he be twenty-one years of age. Whitel. c. 50; 4 Inst. 47. This is also expressly declared by 7 & 8 W. 3. c. 25. § 8 with regard to the House of Commons, doubts having arisen from some contrary adjudications, whether or not a minor was incapacitated from sitting in that house. This provision has not always been strictly attended to.

By 30 Car. 2. st. 2; 1 Geo. 1. c. 13. no member shall vote or sit in either house till he hath, in presence of the house, taken the oath of allegiance, supremacy, and abjuration; (the latter now, as altered by 6 Geo. 3. c. 53. see Oaths;) and subscribed and repeated the declaration against transubstantiation, and invocation of saints, and the sacrifice of the mass. But now, by the 10 Geo. 4. c. 7. s. 2. the acts requiring the declarations against transubstantiation, and the invocation of saints, and the sacrifice of the mass, to be made or subscribed by any of his majesty's subjects, as a qualification for sitting in parliament, or for the exercise of any office or civil right, are repealed; and any person professing the Roman Catholic religion, may sit and vote in either house of parliament, on taking the oath set forth in the act.

Formerly, by the 7 Jac. 1. c. 6, and other acts, no member was permitted to enter into the House of Commons till he had taken the oaths of allegiance and supremacy before the lord steward, or his deputy; who, on the first day of the meeting of a new parliament, attended in a room adjoining to the House of Commons, and administered the oath to the members present; and he then executed a commission or deputation, empowering any one or more of a great number of members specified to administer the oath to others.

But by the 1 & 2 W. 4. c. 9. in order to put an end to the idle repetition of these oaths, the acts requiring them to be taken before the lord steward were repealed.

Aliens, unless naturalized, were likewise, by the law of parliament, incapable to serve therein; and now, by the 12 & 13 Wm. 3. c. 2. no alien, even though he be naturalized, shall be capable of being a member of either house of parliament.

There are not only these standing incapacities, but if any

person is made a peer by the king, or elected to serve in the House of Commons by the people, yet may the respective houses, upon complaint of any crime in such person, and proof thereof, adjudge him disabled, and incapable to sit as a member, and this by the law and custom of parliament. 1 *Comm. c. 2. p. 163*; cites *Whitel. of Parl. c. 102*; and refers to *Lords' Journ. 3 May, 1620*; 13 May, 1624; 26 May, 1725; *Comm. Journ. 14 Feb. 1680*; 21 Ju. 1628; 9 Nov. 1; 21 Jan. 1640; 6 Mar. 1676; 6 Mar. 1711; 17 Feb. 1769.

The sentence immediately preceding was not in the first editions of the Commentaries, but was added, no doubt, with an allusion to the Middlesex election; the circumstances of which were briefly these:—On January, 19, 20, 1764, J. W. was expelled the House of Commons for being the author of a seditious libel: at the next election, in 1768, he was elected for the county of Middlesex; and on February 3, 1769, it was resolved that J. W. Esq., who had acknowledged himself to be the author and publisher of a paper which the house had previously pronounced to be an insolent, scandalous, and seditious libel, (not the same for which he was expelled in the former parliament,) and who had been convicted in the Court of K. B. of having printed and published a seditious libel, and three obscene and impious libels, and being sentenced to twenty-two months imprisonment, be expelled this house. A new writ having been ordered for the county of Middlesex, Mr. W. was re-elected, without opposition; and on February 17, 1769, it was resolved, "that J. W., Esq., having been in this session of parliament, expelled this house, was and is incapable of being elected a member to serve in this present parliament:" and the election was declared void, and a new writ ordered. He was a second time re-elected without opposition; and, on March 17, 1769, the house again declared the election void, and ordered a new writ. At the next election, Mr. Luttrell, who had vacated his seat for the purpose, by accepting the Chiltern Hundreds, offered himself a candidate against Mr. W. Mr. W. had 1,143 votes, and Mr. Luttrell 296. Mr. W. was again returned by the sheriff. On April 15, 1769, the house resolved, that Mr. Luttrell ought to have been returned, and ordered the return to be amended; allowing fourteen days for a petition against the return: one was accordingly presented on April 29, by certain freholders of Middlesex; and, on the 8th of May, the house resolved that Mr. Luttrell was duly elected. On the 3d of May, 1769, it was resolved, that the resolutions of the 17th February, 1769, should be expunged from the journals of the house, as being subversive of the rights of the whole body of electors of this kingdom. And at the same time it was ordered, that all the declarations, orders, and resolutions, respecting the election of J. W. should be expunged.

The history of England furnishes many instances of important constitutional questions that have deeply agitated the minds of the people of this country, which can raise little or no doubt in the minds of those who view them at a distance, uninfluenced by interest or passion. It has been thought by some that it was a violent measure in the House of Commons to expel a member for the libels which he had published; but that the subsequent proceedings were agreeable to the law of parliament, that is, to the law of the land, the authorities referred to, by the learned commentator, seem most unanswerably to prove. But what shall be considered to be the law with regard to the incapacities of candidates, since these proceedings were expunged, it will be difficult indeed to determine. The resolution to expunge implies the correction of an error, after mature deliberation. If it had not been declared that a former resolution was subversive of the rights of electors, it might perhaps have been supposed that it was intended only as a personal compliment to the member expelled. But it does not state in what instance the former resolution was so subversive. They who wish for a certain

knowledge of their rights and liberties must lament such a want of precision; but they must wait with patience till the wisdom of the house has occasion to explain its own judgment; and which, perhaps, if it ever should arise, would be attended with the same outrageous spirit of party, which too frequently influences the decision of public questions; acting rather upon grounds and motives, which ought to be discarded with the most religious impartiality, than on the broad basis of sound constitutional doctrine, or the real interest and welfare of the subject. See 1 *Comm. c. 2. p. 163*, and *n.* More modern instances of expulsion have occurred; but being acquiesced in without contest, are not sufficient to settle the interest of such proceedings.

As every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the High Court of Parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti*: a law much better to be learned out of the rolls of parliament, and other records, and by precedents and continual experience, than can be expressed by any one man. 4 *Inst. 50*. It will be sufficient to observe, that the whole of the law and custom of parliament has its original from this one maxim, "that whatever matter arises, concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere." 4 *Inst. 15*. Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a member; nor will either house permit the subordinate courts of law to examine the merits of either case. But the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of the parliament itself, and are not defined and ascertained by any particular stated laws. See *post*, VI. (B.) 8.

The courts at Westminster may judge of the privilege of parliament, where it is incident to a suit the court is possessed of; and courts may proceed to execution between the session of parliament, notwithstanding appeals lodged, &c. 2 *St. Tr. 66, 209*.

The king cannot take notice of any thing, said to be done in the House of Commons, but by the report of the house, and every member of the house of parliament has a judicial place, and cannot be a witness. 4 *Inst. 15*. When Charles I. being in the House of Commons, and sitting in the speaker's chair, asked the then speaker, whether certain members (whom the king named) were then present? the speaker from a presence of mind which arose from the genius of that house, readily answered, "That he had neither eyes to see, nor tongue to speak, but as the house was pleased to direct him." *Atkin's Jurisd. and Antiquity of the House of Commons*, Hen. VIII., having commanded Sir Thomas Gaudy, one of the judges of the King's Bench, to attend the chief justice, and know their opinion, whether a man might be attainted of high treason by parliament, and never called to answer; the judges declared it was a dangerous question, and that the high court of parliament ought to give examples to inferior courts for proceeding according to justice, and no inferior court could do the like. *Lex Constitution. 161*.

The House of Lords is a distinct court from the Commons, to several purposes: they try criminal causes on impeachments of the commons; and have an original jurisdiction for the trial of peers, upon indictments found by a grand jury; they also try causes upon appeals from the Court of Chancery, or upon writs of error to reverse judgments in B. R. &c. See *post*, V. 2. And all their decrees are as judgments. The judgments given in parliament may be executed by the lord chancellor. 4 *Inst. 21*; *Finch. 233*; 1 *Leo. 165*. Also the House of Commons is a distinct court to many purposes: they examine the right of elections, expel their own members, and commit them to prison, and sometimes other persons, &c.

See *post*. And the book of the clerk of the House of Commons is a record. 2 *Inst.* 536; 4 *Inst.* 23. The commons, coming from all parts, are the grand inquest of the realm; to present public grievances and delinquents to the king and lords to be punished by them; and any member of the House of Commons has the privilege of impeaching the highest lord in the kingdom. *Wood's Inst.* 455.

The High Court of Parliament is the supreme court in the kingdom, not only for the making, but also for the execution of laws; by the trial of great and enormous offenders, whether lords or commons, in the method of parliamentary impeachment. Acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, are new laws made *pro re natâ*, and by no means an execution of such as are already in being: but an impeachment before the lords, by the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom. 1 *Hal. P. C.* 150. A commoner, it is said, by Blackstone, who quotes authorities to prove his position, cannot be impeached before the lords for any capital offence, but only for high misdemeanors; a peer may be impeached for any crime: but it appears, that the right of impeaching a commoner, even in capital cases, has been claimed and asserted by the lords. See 4 *Comm.* 260, in n.

The commons usually, in case of an impeachment of a peer for treason, address the crown to appoint a lord high steward for the greater dignity and regularity of their proceedings; which high steward was formerly elected by the peers themselves, though he was generally commissioned by the king. 1 *Hal. P. C.* 350. But it hath been strenuously maintained, that the appointment of an high steward in such cases is not indispensably necessary, but that the house may proceed without one.

This custom of impeachment has a peculiar propriety in the English constitution; for though in general the union of the legislative and judicial powers ought to be most carefully avoided, yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes as the ordinary magistrates either dares not, or cannot punish. Of these, the representatives of the people, or House of Commons, cannot properly judge; because their constituents are the parties injured, and can therefore only impeach. In the trial of such an impeachment, ordinary tribunals would naturally be swayed by the authority of so powerful an accuser. Reason, therefore, will suggest that this branch of the legislature, which represents the people, must bring its charge before the other branch, which consists of the nobility, who have neither the same interests nor the same passions as popular assemblies. It is proper that the nobility should judge, to insure justice to the accused; as it is proper that the people should accuse, to insure justice to the commonwealth. 4 *Comm.* c. 1, p. 264. See *Impeachment*.

As to the court of the lord high steward for the trial of a peer, see titles *Lord High Steward*, *Peers*, and as to the jurisdiction of the House of Lords, see *further, post*, V. 2.

At the reign of Henry IV. although the old form of the king's appointing receivers and tryers, or auditors, of petitions at the beginning of every parliament, (which is traceable as far back as 33 Edward I. and is still serupulously adhered to, was continued, and so ever gave the opportunity of calling the judicature of the whole parliament to action, yet in point of fact the exercise of jurisdiction in parliament over causes seems to have gradually fallen into disuse. It has been suggested, however, that though this appointment of receivers or tryers, or auditors, of petitions, at the beginning of a new parliament, has long, in point of practice, been considered as mere form, yet it seems still to be open to any

person at the beginning of a new parliament, by presenting a petition to the receivers, within the time limited by the appointment of them, to call into action the duties both of receivers, and of tryers or auditors, and so to resuscitate the ancient manner of exercising parliamentary jurisdiction, or at least to put a test to its susceptibility of being so revived. It is to be considered also that there may be cases which, from the failure of other modes of relief may, at some future time, induce the trial of such an experiment. See *Hargrave's Preface to Hale's Jurisdiction of the Lords' House of Parliament*, p. 6, 35. See also *post*, V. 2.

2. The privileges of parliament are very large and indefinite; and therefore when in 31 *Hen.* 6. the House of Lords propounded a question to the judges concerning them, the chief justice, Sir John Fortesque, in the name of his brethren, declared, that they ought not to make answer to that question, for it hath not been used aforetime that the justices should in anywise determine the privileges of the High Court of Parliament; for it is so high and mighty in its nature, that it may make law; and that which is law, it may make no law; and the determination and knowledge of that privilege belongs to the lords of parliament, and not to the justices. *Seld. Baronage*, p. 1. c. 4. Privilege of parliament was principally established, in order to protect its members, not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown. If therefore all the privileges of parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member, and violate the freedom of parliament. The dignity and independence of the two houses are therefore in a great measure preserved by keeping the privileges indefinite. But in answer to this observation it has been justly remarked, that clearness and certainty are essentially necessary to the liberty of Englishmen; and that rights and privileges cannot well be claimed, unless they are ascertained and defined.

And a recent author (1 *Dwarris on Statutes*, 67) remarking on this passage in Blackstone, submits that there is nothing in the ancient writers upon our laws and constitution, to countenance this pernicious doctrine of later times, that the privileges of parliament are indeterminate and undefined. The *dictum* which is so much relied upon, of Chief Justice Fortesque, in Thorpe's case, (31 *Hen.* 6.) "that the determination and knowledge of the privileges of parliament, belong to the lords of parliament, and not to the justices," evidently only refers to those cases in which the privilege of parliament comes in debate in the House of Lords, where the judges have no deliberate voice. It admits, no doubt, the unquestioned right, in either house of parliament, of exclusively determining upon any violation of their *acknowledged* privileges. In this sense the two houses respectively are properly said to be the judges of their own privileges, that is, whether they are infringed in the particular instance; as they are also the persons to judge of their own peculiar forms and manner of proceeding, *suis propriis legibus et consuetudinibus subsistit*. The judges will only take cognisance of the privileges of parliament, when questions concerning those privileges are brought incidentally or collaterally before them for judgment in the way of action, when the court is obliged to determine the question, to prevent a failure of justice. They will not decide the point when it comes before them directly, because cognizance of such matters belongs *ad aliud examen*; but only when, as Sir Thomas Jones said in Lord Shaftesbury's case, it is an incident to the cause before them. But when privileges claimed by the House of Commons have been submitted to the examination of the courts, and have been found not to be sanctioned by law, they have, whatever votes may

before have passed upon the subject, been disallowed. See *Sir Orlando Bridgman's judgment in Benyon & Evelyn, T. 14 Car. 2. Rol. 2558.*

No resolution of either house of parliament can make that a legal privilege which was not so before. The law of parliament may be expounded from time to time, but cannot be extended or altered without the authority of the whole legislature. 2 *State Trials*, 615; 1 *Mod.* 144. Lord Coke also chiefly relies upon Thorpe's case, but this authority entirely fails of establishing the position it is brought to maintain, that such privileges are undefined and arbitrary; and that members of either house, constituting only as part of the sovereign power in the state (which alone can make new laws) have an unlimited right of creating and extending exceptions in their own favour.

Again, when Fortesque says of parliament, "It is so high and mighty in its nature, that it may make law, and that which is law, it may make no law," he is enlarging upon the transcendent power of parliament in its collective and legislative capacity. And what is obviously true of the whole, becomes monstrous when applied to a part. "It was not their part to judge of the parliament, which may judge of the law." The reason, says *Selden*, to "judge of the law," signifies that they, the parliament, can judge whether a law be good or not, in order to approve it and to re-enact it, or to repeal a law, &c. *Selden's Judicature*, 55.

But these matters, it is then said, are governed by different rules "construed by another law." For "as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law; so it is said by Lord Coke that the court of parliament has its own peculiar law, called the *lex et consuetudo Parliamenti*; a law, a *multis ignorata, a paucis cognita*. 1 *Inst.* 11.

Upon this well-known sentence, Lord Holt has pointedly remarked, that "if the *lex Parliamenti* is a *multis ignorata*, it is only because they will not apply themselves to learn it." But to be the subject of accurate knowledge, this peculiar law, these exclusive maxims, must be fixed and not vague, ascertained and not arbitrary; discoverable, where doubts arise, by examining the records of parliament, and inquiring what was claimed and allowed in similar instances in former times, precisely in the same manner as the common law, consisting of unwritten customs and maxims, is discovered and construed by the judges of the several courts of law, from experience and study, and familiarity with the judicial decisions of their predecessors. The records of the courts, carefully preserved and registered, furnish conclusive evidence of such customs as form part of the common law. The members of the respective houses of parliament, when called upon to declare the law of parliament, (of which the privilege of parliament will be properly insisted to form a part,) are the judges of that law, and will have recourse to the same means of ascertaining and determining what that law is.

The law of parliament, it is apprehended, is a part of the *lex terræ*, in other words of the common law; to be expounded indeed by that house, to which any matter that arises properly relates, and nowhere else; but definable, nevertheless, and subject to certain prescriptive limitations, as being determined by regular custom. To be as explicit as possible on so delicate a subject, it is contended that the decisions of the two houses of parliament, in cases of which they are admitted to be the sole competent judges, are fully governed by usage, and controlled by precedents; and in declaring this law they act judicially, and are under a solemn obligation *jus dicere*, and not *jus dare*.

To the objection that this customary law has not any particular stated maxims, it is answered in the words of the venerable authority already frequently referred to, (Lord Coke, 4 *Inst.* 1.) that the whole of it is to be sought and found "in the rolls of parliament," "in precedents and re-

cords," "and continual experience" of the "custom of parliament."

"The only method," says *Hatsell*, "of knowing what are the privileges of the House of Commons, is to consult the records of that house, and to search into the history of parliament for those cases in which a claim of privilege has been made, and to examine whether it has been admitted or refused." 1 *Hats.* 2.

"The law of parliament," says *Hallam*, "as determined by regular custom, is incorporated into our constitution, but not so as to warrant an indefinite uncontrollable assumption of power in any case, least of all in judicial proceedings, where the form and the essence of justice are unseparable from each other."

There are several privileges of the members of either house, which are sufficiently certain and notorious. These are privileges of speech, of person: (and before the 10 *Geo. 3. c. 50.* of their domestics, and of their lands and goods). As to the first, privilege of speech, see *Strode's Act*, 4 *Hen. 8.*

In the year 1667 the commons resolved that *Strode's Act* was a general law, "extending to indemnify all and every the members of both houses of parliament, in all parliaments for and touching any bills, speaking, naming, or declaring of any matter or matters in and concerning the parliament to be convened and treated of;" and that it was "a declaratory law of the ancient and necessary rights and privileges of parliament."

By the 1 *W. & M. st. 2. c. 2.* it is expressly declared as one of the liberties of the people, "that the freedom of speech, and debates, and proceedings in parliament, ought not to be impeached, or questioned, in any court or place out of parliament." And this freedom of speech (with other privileges) is particularly demanded of the king in person, by the speaker of the House of Commons, at the opening of every new parliament. See also 1 *Dwarris on Stat.* 73.

But though a member of parliament has privilege of speech in parliament, and may express his sentiments in his place in either house, without being questioned in any place or court out of parliament; 1 *Esp.* 226; yet if he publish his speech, it then becomes a subject of common law jurisdiction, and he is liable to an action for libel. 1 *M. & S.* 273.

If any member of either house speak words of offence in a debate, after the debate is over he is called to the bar where commonly on his knees he receives a reprimand from the speaker; and if the offence be great, he is sent to the Tower. When the bill of attainder of the Earl of Strafford, was passing the House of Commons, Mr. Taylor, a member of that house, opposed it with great violence, and being heard, to explain himself, was commanded to withdraw; whereupon it was resolved he should be expelled the house, be made incapable of ever serving as a member of parliament, and should be committed prisoner to the Tower, there to remain during the pleasure of the house: and he was called to the bar, where he kneeled down, and Mr. Speaker pronounced the sentence accordingly. And Sir John Elliot, Daniel Hollis, and another person having spoken these words, "The king's privy council, his judges and his counsel learned in the law, have conspired to trample under their feet the liberties of the subject, and of this house," an imputation was filed against them by the attorney-general; and afterwards for that the king having signified his pleasure to the House of Commons for the adjournment of the parliament, and the speaker endeavouring to get out of the chair, they violently &c. detained him in the chair, upon which there was a great tumult in the house, to the terror of the commons then assembled, and against their allegiance, in contempt of the king, his crown and dignity: the defendants pleaded to the jurisdiction of the court; and refused to answer but in parliament; but it was adjudged, that they ought to answer, the charge being for a conspiracy, and seditious acts, to prevent the adjournment of the parliament, which may be examined

out of it; and not answering, judgment was given against them, that Sir John Elliot should be committed to the Tower, and fined 2000*l.*; and the other two were fined and imprisoned. *Cro. Car.* 130.

To an action of trespass against the speaker of the House of Commons for forcibly, and with the assistance of armed soldiers, breaking into the plaintiff's house and arresting him there, and taking him to the Tower and imprisoning him there; a justification was pleaded that a parliament was held, in which the plaintiff was a member of the House of Commons; that the House having resolved a certain letter to be a libellois paper reflecting on the rights and privileges of the House, the plaintiff had admitted that the letter was printed by his authority, and that the House had therefore resolved that plaintiff had been thereby guilty of a breach of the privileges of the house; and that the house had ordered that for his offence he should be committed to the Tower, and that the speaker should issue his warrant for that purpose, which was done accordingly; and that the serjeant-at-arms, by virtue of such warrant, went to plaintiff's house, where he then was, to execute such warrant; but because the outer door was fastened, and he could not enter, after audible publication of his purpose, and demand made of admission, he, with the assistance of the soldiers, broke and entered plaintiff's house and arrested and conveyed him to the Tower. And this justification was held a legal bar to the plaintiff. *Burdett v. Abbott*, 14 *East*, 1; 4 *Taunt.* 401.

Another action was brought by the same plaintiff against the serjeant-at-arms for excess of authority in executing the same warrant by employing the military to assist him; when a verdict was found for the defendant. *Burdett v. Colman*, 14 *East*, 168.

Since the Revolution it has not been unusual for the House of Commons, in cases of libel and some other offences which may be thought to deserve a punishment different from what the house has power to inflict, to order the attorney-general to prosecute the offenders, or to address the king praying he will give directions for that purpose.

The other privileges of persons, (and heretofore of servants, lands, and goods,) are immunities as ancient as Edward the Confessor, in whose laws we find this precept, "*Ad signatos venientibus sive summoniti sint, sive per se quid agendum habuerint sit simonia pœna.*" 1 *Edw. Conf. c. 1.* This enacted formerly not only privilege from illegal violence, but also from legal arrests and seizures by process from the courts of law.

To assault by violence a member of either house (or formerly his menial servants), is a high contempt of parliament, and there punished with the utmost severity. It has likewise peculiar penalties annexed to it in the courts of law by the 4 *Hen.* 4. c. 8. and 11 *Hen.* 6. c. 11. By this latter statute assaulting a member coming to or attending in parliament incurs the penalty of double damages, and the offender shall make fine and ransom.

Sir Robert Brandling made an assault upon Mr. Witherington, a member of the House of Commons, in the country, before his coming up to parliament; and Sir Robert was sent for to the house and committed to the Tower. And anno 15 *Jas.* 1. some speeches passed privately in the house between two of the members, and one of them going down the parliament stairs struck the other, who catching at a sword in his man's hand, endeavoured to return the stroke: and complaint to the House of Commons they were both ordered to attend, where he who gave the blow was committed to the Tower during the pleasure of the house. *Dict.*

Neither can any member of either house be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of parliament. See *post*.

But all other privileges which derogate from the common law in matters of civil right are now at an end, save only as to the freedom of the member's person, which in a peer (by

the privilege of peerage) is for ever sacred and inviolable; and in a commoner (by the privilege of parliament) for forty days after every prorogation, and forty days before the next appointed meeting; which is now in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. 2 *Lea.* 72. It does not appear that the privilege from arrest is limited to any precise time after a dissolution; but it has been determined by all the judges that it extends to a convenient time. *Col. Pitt's case*, 2 *Str.* 988. *Prynne* is of opinion that it continued for the number of days the member received wages after a dissolution, which were in proportion to the distance between his home and the place where the parliament was held. 4 *Parl. Writs*, 68.

As to all other privileges which obstruct the ordinary course of justice, they were restrained by 12 *Will.* 3. c. 3; 2 & 3 *Ann.* c. 18; 11 *Geo.* 2. c. 24; and are now totally abolished by 10 *Geo.* 3. c. 50, which enacts that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament; which shall not be impeached or delayed by pretence of any such privilege, except that the person of a member of the House of Commons shall not thereby be subject to any arrest or imprisonment. Likewise, for the benefit of commerce, it is provided by the 6 *Geo.* 4. c. 16. § 9. that any trader, having privilege of parliament, may be served with legal process for any just debt to such amount as will support a commission; and unless he makes satisfaction within one month, it shall be deemed an act of bankruptcy, and that a commission of bankrupt may be issued against such privileged traders in like manner as against any other. And by § 11. any trader disobeying any decree or order in equity, or order in bankruptcy or lunacy, or denying the payment of money, shall, after being served with a peremptory order, be deemed to have committed an act of bankruptcy. And now by the act for uniformity of process, 2 *Will.* 4. c. 39, the process for proceeding against a member of parliament according to the 6 *Geo.* 4. c. 16. shall be in the form prescribed by that act, schedule No. 6, instead of the summons or original bill of summons and copy thereof mentioned in the statute; and see 1 *Deacon's B. Law*, 809. See *Bankrupt*.

The 52 *Geo.* 3. c. 144. enacts, that whenever a commission of bankruptcy shall issue against a member of the House of Commons, under which he is declared a bankrupt, he shall, during twelve months from the issuing thereof, be incapable of sitting and voting, unless within that period the commission shall be superseded, or the debts paid to the creditors in full, (or, in case of dispute, be secured by the bond of the bankrupt, with two sureties.) If the commission is not superseded, or the debts satisfied within the above-mentioned time, the speaker shall issue his warrant for the electing a new member.

The 12 *Will.* 3. c. 3. enacted, that actions might be prosecuted against persons entitled to privilege of parliament after a dissolution or prorogation, until a new parliament was called, or the same was re-assembled; and after adjournment for above fourteen days the respective courts might proceed to judgment, &c. Proceedings were to be by summons and distress infinite, &c. until the parties should enter a common appearance; and the real or personal estates of the defendants to be sequestered for default of appearance; but the plaintiff not to arrest their bodies; and where any plaintiff should be staid or prevented from proceeding by privilege of parliament, he should not be barred by any statute of limitation, or nonsuited, dismissed, or his suit discontinued for want of prosecution; but at the rising of the parliament should be at liberty to proceed to judgment and execution. This act was by 10 *Geo.* 3. c. 50. extended to Scotland. See *Privilege*.

By the 2 & 3 *Ann.* c. 18. actions may be prosecuted against officers of the revenue, or in any place of public trust, for any forfeiture or breach of trust, &c. and shall not be staid

by colour of privilege; but such officer, being a member of parliament, is not subject to arrest during time of privilege, but summons, attachment, &c.

The 11 Geo. 2. c. 24. enacted, that any person might prosecute a suit in any court of record, &c. in Great Britain or Ireland, against any peer or member of the House of Commons, or other person entitled to privilege, in the intervals of parliaments or of sessions, if above fourteen days; and the said courts, after dissolutions or prorogations, were to give judgment and award execution; and no proceedings in law against the king's immediate debtor, as such, &c. to be delayed under colour of such privilege; only the person of a member of parliament, &c. shall not be arrested or imprisoned.

The 10 Geo. 3. c. 50. already mentioned, provides, that suits may at any time be prosecuted in courts of record, equity, or admiralty, and courts having cognizance of causes matrimonial and testamentary against peers and members of the House of Commons, and their servants, &c. Process by *distringas* being found dilatory, the court out of which the writ proceeds may order the issues to be sold, and the money arising thereby to be applied to pay the costs to the plaintiff, and the surplus to be retained till the appearance of the defendant, &c. When the purpose of the writ is answered the issues are to be returned; or if sold, the money remaining is to be repaid. Obedience to the rule of the court of King's Bench, Common Pleas, or Exchequer, may be enforced by distress infinite.

In equity privilege of parliament is allowed to members of the House of Commons, on whose neglect to appear, after being served with the subpoena, the first process of contempt to enforce appearance is sequestration, not attachment; and the rules of practice for compelling appearance are the same as regards them and peers, except that it is not necessary to leave with them a copy of the bill with the subpoena, as in the case of peers.

The 47 Geo. 3. st. 2. c. 40. enacts, that when any bill of complaint, &c. shall be exhibited in any court of equity against any member of the House of Commons, it shall not be necessary to leave a copy of the bill with the defendant, or at his place of abode, as formerly practised; but the person exhibiting such bill may proceed for want of appearance or answer, to sequester the real and personal estate of such member, as before he might have done, after leaving the copy of the bill with the defendant.

Under the 45 Geo. 3. c. 124. § 3. if a member of parliament refuse to appear after the whole course of process has been used, the court may order an appearance to be entered for him, and the bill to be taken *pro confesso*. See 16 Ves. 436. And by the fifth section of the above act bills for discovery may after such default as therein mentioned be also taken *pro confesso*. See 17 Ves. 368.

To show what the subject has gained by the provisions of the several acts of parliament, which have restrained the privileges of members, so far as they could be used as exceptions to, or infringements on, public justice, we need only recur to the cases in our books treating of the privileges of parliament, relating to arrests of members of the House of Commons, and their servants, and the manner of their confinement, release, &c. In the first year of King James I., Sir Thomas Shirley, a member of parliament, was arrested four days before the sitting of the parliament, and carried prisoner to the Fleet; on which a warrant issued to the clerk of the crown for a *habeas corpus* to bring him to the house, and the serjeant was sent for in custody, who being brought to the bar, and confessing his fault, was excused for that time: but on hearing counsel at the bar for Sir Thomas Shirley, and the warden of the Fleet, and upon producing precedent, Simpson the prosecutor, who caused the arrest to be made, was ordered to be committed to the Tower; and afterwards the warden refusing to execute the writ of *habeas corpus*, and the delivery of Sir Thomas being denied, was likewise committed to the

Tower; though on his agreeing to deliver up Sir Thomas, upon a new warrant for a new writ of *habeas corpus*, and making submission to the house, he was discharged; this affair taking up some time, the house entered into several debates touching their privilege, and how the debt of the party might be satisfied; which produced three questions: *First*, Whether Sir Thomas Shirley should have privilege? *Secondly*, Whether presently, or to be deferred? And, *Thirdly*, Whether the house should petition the king for some course for securing the debt of the party, according to former precedents, and saving harmless the warden of the Fleet? All which questions were resolved; and a bill was brought in to secure Simpson's debt, &c. which also occasioned the statute 1 Jac. 1. c. 13. for relief of plaintiffs in writs of execution, where the defendants in such writs are arrested, and set at liberty by privilege of parliament: by which a fresh prosecution and new execution may be had against them when that privilege ceases. *Lex Constitution.* 141. And anno 19 Jan 1 one Johnson, a servant to Sir James Whitlock, a member of the House of Commons, was arrested by two bailiffs; who being told Sir James Whitlock was a parliament-man, answered, that they had known greater men's servants than his taken from their masters in time of parliament: and this appearing, the two bailiffs were sentenced to ask pardon of the house and Sir James Whitlock, on their knees; that they should both ride on one horse bare backed, back to back, from Westminster to the Exchange, with papers on their breasts signifying their offence; all which was to be executed presently, *sedente curia*. *Lex Const.* 141.

In action of debt on a bond, conditioned that B. B. should render himself at such a day and place to an arrest; defendant pleaded, that by privilege of parliament, the members &c. and their servants ought not to be arrested by the space of forty days before the sitting of the parliament, nor during the session, nor forty days afterwards; and that B. B. was at that time servant to such a member of parliament, so as he could not render himself to be arrested; upon demurrer to this plea, it was adjudged ill, because he might have rendered himself at the time and place; but then it would be at their peril if he was arrested. 1 Brownl. 81.

The only way by which courts of justice could anciently take cognizance of privilege of parliament was by writ of privilege, in the nature of a *supersedeas*, to deliver the party out of custody when arrested in a civil suit. *Dyer*, 59; 4 *Pryn* out of custody when arrested in a civil suit. *Dyer*, 59; 4 *Pryn* out of custody when arrested in a civil suit. *Brev. Parl.* 757. For when a letter was written by the speaker to the judges to stay proceedings against a privileged person, they rejected it as contrary to their oath of office. *Latch.* 58, 150; *Noy*, 83. But since the 12 W. 3. c. 3 which enacts, that no privileged person shall be subject to arrest or imprisonment, it hath been held, that such arrest is irregular *ab initio*, and that the party may be discharged upon motion. *Stra.* 989. It is to be observed, that there is no precedent of any such writ of privilege, but only in civil suits and that the 1 Jac. 1. c. 13. and that of King William (which remedy some inconveniences arising from privilege of parliament) speak only of civil actions. And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes; or, as it hath been frequently expressed, of treason, felony, and breach (or surety) of the peace. See 4 *Inst.* 25. Whereby it seems to have been understood, that no privilege was allowable to the members, their families, or servants, in any crime whatsoever; for all crimes are treated by the law as being *contra pacem domini regis*: and instances have not been wanting wherein privileged persons have been convicted of misdemeanors, and committed or prosecuted to outlawry, even in the middle of a session; which proceeding has afterwards received the sanction and approbation of parliament. *Mic.* 16 E. 4. *Sac. Ld. Raym.* 1461; *Comm. Journ.* 1726.

To which may be added, that in the year 1763, the case of writing and publishing seditious libels was resolved, by the

houses, not to be entitled to privilege; and that the reasons upon which that case proceeded extended equally to every indetenable offence. It is not a little remarkable, that the contrary position had been determined, a short time before, in the case of the *King v. Wilkes*, by the Court of Common Pleas. A circumstance which serves to show that the house, where the case of one of their own members and the dignity of the house were concerned, made a determination more consonant to the rules of general municipal justice, and more favourable to political subordination, than one of the courts of law in Westminster-Hall. See 2 *Wils.* 159, 251; *Comm. Journ.* 24 Nov.; *Lords' Journ. & Protest*, 29 Nov. 1763; *Case of the Seven Bishops, Philipp's State Trials*.

The chief, therefore, if not the only, privilege of parliament in criminal cases, seems to be the right of each house to receive immediate information of the imprisonment or detention of any member, with the reason for which he is detained; a practice that is daily used upon the slightest military accusations, preparatory to a trial by a court martial; and which is recognized by the several temporary statutes for suspending the *habeas corpus* act (particularly 31 *Geo.* 3. c. 54), whereby it is provided, that no member of either house shall be detained, till the matter of which he stands suspected be first communicated to the house of which he is a member, and the consent of the said house obtained for his commitment or detaining. But yet the usage has uniformly been, ever since the Revolution, that the communication has been subsequent to the arrest. 1 *Comm.* c. 2.

The privilege of franking letters, which was claimed by the House of Commons when the post-office was first established, is regulated by the 1 *Geo.* 1. c. 24; 21 *Geo.* 3. c. 2. § 57, & 35 *Geo.* 3. c. 53; by which acts many abuses that had crept into the practice were restrained. By the latter statute, no letter exceeding an ounce in weight shall go free, or any letter directed by a member, unless he be within twenty miles of the post town from which it is sent on the day, or the day before, it is put into the office. No member can send more than ten, or receive above fifteen letters free from postage in one day.

V. 1. ONE very ancient privilege of peers, considered as members of parliament, is that declared by the Charter of the Forest, (cap. 11.) confirmed in parliament, 9 *Hen.* 3; viz. That every lord, spiritual or temporal, summoned to parliament, and passing through the king's forests, may, both in going and returning, kill one or two of the king's deer without warrant; in view of the forester, if he be present, or on blowing a horn, if he be absent; that he may not seem to take the king's venison by stealth. 1 *Comm.* c. 2.

In the next place they have a right to be attended, and constantly are, by the judges of the Courts of K. B. and C. P. and such barons of the Exchequer as are of the degree of baron, or have been made serjeants at law; as likewise by the king's learned counsel being serjeants, and by the Masters of the Court of Chancery; for their advice in point of law, and for the greater dignity of their proceedings. (The lord chancellor is usually the speaker of the House.)

The secretaries of state, with the attorney and solicitor-general, were also used to attend the House of Peers, and now to this day (together with the judges, &c.) their regular writs of summons, issued out at the beginning of every parliament, *ad tractandum* et *consilium impendendum*, though not *ad consentiendum*; but whenever, of late years, they have been members of the House of Commons, their attendance here hath fallen into disuse. See 31 *Hen.* 8. c. 10; 3 *Ann.* 551; 4 *Inst.* 4, 48; *Hale of Parl.* 140. On account of this attendance there are several resolutions, before the restoration, declaring the attorney general incapable of sitting in the commons. See *post*, VI. (B.) 2. Sir Henry E. 1. member for the University of Oxford, afterwards

Lord Nottingham, and chancellor, was the first attorney general who enjoyed that privilege. *Sim.* 28.

Another privilege is, that every peer, by licence obtained from the king, may make another lord of parliament his proxy, to vote for him in his absence. *Seld. Baronage*, p. 1. c. 1. A privilege which a member of the other house can by no means have; as he is himself but a proxy for a multitude of other people. 4 *Inst.* 12. This licence had long ceased in Ireland: but the proxies in the House of Lords were still entered, in Latin, *ex licentiâ regis*. This created a doubt in Nov. 1788, whether the proxies in that parliament were legal, on account of the king's illness. 1 *Ld. Mountm.* 342. But it seems now to be so much a mere form, that the licence may be presumed, though instances are on record where they have been denied by the king, particularly *an.* 6, 27 & 29 *E.* 3. Proxies cannot be used in a committee. *Ib.* 106. Nor can a proxy sign a protest in England; but he could in Ireland. 2 *Ld. Mountm.* 191. If a peer, after appointing a proxy, appears personally in parliament, his proxy is revoked and annulled. 4 *Inst.* 13. And by the orders of the house no proxy shall vote upon a question of "guilty or not guilty." The order that no lord should have more than two proxies, (i. e. be a proxy for more than two absent lords,) was made *anno* 2 *Car.* 1. because the Duke of Buckingham had no less than fourteen. 1 *Rushm.* 269. Two or more peers may be proxy for one absent peer; but Coke is of opinion, that they cannot vote, unless they all concur. 4 *Inst.* 12; 1 *Wood.* 41.

There is an instance, in *Wight.* 50, where a proxy is called *litera attornatus ad Parliamentum*; which it is in effect. The peer who has the proxy is always called, in Latin, *procurator*. And anciently a commoner was allowed to act as a proxy of a peer in the House of Lords, of which *Elsyne* has given several instances; but now a spiritual lord shall only be proxy for a spiritual lord, and a temporal lord for a temporal.

Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house with the reasons for such dissent, which is usually styled his protest. 1 *Comm.* c. 2. Lord Clarendon relates, that the first instances of protests, with reasons, in England, were in 1641; before which time they usually only set down their names as dissentient to the vote. The first regular protest in Ireland was in 1662. 1 *Ld. Mountm.* 402.

All bills likewise that may, in their consequences, any way affect the right of the peerage, are by the custom of parliament to have their first rise and beginning in the House of Peers; and to suffer no changes or amendments in the House of Commons.

There is also one statute peculiarly relative to the House of Lords, which regulates the election of the sixteen representative peers of North Britain, in consequence of the twenty-second and twenty-third articles of the Union; and for that purpose prescribes the oaths, &c. to be taken by the electors; directs the mode of balloting; prohibits the peers electing from being attended in an unusual manner; and expressly provides, that no other matter shall be treated of in that assembly, save only the election, on pain of incurring a *præmunire*. 6 *Ann.* c. 23.

Most of the other privileges of peers belong to them in their judicial capacity, and not as members of parliament. See further *Peers*.

2 Considered in its judicial capacity, the House of Peers is the supreme court of judicature in the kingdom; having at present no original jurisdiction over causes, but only upon appeals and writs of error to rectify any injustice or mistake of the law committed by the courts below. But this house has original criminal jurisdiction in the cases of im-

peachment by the commons, and of the trial of peers. See those titles: and see *ante*, IV. 1.

To this authority, this august tribunal succeeded of course upon the dissolution of the *Aula Regia*: for as the barons of parliament were constituent members of that court, and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived. They are, therefore, in all causes the last resort, from whose judgment no further appeal is permitted; but every subordinate tribunal must conform to their determinations; the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that (if possible) they will make themselves masters of those questions, upon which they undertake to decide; and in all dubious cases refer themselves to the opinions of the judges, who are summoned by writ to advise them; since upon their decision all property must finally depend. 3 *Comm.* c. 4. p. 57. See also 27 *Eliz.* c. 8; & 31 *Eliz.* c. 1.

To this judicial capacity Blackstone refers the tribunal established by 14 *E. 3.* c. 5. consisting (though now out of use) of one prelate, two earls, and two barons, who are to be chosen at every new parliament, to hear complaints of grievances and delays of justice in the king's courts; and (with the advice of the chancellor, treasurer and justices of both benches) to give directions for remedying those inconveniences in the courts below. See also 27 *Eliz.* c. 8; & 31 *Eliz.* c. 1. This committee seems to have been established, lest there should be a defect of justice, for want of a supreme court of appeal, during any long intermission or recess of parliament; for the statute further directs, "that if the difficulty be so great that it may not well be determined, without assent of parliament, it shall be brought by the said prelate, earls, and barons unto the next parliament, who shall finally determine the same." 3 *Comm.* 58.

It has been well hinted, to all the members of this super-eminent judicature, that when they are declaring what is the law of parliament, their character is totally different from that with which, as legislators, they are invested, when they are framing new laws; and that they ought never to forget the admonition of that great and patriotic chief justice Lord Holt, *viz.* "That the authority of parliament is from the law, and as it is circumscribed by law, so it may be exceeded; and if they do exceed those legal bounds and authority, their acts are wrongful, and cannot be justified any more than the acts of private men." 1 *Salk.* 505. And for the position, that parliaments, in their judicial capacity, are governed by the common and statute laws, as well as the courts in Westminster-Hall, see 4 *Inst.* 14, 15; 2 *St. Tr.* 735.

In the case of the Bishop of London *v.* *Ffytche* it was determined, that a general bond of resignation (given by the clergyman to the patron on his being presented to a living) is simoniacal and illegal: and the House of Lords reversed the judgments of the Courts of C. P. and K. B. to the contrary, though founded on a series of judicial decisions, by which these courts held themselves bound to decide that such bond was not illegal. The question arose on the words of the 31 *Eliz.* c. 6. Some dissatisfaction has been expressed at this determination of the lords: and it has been supposed, that a different judgment might be given on a future occasion. See *Cases in Parliament*, 8vo. title *Clergy*, Ca. 3. But it is generally understood that the lords, to prevent inconsistencies in their judgments, will never permit a question of law, once decided in that house, to be debated again. With respect to the influence which the judgments of the inferior courts ought to have upon the House of Lords, it has been suggested that a distinction may be made between cases arising merely on the common law, and cases which depend

on the construction of a statute. A series of decisions in the courts are the best evidence of a common law: and the lords cannot find any adequate authority to oppose to these decisions in justification of their reversal: but upon the construction of a statute, where there is no reason to suspect any variation from the original, they seem as fully competent to determine a question, after any number of decisions in the courts below, as after the first; and the length of the series can operate no farther than as an object of general convenience. See 2 *Comm.* c. 18. and the note there; and title *Simony*.

On the general question of the jurisdiction of the Lord's House of Parliament; see Lord Hale's treatise on that subject, and Mr. Hargrave's learned preface prefixed. Mr. Hargrave, after recounting the various contests between the two houses of parliament on this subject, states the result in the following terms.

From the year 1717 there has been an absolute cessation of hostility between the lords and commons on the right of judicature in parliament. The lords have ceased to encourage interference with the judicature of the commons over the rights of election—ceased to meddle with original jurisdiction—ceased to countenance attempts to introduce original causes under the disguise of being appellants—ceased to extend their exercise of appellate jurisdiction beyond examining judgments at law under writs of error, and decrees of Courts of Equity upon petition of appeal—ceased to meddle with appeals from sentences of Ecclesiastical Courts, and other courts of special jurisdiction—ceased to advance claims of universal jurisdiction, both original and appellate—ceased to state themselves as being the virtual, absorbing, and inherent representatives of the king and commons in matter of judicature, and in effect for that purpose the full and whole parliament; and as such the supreme and last resort. On the other hand, the commons have ceased to interrupt the exercise of appellate jurisdiction by the lords over decrees of Courts of Equity—nay, they have even forbore to revive considering the rights of the lords to *fine* the commons of England for breach of privilege, and to imprison them on that account beyond the sitting of parliament; notwithstanding the objections heretofore so strongly urged against but not these practices; and notwithstanding the laudible abstinence of the commons themselves from attempting to vindicate the breach of their own privileges, otherwise than by an imprisonment, which, if not sooner determined by their own act, of course ceases when parliament is either dissolved or prorogued. Thus at length the lords have so long acquiesced in the condemnation of their exercise of original jurisdiction, that it seems as if they had never claimed it: and the commons have so long acquiesced in the exercise of appellate jurisdiction by the lords, that it now seems as if it had never been disputed; and however irregular that appellate judicature might be in its origin, it has obtained sanction from long practice.

By the writ of error as now in use, and which appears to have continued, in the same form, from at least the year 1624, after mentioning the king's being informed of error, the king commands the record and process to be sent into parliament "that inspecting the record and process aforesaid, we may cause further to be done thereupon by the assent of the lords spiritual and temporal, in the same parliament assembled, for amending the said error, as of right, and according to the law and custom of England shall be meet to be done."

On the whole it is probable that the great trust of becoming the Court of Judicature in the last appeal, could now were more properly reposed than, as by law it is, in the House of Peers. It is not that the lords are presumed by the constitution to be better acquainted with the law than the judges, whose decisions they are called upon to review: on the contrary, the constitution makes the judges the dignified attend-

ants on the peers for the purpose of informing them in the law. But, when questions have been thoroughly discussed before tribunals, in which the best talents, the longest experience, and the soundest knowledge are allowed to preside, it is felt that for settling the law definitively authority is wanted, more than new lights. In difficult cases the lords usually pronounce such judgments as the twelve judges in fact dictate to them. Yet every one must be sensible that judgments so pronounced are far more weighty as the decree of that august tribunal, than as the mere decision of twelve judges overruling, or even affirming, a previous judgment of other judges. See 1 *Comm.* 12. and *Coleridge's* note there.

VI. (A.) As the House of Lords seem to be politically constituted for the support of the rights of the crown; so the province of the House of Commons is to stand for the preservation of the people's liberties. The commons, in making and repealing laws, have equal power with the lords; and for laying taxes on the subject, the bill is to begin in the House of Commons. And as formerly the laying and levying of new taxes have caused rebellions and commotions, this has occasioned, (particularly anno 9 *L.* 3.) when a motion has been made for a subsidy of a new kind, that the commons have desired a conference with those of their several counties and places, whom they have represented, before they have treated of any such matters. 4 *Inst.* 34.

It is the ancient indisputable privilege and right of the House of Commons, that all grants of subsidies or parliamentary aids, do begin in their house, and are first bestowed by them; although their grants are not effectual, to all intents and purposes, until they have the assent of the other two branches of the legislature. 4 *Inst.* 29. The general reason given, for this exclusive privilege of the House of Commons, is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be answerable if the commons taxed none but themselves; but it is notorious, that a very large share of property is in the possession of the House of Lords; that this property is equally taxable and taxed as that of the commons; and therefore the commons not being the *sole* persons taxed, this cannot be the reason of their having the *sole* right of raising and modelling the supply. The true reason, arising from the spirit of our constitution, seems to be this; the lords being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the crown, and when once influenced, to continue so, than the commons, who are a temporary elective body, freely chosen by the people; it would therefore be extremely dangerous to give the lords any power of framing new taxes for the subject; it is sufficient that they have a power of assenting, if they think the commons too lavish or improvident in their grants. But, so reasonably jealous are the commons of this valuable privilege, that herein they will not suffer the other house to exert any power, except that of rejecting. They will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill; under which appellation are included all bills by which money is directed to be raised upon the subject, for any purpose, or in any shape whatsoever; for the exigencies of government, and collected from such rates, and the like. This rule is even extended to all taxes for canals, paving, provision for the poor, and to every tax in which tolls, rates, or duties are ordered to be collected, and also to all bills in which pecuniary penalties and fines are imposed for offences. 3 *Hatts.* 110. But perhaps it is carried beyond its original spirit and intent, when the money raised is not granted to the crown. Yet Sir *Matthew Hale* mentions one case, founded on the practice of parlia-

ment in the reign of Henry VI. wherein he thinks the lords may alter a money bill; and that is, if the commons grant a tax, as that of tonnage and poundage, for four years; and the lords alter it to a less time, as for two years; here, he says, the bill need not be sent back to the commons for their concurrence, but may receive the royal assent without farther ceremony; for the alteration of the lords is consistent with the grant of the commons. See *Hale on Parliaments*, 65, 66; *Year-Book*, 33 Hen. 6. 17. But such an experiment will hardly be repeated by the lords, under the present improved idea of the privilege of the House of Commons; and, in any case where a money bill is remanded to the commons, all amendments in the mode of taxation are sure to be rejected. And, even if the commons desire to agree with the amendment, the form is to reject the bill so amended by the lords, and to bring in a new bill containing those amendments, solely for the purpose of preserving the privileges of the commons. See *post*, VII. Upon the application of this rule, there have been many warm contests between the lords and commons, in which the latter seem always to have prevailed. See many conferences collected by Mr. *Hatsell*, in his appendix to the third volume, and particularly in appendix D.; the conference of 20th and 22nd April, 1671: the general question is debated with infinite ability on both sides, but particularly on the part of the commons, in an argument, drawn up by Sir *Henenge Finch*, then attorney general; and who there answers the case alluded to by *Hale* from the *Year-Book*.

The following observations upon the power claimed by the House of Commons with respect to money bills, are (with some slight alteration in phraseology) from *Hallam's Constitutional History of England, from Henry VII. to George II.* c. 13.

In our earliest parliamentary records the lords and commons summoned, in a great measure, for the sake of relieving the king's necessities, appear to have made their several grants of supply without a mutual communication, and the latter generally in a higher proportion than the former. These were not in the form of laws, nor did they obtain any formal assent from the king to whom they were tendered in written indentures, entered afterwards on the roll of parliament. The latest instance of such distinct grants from the two houses, so far as can be judged from the rolls, is in the 18th of Edw. III. *Parl. Hist.* 2. 148, 149. But in the 22nd year of that reign, the commons alone granted three fifteenths of their goods in such a manner, as to show beyond a doubt, that the tax was to be levied solely upon themselves. *Parl. Hist.* 2. 200.

After this time the lords and commons are jointly recited in the rolls to have granted them sometimes, as it is expressed upon deliberation had together. In one case it is said that the lords with one assent, and afterwards the commons, granted a subsidy on exported wool. *Parl. Hist.* 2. 300.

A change of language is observable in the reign of Richard II. when the commons are recited to grant, with the assent of the lords; and this seems to indicate not only that in practice the vote used to originate with the commons, but that their proportion of the tax being far greater than that of the lords, especially in the usual imposition on wool and skins, which ostensibly fell on the exporting merchants, the grant was to be deemed mainly theirs, subject only to the assent of the lords. This is, however, so explicitly asserted in a passage on the roll of 9 Henry IV. without any apparent denial, that it cannot be called in question.

The language of the rolls continues to be the same in the following reigns; the commons have the granting, the lords the consenting power. It is even said by the Court of K. B. in a year-book of Edw. IV. that a grant of money by the commons would be binding without the consent of the lords, meaning of course as to commoners only, though the position seems questionable even with that limitation. It might be

almost suspected by considering this remarkably exclusive privilege, of originating grants of money to the crown, as well as by the language of some passages in the rolls of parliament relating to them, that no part of the direct taxes (the tenths or fifteenths of goods), were assessed upon the lords temporal or spiritual, except where they are positively mentioned, as is frequently the case; but this may be an unfounded surmise, or at least only applicable to the earlier period of our parliamentary records, not having, as it appears, been asserted by any who have heretofore turned their attention to the antiquities of our constitution.

These grants continued to be made as before, by the consent indeed of the two houses of parliament, but not as legislative enactments—most of the few instances where they appear among the statutes, are where some condition is annexed, or some relief of grievances so interwoven with them, that they may make part of a new law. See 14 *Edw. 3. st. 1. c. 21.* containing a proviso of the lords not to assent in future to any charge beyond the old custom, without assent of the commons in full parliament. *Stat. 2.* of the same year, the king promises to lay on no charge but by assent of the lords and commons. See also 18 *Edw. 3. st. 2. c. 1.* The commons grant two fifteenths of the commonalty, and two tenths of the cities and boroughs, with a remarkable precedent of appropriation. In two or three instances are found grants of tenths and fifteenths in the statutes, without any other matter. See 14 *Edw. 3. st. 1. c. 20*; 27 *Edw. 3. st. 1. c. 4.*

In the reign of Henry VII. the grants are occasionally inserted among the statutes, but still without any enacting words. See 7 *Hen. 7. c. 11*; 12 *Hen. 7. c. 12.* It is to be remarked that the regular form of separate acts did not commence till after 4 Henry VII.

In the reign of Henry VIII. the form is rather more legislative, and the grants are said to be enacted by the authority of parliament, though the king's name is not mentioned (except in 5 *Hen. 8. c. 17.*) till about the conclusion of his reign, after which a sense of the necessity of expressing his legislative authority seems to have led to its introduction in some part or other of the bill. See 37 *Hen. 8. c. 25.* The lords and commons are sometimes both said to grant, but more frequently the commons with the assent of the lords, as continued to be the case through the reigns of Elizabeth and James I. In the first parliament of Charles I. the commons began to insert the name of the lords in the preamble of bills of supply, reciting the grant as if wholly their own; but in the enacting words adopted the customary form of statutes: this, though once remonstrated against by the Upper House, has continued ever since to be the practice.

The originating power as to taxation was thus indubitably placed in the House of Commons; nor did any controversy arise on that ground. But they maintained also that the lords could not make any amendment whatever in bills sent up to them, for imposing directly or indirectly a charge upon the people. There seems no proof that any difference between the two houses on this score had arisen before the Restoration; and in the convention parliament the lords made several alterations in undoubted money bills, to which the commons did not object. But in 1661 the lords having sent down a bill for paving the streets of Westminster, to which they desired the concurrence of the commons; the latter on reading the bill a first time "observing that it went to lay a charge upon the people, and conceiving that it was a privilege inherent in the Commons' House, that bills of that nature should first be considered there," laid it aside, and caused another to be brought in. *Com. J. 24-29 July, Lords' J. 30 July, 1661.* When this bill was sent up to the lords they inserted a clause to which the commons disagreed, as contrary to their privileges; because the people cannot have any tax imposed upon them, but originally by the

House of Commons. The lords resolved this assertion of the commons to be against the inherent privileges of the House of Peers, and mentioned one precedent of a similar bill in the reign of Mary, and two in that of Elizabeth, which had begun with them. The bill in question was defeated by the unwillingness of either party to recede; but for a few years after, though the point in question was still agitated, instances occur where the commons suffered amendments, and what were now considered as money bills to pass, and others where the lords receded from such amendments, rather than defeat the proposed measure. In April 1671 however, the lords having reduced the amount of an imposition on sugar, it was resolved by the commons, that "in all aids given to the king by the commons, the rate or tax ought not to be altered by the lords." This brought on several conferences between the houses, wherein the limits of the exclusive privilege claimed by the commons were discussed with considerable ability; (and less zeal than in certain disputes concerning judicature;) but (in the opinion of the writer of the History) with a decided advantage, as to precedent and constitutional authority, on the side of the peers. See *Lords & Commons' Journals*, Ap. 17—22. 1679; *Parl. Hist.* iv. 480; and *Hatsell's Precedents*, 109, 368, 409, and see Lord *Anglessea's* "Case stated of the Jurisdiction of the House of Lords in point of Impositions (1656), *Year-Book*, 33 H. 6. 17, that the lords might reduce taxes at least as to the period of their duration."

If the commons, as in early times, had merely granted their own money, it would be reasonable that the house should have, as it claimed, "a fundamental right as to the matter, the measure, and the time." But that the peers, subject to the same burdens as the rest of the community, and possessing no trifling proportion of the general wealth, should have no other alternative than to refuse the necessary supplies of the crown, or to bear their exact proportion with all qualifications and circumstances attending the grant presented or prescribed to them unalterably by the other house, appears an anomaly which could hardly rest on any other ground of defence than such a series of precedents as constitute a constitutional usage; while in fact it could be made out that such a pretension was ever advanced by the commons before that present parliament. In the short parliament of 1840, the lords having sent down a message requesting the other house to give precedence on a certain business to matter of supply, it had been highly resented as an infringement of their privilege, and Mr. Pym was appointed to represent their complaint at a conference. He even then, in the fervour of that critical period, the bold advocate of popular privileges who could have been selected, was content to assert that the matter of subsidy and supply ought to begin in the House of Commons.

There seems to be still less pretext for the great extension given by the commons to their acknowledged privilege of originating bills of supply. The principle was well admitted to that earlier period, when security against misgovernment could only be obtained by the vigilant jealousy and uncompromising firmness of the commons. They came to the grant of subsidy with real or feigned reluctance, as the stated price of redress of grievances. They considered the lords, generally speaking, as too intimately united with the king's ordinary council, which indeed sat with them, and had perhaps, as late as Edward III. a deliberative voice. They knew the influence or intimidating ascendancy of the peers over many of their own members. It may in fact be doubted whether the lower house shook off, absolutely and permanently, all sense of subordination, or at least dependence, to the upper till about the close of the reign of Elizabeth. But in applying the wise and ancient maxim, that the commons alone can empower the king to levy the people's money, to a private bill for lighting and cleansing a certain town, or cutting dykes in a fen, or to any local or limited assessment for local benefits, as to which the crown has no manner of

interest, nor any thing to do with the collection; there may be thought to be more disposition shown to make encroachments, than to guard against those of others. Soon after the Revolution the commons began to introduce a still more extraordinary construction of their privilege, not receiving from the House of Lords any bill imposing a pecuniary penalty on offenders, nor permitting them to alter the application of such as had been imposed by the commons. The principles laid down on this subject, by an authority now much deferred to, are—1. That in bills of supply the lords can make no alteration, but to correct verbal mistakes. 2. That in bills, not of absolute supply, yet imposing burdens, as turnpike acts, &c. the lords cannot alter the quantum of the toll, or the persons to manage it, &c.; but in the other clauses they may make amendments. 3. That where a charge may indirectly be thrown on the people by a bill, the commons object to the lords making amendments. 4. That the lords cannot insert pecuniary penalties in a bill, or alter those inserted by the commons. *Hatsell's Precedents*, vol. iii. 137. Contests of this nature have now for a long time been avoided by a practice which may be called evasion: where a money bill, or what the House of Commons deem such, has been amended by the lords; the commons, to satisfy their dignity, move on it the bill, but immediately bring in another, with the amendments inserted. The lords have never acknowledged any privilege in the commons on this question, beyond that of originating bills of supply.

VI. (B.) In the election of knights, citizens, and burgesses, to represent the counties, cities, and boroughs of the kingdom, consists the exercise of the democratical part of the British constitution: the only true sovereignty of the people being shown in their choice of their representatives. This exercise is, therefore, a matter of such high importance, to the preservation of rational freedom, that the laws have very carefully guarded against any usurpation or abuse of this power by many salutary provisions; which shall be here considered according to the division of the subject made at the beginning of this article.

The true reason of requiring any qualification, with regard to property in voters, is, to exclude such persons as are in so disadvantageous a situation, that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or wealthy man a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely, and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a share in electing those delegates to whose charge is committed the disposal of his property, his liberty, his life. But since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, popular states have been obliged to establish certain qualifications, whereby some who are suspected to have no will of their own, are excluded from voting; in order to set free individuals, whose wills may be supposed independent, more thoroughly upon a level with each other. 1 *Comm. c.* p. 171.

The constitution of suffrages is framed upon the wisest principle; steering between the two extremes of too much regard to property on the one hand, or to mere numbers on the other, only such persons are entirely excluded from the electors as can have no will of their own: there is still, a free agent to be found who is not, (or may not if reason is attended to) a slave in some place or other of the kingdom. Nor is comparative wealth or property entirely disregarded in elections; for though the richest man has only one vote at one place, yet if his property be at different places, he has probably a right to vote at more places

than one, and therefore has many representatives. This, says *Blackstone*, is the spirit of our constitution; not that it is, in fact, quite so perfect as described; for he candidly adds, if any alteration might be wished or suggested in the present frame of parliaments, it should be in favour of a more complete representation of the people. 1 *Comm. c.* 2. p. 171.

The amendment in the elective franchise, suggested by *Blackstone*, giving to the people a more complete representation in the House of Commons, has at length been accomplished by the Reform Act (2 *W. 4. c.* 45.), a measure wrung from a reluctant House of Lords by the determination of the nation; and for which, next to its own exertions, it is indebted to Lord Grey and the other members of his ministry.

1. By the Reform Act the number of county members is much increased. By § 12. Yorkshire is to send six members, two for each Riding. § 13. Lincolnshire sends four members, two for the parts of Lindsey, and two for the parts of Kesteven and Holland. By § 14. the following counties are divided into two districts, each of which sends two members, viz., Cheshire, Cornwall, Cumberland, Derbyshire, Devonshire, Durham, Essex, Gloucestershire, Kent, Hants, Lancashire, Leicestershire, Norfolk, Northumberland, Nottingham, Shropshire, Somersetshire, Staffordshire, Suffolk, Surrey, Sussex, Warwickshire, Wiltshire, Worcestershire. By § 15. the following counties shall send two members instead of one, Carmarthen, Denbigh, Glamorgan—and the following counties shall send three members instead of two, viz., Berkshire, Buckinghamshire, Cambridgeshire, Dorsetshire, Herefordshire, Hertfordshire, Oxfordshire. By § 16. the Isle of Wight returns one knight of the shire. By § 17. various towns which are counties in themselves are, for the purpose of elections, included in the adjoining counties, viz., Carmarthen in Carmarthenshire; Canterbury in Kent; Chester in Cheshire; Coventry in Warwickshire; Gloucester in Gloucestershire; Kingston-upon-Hull into the East Riding of Yorkshire; Litch in the parts of Lindsey, in Lincolnshire; London in Middlesex; Newcastle-upon-Tyne in Northumberland; Poole in Dorsetshire; Worcester in Worcestershire; York and the Ainsty in the North Riding of Yorkshire; Southampton in Hampshire.

Previous to the Reform Act the elective franchise for counties was confined to freeholders.

By the 8 *H. 6. c.* 7; 10 *H. 6. c.* 2; (amended by *stat.* 14 *Geo. 3. c.* 58, which made the residence of the electors and the elected in their respective counties, cities, and boroughs no longer necessary;) the knights of the shire should be chosen by people, whereof every man should have freehold, to the value of 40s. by the year within the county; which, by subsequent statutes, was to be clear of all charges, and deductions, except parliamentary and parochial taxes.

By the Reform Act the electors for counties now consist of five classes, viz. freeholders, copyholders, and tenants in ancient demesne, leaseholders and tenants or occupiers of land.

1. *Freeholders*.—No alteration is made with respect to freeholders of inheritance, who are still entitled to vote when of the value of 40s. a year above all charges. 8 *Hen. 6. c.* 7; 18 *Geo. 2. c.* 18, § 1.

But as regards freeholders for life the franchise is narrowed, for by § 18. no freeholder for life (except when he is in actual or *bonâ fide* occupation, or where the lands or tenements come to him by marriage, marriage-settlement, devise, or promotion to a benefice or office,) shall have a right of voting unless the property be worth 10l. per annum free from all rents and charges, which words in the act do not include any public or parliamentary tax, or any church rate, county rate, or parochial rate. § 21. This provision however is prospective, as the rights of existing freeholders for life are preserved.

Formerly in cities and towns that were counties of themselves freeholders had no vote; but, as already mentioned,

by § 17. such cities and towns are included in the adjoining counties. See *ante*.

Where however a freeholder is in the occupation of property which would give him a vote for a city or borough, as, for instance, a house worth 10*l*. a year, such property will not confer a right to vote for the county, even although he should not register himself for such city, &c. § 24.

And the same is declared, in the following section, of any copyholder or other elector whose property gives him a vote for a city or borough.

2. *Copyholders and tenants in ancient demesne*.—Every male person of full age, and not subject to any legal incapacity, who shall be seised at law or in equity of lands or tenements of copyhold, or any other tenure, except freehold for life, or any larger estate of not less than 10*l*. clear yearly value, are entitled to vote for knights of the shire. § 19.

3. *Leaseholders*.—A right of voting for county members is also given to leaseholders entitled for any term originally created for at least sixty years, (whether determinable on lives or not,) where the lands are worth 10*l*. a year, or for any term originally created for twenty years, (whether determinable on lives or not,) of the yearly value of 50*l*. A sub-lessee or an assignee of a sub-lessee of terms of sixty or twenty years must be in actual occupation of the premises to entitle him to vote.

4. *Tenants or occupiers*.—Persons occupying lands for which they are liable to a *bond fide* rent of 50*l*. a year are likewise invested with the elective franchise for counties.

The act imposes on all persons the necessity of registering their votes. County electors, with the exception of leaseholders and tenants or occupiers, must have been in possession of the property for which they claim to vote six calendar months, and leaseholders, &c. twelve calendar months before the last day of July in the year in which they seek to be registered. There is however an exception with respect to both classes, in case the property comes to them within the six or twelve months by descent, succession, marriage, marriage-settlement, devise, or promotion to any office or benefice.

County voters formerly must have been assessed to the land tax, but this by § 22. is no longer necessary in any case.

The other less important qualifications of the electors for counties in England and Wales may be collected from the following statutes, viz. 7 & 8 *Will. 3. c. 25*; 10 *Ann. c. 23*; 2 *Geo. 2. c. 24*; 18 *Geo. 2. c. 18*; 19 *Geo. 2. c. 28*; 31 *Geo. 2. c. 14*; 3 *Geo. 3. c. 24*; 20 *Geo. 3. c. 17*; and 30 *Geo. 3. c. 35*. These statutes direct—

That no person under twenty-one years of age shall be capable of voting for any member. This extends to all sorts of members, as well for boroughs as counties, as does also the next; viz.—

That no person convicted of perjury, or subornation of perjury, or of having asked or received any bribe, shall be capable of voting at any election. 2 *Geo. 2. c. 24. § 6, 7*.

That no person shall vote in right of any freehold, granted to him fraudulently, to qualify him to vote. Fraudulent grants are such as contain an agreement to re-convey, or to defeat the estate granted; which agreements are made void, and the estate is absolutely vested in the person to whom it is so granted. And every person who shall prepare or execute such conveyance, or who shall give his vote under it, shall forfeit 40*l*. 10 *Ann. c. 23. § 1*.

That no person shall vote in respect of an annuity or rent-charge, unless registered with the clerk of the peace twelve calendar months before. Such annuity or rent-charge to be issuing out of a freehold estate; and if it accrues or devolves, by operation of law, within a year before the election, a certificate of it to be entered with the clerk of the peace before the first day of the election. 3 *Geo. 3. c. 24; Heyw. 145*.

But by 51 *Geo. 3. c. 99*, to entitle any person to vote in respect of land-tax purchased under the act for redemption

of that tax (by which act such purchasers are declared to be possessed of the same as fee-farm rents), no memorial of the contract need be registered, as in the case of other fee-farm rents.

That in mortgaged or trust estates, the person in possession, under the above-mentioned restrictions, shall have the vote. See also 2 *Will. 4. c. 45. § 23*.

That only one person shall be admitted to vote for any one house or tenement; to prevent the splitting of freeholds, and multiplying votes for election purposes. But this does not extend to cases which arise from operation of law, as devises, descents, &c. As if an estate should descend to any number of females, the husband of each would have a right to vote, if his interest amounted to 40*s*. a year.

By 53 *Geo. 3. c. 49*, it is declared that all devises by will made in order to split or multiply votes, shall be considered as conveyances within the meaning of the act 7 & 8 *Will. 3. c. 25*. But for quieting possession this provision is not extended to devises by testators having died twenty years before the act.

See *post*, 2. as to the right of joint occupiers of houses to vote in the election of members for boroughs under the Reform Act.

By the 20 *Geo. 3. c. 17. § 12*, a husband may vote for his wife's right of dower, without an actual assignment of it by metes and bounds.

By 7 & 8 *Geo. 4. c. 87*, persons employed as counsellor, agent, attorney, poll-clerk, &c. for any candidate for peer or reward, within six days before the election, or within fourteen days after, shall be incapable of voting, and his vote, if given, shall be void.

Individuals holding places in the excise or customs, or in the post-office, or engaged in the collection of the stamp duties, &c. are by statute incapacitated from voting.

The lists of electors for both counties and boroughs are revised annually by barristers appointed for that purpose, who hear the objections urged against them.

With respect to the registration of county voters the overseers of parishes are every year to make out an alphabetical list of persons entitled to vote in respect of property within their parishes. In order to obtain the means of making out such lists correctly they are at a stated time in each year to give a public notice requiring persons claiming to vote to notify their claims by a certain day. Where, however, a person has once been registered, he need not make a fresh claim. The lists thus made out, and which are to contain the christian and surname and abode of every claimant, with the nature of his qualification, &c. are, after having been published the two next Sundays after the last day of July in each year on the doors of the churches and chapels within the parish, to be delivered to the high constable of the hundred or district in which the parish is situate, by whom they are to be transmitted to the clerk of the peace. With regard to objections to votes, the overseers may mark any as doubtful, which will compel the party to prove their qualification before the revising barrister. Persons who are in the lists of electors, or who claim to be inserted therein for the current year, may object, by sending before the 25th of August in every year a notice in writing to the overseers, as well as to the individual objected to. The overseers are to make out lists of parties objected to, which are to be affixed for the two Sundays preceding the 15th of September on the doors of the churches and chapels within their parish. A written statement of the number of persons objected to, either by the overseers or other parties, is also to be delivered by the former to the high constable, and by him to the clerk of the peace, who is to make an abstract of the number of persons objected to in each parish, and transmit it to the revising barrister. The barristers are annually to be appointed to revise the lists, who are to make a circuit of the county, &c. for which they are named, between the 15th of September

and the 25th of October in every year, and to give three days' notice by advertisement, &c. of the times and places where they intend to hold their courts.

The barrister's court is to be an open court, but he is not to be attended by counsel. The clerk of the peace is to produce the lists of voters, and overseers are to attend and deliver to the barrister copies of the lists of persons objected to in each parish, and to furnish him on oath with all the information in their power, to enable him to revise the lists. And for the like purpose collectors and officers having the custody of tax assessments and rate books are, on being required, to produce them before him.

The barrister is to retain on the lists all names to which no objection is made by the overseers or others, as well as the names of persons objected to by others than overseers, who do not appear by themselves or agents to support their objections.

Where a person objected to fails to prove he was entitled to be inserted in the list on the last day of July preceding, his name is to be expunged.

The barrister has power to rectify mistakes and supply omissions in the lists, and may insert the names of claimants omitted by overseers, on proof of due notice having been given of their claims, and that they possessed the necessary qualification.

The barrister, having decided the claims and objections, is to open court to write his initials against all names he has struck out or inserted, and against all alterations he has made; and having settled the lists of voters, he is to sign his name to every page of them.

The lists, when settled, are to be transmitted to the clerk of the peace, and kept by him among the records of the session, while a copy of them is to be made into a book which is to be delivered to the sheriff or under-sheriff, and is to be the register of the electors at any election subsequent to the last day of October, against which it is to be completed, and the first of November in the following year.

By the Scotch Reform Act, 2 & 3 Will. 4. c. 65, the members for Scotland are increased to fifty-three, whereof thirty are county members; viz. twenty-seven for the counties following, each returning one member, viz. Aberdeen, Argyle, Arran, Bute, Berwick, Caithness, Dumbarton, Dumfries, Edinburgh, Fife, Forfar, Haddington, Inverness, Kincardine, Kirkcubright, Linlithgow, Orkney and Shetland, Perth, Renfrew, Roxburgh, Selkirk, Stirling, Sutherland, Wigton; and three for the following counties,—viz. Elgin and Nairn one jointly, Ross and Cromarty one jointly, Caithness and Kinross one jointly.

They are elected by the old enrolled freeholders, who are to retain their votes for their lives; the owners of heritable property of the yearly value of 10*l.*; by tenants holding under leases for not less than fifty-seven years, at the option of the landlord, or for their lifetimes, where their interest is of the yearly value of 10*l.*, or for not less than nineteen years where the value is 50*l.* a year; or where the tenants, whatever the rent may be, have paid a grassum or consideration of 5*l.*, 6*l.*, 7*l.*, 8*l.*, 9*l.*

The electors are required to register their votes as in England. See also 4 & 5 Will. 4. c. 88.

The Irish Reform Act, 2 Will. 4. c. 88, has made no addition to the county members of that country, who consist now, as before, of sixty-four, being two for each county. They are elected by freeholders of 10*l.* a year (the forty-shilling freeholders having been disfranchised, and the qualification raised to the above amount by the 10 Geo. 4. c. 8.); by copyholders of 10*l.* a year; and by leaseholders of terms not less than sixty years, whether determinable on lives or not, of the yearly value of 10*l.*; or for fourteen years, whether determinable on lives or not, of the yearly value of 20*l.*; or for twenty years, having a beneficial interest of the clear yearly value of 10*l.* 2 Will. 4. c. 88 § 1, 2.

All voters are to be registered. § 13.

2. The electors of citizens and burgesses are supposed to be the mercantile part or trading interest of the kingdom. But as trade is of a fluctuating nature, and seldom long fixed in a place, it was formerly left to the crown to summon, *pro re nata*, (but this has been questioned,) the most flourishing towns to send representatives to parliament. So that as towns increased in trade, and grew populous, they were admitted to a share in the legislature. But the deserted boroughs continued to be summoned as well as those to whom their trade and inhabitants were transferred; except a few, which petitioned to be eased of the expense, then usual, of maintaining their members; 4*s.* a day being allowed for a knight of the shire, and 2*s.* for a citizen or burgess; which was the rate of wages established in the reign of Edward III. 4 Inst. 16.

The universities were in general not empowered to send burgesses to parliament; though once, in 28 Edw. 1. when a parliament was summoned to consider the king's right to Scotland, there were issued writs which required the university of Oxford to send up four or five, and that of Cambridge two or three, of their most discreet and learned lawyers for that purpose. *Prynne, Parl. Writs*, i. 345. But it was King James I. who indulged them with the permanent privilege to send constantly two of their own body to serve for those students who, though useful members of the community, were neither concerned in the landed nor the trading interest; and to protect in the legislature the rights of the republic of letters. 1 Comm. c. 2. p. 174.

Mr. Christian, in his note on the above passage, quotes *Prynne*, to show that the wages formerly given to members of parliament had no other origin than that principle of natural equity and justice, *qui sentit commodum sentire debet et onus*. Mr. Christian suggests, that representation, at the first, was nothing more than the attendance of part of a number who were all individually bound to attend, and where the attendance of the rest was dispensed with; and as all were under the same obligation to render this service, and it was left to themselves to determine which of them should undertake it, it became equitable that all should contribute to the expense and inconvenience incurred. *Prynne* says, the first writs *de expensis militum*, &c. are coeval with our kings' first writs of summons to elect and send knights, citizens, and burgesses to parliament, viz. anno 49 Hen. 3; before which there are no memorials of either of those writs. These expenses were reduced to the certainty abovementioned, of 2*s.* and 4*s.* per day, in the 16th of Edward II., though there are some instances where a less sum was allowed; and even one in 3 Edw. 4. 1463, where Sir John Strange, the member for Dunwich, agreed to take a cade and half a barrel of herrings as a composition for his wages. *Glanv. Rep. Pref.* p. 23.

Andrew Marvell, member for Hull, in the parliament after the Restoration, was, it is said, the last member who received these wages; and they were formerly of so much consequence that many boroughs petitioned to be excused from sending members to parliament, on account of the expense. *Prynne* on 4 Inst. 32. And from 33 Edw. 3. uniformly through the five succeeding reigns, the sheriff of Lancashire returned that there were no cities or boroughs in his county that ought or were used, or could, on account of their poverty, send any citizens or burgesses to parliament. 1 Comm. c. 174, in n.

By reason of these exemptions, and new creations by royal charter, which commenced in the reign of Edward IV., who in the 17th year of his reign granted to the borough of Wenlock the right of sending one burgess to parliament, (*Sim.* 97.) the number of the members of the House of Commons perpetually varied. Charles II., in the 29th year of his reign, granted by his charter to Newark the privilege of sending

representatives to parliament; and this was the last time that this prerogative of the crown was exercised. 1 *Dougl. El.* 69. Since the beginning of the reign of Henry VIII. down to the union with Ireland, the number of the representatives of the Commons has been more than doubled; for in his first parliament the house consisted only of 298 members; 360 were subsequently added by acts of parliament, or by the king's charter, either creating new or reviving old boroughs. Under the provision of the 27 *Hen. 8. c. 26. § 29.* and 34 & 35 *Hen. 8. c. 26. § 27.* there were added twenty-four for Wales; twelve precisely by the first act for the counties, and twelve under the provision of the latter act for the boroughs. Two for the county and two for the city of Chester were added by 34 & 35 *Hen. 8. c. 13*; two for the county and two for the city of Durham by 25 *Car. 2. c. 9*; forty-five for Scotland, by the acts of union with that kingdom; and one hundred for Ireland, by the acts of union with that kingdom; and the remainder by charter.

By the Reform Act an extensive alteration has been made in the borough representation. Fifty-six boroughs have been most justly deprived of the right of sending members. (See Schedule A.) Thirty other boroughs have had one of their two members taken away. (See Schedule B.) Twenty-two new boroughs have been created with the right of sending two members; viz. Manchester, Birmingham, Leeds, Greenwich, Sheffield, Sunderland, Devonport, Wolverhampton, the Tower Hamlets, Finsbury, Mary-le-bone, Lambeth, Bolton, Bradford, Blackburn, Brighton, Halifax, Macclesfield, Oldham, Stockport, Stoke-upon-Trent, Stroud. Twenty other new boroughs have been invested with the right of sending one member; viz. Ashton-under-Line, Bury (Lancashire), Chatham, Cheltenham, Dudley, Frome, Gateshead, Huddersfield, Kidderminster, Kendal, Rochdale, Salford, South Shields, Tynemouth, Wakefield, Walsall, Warrington, Whitby, Whitehaven, Merthyr Tydvil. By § 6. Weymouth and Melcombe Regis are to send two members only instead of four. By § 10. the towns of Swansea, Loughor, Neath, Aberavon, and Kenfig, are to form one borough, returning one member.

The electors for cities and boroughs now consist partly of the old voters, some of whose rights are preserved to them in perpetuity, and others for a limited time, and partly of a new class of householders created by the Reform Act.

By § 31. in cities or towns, being counties of themselves, all freeholders and burgage tenants who possessed the right of voting still retain it, subject to the condition of registration.

The places to which this section applies are Bristol, Exeter, Haverfordwest, Lichfield, Norwich, and Nottingham.

Freeholders for lives, however, are disqualified unless in the actual occupation of the property giving the right to vote, or unless it shall come to them by marriage-settlement, devise, or promotion to some benefice or office; or it is worth 10*l.* a year above all rents and charges. An exception is made of all existing freeholders for life, who have, or but for the act might acquire, (as, for instance, minors coming of age,) a right to vote for such cities or towns. § 18.

All burgesses or freemen of cities or boroughs not included in Schedule A., and the freemen and liverymen of London, have their right of voting preserved to them if they are duly registered, and previous to such registration have resided six calendar months within such cities or boroughs, or within seven miles from the place where the poll for the same has heretofore been taken. There is an exception of persons becoming burgesses or freemen after the 1st of March, 1831, otherwise than by birth or servitude; and those claiming by birth must derive their right from persons admitted or entitled to be admitted burgesses or freemen previous to that day, or becoming so since that time in respect of servitude. § 32.

By § 33. the right of voting for any city or borough by

virtue of any other qualification than as burgesses or freemen, or as freeholders in the case of cities being counties of themselves, is continued to every person having such right so long as he shall be qualified as an elector according to the usages of such city or borough, provided he is duly registered, and shall have resided six calendar months in or within seven miles of such city, &c. previous to the last day of July in the year when he is so registered. The right, however, of any individual is to cease if his name be omitted for two successive years from the register, unless it be in consequence of receiving parochial relief, or of absence on his majesty's service.

The persons whose rights are reserved by the above section are inhabitants paying scot and lot, who are termed potwallopers, and freeholders and burgage tenants in cities and boroughs not being counties of themselves; but by § 33 such freeholders and burgage tenants are not entitled to vote in respect of property acquired subsequently to the 1st of March, 1831, unless it come to them between that day and the passing of the act, (7th June, 1832,) by descent, succession, marriage, marriage-settlement, devise, or promotion to a benefice or office.

The 34th section preserves to all persons the right to vote for New Shoreham, Cricklade, Aylesbury, or East Retford, in respect of freeholds in the adjacent hundred, if duly registered, and if previous to such registration they have resided six calendar months in the borough for which they claim to vote, as defined by the fifth section of the act, or within seven miles from any part thereof.

The most important class of electors for boroughs are those created by the 27th section of the act, which enacts that in every city or borough returning members to parliament, every male of full age, and not subject to legal incapacity, who shall occupy within such city, &c., or within any place sharing in the election for such city, &c. as owner or tenant of any house, &c., or other building, either separately or jointly with land, within such city, &c., occupied therein as owner or as tenant under the same landlord, of the clear yearly value of 10*l.*, shall, if duly registered, be entitled to vote for such city, &c. No person can be registered unless he has occupied such premises for twelve calendar months previous to the last day of July in any year, or unless he has paid on or before the 20th of July in such year all poor-rates and assessed taxes due previous to the preceding 6th of April. Neither can he be registered unless he has resided for six calendar months, previous to the last day of July in the year in which he is registered, within the city, &c. or within seven miles of some part thereof.

By § 28. the premises occupied during the twelve months previous to registration need not be the same premises if they are only occupied in immediate succession, and all poor-rates and assessed taxes due in respect thereof prior to the preceding sixth of April are paid.

By § 29. joint occupiers, as owners or tenants of premises, are all entitled to vote in case the clear yearly value of such premises, if divided by the number of occupiers, shall give for each a sum of 10*l.*

The registration for cities and boroughs is in some respects different to that for counties. The lists of the ten-poll householders are to be made out by the overseers of the poor, those of the freemen by the town clerk.

The proceedings before the revising barristers are nearly similar to those which have been shortly stated with regard to the revision of the county lists of electors.

All laws in force respecting elections in England and Wales are to continue in force, except so far as they are altered or are inconsistent with the act. § 75.

The act does not extend to the universities. § 78. The right of election in boroughs being various, depending entirely on the several charters, customs, and constitutions of the respective places, occasioned infinite disputes. It

some measure to prevent this evil the 7 & 8 Will. 3. c. 7. enacted, that the determination of the House of Commons, the old judicature in cases of contested elections,) as to the right of election, should bind the returning officer in taking the poll. That statute was enlarged by 2 Geo. 2. c. 24. by the 4th section of which the last determination of the House of Commons was declared to be final. The statutes which established the modern judicature of election committees did not transfer to them the same power of specially determining on the right of election; but by 28 Geo. 3. c. 52. § 25—26. and 34 Geo. 3. c. 83. such committees are invested with the power of finding by their decision the right of election, and of appointing a returning officer where the right is litigated, subject to an appeal by petition to the house within fourteen days after the commencement of the next sessions, and not otherwise. Such petition to be referred to another committee of the house, to be chosen according to the regulations of the said statutes. The determination of such appellate committee (or of the first committee, if not appealed against,) is now, therefore, conclusive in all subsequent elections. See *post*, VI. (B.) 3.

Previous to the Reform Act no length of possession was required from voters in burgage-tenure boroughs. In these the right of voting was annexed to some tenement, house, or part of ground upon which a house in ancient times has stood. Any number of these burgage-tenure estates might have been purchased by one person, which, at any time before a contested election, might be conveyed to so many of his friends, who would each in consequence have a right to vote.

Now burgage tenants, in the few places where they still exist, must comply with the requisitions of the Reform Act. See *ante*.

By the Scotch Reform Act Scotland now sends twenty-three members for cities, towns, and burghs; viz. Edinburgh and Glasgow two members each, and one for each of the following towns: Aberdeen, Paisley, Dundee, Greenock, Perth, and fourteen members for fourteen districts of burghs, each district returning one. See Schedule E.

By the Irish Reform Act 2 & 3 Will. 4. c. 88. § 11. one member is given to the cities of Liverpool and Belfast, the borough of Belfast, the county of the town of Drogheda, and the university of Dublin.

The Reform Act has left the aggregate number of members of the house as it was, viz. 65; but it has increased the number for Ireland by five, and for Scotland by eight, for Wales by four, and reduced the number for England by six.

The number of the house may now therefore be stated as,—

ENGLAND.

Twenty-six counties returning four members each.	104
Seven counties returning three members each.	21
Six counties returning two members each.	12
One county (York) returning six members.	6
One county (Isle of Wight) returning one member.	1

Twenty-two new boroughs with two members each.	44
Nineteen new boroughs with one member each.	19
Forty-four old boroughs with one member each.	44
One hundred and eleven old boroughs and two universities with two members each.	226
London four members.	4

WALES.

Five counties with one member each.	5
Three counties with two members each.	6
One new borough (Merthyr Tydvil) one member.	1
Eleven districts of boroughs one member each.	11

One borough two members.	2
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SCOTLAND.

Twenty-seven counties one member each.	27
Six counties returning three members.	3
Two cities returning two members each.	4
Five towns returning one member each.	5
Fourteen districts of burghs returning each one member.	14

IRELAND.

Thirty-two counties two members each.	64
Six cities and boroughs and one university two members each.	12
Twenty-nine cities and boroughs one member each.	29
	105

From the foregoing statements it appears that England now sends 144 county members, and 327 members for cities and boroughs; Wales, 15 county members, and 14 members for cities and boroughs; Scotland, 30 county members, and 23 members for cities and boroughs; and Ireland 64 county members, and 41 members for cities and boroughs. The total number of county members is therefore now 259, and of members for cities and boroughs, including the English and Irish universities, 415.

Previous to the Reform Act the number of county members amounted only to 188.

The various boundaries of the districts of the counties divided by the Reform Act, and of the cities and boroughs, as well old as new, were settled and described by the 2 & 3 Will. 4. c. 64. generally called the Boundary Act.

VI. (B.) 2. As to the qualifications of persons to be elected members of the House of Commons, some of these depend upon the law and custom of parliament, declared by the House of Commons; 4 Inst. 47, 48; others upon certain statutes. And from these it appears,

That they must not be aliens born, 12 & 13 Will. 3. c. 2. § 3.—nor minors, 7 & 8 Will. 3. c. 25. § 8.

They must not be any of the peers, nor of the twelve judges, because they sit in the Lords' House. But persons who have judicial places in the other courts, ecclesiastical or civil, are eligible. 4 Inst. 47. Unless excluded by act of parliament, as is the case with the vice-chancellor, and the judges and commissioners of the Bankrupt Court. Nor of the clergy; the reason assigned for which was, that they might sit in the convocation. Nor persons attainted of treason or felony, for they are unfit to sit any where. 4 Inst. 47. 1 Comm. 175.

With respect to the clergy, their right or capacity of sitting in parliament was for a long time contested; but at length, by 41 Geo. 3. (U. K.) c. 63. it was enacted, that no person, having been ordained to the office of priest or deacon, or being a minister of the church of Scotland, shall be capable of being elected to serve in parliament as a member of the House of Commons. The election of such persons is declared void; and if any person after his election is ordained, he must vacate his seat. The penalty for any person sitting as a member, contrary to this act, is 500l. a day; and proof of having celebrated divine service is declared *prima facie* evidence of the party's being ordained, &c.

As attendance of this nature is for the service of the public, the whole nation has such an interest therein, that the king cannot grant an exemption to any person from being elected as a knight, citizen, or Burgess in parliament; and for that elections ought to be free. 29 Hen. 6. And persons who are eligible might formerly in all cases, and may still in some,

be compelled to serve in parliament against their consent. See 1 *Dougl. El. Ca.* 284.

Sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers. *Bro. Abr. tit. Parliament*, 7; *Hal. of Parl.* 114. But sheriffs of one county are eligible to be knights of another. 4 *Inst.* 48; *Whitelocke on Parl.* ch. 99, 100, 101.

Thus it has been decided that the sheriff of Berkshire could not be elected for Abingdon, a borough within that county. 1 *Dougl. El. Ca.* 419. But a sheriff of Hampshire may be elected for the town of Southampton within that county, because Southampton is a county of itself, and is as independent of Hampshire as of any other county. 4 *Dougl.* 87. It seems that the expression, that sheriffs of one county are eligible to be knights of another, is too confined, as they may be also members for any city or borough not in the county for which they are sheriffs.

Until recently the eldest son of a peer of Scotland was incapacitated from being elected to represent a Scotch county. *Lord Daer's Case*, 26 Mar. 1793, *Parliament Cases*, 8vo. But by the Scotch Reform Act this restriction has been removed.

No persons concerned in the management of any duties or taxes, created since 1602 (except the commissioners of the treasury, 5 *W. & M. c. 7. § 57*); nor any of the officers following: viz. commissioners of prizes, transports, sick and wounded, wine licences, navy and victualling; secretaries, or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations, and their deputies; officers of Minorca or Gibraltar; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretary of state, salt, stamps, appeals, wine-licences, hackney-coaches, hawkers and pedlars; nor any persons that hold any new office or place of profit under the crown since 1705; are capable of being elected or of sitting as members. See 11 & 12 *Will. 3. c. 2. § 150, 151, 152*; 12 & 13 *Will. 3. c. 10. § 89, 90*; 6 *Ann. c. 7. § 25—31*; 15 *Geo. 2. c. 22*.

If any member accepts an office of profit under the crown, which was in existence prior to 1705, except an officer in the army or navy accepting a new commission, his seat is vacated; but such member is capable of being re-elected. 6 *Ann. c. 7. § 26*.

No person having a pension under the crown during pleasure, or for any term of years, is capable of being elected or of sitting. 6 *Ann. c. 7. § 25*; 1 *Geo. 1. st. 2. c. 56*.

All the persons thus enumerated are utterly incapable of sitting in the House of Commons whilst they continue in their respective situations. But by 15 *Geo. 2. c. 22. § 3*, the treasurer or comptroller of the navy, the secretaries of the treasury, the secretary to the chancellor of the exchequer, secretaries of the admiralty, under-secretary to any of the secretaries of state, deputy-paymaster of the army, and persons having an office or employment for life, or during good behaviour, are expressly excepted from the prohibition, and are therefore eligible.

So by 41 *Geo. 3. (U. K.) c. 52*, a member accepting any office under the king, or the lord lieutenant of Ireland, shall vacate his seat.

But by 54 *Geo. 3. c. 16*, it is provided, that on the removal of a lord lieutenant of Ireland, a member remaining in office under the succeeding lord lieutenant shall not vacate his seat.

By 56 *Geo. 3. c. 98*, (for consolidating the revenues of Great Britain and Ireland,) the vice-treasurer of Ireland, and the commissioners of the treasury of the United Kingdom, are expressly declared capable of sitting in parliament. § 16.

By 22 *Geo. 3. c. 45*, no contractor with the officers of government, or with any other person for the service of the public, shall be capable of being elected, or of sitting in the house, as long as he holds any such contract, or derives any

benefit from it. But this does not extend to contracts with corporations, or with companies, which then consisted of ten partners, or to any person to whom the interest of such a contract shall accrue by marriage or operation of law, for the first twelve months. And if any person disqualified by such a contract shall sit in the house, he shall forfeit 500*l.* for every day; and if any person who engages in a contract with government admits any member of parliament to a share of it, he shall forfeit 500*l.* to the prosecutor. By 39 *Geo. 3. c. 94*, the master of the mint is declared not to be a contractor within the meaning of 22 *Geo. 3.*

By the Irish acts, 33 *Geo. 3. c. 41*, and 38 *Geo. 3. c. 36*, persons are incapacitated from being elected members of parliament, if holding places, pensions, &c. under his majesty, or the lord lieutenant, upon principles partly similar to those hereinbefore stated as imposed by the British acts, but not to so great an extent. By 41 *Geo. 3. (U. K.) c. 52* it is expressly enacted, that all persons disabled from sitting in the British parliaments, shall in future be disabled from sitting in the parliaments of the United Kingdom of Great Britain and Ireland as members for any place in Great Britain, and that all persons disabled from sitting in Irish parliaments should be disabled from sitting in the united parliament for any place in Ireland. And the several other incapacities imposed by the British acts on British members, are enumerated and extended to the members for Ireland, with certain modifications.

By 52 *Geo. 3. c. 51. § 3*, and *c. 52. § 4*, commissioners for auditing the public and military accounts in Ireland, are disabled from sitting in parliament. By 57 *Geo. 3. c. 62*, by which the offices of clerk of the council, muster-master-general, pratique master of the port of Dublin, and store-keeper of the customs in that port, are regulated, and the duties directed to be performed by the officer in person, the persons holding any such offices, or in any part of the establishment thereof, are declared incapable of sitting in parliament. § 10.

By § 5. of 57 *Geo. 3. c. 68*, the clerk of the signet, and clerk of the privy seal, and all in those offices, are declared incapable; and by § 5. of *c. 84*, of the same session auditors, tellers, and clerks of the pells in the exchequers of England or Ireland, and in all those offices, are declared incapable.

The office or trust of a member of parliament cannot be resigned; and every member is compellable to discharge the duties of it, unless he can show such cause as the house in its discretion will think a sufficient excuse for his non-attendance, upon a call of the house; the only way, therefore, of vacating a seat is by accepting a situation, in consequence of which the law declares his seat vacant. So where members wish to vacate their seats and retire from parliament, it is now usual for the crown to grant them the office of the stewardship of the Chiltern Hundreds. Mr. *Hatsell* observes, "that the practice of accepting this nominal office, which began (he believes) only about the year 1750, has been now so long acquiesced in, from its convenience to all parties, that it would be ridiculous to state any doubt about the legality of such a proceeding; otherwise (he believes) it would be found very difficult, from the form of these appointments, to show that it is an office of profit under the crown." 2 *Hat.* 41. It is observable that the words of the act are, "office or place of profit;" perhaps, therefore, it is sufficient if the office is new, though not of profit, for in another part of the act the words *office of profit* are used; the distinction may seem trifling, but for a good purpose it may be applicable. This mode of vacating a seat has been repeatedly denied to such members as, for any offences, are liable to expulsion from parliament, and would thus wish to avoid the disgrace of such expulsion.

All knights of the shire shall be actual knights, or such notable esquires and gentlemen as have estates sufficient to

be knights, and by no means of the degree of yeomen. 23 Hen. 6. c. 15. Thus by the *stat. de militibus*, 1 E. 2, was 20*l.* a year, and put in force against those who had 40*l.* a year till 16 Car. 1. c. 16. But it is now reduced to a certainty, by ordaining—

That every knight of a shire shall have a clear estate of freehold or copyhold, or mortgage, if the mortgagee has been seven years in possession, to the value of 600*l.* per annum; and every citizen and burgess to the value of 500*l.*; except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities. 6 Ann. c. 5. This somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men; and of this qualification the member must make oath, and give in the particulars in writing, at the time of his taking his seat. But this act does not extend to Scotland.

This qualification, which now extends to members for Ireland, may be situate in any part of the United Kingdom without reference to the place for which the member is elected. See 33 Geo. 2. c. 20; 41 Geo. 3. c. 101. § 23.

There is no restriction in this respect imposed on the choice of members of parliament elected for Scotland. A clause was originally inserted in the Scotch Reform Act, whereby the representatives for that country were to possess a certain qualification, but the public feeling being strongly expressed against it, the clause was withdrawn.

With the exception of these standing restrictions and disqualifications, and some others created by the acts already recited, excluding certain public officers, every subject of the realm is eligible of common right; though there are instances wherein persons in particular circumstances have forfeited that common right, and have been declared ineligible for that parliament, by a vote of the House of Commons, (see ante;) or for ever, by an act of the legislature. 7 Geo. 1. c. 28. But it was an unconstitutional prohibition, which was grounded on an ordinance of the House of Lords, and inserted in the king's writs, for the parliaments holden at Coventry, 6 Hen. 4. that no apprentice or other man of the law should be elected a knight of the shire therein. 4 Inst. 19. 48; *Prynne's Plea for Lords*, 379; 2 *Whitlocke*, 359, 360. *Prynne* on 4 Inst. 13. In return for which our law books and historians have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament. And Sir E. Coke observes, with some spleen, that there was never a good law made thereat. *Watlingh. A. D.* 1405; 4 Inst. 48.

It is said by some writers, that in ancient times the king hath nominated the very persons to be returned, and did not leave it to the election of the people; for which an instance is given in the 45th year of Edward III. And among the parliament writs 14 Eliz. there appears to be an appointment and return of burgesses by the lord of a town, &c. But these are single instances in their kind. *Duct.*

In strictness, all members ought to have been inhabitants of the places for which they are chosen; 1 Hen. 5. c. 1; 23 Hen. 6. c. 15; but this having been long disregarded, was at length entirely repealed, as has already been mentioned, by 14 Geo. 3. c. 58.

VI (B.) 3. The method of proceeding in elections is regulated, from first to last, by the law of parliament, and a vast variety of statutes; the effect of which is given in the ensuing tables, the provisions of the several statutes being blended together. The following are the British statutes on which this abridgment is founded, viz. 7 H. 4. c. 15; 8 H. 6. c. 7; 23 H. 6. c. 14; 2 W. & M. st. 1. c. 7; 5 & 6 W. & M. c. 20. § 48; 7 W. 3. c. 4; 7 & 8 W. 3. c. 7, 25; 10 & 11 W. 3. c. 7; 12 & 13 W. 3. c. 10, § 89, 91; 6 Ann. c. 23; 9 Ann. c. 5; 10 Ann. c. 19, 33; 2 Geo. 2. c. 24; 3 Geo. 2. c. 30; 4 Geo. 2. c. 18; 19 Geo. 2. c. 28; 10 Geo. 3. c. 16; 11 Geo.

3. c. 42; 28 Geo. 3. c. 52; and several others, which are occasionally particularized.

The provisions of some of these statutes are however now superseded or repealed by the Reform Act.

In case of a new parliament, as soon as it is summoned by the king, the lord chancellor sends his warrant to the clerk of the crown in chancery; who thereupon issues out writs to the sheriff of every county, for the election of all the members to serve for that county, and every city and borough therein. See 53 Geo. 3. c. 89; as to conveying these writs, *ante*, II.

If a vacancy happens by the death, &c. of any member during the sitting of parliament, the speaker may, by order of the house, send his warrant to the clerk of the crown; who thereupon proceeds as in other cases where the warrant is sent by the lord chancellor. And with regard to a vacancy happening by death, or peerage, during the prorogation or recess of parliament, the 24 Geo. 3. st. 2. c. 26, which repeals the former statutes upon this subject, provides, that if, during any recess, any two members give notice to the speaker, by a certificate under their hands, that there is a vacancy by death, or that a writ of summons has issued under the great seal, to call up any member to the House of Lords, the speaker shall forthwith give notice of it to be inserted in the Gazette; and at the end of fourteen days after such insertion he shall issue his warrant to the clerk of the crown, commanding him to make out a new writ for the election of another member; but this shall not extend to any case where there is a petition depending for such vacant seat; or where the writ, for the election of the member so vacating, had not been returned fifteen days before the end of the last sitting of the house; or where the new writ cannot issue before the next meeting of the house for the despatch of business. And to prevent any impediment in the execution of this act, by the speaker's absence from the kingdom, or by the vacancy of his seat, at the beginning of every parliament he shall appoint any number of members from three to seven inclusive, and shall publish the appointment in the Gazette; these members, in the absence of the speaker, shall have the same authority as is given to him by the statute; these are the only cases provided for by act of parliament; for any other species of vacancy, therefore, no writ can issue during a recess of parliament.

In the event of any mistake in issuing the writ, or of misdirection, or for any other adequate cause, such as a place by its corruption having incurred the displeasure of the house, (as in the Hindon and Shaftesbury cases, 2 Hats. 310, and of which there are several more recent instances,) the house has authority to supersede a writ when issued, or to suspend its execution.

Within three days (or in the cinque ports, some of which however are now wholly or partially disfranchised, within six days, 10 & 11 W. 3. c. 7.) after the receipt of this writ out of chancery, the sheriff is to send his precept, under his seal, to the proper returning officers of the cities and boroughs, commanding them to elect their members; and those returning officers are to proceed to election within eight days from the receipt of the precept, giving four days' notice of the same, and to return the person chosen, together with the precept, to the sheriff. In the borough of New Shoreham, in Sussex, wherein certain freeholders of the county are entitled to vote by the 11 Geo. 3. c. 55, the election must be within twelve days, with eight days' notice of the same.

But elections of knights of the shire must be proceeded to by the sheriffs themselves in person; and, according to former laws, at the next county court after the delivery of the writ, to be holden at the most usual place in the county. If the county court fell upon the day of delivering the writ, or within six days after, the sheriff might have adjourned the court, and election, to some other convenient time, not longer than sixteen days, or shorter than ten; but he cannot alter the place without the consent of all the candidates. Now, by

25 Geo. 3. c. 84. it is enacted, that the sheriff having indorsed on the back of the writ the day on which he received it, shall, within two days after the receipt thereof, cause proclamation to be made at the place where the ensuing election ought by law to be held, of a special county court, to be there held for the purpose of such election only; on any day, Sunday excepted, not later from the day of making such proclamation than the sixteenth day, nor sooner than the tenth; and that he shall proceed on such election, at such special county court, in the same manner as if the said election had been held at a county court, or at an adjourned county court, according to the former laws. And by the 33 Geo. 3. c. 64. all notices of the time and place of election of members of parliament shall be publicly given, at the usual place, between eight in the morning and four in the afternoon, from October 25th to March 25th; and, during the other half year, between eight in the morning and six in the afternoon.

And as it is essential to the very being of parliament, that elections should be absolutely free, all undue influence whatever upon the electors is illegal, and strongly prohibited. As soon, therefore, as the time and place of election within counties or boroughs are fixed, all soldiers quartered in the place are to remove, at least one day before the election, to the distance of two miles or more, and not to return till one day after the poll is ended, except in the liberty of Westminster, or other residence of the royal family, in respect of his majesty's guards, and in fortified places; 8 Geo. 2. c. 30. § 3. Riots likewise have been frequently determined to make an election void. By vote also of the House of Commons, no lord of parliament, or lord lieutenant of a county, hath any right to interfere in the election of commoners; and, by statute, the lord warden of the cinque ports shall not recommend any members there. If any officer of the excise, customs, stamps, or certain other branches of the revenue, presume to intermeddle in elections, by persuading any voter, or dissuading him, he forfeits 100*l.* and is disabled to hold any office. Consistently with the same principle also, it has been decided, that a wager between two electors, upon the success of their respective candidates, is illegal and void; for were it permitted, it would manifestly corrupt the freedom of elections. 1 T. R. 55.

Indeed, however the electors of one branch of the legislature may be secured from any undue influence from either of the other two, and from all external violence and compulsion; the greatest danger is that, in which themselves co-operate, by the infamous practice of bribery and corruption; to prevent which it is enacted, that no candidate shall, after the date (usually called the *teste*) of the writs; or after the ordering of the writs, that is, after the signing of the warrant of the chancellor for issuing the writs (*Sim.* 165), or after any vacancy, give any money or entertainment to his electors, or promise to give any, either to particular persons, or to the place in general, in order to his being elected, on pain of being incapable to serve for that place in parliament; that is, incapable of serving upon that election. This is provided by 7 & 8 W. 3. c. 4. commonly called the Treating Act. It was decided by one committee, that treating vacates the election only; and that the candidate is no way disqualified from being re-elected, and sitting upon a second return. 3 Lud. 455. But a contrary determination was made by the Southwark committee in the first session of the parliament called in 1786; who declared a candidate disqualified on the ground of his having treated at a former election which was declared void for such treating. It has been supposed that the payment of travelling expenses, and a compensation for loss of time, were not treating, or bribery, within this or any other statute; and a bill passed the House of Commons to subject such case to the penalties imposed by 2 Geo. 2. c. 24. upon persons guilty of bribery. But this bill was rejected in the House of Lords, by the opposition of Lord Mansfield,

who strenuously maintained that the bill was superfluous: that such conduct by the laws in being was clearly illegal; and subject, in a court of law, to the penalty of bribery. 2 Lud. 67.

To guard against gross and flagrant acts of bribery, it is enacted by the 2 Geo. 2. c. 24. (explained and enlarged by the 9 Geo. 2. c. 38. and 16 Geo. 3. c. 11.) that if any money, gift, office, employment, or reward, be given, or promised, to be given, to any voter, at any time, in order to influence him to give or withhold his vote, as well he that takes as he that offers such a bribe, forfeits 500*l.* and is for ever disabled from voting at any election for a member of parliament, and holding any office in any corporation; unless, before conviction, he will discover some other offender of the same kind, and then he is indemnified for his own offence. But these statutes do not create any incapacity of sitting in the house; that depends solely upon the Treating Act already mentioned.

It has been held that it is bribery if a candidate gives an elector money to vote for him, though he afterwards votes for another. 3 Burr. 1235. And there can be no doubt but it would also be bribery in the voter; for the words of the statute clearly make the offence mutual. And it has been decided, that such vote will not be available to the person to whom it may afterwards be given gratuitously; though the propriety of this decision has been questioned by respectable authority. 2 Doug. 416. An instance is given in 4 Jong 366. of an action in which twenty-two penalties, to the amount of 11,000*l.* were recovered against one defendant.

By the 49 Geo. 3. c. 118. for better securing the independence and purity of parliament, by preventing the procuring, or obtaining seats in parliament by corrupt practices, after reciting that the giving or promising any gift, office, place, or gratuity, to procure the return of a member, if not made for the use of a returning officer, or voter, is not bribery, within the meaning of the act 2 Geo. 2. c. 24; but that such gifts or promises are contrary to the ancient usage, right, and freedom of elections, and contrary to the laws and constitution. The following penalties are imposed on all persons giving or promising, and on all persons accepting or receiving any sum of money, gift, or reward, upon any engagement to procure, or endeavour to procure, the election or return of a member of parliament, viz. on the party giving or promising, if not returned as a member, 1000*l.*; and on the party giving or promising, or privy, if returned a member, forfeiture of his seat; and on the party receiving, forfeiture of the money received, and also 500*l.* to be recovered by any party suing for the same in the superior Courts of Record in Great Britain or Ireland, § 1. The act contains a proviso for "any legal expense *bond fide* incurred at or concerning such election." § 2. Penalties are also imposed on all persons who shall give, or procure, or promise to give or procure any office, place, or employment, to any person, upon any express contract to procure a seat in parliament, viz. on the member returned (so giving, or procuring, or promising, or privy,) loss of his seat; on the receiver of the office, forfeiture, incapacity, and 500*l.*; and on any person (holding any office under the crown) who shall give any office, &c. upon any such account, 1000*l.* § 3. Actions on this statute must be brought within two years. § 4.

Besides the penalties thus imposed by the legislature, bribery is a crime at common law, and punishable by indictment or information; though the Court of King's Bench will not in ordinary cases grant an information within two years, the time within which an action may be brought for the penalties under the statute. 3 Burr. 1335, 1359. But this rule does not affect a prosecution by indictment, or information by the attorney-general; who in one case was ordered by the house to prosecute two persons who had procured themselves to be returned by bribery. They were convicted and sentenced by the Court of King's Bench to pay each a fine of 1000 marks, and to be imprisoned six months. 4 Doug. 292.

In order to diminish the expenses of elections, it is enacted by 7 & 8 Geo. 4. c. 37. that no person elected to serve in parliament shall, after the *taste* of the writ of summons, or after the place becomes vacant before his election, by himself or his agent, give or allow to any voter, or to any inhabitant of the county, city, town, &c. any cockade, ribbon, or other mark of distinction.

Great abuses having existed in several corporations by the application of the corporate property for electioneering purposes, and towards the expenses of the favoured candidates, the 2 & 3 W. 4. c. 69. was passed to restrain such application in future, and a variety of provisions are enacted for that purpose; and members of corporations offending against the act are declared guilty of a misdemeanor.

Undue influence being thus endeavoured to be effectually guarded against, the election is to be proceeded to on the day appointed; the sheriff or other returning officer first taking an oath against bribery, and for the due execution of his office. As soon as the returning officer has taken this oath, he must read or cause to be read the Bribery Act, under the penalty of 50*l*. The candidates, likewise, if required, must swear to their qualification, or their election shall be void.

The case of Malden decides, that where a candidate wilfully refuses to take the qualification oath, though duly required so to do, and not having done so any time before the meeting of parliament, his election is void. 18 Journ. 129; *Commons*, C. & D. 1.

By the Reform Act, the sheriffs of counties in person, or by deputy, are to preside at the election of knights of the shire, and the counties and divisions of counties established by the act are to be divided into convenient districts for polling, and places appointed, not exceeding fifteen in each district, for taking the poll. These districts and places were subsequently specified by the Boundary Act. Sheriffs, on being required by any candidate, or of their own accord, are to cause a reasonable number of booths to be erected at the principal place of election, and also at each of the other polling places; and no voter is to vote out of the district where his property lies. The polling at a contested election is to commence at nine in the forenoon of the next day but two after the day fixed for the election, unless such next day be a Saturday or Sunday, and then on the Monday following, and is to continue only for two successive days, *viz.* for seven hours on the first and eight hours on the second day, and is not to be kept open later than four in the afternoon of the second day. The poll clerks, at the close of each day's poll, are to enclose and seal their books, and deliver them to the sheriff or deputy presiding at each poll, who on the commencement of the second day's poll are to re-deliver them so sealed to the persons from whom they were received. On the final close of the poll the deputies are to transmit the books sealed to the sheriff or his under-sheriff, who on the reassembling of the court on the day next but one after the close of the poll, (unless that day be Sunday, and then on the following Monday,) is to openly break the seals thereon, and cast up the number of votes appearing on such books, and declare the state of the poll, and make proclamation of the members chosen, not later than two in the afternoon.

The polling at contested elections for cities and boroughs, except for Monmouth, is to commence on the day fixed for the election, or the following day, or at the latest on the third day, unless any of those days shall be Saturday or Sunday, and then on the Monday following; the particular day for the commencement of the poll to be fixed by the returning officer, and such polling is to continue for two successive days only, seven hours the first and eight hours the second day, and to be finally closed at four o'clock in the afternoon of the second day. Polling booths are to be erected if required by any candidate, or at the discretion of the

returning officers for the different parishes, &c. of such cities, &c., and may be divided into compartments; but no greater number than six hundred are to poll at any one compartment. Each person is to vote at the booth appointed for his parish, &c. A deputy of the returning officer is to preside at each booth; and the act contains provisions for the custody of the poll-books, and the declaration of the poll, nearly similar to those enacted in respect of counties, except that such declaration is to be made on the day following the final close of the poll, and except that the returning officer may, if he thinks proper, make the declaration and the return immediately after the termination of the polling.

Sheriffs or other returning officers may still close the poll previous to the time fixed, in all cases where it might have been closed before the passing of the act, and may adjourn it in case of riot.

Formerly electors might have been required to take the oaths of allegiance, supremacy, and abjuration, and make the declaration of fidelity, besides the bribery oath; and might also be sworn and questioned as to their qualifications; but by the Reform Act only three inquiries can now be made of the voter, *viz.* his identity with the person registered—whether he has already voted—and if his qualification continues; and the only oath, with the exception of the bribery oath, which may still be tendered as enacted by the 2 Geo. 2. c. 24. is an oath affirming the above three points.

No scrutiny is to take place before any returning officer with respect to votes given or tendered at elections; but persons excluded from the register by the revising barrister may tender their votes, which shall be entered in the poll-books and distinguished from the others.

The election being closed, the returning officer in borough returns his precept to the sheriff; with the names of the persons elected by the majority; and the sheriff returns the whole, together with the writ for the county, and the names of the knights elected thereupon, to the clerk of the crown in chancery, before the day of meeting, if it be a new parliament; or within fourteen days after the election, if it be an occasional vacancy; and this under penalty of 500*l*. If the sheriff does not return such knights only as are duly elected, he forfeits, by the old statutes of Henry VI. 100*l*. and the returning officer in boroughs, for a like false return, 40*l*. and they are besides liable to an action, in which double damages shall be recovered, by the latter statutes of King William; and any person bribing the returning officer shall also forfeit 300*l*; but the members returned by him are the sitting members, until upon petition the return shall be adjudged to be false and illegal.

By the 10 Ann. c. 23. the returning officer, within twenty days after the election, is to deliver over to the clerk of the peace, all the poll books on oath made before two justices; to be preserved among the records of the sessions of the peace, &c.

By the 7 & 8 W. 3. c. 7. which gives the action for double damages in case of a false return, all false returns, wilfully made, are declared to be illegal; and over and above the remedy which the party grieved has, by action under this statute, the returning officer or other person offending is punishable by the house; which in such cases has generally committed him to custody, and sometimes to Newgate. And the accepting and returning of indentures of return, not signed by the proper returning officer in Scotland, has been held a false return, and the under-sheriff offending committed. *Sim.* 181, 182.

And in order to prevent the evil of double returns, it was by the same statute enacted, that if the returning officer return more persons than are required to be chosen by the writ or precept, the same remedy may be had by the party grieved, as in case of a false return. And by § 10 of the 25 Geo. 3. c. 81. it is provided that if no return shall be made to a general writ on or before the return day, or upon a new

writ within fifty-two days after the *teste*, or if a special return be made, the party grieved may petition the house against the same; and a committee shall determine whether any, and which of the persons named in such petition, ought to have been returned, or whether a new writ ought to issue; and the house shall give the necessary orders. And for any offence against this statute, the returning officer is made liable to a prosecution by information or indictment. And if any returning officer shall wilfully delay, neglect, or refuse duly to return a person elected, such person, on the determination of a committee in his favour, may sue the returning officer, and recover double damages. See 25 Geo. 3. c. 84. §§ 11, 14.

Where the right of election is doubtful, and consequently it is uncertain what candidates are duly elected, the returning officer may, and for his own safety ought to, make a double return. But this must be done upon the returning officer's own judgment, not upon the agreement of the parties. If two or more sets of electors make each a return of a different member, (which is called a double election,) that return only which the returning officer, to whom the sheriff's precept was directed, has signed and sealed, is good. And the members by him returned shall sit until displaced on petition. *Sim.* 184. By the Irish Act, 35 Geo. 3. c. 29, the returning officer (even though not otherwise qualified to vote) must in case of an equality of votes at the poll give his casting vote, and make a return.

Where a false return, or a double return, is made, it may be amended at the bar of the house. The former either by taking the return off the file, if made by an illegal returning officer, and annexing to the writ the real return delivered by the legal officer to the clerk of the crown. Where the christian name of the party returned is mistaken, it may be rectified; sometimes the amendment is made by erasure of the endorsement of the wrong name, and every thing belonging to it, and by a substitution of the right name. Formerly the returning officer himself used to amend the return; but now it is usually done by the clerk of the crown. The double return is amended by taking one off the file. When the return is made, in order to preserve it free from dispute, the clerk of the crown is directed to enter it, whether a single or double return, in a book to be kept for that purpose in his office, within six days after the return: and no amendment or alteration must be made by him or his deputy, or other, of the return, except by order of the house; and such book, or a copy thereof, is directed to be sufficient evidence of the return, in any action to be brought upon that statute; and for any default or omission in such particulars, or for certifying any person returned who was not returned, the clerk of the crown is liable to a penalty of 500*l.* to the party grieved, and forfeiture of his office. 7 & 8 W. 3. c. 7. made perpetual by 12 Ann. st. 1. c. 15.

In double returns, it has been formerly a general practice in the House of Commons, that neither one nor the other should sit in the house until it be decided. In the year 1640 two returns were made for Great Marlow, and in both indentures one person was returned, and he was admitted to sit, but the others ordered to withdraw until the question was determined. And in the same year, it was ordered, that where some are returned by the sheriff, or such other officer as by law hath power to return, and others returned by private hands; in such case, those returned by the sheriff, or other officer, shall sit until the election is quashed by the house. *Ordinan.* 1640. If one be duly elected, and the sheriff, &c. return another, the return must be reformed and amended; and he who is duly elected is to be inserted, for the election is the foundation, and not the return. 4 Inst. 49.

Double returns are to be determined before double elections; and the return immediately annexed to the writ must be first heard. *Sim.* 184, n.

In an action on the case, the plaintiff declared that he was duly elected a member of parliament for such a borough, and that the defendant returned two other persons; and that he petitioned the House of Commons, and was adjudged to be duly elected, and his name ordered to be inserted in the roll, and the name of the other to be razed out: the plaintiff had a verdict; but it was adjudged, in arrest of judgment, that this declaration was not founded on the 7 & 8 W. 3. c. 7. because that statute gave an action where there was none before; therefore the fact must be made agreeable to it, which not being done, defendant had judgment. 2 Salk. 504. The court will not meddle in an action upon a double return until it is determined in parliament. *Lutw.* 88. And it hath been holden, that for a double return, no action lay, before the statute 7 & 8 W. 3. c. 7. because it is the only method the sheriff had to secure himself; and when the right was decided in parliament, then one indenture was taken off the file, so that it is not then a double return; neither can the party have an action for a false return, for the matter may be determined in the house whether true or false; and if so, there will be an inconvenience in contrary resolutions, if they should determine one way, and the courts at law another: but after a dissolution the action may lie for a false return, for then the right cannot be determined in parliament. 2 Salk. 502.

A double return is the same as a false return, as to action on the case; in both it is grounded on the falsity; but there is another reason why this action will not lie for a double return, viz. because the law doth not take notice of such a return; it is only allowed by the usage of parliament, and in case wherein the proper officer cannot determine who is chosen; therefore, when he doubts, he makes a double return, and submits the choice to the determination of the House of Commons, and if that house admit such returns, and make determinations on them, it will be hard for the law to subject a man to an action only for submitting a fact to be determined by a court, which hath a proper jurisdiction to determine it. 2 Lev. 114.

A member elected and returned for several places, is to make his choice for which place he will serve; and if he doth not, by the time which the house shall appoint, the house may determine for what place he shall continue a member, and writs shall go out for the other places.

The proceedings on elections in Ireland are regulated by the Irish acts 35 Geo. 3. c. 29; 37 Geo. 3. c. 47; amended by 45 Geo. 3. c. 59; 51 Geo. 3. c. 77; 60 Geo. 3. and 1 Geo. 4. st. 1. c. 11, and the Irish Reform Act.

An action on the case lies, by a burgess against the returning officer of a borough, for refusing his vote at an election for members to serve in parliament. This was decided in an action brought by one Ashby, a burgess of Aylesbury against *White & al.* constables of the said borough, for refusing to receive the plaintiff's vote in the election of a member of parliament; the plaintiff had a verdict, with 4*l.* damages; but the judgment was arrested by the opinion of three judges, against *Holt, C. J.* viz. that the action is not maintainable, because the constables acted as judges, and the plaintiff's vote is *damnum sine injuria*; for when the matter comes before the house, his vote will be received; that the right of electing members to serve in parliament is to be decided in parliament, and the plaintiff may petition the house for that purpose; and after it is determined there, he may then bring his action and not before; *Holt, C. J. contra*; That the plaintiff had a right to vote; and a freeholder has a right to vote by reason of his freehold; and it is a real right, and the value of his freehold was not material till the 8 Hen. 6, which requires it to be 40*s.* per annum; that as it is *ratione liberi tenementi* in counties burgii; and in cities and corporations, it is *ratione franchise*, and a personal inheritance, vested in the whole corporation

but to be used by the particular members; that this is a noble privilege, which entitles the subject to a share in the government and legislature; and that if the plaintiff hath a right, he must have a remedy to assert that right, for want of right and want of remedy is the same thing; that refusing to take the plaintiff's vote is an injury, and every injury imports a damage; and that where a parliamentary matter comes in, incidentally, to an action of property in the King's Court, it must be determined there and not in parliament; the parliament cannot judge of the injury, nor give damages to the plaintiff, and he hath no remedy by way of petition; and, according to this opinion of *Holt*, the judgment of the other three judges was reversed, upon a writ of error brought in the House of Lords; who ordered that the plaintiff should recover his damages assessed by the jury. See *Bro. P. C.* and also *1 Salk. 19*; *6 Mod. 45*; *3 Salk. 17*; *8 St. Tri. 89*; *Holt, 524*; *Ld. Raym. 938*; *Raym. Ent. 479*.

This determination occasioned much disturbance in both houses of parliament; and on the 25th of January, 1704, the House of Commons resolved itself into a committee on the business; and, after a very long and animated debate, came to five resolutions; importing, that the Commons of England, in parliament assembled, had the sole right to examine and determine all matters relating to the right of election of their own members; and that the right was not determinable elsewhere. That the practice of determining the qualifications of electors, in any court of law, would expose all returning officers to a multiplicity of vexatious suits and insupportable expenses; and subject them to different and independent jurisdictions, as well as to inconsistent determinations in the same case, without relief. That *Ashby* was guilty of a breach of privilege, as were all persons bringing actions, and all attorneys, solicitors, counsellors, and sergeants at law, soliciting, prosecuting, or pleading in any case of the same nature. These resolutions, signed by the clerk, were fixed upon the gate of Westminster Hall. The lords, on their part, passed resolutions in support of their judgment, copies of which and the case itself were sent by the lord keeper to all the sheriffs of England, to be circulated through all the boroughs of their respective counties. See *Bro. P. C.* title *Action*. *Smollett's Hist. Eng. l. 1. c. 8*.

Several persons were, in the next session, committed to Newgate, under a warrant signed by Robert Harley, speaker of the House of Commons, for prosecuting actions at law against the constables of the borough of Aylesbury, who refused to take their votes at the election of members of parliament, &c. in contempt of the jurisdiction and privileges of the house; and this matter being returned to several writs of *habeas corpus*, and the several persons defendants brought into court, counsel moved that they might be discharged; for that the prosecution of a suit at law could be no unlawful act, nor a breach of the privilege of the House of Commons. three judges were of opinion, that the house were the proper judges of their own privileges; and the parties were accordingly remanded, on the ground that the Court of K. B. had not jurisdiction. *Holt*, chief justice, however, held, that the authority of the commons was circumscribed by law; and if they should exceed that authority, then to say they were judges of their own privileges, is to make their privileges to be what they would have them to be, and that if they should wrongfully imprison, there could be no redress, so that the courts at Westminster could not execute the laws upon which the liberties of the subject subsist. *2 Salk. 503*; *2 Ld. Raym. 1105*. See *ante*, IV. 1; V. 2.

The question as to this right of action against a returning officer for refusing a vote, was intended to have been decided on a writ of error, to review the judgment of the Court of K. B.; but some doubt was entertained whether such writ of error lay. *3 Salk. 504*.

The lords addressed the queen, requesting her to issue the

writs of error demanded, upon the refusal of the K. B. to discharge the parties committed by the House of Commons. The queen answered that she should have granted the writs of error desired by them, but finding an absolute necessity of putting an immediate end to the session, she was sensible there could be no further proceeding upon them. The meaning of this could only be, that as by a prorogation of parliament all commitments by order of the House of Commons are determined, the parties would stand in no need of a *habeas corpus*. But the decision of a great constitutional question was thus prevented.

The determination in *Ashby* and *White* has never since been disputed.

The question, as to the power of the House of Commons to commit for a contempt, was again brought before the Court of King's Bench in the Honourable *Alex. Murray's Case*, *1 Wils. 299*; and before the Court of Common Pleas in the case of *Brass Crosby*. *3 Wils. 188*; *Black. Rep. 754*. In both which it was ruled, according to the decision in *Salkeld*, that a person committed by the House of Commons for a contempt, cannot be discharged by a court of common law. See *Hobhouse's Case*, *3 Barn. & Ald. 420*; and see title *Bail*, II.

The form and manner of proceeding upon petitions to the House of Commons, in cases of controverted elections, was regulated by *10 Geo. 3. c. 16*; (made perpetual by *14 Geo. 3. c. 15*.) An excellent law best known by the name of *Grenville's Act*; and it has been much improved by the *11 Geo. 3. c. 42*; *25 Geo. 3. c. 84. § 10—12*; *28 Geo. 3. c. 52*; *32 Geo. 3. c. 1*; *36 Geo. 3. c. 59*; *42 Geo. 3. c. 84*; (made perpetual, *47 Geo. 3. st. 1. c. 1*;) *53 Geo. 3. c. 71*. These statutes are now consolidated into one act with considerable amendments, *9 Geo. 4. c. 2*.

By this statute any person claiming to vote, or claims to be returned, or being a candidate, may present a petition, complaining of an undue election: but one subscriber to the petition must within fourteen days enter into a recognizance himself in 1000*l.* with two sureties in 500*l.* or four in 250*l.* to pay the costs of witnesses, clerks, officers of the house, clerks, &c. which costs are to be taxed under direction of the speaker. The house shall appoint some day and hour for the consideration of the petition, and shall give notice to the petitioners, and the sitting members, &c. to attend the bar of the house on that day by themselves, their counsel or agents; this day, however, may be altered, but notice shall be given of the new day appointed, and if the petitioners do not attend, the petition shall not be proceeded in. On the day fixed, if 100 members do not attend, the house shall adjourn from day to day, (except Sundays, Christmas-day, and Good Friday,) till there shall be 100 members present to take the petition into consideration; and on such day the house shall not proceed to any other business, previous to reading the order of the day for taking the petition into consideration, except swearing in members; receiving reports from committees; amending a return; attending his majesty, or a commission, in the House of Lords; receiving messages from the lords; proceeding in the prosecution of an impeachment before that house; or proceeding upon the order of the day for the call of the house; and making other orders for enforcing the attendance of members.

If on summoning and counting the members, 100 are present, the parties, their counsel or agents attend the bar, and the door is locked. The order of the day is then read.

The names of all the members belonging to the house are then put into six boxes or glasses in equal numbers, (such names having been previously written on slips of paper by the clerk, and put into a box by him in the presence of the speaker, and the speaker having sealed the box, and affixed his written attestation,) and the clerk shall draw a name from each of the glasses in rotation, which name shall be read by the speaker, and in this manner they proceed till thirty-three

such names of members present are collected. Members who have voted at the election in question, or who are petitioners or petitioned against, or who have served on a committee, which has reported on a right of election petitioned against, cannot serve: and persons who are sixty years of age, or who have served before, are excused, if they require it; and others, who can show any material reason, may also be excused by the indulgence of the house. After thirty-three names are so drawn, lists of them shall be given to the respective parties; who shall withdraw, and shall alternately strike off one (the petitioners beginning) till they are reduced to eleven, and these eleven constitute the select committee. If there are three parties they shall alternately strike off one, the order in which the parties shall strike off to be determined by lot. The members of the committee shall then be ordered by the house to meet within twenty-four hours; and they cannot adjourn for more than twenty-four hours, except over Sunday, Christmas-day, and Good Friday, without leave of the house; and no member of the commons shall absent himself without the permission of the house. And the committee shall not sit till all the members to whom leave has not been granted have met, and if all do not meet within one hour of the time appointed, a further adjournment shall be made, and the cause reported to the house. If more than two members are absent on any account, the committee are to adjourn. If committee reduced by death or otherwise to less than nine, for three sitting days, it is dissolved, and another must be appointed, unless they have sat for business fourteen days, in which case they may proceed with eight members. All the fifteen members of the committee take a solemn oath, in the house, that they will give a true judgment according to the evidence; and every question is determined by a majority. The committee may send for witnesses, papers, and records, and examine witnesses upon oath, a power which the House of Commons does not possess; and if they report that the petition or defence is frivolous or vexatious, the party aggrieved shall recover costs. On the close of the whole business, the committee report their determination to the house; who order the return to the writ to be amended accordingly, if necessary, or a new writ to be issued, and the determination to be carried into execution, and thus the election is definitively decided.

When the committee's decision has turned on the right of election in any place, any person, within six months after the report, may petition to be admitted to oppose the right declared valid; and within twenty-one days after the expiration of the six months, a day and hour shall be appointed for considering the same, and notice given to all the parties; but if no such petition presented within such time, the judgment of the committee shall be final and conclusive. § 51. Notice of the day and hour appointed is to be inserted by the speaker in the Gazette. § 52. At the time appointed for considering the petition, the house shall appoint a committee in the same manner as the committees before mentioned; and the determination of the committee of appeal shall be final, and entered on the journals. All the regulations, powers, and authorities, applying to election committees, are to apply to the committees of appeal.

By the Reform Act, § 70. upon any petition complaining of an undue election or return, any petitioner or person defending such election or return, may impeach the correctness of the register of votes, by proving that the name of any person who voted at the election was improperly inserted or retained therein by the revising barrister; or the name of any person who tendered his vote at such election was improperly omitted; and the select committee appointed for the trial of such petition shall alter the poll taken at such election according to the truth of the case, and report their decision to the house, who shall carry such determination into effect, and

the return be amended, or the election declared void, and the register corrected, or such other order made as the house shall deem fit.

By 42 G. 3. c. 106. amended by 47 G. 3. st. 1. c. 14. for regulating the trial of controverted elections of members elected for Ireland, &c. the regulation of the existing British acts are extended to petitions on Irish elections, with such amendments as the circumstances of the place and distance of such elections required. Among these the most important are, that the committee are empowered, on application of either of the parties, to make an order for appointing commissioners in Ireland, to take evidence there as to any matter which may be assigned and limited by the committee on such appointment. The chairman of the committee shall issue his warrant to the commissioners to proceed accordingly; and then the committee shall adjourn.—Directions are given, as to the mode in which the commissioners shall proceed in taking the evidence; and when that is done, the commissioners are to transmit one copy thereof to the clerk of the crown in Ireland, and another to the speaker of the House of Commons, who thereupon shall issue his warrant for the committee to re-assemble within one month, or (by the 60 Geo. 3. c. 7.) if the house are at that time adjourned, then within one month after the day to which they are adjourned; which committee shall proceed to decide on the merits of the petition, determining all matters referred to the commissioners, according to the evidence taken and transmitted by them. The committee may send for papers produced before the commissioners; but cannot enter into any new evidence on the facts referred to the commissioners.

In the case of a petition on an election for Downpatrick, where a warrant for a commission had issued, and the petitioner was desirous of withdrawing his petition, a special act was found necessary to avoid the warrant, and enable the committee to proceed to a decision. See 55 G. 3. c. 98.

VII. THE mode of making laws is much the same in both houses. It is proper previously to premise that for despatch of business each house of parliament has its speaker. The speaker of the House of Lords, whose office it is to preside there, and manage the formality of business, is the lord chancellor, or keeper of the king's great seal, or any other appointed by the king's commission: and, if none be so appointed, the House of Lords (it is said) may elect; and an instance of that nature has occurred in the Irish House of Lords.

The speaker of the House of Commons is chosen by the house; but must be approved by the king. This point seems not to have been settled till A. D. 1679, when the house elected Sir Edward Seymour, after the nomination of another person by the court. This produced a conflict, which terminated, after a short prorogation, by the election of a third person; with an understanding that the virtual election was in the house, and only a nominal approval in the crown. See Burnett's History, Oxford Edition, 1823; ii. 195; and 1 Dugdale on Stat. 50.

The speaker of the House of Commons cannot give his opinion or argue any question in the house; but the speaker of the House of Lords, if a lord of parliament, may.

The commons anciently had no continual speaker, but after consultation, their manner of proceeding was to agree upon some person of great abilities, to deliver their resolutions. In the reign of William Rufus, at a great parliament held at Rockingham, a certain knight came forth, and stood before the people, and spake in the name and behalf of them all; who was undoubtedly the speaker of the House of Commons at that time. The first speaker certainly known was Peter de Montford, 44 H. 3, when the lords and commons sat in several houses, or at least gave their assents severally. See Constitutionis, 162.

Hume is mistaken, who says that Peter de la Mere, chosen

in the first parliament of Ric. II. was the first speaker of the commons. *Vol. 3. p. 3.* And in the rolls of parliament, 51 Ed. 3. No. 87. it appears, that Sir Thomas Hungerford, chevalier, *qui avoit les parolles des communes en cest parlement*, addressed the king, in the name of the commons, in that justice year, to pray that he would pardon several persons who had been convicted on impeachments. And there he is not mentioned as if his office was a novelty. 1 *Comm.* 181. in n.

Sir Richard Walgrave, 5 R. 2. was the first speaker who made any formal apology for inability, as now practised: Richard Rich, Esq. an. 25 H. 8. was the first speaker who is recorded to have made request for access to the king. Thomas Moyle, Esq. an. 31 H. 8. is said to be the first speaker who petitioned for freedom of speech; and Sir Thomas Cargrave, an. 1 Eliz. was the first who made the request for privilege from arrests, &c. Sir John Busby, an. 17 R. 2. was the first speaker presented to the king, in full parliament, by the commons. And when Sir Arnold Savage was speaker, an. 2 H. 4. it was the first time that the commons were required by the king to choose a speaker. *Det.*

The salary of the speaker was settled at 1500*l.* a quarter, or 6000*l.* a year, by the 20 Geo. 3. c. 10; and by the 2 & 3 W. 4. c. 105. his salary is to be in future payable out of the consolidated fund, and the fees previously received by him are to be paid to the fee fund of the House of Commons. Both acts prohibit him from holding any office under the crown during pleasure.

By the 4 & 5 W. 4. c. 70. the salary of the speaker of the House of Commons is in future to be reduced to 5000*l.* a year; but the act does not extend to the present speaker.

Each house the act of the majority binds the whole; and this majority is declared by votes openly and publicly given.

In the House of Commons the speaker never votes (unless in committee) except when there is an equality without his casting vote, which in that case creates a majority of the house: but the speaker of the House of Lords has no casting vote, his vote being connected with the rest of the house, and in the case of an equality, the *non contents*, or negative voices, have the same effect and operation as if they were a fact a majority. *Lords' Journ.* 25 June, 1661.

The House of Lords in Ireland observed the same rule, and in cases of equality *semper præsumitur pro negante*. *Id.* *Mountin*, i. 107. Hence the order in putting the question, on appeals and writs of error, was this; "Is it your lordships' pleasure, that this decree or judgment should be reversed?" for if the votes were equal, the judgment of the court below was affirmed. *Id.* ii. 81.

Here it may not be improper to remark, that there is no casting voice in courts of justice; but in the superior courts, if the judges are equally divided, there is no decision; and the cause is continued in court till a majority concur; which they frequently do by consent merely for the purpose of sending the cause, by appeal, to a higher jurisdiction. At the sessions, the justices, in case of equality, ought to respite the matter till the next session; but if they are equal one day, and the matter is duly brought before them on another day in the same sessions, and there is then an inequality, it will amount to a judgment: for all the time of the session is considered but as one day. A casting vote sometimes signifies the single vote of a person who never votes but in the case of an equality; sometimes the double vote of a person who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote. A casting vote neither exists in corporations nor elsewhere, unless it is expressly given by statute or charter; or what is equivalent, exists by immemorial usage. 1 *Comm.* 181. in n.

With respect to other formalities in the two houses it may be observed, there are no places of precedency in the House of Commons as there are in the House of Lords; only the

speaker has a chair or seat fixed towards the upper end, in the middle of the house; and the clerk, with his assistant, sits near him at the table, just below the chair. The members of the House of Commons never had any robes, as the Lords ever had, except the speaker and clerks, who in the house wear gowns, as professors of the law do during term time.

No knight, citizen, or burgess of the House of Commons, shall depart from the parliament without leave of the speaker and commons assembled; and the same is to be entered in the book of the clerk of the parliament. 6 *Hen.* 8. c. 16. And in the 1 & 2 *Phil. & Mar.* informations were preferred by the attorney-general against thirty-nine of the House of Commons for departing without licence, whereof six submitted to fines; but it is uncertain whether any of them were paid.

Calling the house is to discover what members are absent without leave of the house, or just cause; in which cases fines have been often imposed. On the calling over, such of the members as are present are marked; and the defaulters being called over again the same day, or the day after, and not appearing, are summoned or sent for by the serjeant-at-arms. *Lex Constitutionis*, 159.

Forty members are requisite to make a House of Commons for despatch of business; and the business of the house is to be kept secret among themselves. In the 23d year of Queen Elizabeth, Arthur Hall, Esq. member of parliament, for publishing the conferences of the house, and writing a book which contained matters of reproach against some particular members, derogatory to the general authority, power, and state of the house, and prejudicial to the validity of the proceedings, was adjudged by the commons to be committed to the Tower for six months, fined 500*l.* and expelled the house. But the speaker of the House of Commons, according to the duty of his office, as a servant to the house, may publish such proceedings as he shall be ordered by the commons assembled; and he cannot be liable for what he does that way by the command of others, unless those other persons are liable.

All bills, motions, and petitions, are by order of parliament to be entered on the parliament rolls, although they are denied, and never proceed to the establishment of the statute, together with the answers. *Lex Constitutionis*, 154.

The speaker of the House of Commons is not allowed to persuade or dissuade in passing a bill, only to make a short narrative of it; opening the parts of the bill, so that all may understand it; if any question be upon the bill, he is to explain, but not enter into a argument or dispute. When Mr. Speaker desires to speak, he ought to be heard without interruption; and when the speaker stands up, the member standing up is to sit down; if two stand up to speak to a bill, he who would speak against the bill, if it be known, is to be first heard; otherwise he who was first up, which is to be determined by the speaker; no member is to be taken down unless by Mr. Speaker, in such cases as the house do not think fit to admit; and if any person speak impertinently, or besides the question, the speaker is to interrupt him, and know the pleasure of the house whether he shall be further heard; but if he speaks not to the matter, it may be moderated; and whosoever hisses or disturbs any person in his speech, shall answer it at the bar of the house.

In enacting laws and other proceedings in parliament the lords give their voices in their house, from the puisne lord *seriatim*, by the word *Content*, or *Not Content*: the manner of voting in the House of Commons is by *Yea* and *No*; and if it be difficult to determine which are the greater number, the house divides, and four tellers are appointed by the speaker, two of each side, to number them, the *Ay's* going out, and the *No's* staying in; and thereof report is made to the house. When the members of the house go forth, none is to stir until Mr. Speaker rises from his seat, and then all the rest are to follow after.

To bring a bill into the house, if the relief sought by it is of a private nature, it is first necessary to prefer a petition, which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition (when founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the house; and then (or otherwise upon the mere petition) leave is given to bring in the bill. In public matters the bill is brought in upon motion made to the house, without any petition at all. Formerly all bills were drawn in the form of petitions, which were entered upon the parliament rolls, with the king's answer thereunto subjoined, not in any settled form of words, but as the circumstances of the case required; and at the end of each parliament the judges drew them into the form of a statute, which was entered on the statute rolls. (See, among numberless other instances, the *articuli cleri*, 9 *Edw. 2.*) In the reign of Henry V. to prevent mistakes and abuses, the statutes were drawn up by the judges before the end of the parliament; and in the reign of Henry VI. bills in the form of acts, according to the modern custom, were first introduced.

It appears that prior to the reign of Henry V. it had been the practice of the kings to add and enact more than the commons petitioned for. In consequence of this there is a very memorable petition from the commons, *an. 2 Hen. 5.* which states, that it is the liberty and freedom of the commons that there should be no statute without their assent, considering that they have ever been assenters as well as petitioners; and therefore they pray that for the future there may be no additions to, or diminutions from their petitions. And in answer to this the king granted that from thenceforth they should be bound in no instance without their assent, saving his royal prerogative to grant and deny what he pleases of their petitions. *Ruff. Pref. xv. Rot. Parl. 2 Hen. 5. No. 22.*

Any member may move for a bill to be brought in, except it be for imposing a tax, which is to be done on a report from a committee of the whole house; and leave being granted, the person making the motion, and those who second it, are ordered to prepare and bring in the same.

Public bills or acts of parliaments are commonly drawn, such as relate to taxes, or other matters of government, by the several public boards, according to their respective jurisdictions; others by such members of the House of Commons as are most inclined to effect the good of the public, particularly in relation to the bill designed, taking advice thereupon; and acts for the revival, repeal, or continuance of statutes, or other legal matters, are penned by lawyers, members of the house, appointed for that purpose.

The persons directed to bring in the bill present it in a competent time to the house, drawn out on paper, with a multitude of blanks, or void spaces, where any thing occurs that is dubious, or necessary to be settled by the parliament itself, (such, especially, as the precise date of times, the nature and quantity of penalties, or of any sums of money to be raised,) being indeed only the skeleton of the bill. In the House of Lords if the bill begins there, it is (when of a private nature) referred to two of the judges, to examine and report the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety. This is read a first time, and at a convenient distance a second time; and after each reading the speaker opens to the house the substance of the bill, and puts the question whether it shall proceed any farther. The introducing of the bill may be originally opposed, as the bill itself may at either of the readings; and if the opposition succeeds the bill must be dropped for that session, as it must also, if opposed with success, in any of the subsequent stages. But it is not unusual to introduce a rejected bill under a new form and title.

After the second reading it is committed, that is, referred to a committee, which is either selected by the house in matters of small importance, or else upon a bill of consequence the house resolves itself into a committee of the whole house. A committee of the whole house is composed of every member; and to form it the speaker quits the chair, (another member being appointed chairman,) and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new modelled. After it has gone through the committee the chairman reports it to the house with such amendments as the committee have made; and then the house reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. When the house hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be engrossed, or written in a strong gross hand, on one or more long rolls or presses of parchment sewed together. When this is finished it is read a third time, and amendments are sometimes then made to it; and if a new clause be added it is done by tacking a separate piece of parchment on the bill, which is called a rider. The speaker then again opens the contents, and, holding it up in his hands, puts the question, whether the bill shall pass. If this is agreed to, the title to it is then settled, which used in ancient times to be a general one for all the acts passed in the session; distinct titles for each chapter were not introduced with much regularity before the time of Henry VII. One of the members is directed to carry the bill to the lords, and desire their concurrence, who, attended by several more, carries it to the bar of the house of peers, and there delivers it to their speaker, who comes down from his woosack to receive it.

If there passes through the same forms as in the other house, (except engrossing, which is already done,) and if rejected, no more notice is taken, but it passes *sub silentio*, to prevent unbecoming alterations. But if it is agreed to, the lords send a message by two masters in chancery, (or upon matters of high dignity or importance, by two of the judges,) that they have agreed to the same; and the bill remains with the lords, if they have made no amendment to it. But if any amendments are made, such amendments are sent down with the bill to receive the concurrence of the commons. If the commons disagree to the amendments, a conference usually follows between members deputed from each house; these meet in the painted chamber, and debate the matter, and for the most part settle and adjust the difference; but if both houses remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is sent back to the lords by one of the members, with a message to acquaint them therewith. The same forms are observed *mutatis mutandis*, when the bill begins in the House of Lords. But when an act of grace or pardon is passed, it is first signed by his majesty, and then read once only in each of the houses, without any new engrossing or amendment. *D'Enc's Journ. 20, 73; Com. Journ. 17th June, 1747.* And when both houses have done with any bill, it is always deposited in the house of peers to wait the royal assent; except in the case of a bill of supply, which, after receiving the concurrence of the lords, is sent back to the House of Commons. *Com. Journ. 24th July, 1660.*

If any debate happens on the first reading of a bill, the speaker puts the question whether the same shall have a second reading, and sometimes upon motion appoints a day for it; for public bills, unless upon extraordinary occasions, are seldom read more than once a day, the members being allowed convenient time to consider of them: if nothing be said against a bill, the ordinary course is to proceed without a question; but if the bill be generally disliked, a question is sometimes put, whether the bill shall be rejected? If it be rejected, it cannot be proposed any more that session;

when a bill hath been read a second time, any member may move to have the same amended; but no member of the house is admitted to speak more than once in a debate, except the bill be read more than once that day, or the whole house is turned into a committee; and after some time spent in debates, the speaker, collecting the sense of the house, reduces the same to a question, which he submits to the house, and is put to the vote; and a question is to be put, after the bill is so read a second time, whether it shall be committed? The chairman of the committee makes his report of a bill at the side bar of the house, reading all the alterations made, and then delivers the same to the clerk of the parliament, who likewise reads all the amendments, and the speaker puts the question, whether they shall be read a second time? And if that be agreed unto, he reads the amendments himself, and puts the question, whether the bill so amended shall be engrossed, and read a third time some other day? In the House of Lords, if a bill be not committed, then it is to be read a third time, and the next question to be for its passing; and on the third reading of the bill, any member may speak against the whole bill to throw out the same, or for amendment of any clause. *Prac. Solic. in Par.* 397, 398.

In cases of private bills, when the petition is read, and leave given to bring in the bill, the persons concerned and affected by it may be heard by themselves or counsel at the bar, or before the committee, to whom such bill is referred; and in case of a peer, he shall be admitted to come within the bar of the House of Commons, and sit covered on a stool whilst the same is debating. And after counsel are heard on both sides, and the house is satisfied with the contents of the bill, it goes through the several forms.

For full information as to the manner of passing public and private bills, see 1 *Dwarris on Statutes*, 112.

The royal assent may be given two ways: 1. In person when the king comes to the House of Peers in his crown and royal robes, and sending for the commons to the bar, the titles of all the bills that have passed both houses are read, and the king's answer is declared by the clerk of the parliament in Norman-French; a badge, it must be owned, (now the only one remaining,) of conquest, and which one could wish to see fall into total oblivion, unless it be reserved as a solemn memento to remind us that our liberties are mortal, having been once destroyed by a foreign force. If the king consents to a public bill, the clerk usually declares, "*Le roy le veut*—The king wills it so to be." if to a private bill, "*Soit fait comme il est desire*," Be it as it is desired. If the king refuses his assent, it is in the gentle language of "*Le roy s'avisera*—The king will advise upon it." When a bill is passed, it is carried up and presented to the king by the speaker of the House of Commons; and the royal assent is thus expressed, "*Le roy remercie ses loyals subjects, accepte leur benevolence, et ainsi le veut*." The king thanks his subjects, accepts their benevolence, and wills it so to be. *Rot. Parl. 9 Hen. 4. in Pryn. 4 Inst.* 30, 31. In case of an act of grace, which originally proceeds from the crown, and has the royal assent in the first stage of it, the clerk of the parliament thus pronounces the gratitude of the subject: "*Les prelates, seigneurs, et commons, en ce present parlement assemblez, au nom de tous vos autres subjects, remercient tres humblement votre majeste, et prient a Dieu vous donner en saute loing vie et loing.*" The prelates, lords, and commons, in this present parliament assembled, in the name of all your other subjects, most humbly thank your majesty, and pray to God to grant you in health and wealth long to live." *D'Elwes's Journ.* 31.

The words *Le roy s'avisera* correspond to the phrase formerly used by courts of justice, when they required time to consider of their judgment; viz. *Curia advisare vult*. And there can be little doubt but originally these words implied a serious intent in the king to take the subject under con-

sideration; and they only became in effect a negative when the bill or petition was annulled by a dissolution before the king communicated the result of his deliberation; for in the rolls of parliament the king sometimes answers that the petition is unreasonable, and cannot be granted; sometimes he answers, that he and his council will consider of it; as in *Rot. Parl.* 37 *Edw. 3. No. 33.*

This prerogative of rejecting bills was exercised to such an extent in ancient times, that *D'Elwes* informs us that Queen Elizabeth, at the close of one session, gave her assent to twenty-four public and nineteen private bills; and at the same time rejected forty-eight, which had passed the two houses of parliament. *Journ.* 596. The last time it was exerted was in the year 1692, by King William III. who at first refused his assent to the bill for triennial parliaments; but was prevailed upon to permit it to be enacted two years afterwards. *De Lolme*, 404.

By § 3, 4. of 33 *Hen. 8. c. 21.* which was passed to attain Queen Katherine of treason, it was enacted that the king's assent by letters-patent under his great seal, signed with his hand, and notified in his absence to both houses assembled together in the Lords' House, ever was and should be of like force as if given by the king in person.

When the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of parliament, and is placed among the records of the kingdom; there needing no formal promulgation to give it the force of a law, as was necessary by the civil law with regard to the emperor's edicts; because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives. However, a copy thereof is usually printed at the king's press for the information of the whole land. And formerly, before the invention of printing, it was used to be published by the sheriff of every county; the king's writ being sent to him at the end of every session, together with a transcript of all the acts made at that session, commanding him, "*ut statuta illa, et omnes articulos in eisdem contentos, in singulis locis ubi expedire viderit, publice proclamari, et firmiter teneri et observari faciat.*" And the usage was to proclaim them at his county-court, and there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of Henry VII. 3 *Inst.* 41; 4 *Inst.* 26. See further, *tit. Statute*.

An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the king himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament; for it is a maxim in law, that it requires the same strength to dissolve as to create an obligation. It is true it was formerly held, that the king might in many cases dispense with penal statutes. *Finch. L.* 81, 234; *Bacon. Elem. c. 19.* But now, by 1 *W. & M. st. 2. c. 2.* it is declared, that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal; as has already been repeatedly noticed. See *King*.

VIII. An adjournment is no more than a continuance of the session from one day to another, as the word itself signifies; and this is done by the authority of each house separately every day; and sometimes for a fortnight or month together, as at Christmas or Easter, or upon other particular occasions. But the adjournment of one house is no adjournment of the other. 4 *Inst.* 28. It hath also been usual, when his majesty hath signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the king's pleasure so signified, and to adjourn accordingly. *Com. Journ. passim.* Otherwise, besides

the indecorum of a refusal, a prorogation would assuredly follow, which would often be very inconvenient to both public and private business. For prorogation puts an end to the session; and then such bills as are only begun, and not perfected, must be resumed *de novo* (if at all) in a subsequent session; whereas, after an adjournment, all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement.

A prorogation is the continuance of the parliament from one session to another, as an adjournment is a continuation of the session from day to day. This is done by the royal authority, expressed either by the lord chancellor in his majesty's presence, or by commission from the crown, or frequently by proclamation.

At the beginning of a new parliament, when it is not intended that the parliament should meet, at the return of the writ of summons, for despatch of business, the practice is to prorogue it by a writ of prorogation; as the parliament called in 1790 was prorogued twice by writ; and the first parliament in the reign of Geo. III. was prorogued by four writs. On the day upon which the writ of summons is returnable, the members of the House of Commons who attend do not enter their own house, or wait for a message from the lords, but go immediately up to the House of Lords, where the chancellor reads the writ of prorogation; and when it is intended that they should meet upon the day to which the parliament is prorogued for despatch of business, notice is given by a proclamation. 1 *Comm. c. 2. p. 187. in n. See post.*

Both houses are necessarily prorogued at the same time, it not being a prorogation of the House of Lords or Commons, but of the parliament. The session is never understood to be at an end until a prorogation; though, unless some act be passed, or some judgment given in parliament, it is in truth no session at all. 4 *Inst. 28; Hale of Parl. 38; Hut. 61.* And formerly the usage was for the king to give the royal assent to all such bills as he approved at the end of every session, and then to prorogue the parliament, though sometimes only for a day or two; after which all business then depending in the houses was to be begun again. Which custom obtained so strongly, that it once became a question, whether giving the royal assent to a single bill did not, of course, put an end to the session. And, though it was then resolved in the negative, yet the notion was so deeply rooted, that the 1 *Car. 1. c. 7.* was passed to declare, that the king's assent to that and some other acts should not put an end to the session; and even so late as the reign of Charles II. we find a proviso frequently tacked to a bill, that his majesty's assent thereto should not determine the session of parliament. 12 *Car. 2. c. 1; 22 & 23 Car. 2. c. 1.* But it now seems to be allowed that a prorogation must be expressly made in order to determine the session.

All orders of parliament determine by prorogation; and one taken by order of the parliament, after their prorogation, may be discharged on an *habeas corpus*, as well as after a dissolution; but it was long since determined that the dissolution of a parliament did not alter the state of impeachments brought by the commons in a preceding parliament. *Raym. 120; 1 Lev. 384. See Impeachment.* Cases of appeals and writs of error shall continue, and are to be proceeded on, *in statu quo*, &c. as they stood at the dissolution of the last parliament. *Raym. 381.*

A prorogation of parliament is always by the king; and in this case the sessions must begin *de novo*. An adjournment is by each house, and the sessions continues, notwithstanding such adjournment. 1 *Mod. 242.* By a prorogation of parliament there is a session; and every several session of parliament is in law a several parliament; though if it be only an adjournment, there is no session; and when a parliament is called, and doth sit, but is dissolved without any act passed or judgment given, it is no session of par-

liament, but a convention. 4 *Inst. 27.* If a parliament is assembled, and orders made, and writs of error brought in the House of Peers, and several bills agreed on, but none signed; this is but a convention, and no parliament, or session of parliament; but every session in which the king signs a bill is a parliament; and so every parliament is a session. 1 *Rol. Rep. 29; Hut. 61.*

The parliament from the first day of sitting is called the first session of parliament, &c. *Raym. 120.* And the courts of justice *ex officio* are to take notice of the beginning, prorogation, and ending of every parliament; also of all general statutes. 1 *Lev. 296; Hob. 111.*

On prorogation, such bills as have passed, not having received the royal assent, must fall; for there can be no act of parliament, without consent of the lords and commons, and the royal *fiat* of the king, giving his consent personally, or by commission. Special acts have occasionally been passed to prevent the effect of prorogation of parliament, in cases of impeachment, &c. See 45 *Geo. 3. c. 117 and 125.*

It was held generally, that the king could not summon a parliament before the day to which it was last prorogued; and that when a parliament was prorogued to a certain day, they did not meet on that day, unless it were particularly declared, by the proclamation giving notice of the prorogation, that they should meet for the despatch of business, and when it had not been prorogued by such a proclamation, and it was intended that parliament should actually sit, it was the established practice to issue a proclamation to give notice that it was for the despatch of business; and this proclamation, unless upon some urgent occasion, bore date at least forty days before the meeting. 2 *Hats. 237.* Provisions for the meeting of parliament within fourteen days have been from time to time made by the several militia acts. By the existing acts, 42 *Geo. 3. c. 90.* for England; c. 91. for Scotland; in all cases of actual invasion, or imminent danger of it, and in cases of rebellion or insurrection, the king having first communicated the occasion to parliament, if sitting, and if no parliament be sitting, having notified the occasion by proclamation, may order the militia to be called out and embodied. And wherever this is done, if the parliament be adjourned or prorogued, he shall convene them within fourteen days. See 42 *Geo. 3. c. 90. § 111—113. 146. 147. and c. 91. § 139. 142.*

By the 37 *Geo. 3. c. 127.* a permanent provision was introduced, that whenever the king shall be pleased, by advice of the privy council, to issue a proclamation that parliament shall meet and be holden for despatch of business, on any day not less than fourteen days from the date of such proclamation, the same shall be sufficient notice to all persons, and the parliament shall stand prorogued to the day and place there declared, notwithstanding any former prorogation, or any law or usage to the contrary. And by 39 & 40 *Geo. 3. c. 11.* this provision is extended to the case of an adjournment of parliament, as well as a prorogation.

A dissolution is the civil death of the parliament; and this may be effected three ways; first, by the king's will, expressed either in person or by representation. For, as the king has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that he may (whenever he pleases) prorogue the parliament for a time, or put a final period to its existence. If nothing had a right to prorogue or dissolve a parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power: as was fatally experienced by the unfortunate King Charles the First; who having unadvisedly passed an act to continue the parliament then in being, till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power which he himself had consented to give them. It is, therefore, extremely necessary that the crown should be empowered to regulate the duration of these assem-

bles, under the limitations which the English constitution has prescribed; so that, on the one hand, they may frequently and regularly come together for the despatch of business and redress of grievances; and may not, on the other, even with the consent of the crown, be continued to an inconvenient or unconstitutional length.

A parliament, it hath been said, ought not to be dissolved as long as any bill remains undischarged; and proclamation must be made in the parliament, that if any person have any petition, he shall come in and be heard, and if no answer be given, it is intended the public are satisfied.

Secondly, a parliament may be dissolved by the demise of the crown. This dissolution formerly happened immediately upon the death of the reigning sovereign; for he being considered in law as the head of the parliament, that failing, the whole body was held to be extinct. But the calling a new parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no parliament in being in case of a disputed succession, it was enacted by 7 & 8 W. 3. c. 15. that the parliament in being should, if sitting, continue for six months after the demise of the crown, unless sooner dissolved, &c. by the successor; and if not sitting, should meet on the day of prorogation; and that in case no parliament was in being, the last preceding parliament should convene and sit. By 1 Ann. c. 7. § 1. it is more explicitly enacted, that parliament shall not be determined or dissolved by demise of the crown; but shall continue, and if sitting at the time of such demise, immediately proceed to act for six months, and no longer, unless sooner prorogued or dissolved by the successor; and if prorogued, shall meet on the day of the prorogation, and sit for the remainder of the said six months, unless sooner dissolved, &c. By § 5. if there be a parliament in being at the time of the demise of the crown, but the same happens to be then separated by a adjournment or prorogation, such parliament shall immediately after such demise meet, convene, and act, and shall act, notwithstanding such demise, for six months, unless sooner dissolved, &c. By § 6. repeated by 37 Geo. 3. c. 127. it was provided, that in case at the time of such demise there were no parliament in being that had met and acted, the last preceding parliament should immediately convene.

The said act, 37 Geo. 3. c. 127. enacts, (§ 3.) that in case of the demise of the crown, subsequent to the dissolution or expiration of a parliament, and before the day appointed by the writs of summons for assembling a new parliament, in such case the last preceding parliament shall immediately convene and sit at Westminster, and be a parliament for six months, and no longer, as if the said parliament had not been dissolved or expired; subject to be dissolved or prorogued by the successor. By § 4. this proviso is extended to the case of the demise of a successor to the crown, within six months after his accession, without his having dissolved the parliament, or after it shall have been dissolved, and before a new parliament shall have met. By § 5. in case of the demise of the crown, on or after the day appointed by the writs of summons for assembling a new parliament, and before such new parliament shall have actually met, such new parliament shall immediately after such demise convene and sit at Westminster, and be a parliament for six months, and no longer, subject to be dissolved, &c.

Lastly, a parliament may be dissolved or expire by length of time. For if either the legislative body were perpetual; or might last for the life of the prince who convened them as members; and were so to be supplied, by occasionally filling the vacancies with new representatives; in these cases, if it were once corrupted, the evil would be past all remedy; but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly also, which is sure to be separated again, (whereby its members will themselves become

private men, and subject to the full extent of the laws which they have enacted for others,) will think themselves bound, in interest as well as duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed to sit, by the 6 W. & M. c. 2. was three years; after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continued. But by the 1 Geo. 1. st. 2. c. 38. (in order, professedly, to prevent the great and continued expenses of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government then just recovering from the late rebellion,) this term was prolonged to seven years; and, what alone is an instance of the vast authority of parliament, the very same house, that was chosen for three years, enacted its own continuance for seven. So that, as our constitution now stands, the parliament must expire, or die a natural death, at the end of every seventh year, if not sooner dissolved by the royal prerogative; as it generally is, in the course of every five or six years.

This Septennial Act has been termed an unconstitutional exertion of the authority of parliament; and the reason alleged is, that those who had a power delegated to them for three years only, could have no right to extend that term to seven years. But on this it has been observed, that it is not true in fact, as the argument is usually put, that a parliament chosen for three years continued themselves for seven, since it was only one part of the parliament, the House of Commons, which was chosen for any limited time; and the Septennial Act was the act of the whole legislature.

When a parliament is dissolved, impeachments by the commons, appeals, or writs pending in parliament, do not abate by the dissolution, but the next parliament shall proceed upon them in the state in which they were left at the dissolution. *Raym.* 383.

PARLIAMENTUM DIABOLICUM. A parliament held at Coventry, 38 Hen. 6. wherein Edward Earl of March (afterwards King Edward IV.) and many of the chief nobility were attainted, was so called; but the acts then made were annulled by the succeeding parliament. *Holingshed's Chron.*

PARLIAMENTUM INDOCTORUM, the *Lacklearning Parliament.* A parliament held 6 Hen. 4. whereunto by special precept to the sheriffs in their several counties, no lawyer, or person skilled in the law, was to come. See tit. *Parliament*, VI. 2.

PARLIAMENTUM INSANUM. A parliament assembled at Oxford, anno 41 Hen. 3. so styled from the madness of their proceedings; and because the lords came with armed men to it, and contentions grew very high between the king, lords, and commons, whereby many extraordinary things were done. 4 *Inst.*

PARLIAMENTUM RELIGIOSORUM. In most convents they had a common room into which the brethren withdrew for conversation; and the conference there had was termed *Parliamentum.* *Mat. Paris.* The abbot of Croyland used to call a parliament of his monks, to consult about the affairs of his monastery; and, at this day, the societies of the two Temples, or Inns of Court, call that assembly of the benchers or governors, a parliament; wherein they confer upon the common affairs of their several houses. *Crompt. Jurisd.* 1.

PAROCHIAL LIBRARY. See *Library.*

PAROL. Word of mouth. See *Agreement, Assumpsit, Fraud, Trust, Will.*

As to what things may be done by parol without deed, the following determinations may deserve notice.

An use will not pass by parol without deed; but Chief Justice *Pemberton* said it would be a good trust or chancery use, if for money. 2 *Show.* 156. A parol release is good to discharge a debt by simple contract. *Arg.* 2 *Show.* 417.

A promise merely executory on both parts; as if I promise B. 5s. if he goes to Paul's, before B. goes, I may dis-

charge him, and so shall discharge myself of payment of the 5s., for no debt was yet due, nor any thing executed on either side. 3 Lev. 238. An agreement in writing, since the statute of frauds and perjuries, may be discharged by parol. Vern. 240. A rent assigned in lieu of dower may be by parol without deed, though it be a freehold created *de novo*; and though a rent lies in grant; because this is not properly a grant, but an appointment. 12 Mod. 201. Lessee for years surrendered to the lessor by parol reserving rent; adjudged this was a good reservation upon the contract, and that an action of debt would lie for the rent after the first day of payment incurred, though the reservation was by way of contract, and without any deed. 3 Salk. 312. pl. 7.

If one has a bill of exchange, he may authorize another to indorse his name upon it, by parol; and when that is done, it is all one as if he had done it himself. 12 Mod. 564. See *Bill of Exchange*.

An insurance was made from Archangel to the Downs, and from the Downs to Leghorn, but there was a parol agreement at the same time that the policy should not commence till the ship came to such a place, and it was held that the parol agreement should avoid (or defeat) the writing; cited *per Holt, C. J.* as adjudged in *Pemberton's time*. 2 Salk. 444, 445. See *Insurance*.

If a thing is granted by a writing, which is grantable by parol, it may be revoked by parol. *Vide* 10 Mod. 74.

Deputation of an office is in its own nature grantable by parol; and therefore though it should happen to be granted by writing, yet since it is in itself grantable by parol, it may be revoked by parol. 10 Mod. 74.

PAROLS, or pleadings, are the mutual altercations between the plaintiff and defendant; which at present are set down and delivered into the proper office in writing, though formerly they were usually put in by their counsel *ore tenus*, or *viva voce*, in court, and then minuted down by the chief clerks, or prothonotaries; whence in our old law French, the pleadings are frequently denominated the parol. 3 Comm. 293. See *Pleadings*.

Parol is sometimes joined with lease, as lease parol, i. e. lease *per parol*, a lease by word of mouth, to distinguish it from a lease in writing. *Cowell*.

PAROL ARREST. Any justice of peace may, by word of mouth, authorize any one to arrest another who is guilty of a breach of the peace in his presence, &c. *Dalt.* 117. See *Arrest*.

PAROL DEMURRER. A plea or privilege formerly allowed an infant sued concerning lands which came to him by descent; whereon the court gave judgment *quod loquela predicta remaneat, quousque* the infant attained the age of twenty-one years. And where the age was granted on parol demurrer, (which might happen on the suggestion of either party, 3 Comm. 300,) the writ did not abate, but the plea was put *sine die*, until the infant was of full age; and then there was a re-summons. 2 Lill. Abr. 283; 2 Inst. 258; *Rast. Entr.* 383.

Parol demurrer was allowed in some real actions, and might be founded on the non-age of either party, but since they have been abolished, with the exception of dower and *quare impedit*, there is now no real action in which, if still existing, it could be pleaded; for in a writ of dower the heir never was allowed his age; for it was necessary that the widow's claim should be immediately determined, else she might want a present subsistence. 1 Roll. Abr. 137. Neither was it permitted an infant patron in a *quare impedit*, since the law held it necessary and expedient that the church should be immediately filled. 1 Roll. Abr. 138.

In personal actions the privilege extended to the defendant only, and that in very few instances; and it appears to be altogether taken away by the 1 H. 4 c. 47. § 10 which enacts that the parol shall not demur where any action, suit, or other proceeding for the payment of debts, or any other purpose,

shall be commenced by or against an infant, either alone or with any other person.

PAROL EVIDENCE. See *Evidence*, II.

PARRICIDE, *Patricida*.] He who kills his father or mother. *Law Lat. Dict.* It is also used for the crime of killing.

By the Roman law, parricide, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leather sack, with a live dog, a cock, a viper, and an ape, and so cast into the sea. Solon, it is true, in his laws, made none against parricide; apprehending it impossible that any one should be guilty of so unnatural a barbarity. And the Persians, according to Herodotus, entertained the same notion when they adjudged all persons who killed their reputed parents to be bastards. And, upon some such reason as this, must we account for the omission of an exemplary punishment for this crime in our English laws; which treat it no otherwise than as simple murder, unless the child was also the servant of his parents. 1 Hal. P. C. 380.

For though the breach of natural relation was unobserved, yet the breach of civil or ecclesiastical connections, when coupled with murder, formerly denominated it a new offence, no less than a species of treason, called *parva proditio*, or petit treason; which, however, was nothing else but an aggravated degree of murder; although, on account of the violation of private allegiance, it was stigmatized as an inferior species of treason. And, in the ancient Gothic constitution, the breach both of natural and civil relations are ranked in the same class with crimes against the state and sovereign. 4 Comm. 202, 203. Petit treason, however, is now reduced to the crime of murder. See *Homicide*, III. 4; and *Treason*.

PARSON.

PERSONA ECCLESIE.] One that hath full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the church, which is an invisible body, is represented; and he is in himself a body corporate, in order to protect and defend the rights of the church (which he personates) by a perpetual succession. 1 Inst. 300. It has been also said, that he is called parson, as he is bound, by virtue of his office, *in propria persona servare Decem. Flata*, 9. c. 18. He is sometimes called the rector or governor of the church; but the appellation of parson is the most legal, as well as the most beneficial and honourable title that a parish priest can enjoy; because such a one, (as Coke observes, and he only, is said *vicem seu personam ecclesie gerere*. 1 Comm. c. 11. p. 384.

Parson properly signifies the rector of a parish church, because during the time of his incumbency he represents the church, and in the eye of the law sustains the person thereof, as well in suing as in being sued in any action touching the same. *God.* 185.

The word parson, in a large sense, includes all clergymen having spiritual presentments.

There may be two parsons in one church; one of the one moiety, and the other of the other; and a part of the church and town allotted to each; and there may be two, that make but one parson in a church, presented by one patron. 1 Inst. 17, 18.

A parson hath the entire fee of his church; and where it is said he hath not the right of fee-simple, that is understood as to bringing a temporal writ of right. *Cro. Car.* 582. And in the time of the parson, the patron hath nothing to do with the church; but if the parson wastes the inheritance thereof to his own private use, in cutting trees, &c. his patron may have a prohibition, so that, to some purposes, he hath an interest during the parson's time. 11 H. 6. 4; 11 Rep. 4.

PARSON, I.

- I. *The Distinction between a Parson (or Rector); and a Vicar.*
- II. *The Method of becoming a Parson or Vicar; and of their Qualifications and Duties.*
- III. *How one may cease to be a Parson or Vicar.*

I. THOUGH a parson has regularly during his life the freehold in himself of the parsonage house, the glebe, the tithes, and other dues; yet these are sometimes appropriated; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single private clergyman. See *Appropriation*.

The ancient appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and administer the sacraments in those parishes, of which the society thus became the parson. This officiating minister was in reality no more than a curate, deputy, or vicergerent of the appropriator, and therefore called *vicarius* or vicar. His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody, *qui illis de temporalibus, episcopo de spiritualibus, debeat respondere*. *Schd. Lth. c. 11. l. 1.* But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the Legislature was forced to interpose; and, accordingly, it is enacted by the 15 R. 2. c. 6. that in all appropriations of churches, the diocesan bishop shall ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be sufficiently endowed. It seems the parishes were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which, among other purposes, the payment of tithes was originally imposed; and therefore, in this act, a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend; and therefore, by the 4 Hen. 1. c. 12. it is ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the ordinary, for these three express purposes: to do divine service; to inform the people; and to keep hospitality.

From this statute we may date the origin of the present vicarages; for, before this time, the vicar was nothing more than a temporary curate; and when the church was appropriated to a monastery, he was generally one of their own body; that is, one of the regular clergy; for the monks, who lived *secundum regulas* of their respective houses or societies, were denominated regular clergy, in contradistinction to the parochial clergy, who performed their ministry in the world, *in secula*; and who, from thence, were called secular clergy.

All the tithes or dues of the church of common right belong to the rector; or to the appropriator or impropriator, who have the same rights as the rector, and the vicar is entitled only to that portion which is expressed in his endowment; or what his predecessors have immemorially enjoyed by prescription, which is equivalent to a grant or endowment.

The endowments, in consequence of these statutes, have usually been by a portion of the glebe, or land, belonging to the parsonage, and a particular share of the tithes, which the appropriators found it most troublesome to collect, and which are therefore generally called *privy* or *small tithes*; the greater, or predial, tithes being still reserved to their

PARSON, II.

own use. But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily, endowed: and hence the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial, tithes. 1 *Comm. c. 11.*

These endowments frequently invest the vicar with some part of the great tithes; therefore the words rectorial and vicarial tithes have no definite signification: but great and small tithes are technical terms; and which are, or ought to be, accurately defined and distinguished by the law. See title *Tithes*.

The distinction therefore of a parson and vicar is this: The parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled to the best part of the profits, to whom he is in effect perpetual curate, with a standing salary. Though in some places the vicarage has been considerably augmented by a large share of the great tithes; which augmentations were greatly assisted by the 29 Car. 2. c. 8. enacted in favour of poor vicars and curates; which rendered such temporary augmentations (when made by the appropriators) perpetual.

A vicar indeed must necessarily have an appropriator over him, or a sinecure rector, who in some books is considered as, and called, an appropriator. Of benefices, some have never been appropriated; consequently, in those there can be no vicar, and the incumbent is rector, and entitled to all the dues of the church. Some were appropriated to secular ecclesiastical corporations, which appropriations still exist, except perhaps some few which may have been dissolved; others were appropriated to the houses of the regular clergy; all which appropriations, at the dissolution of monasteries, were transferred to the crown; and, in the hands of the king or his grantees, are now called *impropriations*; but in some appropriated churches no perpetual vicar has ever been endowed; in that case, the officiating minister is appointed by the appropriator or impropriator, and is called a perpetual curate. 1 *Comm. c. 11. in n.*

In 1 *Hugard's Rep. 157.* Lord Stowell, after observing that the term "appropriation" is almost entirely confined to the English church, and the English canon law, states that it was of two kinds: the one *pleno jure sive utroque jure tam in spiritualibus quam in temporalibus*; the other in *temporalibus* only, the want of distinguishing between which had led to great confusion. In the first, that in which both the spiritual and temporal interests of the church were annexed to the house, it had the cure of souls, and performed the duties by its own members, or mere stipendiary curates, from whence probably sprung the perpetual curacies of the present day. In the second kind, the cure of souls resided in an endowed perpetual vicar, who was instituted by the bishop. See further titles *Vicar, Vicarage*.

II. THE method of becoming a parson or vicar is much the same. To both there are four requisites necessary: holy orders, presentation, institution, and induction. The method of conferring the holy orders of deacon and priest, according to the liturgy and canons, is foreign to the present purpose, any farther than as they are necessary requisites to make a complete parson or vicar. See 1 *Burn's Eccl. Law, 103.* By common law, a deacon of any age, might be instituted and inducted to a parsonage or vicarage; but it was enacted by the 13 Eliz. c. 12. that no person under 23 years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained priest within one year after his induction, he should be *ipso facto* deprived: afterwards, by the 13 & 14 Car. 2. c. 4. that no person should be capable of being admitted to any benefice, unless he had been first ordained a priest; and then he is, in the language of the law, a *clerk in orders*. And now, by the

44 Geo. 3. c. 43. for enforcing the due observance of the canons and rubric, respecting the age of persons admitted into the sacred orders of deacon and priest, it is enacted, that no one shall be admitted a deacon before the age of 23, or a priest before 24, or be capable of holding a benefice. If orders, or a licence to preach, be obtained by money or corrupt practices, (which seems to be the true, though not the common notion, of simony,) the person giving such orders forfeits 40*l.* and the person receiving 10*l.* and is incapable of any ecclesiastical preferment for seven years afterwards. *Stat. 31 Eliz. c. 6.*

Any clerk may be presented to a parsonage or vicarage; that is, the patron, to whom the advowson of the church belongs, may offer his clerk to the bishop of the diocese to be instituted. A layman also may be presented; but he must take priest's orders before his admission. *1 Burn's Eccl. Law, 103.* As to advowsons, or the right of presentation, which are a species of private property; see title *Advowson*.

But when a clerk is presented, the bishop may refuse him upon many accounts. As, if the patron is excommunicated, and remains in contempt forty days. *2 Roll. Abr. 355.* Or if the clerk be unfit; *Glan. l. 13. c. 20;* which unfitness is of several kinds. First, with regard to his person; as if he be a bastard (though that incapacity seems now exploded, see *Bastard*); an outlaw, an excommunicate, an alien, under age, or the like. *2 Roll. Abr. 356; 2 Inst. 263; Stats. 3 Ric. 2. c. 3; 7 Ric. 2. c. 12.* Next, with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se*, but if the bishop alleges only in generals, as that he is *schismaticus inveteratus*, or objects a fault that is *malum prohibitum*, merely as haunting taverns, playing at unlawful games, or the like, it is not good cause of refusal. *5 Rep. 58.* Or, lastly, the clerk may be unfit to discharge the pastoral office, for want of learning. In any of which cases the bishop may refuse the clerk.

In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, there the bishop must give notice to the patron of such his cause of refusal, who, being usually a layman, is not supposed to have knowledge of it; else he cannot present by lapse: but, if the cause be temporal, there he is not bound to give notice. *2 Inst. 632. title Advowson, II.*

If the patron be not a layman, or more correctly, if he present in a spiritual right, the bishop, it seems, is not bound to give him notice, though the cause of refusal be of a spiritual nature. Indeed, the notice would be useless, because such a patron, who ought to know whether his presentee be fit or not, and who in presenting an unfit person, is not supposed to have erred unintentionally, cannot without the bishop's consent, revoke his presentation and present a clerk better qualified. See *1 Burn's Eccl. Law, 157.*

If an action at law be brought by the patron against the bishop for refusing his clerk, the bishop must assign the cause. If the cause be of a temporal nature and the fact admitted, (as, for instance, outlawry,) the judges of the king's courts must determine its validity, or whether it be sufficient cause of refusal; but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature, (as, heresy, particularly alleged,) the fact, if denied, shall also be determined by a jury: and if the fact be admitted or found, the court, upon consultation, and advice of learned divines, shall decide its sufficiency. *2 Inst. 632.* If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, but only allege that he is deficient; for the *9 Edm. 2. st. 1. c. 13.* is express, that the examination of the fitness of a person presented to a benefice belongs to the ecclesiastical judge. *5 Rep. 58; 3 Lev. 313.* But because it would be nugatory in this case to demand the reason of refusal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit; therefore, if the bishop returns the clerk to

be *minus sufficiens in literaturâ*, the court shall write to the metropolitan, to re-examine him, and certify his qualifications; which certificate of the archbishop is final. *2 Inst. 632.*

If the bishop has no objections, but admits the patron's presentation, the clerk so admitted is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice; for by institution the care of the souls of the parish is committed to the charge of the clerk. When a vicar is instituted, he (besides the usual forms) formerly took, if required by the bishop, an oath of perpetual residence, according to the maxim of law, that *vicarius non habet vicarium*, and, as the non-residence of the appropriators was the cause of the perpetual establishment of vicarages, the law judged it very improper for them to defeat the end of their constitution, and by absence to create the very mischief which they were appointed to remedy; especially as, if any profits arose from putting in a curate and living at a distance from the parish, the appropriator, who was the real parson, had undoubtedly the elder title to them. And it appeared that the bishop could not dispense with the vicar's oath, which was, that he will be resident upon his vicarage, unless dispensed withal by his diocesan. *1 Burn's Eccl. Law, 148.*

However this oath was taken away by the *57 G. 3. c. 99. § 34.* by which statute the bishop is enabled to grant a licence of non-residence in certain enumerated cases.

When the ordinary is also the patron, and confers the living, the presentation and institution are one and the same act, and are called a collation to a benefice. See title *Advowson, I.* By institution or collation the church is full, so that there can be no fresh presentation till another vacancy at least in the case of a common patron; but the church is not full against the king, till induction; nay, even if a clerk is instituted upon the king's presentation, the crown may revoke it before induction, and present another clerk. *Co. Litt. 344.* Upon institution also the clerk may enter on the parsonage house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction. *1 Comm. c. 11. p. 391.* See further, title *Institution*.

Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. This therefore is the investiture of the temporal part of the benefice, as institution is of the spiritual. See further title *Induction*.

When a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson impersonate. *Co. Litt. 300.*

The duties of a parson or vicar are principally of ecclesiastical cognizance; see title *Preaching*; those only excepted which are laid upon him by statute. And those are indeed so numerous, that it is impracticable to recite them here with any tolerable conciseness or accuracy; they are to be gathered chiefly from such authors as have compiled treatises expressly upon this subject; though these, it is remarked by *Blackstone*, are not to be relied on with certainty.

The article of residence is now regulated in England by the *57 G. 3. c. 99.* and in Ireland by the *5 G. 4. c. 91.* Legal residence is not only in the parish, but also in the parsonage house, if there be one: for it hath been resolved, that the statute intended residence, not only for serving the cure, and for hospitality; but also for maintaining the house, that the successor also may keep hospitality there. *6 Rep. 21.* And if there be no parsonage house, it hath been holden that the incumbent is bound to hire one, in the same parish, to answer

the purposes of residence. See *Comp.* 429; 5 *Burr.* 2722; and title *Residence*.

For the more effectual promotion of this important duty of residence in the parochial clergy in England, a provision is made by the 17 *Geo.* 3. c. 53. for raising money upon ecclesiastical benefices, and to be expended in rebuilding or repairing the houses belonging to such benefices.

This statute enables the incumbent, when there is no parsonage house, or where it is so ruinous as not to be repaired with one year's income of the living, on a certificate of a surveyor on oath, before a justice, of the state of the buildings on the glebe, and of timber fit for repair, which, with an account on oath of the annual value of the living, is to be laid before the patron and ordinary, to borrow of any person, with the consent of the patron and ordinary, upon mortgage for twenty-five years of the revenue of the living, a sum not exceeding two years' clear value, to be laid out in repairs, building, or the purchase of a house. Such mortgage deed shall be registered with the register of the diocese. Mortgagee may recover his interest by distress and sale, or the ordinary may sequester the profits of the living. The money so borrowed shall be paid into the hands of a person appointed by the ordinary, patron, and incumbent, who is to contract and pay for repairs. The annual payments may be apportioned between deceased incumbent, and his successor, by arbitration. The interest of the money so borrowed is to be repaid by the incumbent yearly, and 5*l.* per cent. upon the principal remaining due, or 10*l.* per cent. if he does not reside 20 weeks within a year. And where the income is 100*l.* a year, and the incumbent does not reside 30 weeks within a year, the patron and the ordinary are empowered to borrow and apply money without his consent. Ordinary, patron, and incumbent may purchase a house (with in one mile of the church) and land either under this act, or by exchange of part of the glebe. The governors of Queen Anne's bounty may lend money upon such mortgages at 4*l.* per cent. interest, and 100*l.* upon a living under 50*l.* a year, without any interest. Colleges and other corporations may lend money for this purpose upon their own livings without interest. Where the crown is patron, the consent of the treasury, &c. is requisite. Lords of manors, &c. empowered to grant leases for building such houses. The statute contains the forms and modes of proceeding to fulfil its various purposes. As under this statute the money borrowed was directed to be discharged by paying 5*l.* per cent. yearly upon the principal remaining due; it was directed by 21 *Geo.* 3. c. 66. such instalments should be calculated on the original sum advanced, so that it should be paid, at the farthest, within twenty years.

By 43 *Geo.* 3. c. 107. the governors of Queen Anne's bounty are empowered to build parsonage houses on livings assigned by that fund; and by 43 *Geo.* 3. c. 108. persons possessed in their own right may, by deed enrolled, or by will executed three months before their decease, give lands not exceeding five acres, or personal property not exceeding 500*l.* for building parsonages (or churches), &c. See *Churches*.

Various acts have been passed for the effectuating of the like beneficent purposes in Ireland, viz. 43 *Geo.* 3. c. 106; 44 *Geo.* 3. c. 60; 48 *Geo.* 3. c. 65. For the acts for building additional churches, see *Mortmain*; see also *Churches*, First part.

III. ALTHOUGH there is but one way, whereby one may become a parson or vicar; there are many circumstances, which, by his death, by which one may cease to be so. By *resignation*, in taking another benefice. For by 21 *Hen.* 8. c. 13. if any one having a benefice of 8*l.* per annum or upward, according to the present valuation in the king's books, (see *Par.* 4*l.* c. 6.) accepts any other, the first shall be adjudged void, unless he obtains a dispensation; which no one is entitled to have but the chaplains of the king and others therein mentioned; the brethren and sons of lords and knights (but not of baronets, as that dignity did not exist at the time of the 21 *Hen.* 8.); and doctors and bachelors of divinity and law, admitted by the universities of this realm. See *Chaplain*, *Plurality*. And a vacancy thus made, for want of a dispensation, is called *cession*. See this title.

By *consecration*; for when a clerk is promoted to a bishopric, all his other preferments are void the instant that he is consecrated. See *Bishops*. But there is a method, by the favour of the crown, of holding such livings in *commendam*. *Commenda*, or *reclusa commendata*, is a living commended by the crown to the care of a clerk to hold it as a proper pastor is provided for it. This may be temporary for one, two, or three years; or perpetual; being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*. There is also a *commenda recipere*, which is to take a benefice *de novo*, in the bishop's own gift, or the gift of some other patron consenting to the same; and this is the same to him as institution and induction are to another clerk. See further, tit. *Commendam*.

By *resignation*. But this is of no avail, till accepted by the ordinary, into whose hands the resignation must be made. *Cro. Jac.* 198. See further, *Resignation*.

By *deprivation*; either, first, by sentence declaratory in the ecclesiastical courts, for fit and sufficient causes allowed by the common law; such as attainder of treason or felony; *Dyer*, 108; *Jenk.* 210; or conviction of other infamous crimes in the king's courts; for heresy, infidelity, (*Fitz. Ab. tit. Trial*, 34.) gross immorality, and the like; or, secondly, in pursuance of divers penal statutes, which declare the benefice void, for some non-feasance or neglect, or else some malfeasance or crime. As for simony, by 31 *Eliz.* c. 6; 12 *Ann.* st. 2. c. 12; see *Simony*;—for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common prayer; by 1 *Eliz.* c. 1, 2; 13 *Eliz.* c. 12;—for neglecting, after institution, to read the liturgy and articles in the church, or make the declarations against popery, or take the abjuration oath; 13 *Eliz.* c. 12; 13 & 14 *Car.* 2. c. 4; 1 *Geo.* 1. st. 2. c. 6;—for using any other form of prayer than the liturgy of the Church of England; 1 *Eliz.* c. 2; or for absenting himself sixty days in one year from a benefice belonging to a popish patron, to which the clerk was presented by either of the universities; 1 *W. & M.* st. 1. c. 26; see *Papist*: in all which and similar cases the benefice is *ipso facto* void, without any formal sentence of deprivation. 6 *Rep.* 29, 30; 1 *Comm.* c. 11.

And by the 57 *Geo.* 3. c. 99. § 33. if any spiritual person shall continue under sequestration two years, or incur three sequestrations within that period, his benefice shall become *ipso facto* void.

By the above act (§ 2.) spiritual persons cannot farm above eighty acres of land without the consent of the bishop, or (§ 3.) engage in trade; but (§ 3.) they may keep schools or be tutors.

As to the charging of benefices, see *Lease*, II.

For further matter relating to this subject see *Church*, *Clergy*, *Curate*, *Quare Impedit*, *Sequestration*, *Tithes*, &c.

PARSONAGE, *personatus personagium*.] Is sometimes taken for a dignitary in a church, and sometimes for the benefice itself. *Correll*.

Parsonage, or rectory, is a parish church endowed with a house, glebe, tithes, &c.; or a certain portion of lands, tithes, and offerings, established by law, for the maintenance of the minister who hath the cure of souls; and though properly a parsonage or rectory doth consist of glebe land and tithes, yet it may be a rectory, though it have no glebe but the church and churchyard; also there may be neither glebe nor tithes, but annual payments in lieu thereof. *Par. Conc.* 180.

The rights to the parsonage and church lands are of several natures; for the parson hath a right to the possession;

the patron hath the right of presentation; and the ordinary a right of investiture, &c. But the rights of the patron and ordinary are only collateral rights; neither of them being capable of possessing or retaining the church themselves; though no charge can be laid on the church or parsonage but by the consent and agreement of all of them. *Hughes's Pars. Law*, 188. See *Appropriation, Parson*.

PARSON MORTAL. The rector of a church instituted and inducted for his own life, was called *persona mortalis*; and any collegiate or conventional body, to whom the church was for ever appropriated, was termed *persona immortalis*. *Cart dar. Radmg. Ms. f 182*. See *Appropriation, Parson*.

PARTES FINIS NIHI HABUERUNT, &c. *The parties to the fine had nothing.* Was an exception taken against a fine levied. 3 Rep. 88. See *Fine of Lands*.

PARTICEPS CRIMINIS. See *Accessory*.

PARTIES. Are those who are named in a deed, &c. as parties to it; or they who make any deed, and they to whom it is made. *Cowell*. See *Deeds, Estoppel, Fine of Lands*.

PARTITION, partitio. The dividing land descended by the common law or custom among co-heirs or parceners, where there are two at least. In Kent, where the land is of gavelkind nature, they call their partition *shifting*, from the Saxon *shiftan*, to divide (in Latin *hercisseve*.) See further, as to partition by joint-tenants, tenants in common, or parceners, or co-heirs by gavelkind, tithes. *Gavelkind, Joint-tenants, Parceners, Tenants in Common*.

PARTITIONE FACIENDA, mentioned in 31 Hen. 8. c. 1.] A writ that lies for those who hold lands or tenements *pro indiviso*, and would sever to every one his part, against those who refuse to join in partition as coparceners, tenants in gavelkind, &c. *Old. Nat. Brev.* 142; *F. N. B.* 61. See *Joint-tenants, Parceners, Tenants in Common*.

PARTNERS. Are where two or more persons agree to come into any trade or bargain in certain proportions agreed upon.

- I. *What constitutes a Partnership, and of ostensible, secret or dormant, or nominal Partners.*
- II. *Of the interest of Partners in the Stock-in-trade, and in real property purchased out of the Partnership fund.*
- III. *By what acts one Partner can bind the firm.*
- IV. *How a Partnership may be dissolved.*
- V. *Of other matters relating to Partnerships.*
- VI. *Of public Partnerships or Companies.*

I. In order to constitute a partnership a communion of profit and loss between the parties is essential; and this is the true criterion to judge by, where the question is, whether persons are partners or not. 1 H. Bla. 43, 48.

The shares of the parties must be joint, but it is not necessary they should be equal; and the parties jointly interested in the purchase must also be jointly interested in the future sale. *Ib.*

Partnership, in its extended and complete sense, is a voluntary contract between two or more persons for joining together their money, goods, labour, and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionally between them. *Wats. on Partn.* 1.

Where one takes a moiety of the profits indefinitely, he shall by operation of law be made liable to losses. 2 H. Bla. 247.

Where A., B. and C. had entered into an agreement to purchase goods in the name of A. only, and to take aliquot shares of the purchase, but it did not appear that they were jointly to resell the goods; the court of C. P. (*Wilson, J. diss.*) held, that on failure of A., the ostensible buyer, B. and C. were not answerable as partners with him. 1 H. Bla. 37.

A. and B. general partners in trade, being indebted to C. for advances paid by him, on the joint account of the three, in the purchase of tobacco, which had been sent out on a special joint adventure to Spain; with a view to liquidate that balance C. agreed with A. and B. to join with them in another adventure to Lisbon, of which he was to have one

moiety; and it was agreed that A. and B. should purchase goods for the adventure, to be shipped on board a certain vessel, and pay for them, and the returns of such adventure were to be made to C. to go in liquidation of his demand on them; but C. was to bear his proportion of the loss, if any, and also to receive his share of the profit, if any, after reimbursing himself out of the returns the amount of his advances previously made to A. and B. The Court of King's Bench held, that this agreement constituted a partnership between the three in the adventure, at and from the time of the purchase of the goods for the adventure by A. and B. although C. did not go with them to make the purchase, nor authorize them to purchase on the joint account; but A. and B. alone, in fact, made the purchase; and although C. also purchased in his own name, and paid for goods to be sent out at the same time, in which B. was to share the profit or loss, and these goods were consigned for sales, and returns to the same person, who went out as supercargo on the joint account of the three. *Gouthwaite v. Duckworth*, 12 East, 421.

Plaintiff and defendant had been engaged in running a coach from B. to L.; plaintiff finding horses for one part of the road, and defendant for the other; and the profits of each party were calculated according to the number of miles covered by his own horses; the plaintiff received the fares and rendered an account thereof to the defendant every week. Held, that plaintiff and defendant were partners. 2 Bing. 170.

The bare consent of the parties is sufficient to contract the relation of a partnership; and such consent may be testified either in express terms, as by articles of co-partnership, or the assent may be tacit, and to be implied solely from the acts of the parties.

A partnership may legally subsist as between individuals and the world, and yet not as between the individuals themselves. For the former purpose, appearing as partners or participating in the profits of a trade is sufficient; for the latter, the parties must have joint shares in the stock, and must be jointly interested in the general trade or the particular adventure.

Thus where A., having neither money nor credit, offers to B. that if he will order with him certain goods to be shipped upon an adventure, if any profit should arise from them B. should have half for his trouble. B. having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by B. alone; held, that he was entitled to recover back such payment in assumpsit against A. who had not accounted to him for the profits; such contract not constituting a partnership as between themselves, but only an agreement for a compensation for trouble and credit, though B. were liable as a partner to third persons, creditors. 4 East, 144. And see 5 Taunt. 74; 2 B. & C. 101; 4 B. & C. 867; 2 Camp. 46.

So where A. and B., ship agents at different ports, entered into an agreement to share in certain proportions the profits of their respective commissions, and the discount on traders' bills employed by them in repairing the ships consigned to them, &c. By this agreement they were held to become liable as partners to all persons with whom either contracted as such agent, though the agreement provided that neither should be answerable for the acts or losses of the other, but each for his own. 2 H. Bla. 235.

Acts subsequent to the time of delivering goods on a contract, may be admitted as evidence to show that the goods were delivered on a partnership account, if it were do at the time of the contract; but if it clearly appears that no partnership existed at the time of the contract, no subsequent act by any person, who may afterwards become a partner, (not even an acknowledgment that he is liable, on his accepting a bill of exchange drawn on them as partners for the very goods, will make him liable in an action for goods sold and delivered; though he will be liable in an action on the bill of exchange. 4 T. R. 720.

A mining speculation, although differing in some respects from a common partnership, is yet in the nature of a trading concern; and the interest of a bankrupt in the partnership is, in the first place, applicable to satisfy his debt to the firm. *Fereday v. Wightwick*, 1 Russ. & M. 45.

With respect to what constitutes a partnership as regards the world, partners may be considered as being of three characters or denominations,—viz. *ostensible*, *secret* or *dormant*, and *nominal* partners.

An actual ostensible partner is a party who not only participates in the profits and contributes to the losses, but who appears and exhibits himself to the world as a person connected with the partnership, and as forming a component member of the firm. A dormant partner is likewise a participant in the profits and contributor to the losses of the trade, but his name being suppressed and concealed from the firm, his interest is consequently not apparent. A nominal partner has not any actual interest in the trade or its profits; but, by allowing his name to be used, he holds himself out to the world as apparently having an interest. *Gow on Partners*, 12.

An actual ostensible partner *quid* partner, is clearly answerable for the debts and engagements of the partnership.

And with respect to a secret or dormant partner, it may be taken down as a clear and well-established principle of law, founded upon reasons of policy, that whoever has a right to share in the profits of a trade or particular adventure, or has a specific interest in the profits themselves, as profits, be chargeable as a partner to third persons, in respect to transactions arising out of the trade or particular adventure, in the profits of which he is to participate. The reason why such a person becomes, by implication and operation of law, connected with the character of partner, is, that by the effect of the agreement for a partnership, the party participant takes from the creditors a part of that fund which is the proper security to them for the satisfaction of their debts, and upon which they rely for payment. *Per D. Gwyn*, 2 Bl. 98. Another reason assigned for subjecting a dormant partner to responsibility is, that if he were exempted he would receive an undue interest for his capital, without its being attended with any risk. *Per Lord Mansfield*, 1 Dougl. 571.

A distinction, however, prevails between an interest in the profits themselves, as profits, and the payment of a given sum of money in proportion to a given quantum of the profits, as the reward of, and as a compensation for, labour. For instance, a remuneration made to a traveller, or other clerk or agent, by a portion of the sums received by or for his principal, in lieu of a fixed salary, does not subject the traveller, clerk, or agent, to liability as a partner, such remuneration being merely a mode of payment adopted to increase or secure exertion. So a factor, receiving for his commission a percentage on the amount of the price of the goods sold by him, instead of a certain sum, proportioned to the quantity of the goods sold, does not thereby become a partner. 3 Wils. 17. And see 4 B. & A. 670.

II. PARTNERS are, at law, joint tenants of their merchandize; not only of that particular part which was brought into the partnership at the time of its formation, but they continue so to carry out their co-partnership dealings, whatever changes or addition may be made to it in the course of trade. The joint tenancy created by the contract of partnership differs, however, in one of its chief characteristics, from an ordinary joint-tenancy, because, as between partners, there is no *jus accrescendi*, or right of survivorship, a quality which, being applied to a possession *per my et per tout* at common law, always accompanies a joint-tenancy. This denial to the survivor of any benefit arising from survivorship, is a maxim of the mercatoria, of which the courts will take notice without being specially pleaded. 1 *Ld. Raym.* 281. Besides the purchase of joint stock, partners are sometimes

obliged to invest part of their capital in real property; for it very frequently happens that joint undertakings require the possession of lands or houses, in order to carry on the intended trade or speculation. Wherever that is the case, and the lands or houses purchased with the joint capital are held for the purpose of, and as the *substratum* for, the partnership concern, the partners are, in reality, and to all beneficial intents, tenants in common thereof, without regard to the form of the conveyance, the individual to whom it is made, or the length of time for which the interest is to endure.

Courts of law, it is true, must look to the legal estate; they will consider the survivor of two joint-tenants as invariably entitled to the whole by survivorship; and if lands are conveyed to one of several partners, they will invest him with all the rights of a tenant in severalty, excluding from their attention the funds from which the lands were bought, and the object of the purchase. But courts of equity, unfettered by technical rules, seek to effectuate the intention of the parties, and are guided by the justice of each particular case; they consequently conceive that there is a tenancy in common between partners of real property, and they decree the person in whom the legal estate vests to be a trustee for those beneficially interested. In equity, therefore, real estates bought by a commercial partnership for the purpose of the partnership fund. 3 Bro. C. C. 199; 1 *Swan*, 508, 521.

But although, during the lives of the partners, freehold estates purchased by a commercial partnership as an article of stock, are considered as forming a portion of the joint fund; yet, on the death of any of the partners, it does not appear to be clearly established whether they pass as real estate, or as stock; although, according to modern decisions, it may perhaps be considered as settled that the right of survivorship does not exist even in such a case. See 3 Bro. C. C. 200; *Eden's n.* Formerly, indeed, it was held, that lands purchased for the purpose of a partnership concern were in all respects a portion of the partnership fund, and were therefore distributed as personal property. 1 *Perm.* 217; 3 P. W. 158; 9 *Ves.* 597. And although it was held by Lord Thurlow, (see 7 *Ves.* 425,) and his decision was twice subsequently recognized by Sir W. Grant, (7 *Ves.* 453; 9 *Ves.* 500,) that a co-partnership agreement to alter the nature of real property must be express; yet the principle on which that decision is founded is very doubtful, if not expressly overruled.

In the case of *Townsend v. Devaynes* (*Mont. on Partners*, n. 97), Lord Eldon decided, that the freehold of premises purchased by partners for the purpose of carrying on the business in which they are engaged, is, on the death of one partner, to be considered as personal estate. The same noble and learned lord is in another case (2 *Dow. P. C.* 242) represented to have stated it as his opinion, that all property involved in a partnership concern ought to be considered as personal. See *Gow on Partnership*, 31—35.

III. It may be laid down, that a partner may, by his own acts, bind his co-partners in all transactions relating to the partnership.

Whatever be the nature of any contract entered into by one partner, if it be within the scope and have reference to the copartnership, it will bind the rest. 7 T. R. 207; 1 *Salk.* 292; *Hope v. Cust*, cited 1 *East*, 48, 7 *East*, 210. And the act or assurance of one partner, made with reference to business transacted by the firm, will bind all the partners, even although it be out of the regular course, and be contrary to an express arrangement among themselves, because it is within the scope of his authority. See 2 B. & A. 679.

One partner, however, cannot bind his co-partners by deed. 7 T. R. K. B. 207; 10 *East*, 413. But he may by drawing or accepting bills of exchange. 7 T. R. 210.

Where, however, one of several partners, with the privacy

of the others, drew bills in his own name in favour of persons who advanced him the amount, which he applied to the use of the partnership, it was held, that though the parties were not jointly liable on the bills, they might be jointly sued by the payees for money lent. 3 *Camp*. 493. However, if one partner draw bills in his own name, and procure them to be discounted, the party discounting has no remedy, either on the bills or for the money lent, against the other partners, though the proceeds are actually carried to the partnership account; for the money is advanced solely on the credit of the names on the bills. 15 *East*, 7; 1 *Rose*, 61.

But if a firm, consisting of several parties, carry on business in the name of one of them, the firm will be bound by the indorsement of that individual on bills indorsed for the partnership account. 8 *B. & C.* 427. And see further, *Bac. Ab. ubi supra*.

Two (of three) partners who had contracted a debt prior to the admission of the third partner into the firm, cannot bind him without his assent by accepting a bill drawn by the creditor in their joint names; but such security is fraudulent, and void as against the third partner, and cannot be recovered in an action against the three, wherein one only of the original partners pleaded to the action. 1 *East*, 48. See *Gregson v. Hutton*, *B. R. East*, 22 *Geo.* 3. and *Marsh v. Vansommer*, *Guildhall*, *Mich.* 1786, (cited) *ib.* 49; and 10 *East*, 264; 1 *Camp*. 405.

If one partner draw or indorse a bill in the partnership firm, it will *prima facie* bind the firm, although passed by the one partner to a separate creditor in discharge of his own debt; unless there be evidence of covin between such separate debtor and creditor, or at least of the want of authority, either express or implied, in the debtor partner to give the joint security of the firm for his separate debt. But the court of K. B. held, that no sufficient circumstance appeared in this case to raise any presumption adverse to the separate creditor taking such joint security; in a case where the bill appeared to have been drawn in the name of the firm to their own order, eighteen days before the delivery of it to the separate creditor, and to have been accepted and indorsed before such delivery, and to have been drawn for a larger amount than the particular debt; and where, though the indorsement was in fact made by the hand of the debtor partner, yet it did not appear that that fact was known to the separate creditor at the time; and this too in a case where direct evidence might have been given of the covin or want of authority, if it existed. 13 *East*, 175.

Where a partner borrowed a sum of money, and gave his own security for it, it was held not to become a partnership debt by being applied to partnership purposes with the knowledge of his co-partner. *Bevan v. Lewis*, 1 *Sim.* 376.

Where A., B. and C. were engaged in a cotton trade under the firm of A. and B. (C. not being known to the world as a partner,) and A. and B. traded under the same firm as grocers, and a bill given to them in the cotton business was indorsed in the firm common to both partnerships, and given in payment by A. and B. for goods received in their grocery business; the court of K. B. held, that C. was liable to pay the bill to the holders, although the indorsement was unknown to C., of whom the indorsee had no knowledge at the time of the indorsement. 7 *East*, 209.

Where the consignee of goods (to whom the bill of lading was indorsed in blank) assigned it over as a security for acceptances given by the assignee, not amounting to the value of the goods, and afterwards they became partners in the goods, by an agreement between them that the profits and loss should be equally divided; but the first was to stand guarantee to the other for the solidity of the factors by whom the goods were to be sold; and it appeared by the agreement that the consignor had not been paid for the goods: the assignee of the bill of lading cannot maintain trover against the consignor, if he stop the goods *in transitu*,

on the insolvency of the consignee; for one partner cannot recover those goods which the other could not. 2 *T. R.* K. B. 674.

But the authority of one partner to bind another by signing bills of exchange and promissory notes in their joint names, is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it; and thus, though it were represented to the holder by the partner signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it were in fact so applied. Nor can he recover against the other partner the amount of the sum so applied to the payment of the partnership debts against such notice. 10 *East*, 264.

One partner can likewise bind the firm by a guarantee to be answerable for the debt or responsibility of a third person in a matter that relates to the partnership. See 1 *East*, 53; 15 *Ves.* 286; 2 *Gl. & Jam.* 306; 2 *B. & A.* 673.

Although a partner cannot by deed bring any fresh burden on his co-partners, he may by deed bar him of a right they jointly possess. Thus he may release a debt due to the firm by deed. *Seln.* N. P. 362; 7 *B. Moore*, 356. So a receipt from one partner will discharge a debtor from the partnership claim; 2 *Stark.* 50, S. C.; 6 *M. & S.* 156; and payment to one partner is payment to all. See 8 *B. & C.* 132. And an acknowledgment of payment by one partner is conclusive evidence against the demand of the other. 3 *B. & A.* 163.

Partners being identified in interest, the acts and declarations of any one, with reference to the common object, are the acts and declarations of all, and are binding upon all. And even after a dissolution the admission of one partner is binding upon his co-partner, if it relate to a transaction which occurred during the existence of the partnership. 1 *Taunt.* 101. But see 7 *Price*, 198, and 3 *Stark.* 3.

Independently of commercial transactions, a partner may bind the rest in legal proceedings by releasing a supposed right of action; 7 *B. Moore*, 356; or by suspending the proceedings. *Harwood v. Edwards*, cited *Gom. on Partn.* 63.

But one partner cannot bind his partners by a submission to arbitration. 3 *Bing.* 101.

IV. THE causes of a dissolution of a partnership may be considered under three general heads:—1st. The act of God. 2. The act of the party; and, 3. The act of operation of law.

A dissolution by the act of God may arise either by the death of one of the partners, whereby the contract of partnership, in the absence of any express stipulation for its continuance, is *ipso facto* dissolved; 3 *Merr.* 614; even where the firm consists of more than two, unless provision is made to the contrary. 3 *Madd.* 254. And see 1 *Swansd.* 60. And although the partnership be for a term of years, it is dissolved by the death of either partner, if there be no agreement providing against that event. 3 *Madd.* 251.

A partner may stipulate for the devolution of his interest on another. 9 *Ves.* 300. But without the express assent of his co-partner, one partner cannot nominate a person to succeed him. *Ibid.*

Insanity does not, like death, *per se*, work a dissolution of a partnership. 2 *Ves. & B.* 303. It appears principally a question of circumstances to be decided by reference to the particular character of the disease, as permanent, or temporary, the terms of the contract and the nature of the undertaking as imposing on the lunatic an obligation of active interference, for the performance of which he is disqualified, or reserving to him a right of inspection, by the suspension of which the safety of his estate may be hazarded. In such cases the jurisdiction of a court of equity is most difficult and delicate, and to be exercised with great caution. *Per Lord Eldon*, 2 *Ves. & B.* 303.

Where no term is expressly limited, and there is nothing in the contract of partnership to fix its existence to any particular period, it is dissoluble at the will of either party. 16 Ves. 50; 1 Swanst. 508.

The effect of a marriage of a *feme sole* partner has never been expressly decided; but on general principles it would most probably be held to operate as a dissolution of the partnership. *Wats. on Partn.*; and see 1 Swanst. 517, n.

With respect to dissolution by the act of the law, where an undertaking cannot be carried on according to the intent of the articles of copartnership; as if a partnership be formed for carrying into effect a new invention, which, after repeated trials, is found impracticable, a court of equity will dissolve it. 1 Cox's Case, 213.

So where there is great misconduct and abuse of good faith on the part of a partner, a dissolution will be decreed; 2 Ves. 299; 1 Jac. & W. 594; and even at the instance of a single partner, notwithstanding the rest object to it. 1 Cox's Case, 213. So violent and lasting dissension, as where parties refuse to meet each other on matter of business, seems to be a ground upon which a court of equity will decree a dissolution. *Le Berenger v. Hamell*, 7 Jarman's Convey. 26.

An act of bankruptcy committed by one partner, if followed by a commission and assignment, is a dissolution of the partnership for all purposes as regards the bankrupt partner; all his property being by the Bankrupt Act vested in assignees, who become tenants in common with the other partners in respect of his share of the partnership stock. 4 Burr. 2174; Comp. 471; 6 Ves. 126; 1 Jac. & W. 609.

An execution, likewise, under which all the interest of one partner is seized and sold, is a determination of the partnership as to him; because, whatever interest he possessed is divested out of him, and becomes by the sale vested in the vendee of the sheriff, who is tenant in common with the solvent partners. *Sayer v. Bennet*, Mont. on Partn. n. 17. And see Comp. 445, and 2 V. & B. 299.

A partnership may likewise be dissolved by an award, and in order to empower arbitrators to direct a dissolution, it is not necessary that they should have an express authority given them by the submission for the purpose. 1 Bl. 475.

V. An action cannot be maintained by several partners for goods sold by one of them living in Guernsey, and packed up by him in a particular manner, for the purpose of smuggling, though the other partners, who resided in England, knew nothing of the sale; for the act of one is, in this respect, the act of all; and as it is a contract by subjects of this country, in contravention of the laws, this case must be considered in the same light as if all the partners resided in England. 4 T. R. 454; and see 4 T. R. 466; 5 T. R. 599.

One of two partners applied trust-money in the trade, without the privity of the other partner; afterwards they separated, and the partnership effects were assigned over to the first, who took on him the debts; this was held to be no payment in discharge of the other partner, but both were liable to make good the trust-money. 5 T. R. 601.

A partnership cannot acquire property in goods acquired by the fraud of one partner, though the other partners were privy to it. 1 Ry. & Moo. 178.

In some respects, an individual partner, or a particular partnership, consisting of two or more such persons as are partners in some larger partnership, may be considered as several persons, in transactions in which the general partnership may happen to be engaged with a correspondent. Per *Lynn, C. J.* 1 B. & P. 546, 547.

A contract made by two partners to pay a certain sum of money to a third person, *equally out of their own private cash*, is a joint contract, and they must be jointly sued upon. 1 H. Bla. 236.

Where money is owing to two partners, and after the death of one it is paid to a third person, the surviving partner

may maintain an action for money had and received in his own right, and not as survivor. 2 T. R. 476.

If partners, by deed assign all their partnership effects, &c. to trustees for the benefit of their creditors, and some of the separate creditors of one partner do not assent to it, the assignment is fraudulent and void. 8 T. R. 140.

On the dissolution of a partnership between A., B. and C., a power given to A., to receive all debts owing to, and to pay all those owing from, the late partnership, does not authorize him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor to the partnership, after the dissolution. The person, therefore, to whom he so indorses it, cannot maintain an action on it against A., B. and C., as partners. Neither can such indorsee maintain an action against A., B. and C., for money paid to the use of the partnership, though, in fact, the money advanced by him in discounting the bill be applied by A. to the payment of a debt due from the partnership. 1 H. Bla. 155.

If three partners (two of whom reside abroad, and one in England), be sued for a partnership debt, and the partner resident in England appear to the action, but refuses to appear for the partners resident abroad, the sheriff, under a *distringas* against the two partners, may take partnership effects, though paid for by the partner resident in England alone, to whom the partnership was legally indebted; and the court will not relieve him against such distress. 3 B. & P. 254.

The defendant agreed, in writing, to take one-half share of certain goods bought by the plaintiff on their joint account, half in the profit and loss, and to furnish the plaintiff with half the amount in time for the payment thereof, the goods being to be paid for by bills. The Court of King's Bench held, first, that this was an agreement relating to the sale of goods within the exemption in the stamp act, 44 Geo. 3. c. 98. sched. A., and did not require a stamp; secondly, that the plaintiff having paid the whole price of the goods which were to constitute the partnership stock, to which both parties were to contribute equally, an action lay against the defendant for his moiety of the price which was to be furnished by him in the first instance, although there might be an account to be taken between them as partners upon the subsequent disposal of the joint stock. 15 East, 7.

If several persons horse, with horses their several property, the several stages of a coach, in the general profits of which they are partners, they are not all jointly liable for goods furnished to one partner for the use of the horses drawing the coach along his part of the road. *Barton v. Hanson & al.* 2 Taunt. 49.

The partners in one house of trade cannot maintain an action against the partners in another house of trade, of which one of the partners in the plaintiff's house is also a member, for transactions which took place while he was partner in both houses; and that whether the action be brought in the lifetime of the common partner, or after his decease; but after his decease, the surviving partners of the one house may sue the surviving partners of the other house, upon transactions subsequent to the decease of the common partner. 6 Taunt. 597.

In assumpsit against one of several partners for not delivering goods, with a count for money had and received, to which defendant pleaded that the promises were jointly made with A. and B., it appeared, that defendant, being partner with A. and B., made the contract individually, though in the name of the partnership, and for the sale of partnership property; and that in fraud of his partners he received the money to his own use, though the bill drawn by him for the money was in the partnership name. Held that plaintiff might recover the money so received, under the common count. 4 M. & S. 475.

If the names of two partners in trade appear (among others) on the certificate of registry, as owners of a ship,

the registry acts do not prevent the showing how and in what proportions the several owners are respectively entitled; and though partners may derive title under different conveyances, yet, if their shares were purchased with the partnership funds, and treated by them as partnership property, and the partners become bankrupt, these shares will be considered as the joint property. 4 M. & S. 450.

A bond was given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor; one of the partners dies, and a new partner is taken into the firm; at that time a considerable balance is due from the obligor to the firm; advances are afterwards made by the bankers, and payments made to them on account by the obligor; the latter is credited by the new firm with the several payments, and charged with the original debt and subsequent advances as constituting items in one entire account; and the balance due at the time of the partner's death is considerably reduced, and that reduced balance, by order of the obligor, is transferred by the bankers to the account of another customer, who, with his assent, is charged with the then debt of the obligor. The person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond: Held, that as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period; and having received in different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, that the bond was to be considered as paid. 2 B. & A. 80.

Quære whether the transfer of the balance due from the obligor to the account of another, with his assent, did not, in point of law, operate as payment. *Id. ib.*

Where one of three partners, after a dissolution of partnership, undertook, by deed, to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills. Held, that the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking under these circumstances the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt. 2 B. & A. 216.

VI. PUBLIC partnerships are where the association consists of an indefinite or a large definite number of joint undertakers, and they are usually called companies or societies.

Of these some are incorporated by letters-patent, or by act of parliament, as the East India Company, and the Bank of England; and others are not,—as, for instance, most of the Fire and Life Insurance Companies. See *Joint Stock Companies*.

Companies or societies, which are not confirmed by public authority, are in fact nothing more than ordinary partnerships, and the laws respecting them are the same. 9 East, 516; 3 Ves. & B. 180.

Now by the 4 & 5 Will. 4. c. 94. his majesty may, by letters-patent, grant to trading and other companies, not incorporated, any privilege which by the common law, or by the 6 Geo. 4. c. 91. (whereby the Bubble Act was repealed,) it would be competent for him to grant by any charter of incorporation, and particularly the privilege of suing and being sued in the name of some officer of such companies.

See further *Gow on Partnerships*; also titles *Bankrupt*, *Indictment*, VI., *Joinder in Action*, *Joint-tenants*.

PART-OWNERS. Those who are concerned in ship matters, and have joint shares therein. See *Insurance*, *Ship*.

PARTY-WALLS. See *Fire*, *London*.

PARVISE. Selden, in his notes on *Fortesque*, c. 51, defines it to be an afternoon's exercise or moot for the instruction of young students, bearing the same name originally with the *Parvisæ* at Oxford. Seld. Notes, p. 56; Chaucer mentions it in one of his prologues.

PASCHA CLAUSUM. The octaves of Easter or Low Sunday, which closes that solemnity; and *die (id est) post Pascha Clausum* is a date in some of our old deeds. The first statute of Westminster, anno 3 Edw. 1, is said to be made the Monday after Easter week—*Lendemain de la cluse de Pasche*, &c.

PASCHA FLORIDUM. The Sunday before Easter, called Palm Sunday; when the proper hymn or gospel sung was *occurreunt turbæ cum floribus et palmis*, &c. *Cartular. Abbat. Glaston. MS. 75.*

PASCHAL RENTS. Rents or yearly tributes paid by the clergy to the bishop or archdeacon, at their Easter visitations.

PASCUA. A particular meadow or pasture ground, set apart to feed cattle. See *Lindwood. Prov. Angl. l. 8. c. 18.* and tit. *Pastura*.

PASCUAGE, *pascuagium*, Fr. *pacage*.] The grazing or pasturing of cattle. *Mon. Angl. ii. 25.* The same was *pannage*.

PASNAGE and PATHNAGE in WOODS, &c. See *Pannage*.

PASSAGE, *passagium*, is properly over water, as *way* is over land; it relates to the sea and great rivers, and is a French word signifying *transitum*.

Passagio is also the name of a writ directed to the keepers of the ports to permit a man to pass over sea, who has the king's leave. *Reg. Orig. 193.* The prices of passage at Dover, &c. were limited by 1 Edw. 3. c. 8, repealed 2 Jac. 1. c. 28. (§ 11.) None to pass out of the realm without the king's licence, 5 R. 2. st. 1. c. 2, repealed 4 Jac. 1. c. 1 (§ 22.) See *King, Ne exeat Regno*. Passage from Kent to Calais restrained to Dover. 4 Edw. 4. c. 10, repealed by 21 Jac. 1. c. 28. (§ 11.)

PASSAGIUM or PASSAGIUM REGIS. A voyage or expedition to the Holy Land, when made by the kings of England in person. *Cowell*.

PASSATOR. He who has the interest or command of the passage of a river, or the lord to whom a duty is paid for passage. *Cowell*.

PASSIAGIARIUS. A ferry-man. *Thorn's Chronicle*, m. an. 1287.

PASSPORT. A compound of two French words, *passer*, *transire*, and *port*, *portus*, a haven.

It signifies a licence for the safe passage of any man from one place to another. See 2 Edw. 6. c. 2; and *Alieu*, 11 Safe-conducts.

PASTITUM. A pastoral field. *Domesday*, per Gite, 761.

PASTORAL STAFF. The form of it was such, which signified *rectum regimin*. All the top part of it was crooked, and the other part sharp; the crooked signified that the bishop presided over the people; and the sharp signified to punish the stubborn. *Cowell*.

PASTURE. Is any place generally where cattle may feed; and feeding for cattle is called pasture; wherefore feeding grounds are called common of pasture; but common of pasture is properly a right of putting beasts to pasture in another man's soil; and in this there is an interest of the lord and of the tenant. *Wood's Inst.* 196, 197. For in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants; and common of pasture is either appendant, appurtenant, because of vicinage, or in gross. See *Common*.

PASTUS. The procuration or provision which tenants

were bound to make for their lords at certain times, or as often as they made a progress to their lands; this, in many places, was turned into money. *Hoc unde per artem liberabo a pastu regis et principum. Chart. Willelmi Regis Marcarum in M. a. Angl. l. 123.*

PATENTS for INVENTIONS. These which have already been slightly treated of under the title of *Monopoly*, are founded upon the 21 Jac. 1. c. 3 § 1, which excepts from the monopolies declared void by that statute, letters patent or grants of privilege for fourteen years, "of the sole working or making of *new manufactures* within the realm to the *true and first inventor* and inventors of such manufactures, which others at the time shall not use, so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient."

1. *Who is an inventor.*—No person who has not, without assistance, formed the original idea of that subject in his own mind, will be enabled to keep any patent he may have obtained; for if the principle be taken from a scientific work, he is not an inventor. *The King v. Arkwright, printed case, 182.* Neither will he be entitled to hold the grant if he has in any manner been informed of the secret by another person in England. *Dav. Pat. Cas. 429.* And see 8 Taunt. 195, 8 C. C. 2 B. Moore, 456; 1 Car. & P. 558.

In *The King v. Arkwright*, the point agitated was,—whether the machine for which the patent had been granted was invented by Mr. Arkwright,—and it was satisfactorily proved, that every part which was not *old*, or had not been used for the same purpose to which it was then applied, was either not material or not useful. It was therefore determined, that he was not the inventor of a new manufacture. So where the improvement consisted principally in the adoption of modes already known, and the only new part was not the object of the invention, it was held in a recent case, that the patent was not maintainable. 3 B. & Ad. 881. If two persons severally discover the same thing, the one who obtains a patent for it before the other has made the matter public, will be adjudged the "true and first inventor." See 9 H. Bla. 487.

The introducer of a foreign invention, whether it has been learnt by travel or produced by study, is within the statute, and entitled to a patent. 2 Salk. 477; *Holt, N. P. C.* 108; and see 1 Car. & P. 558.

2. *What are new manufactures.*—Every manufacture within the meaning of the statute must be, 1, *new*; 2, *not used before*; neither by any other person nor by the inventor; 3, *useful*, and 4, *useful*.

A new manufacture may be, 1, a *substance or thing made*; 2, a *machine or instrument*; 3, an *improvement or addition*; 4, a *combination or arrangement of things already known*; 5, a *principle, method, or process* introduced into practice by *new means*; 6, a *chymical discovery*; 7, a *foreign invention*.

3. *Of the specification.*—The 21 Jac. 1. left the terms in which patents might be obtained, to be settled at the pleasure of the sovereign; and in the reign of Queen Anne, a convention was introduced into the patent that the inventor did, by an instrument under his hand and seal particularly describe and ascertain the nature of his invention, and in what manner the same was to be performed; and also enrol the same in Chancery within a given time (generally six calendar months) the letters patent should be void. In the specification, therefore, the invention must be accurately ascertained and set forth in the most minute detail. The courts have ever looked with jealousy on the specification, as a bargain between the public and the inventor, as Lord Emswold called it (*Dav. Pat. Cas. 434*), should be too much in favour of the patentee; and hence more questions have arisen upon it than upon any other part of the grant, and

more patents declared void upon this than upon any other ground.

The patent and the specification have always been considered as connected together and dependent on each other for support, and the one may be looked at to understand the other. 8 T. R. 95; and 2 H. Bla. 478. Still, however, the specification must contain within itself a full description of the invention.

The specification must support the title of the patent, and the latter should not indicate one thing, and the former describe another. 2 B. & A. 350. And it was held that a patent taken out for a tapering brush was not supported by the specification of a brush in which the hairs or bristles were made of unequal length. 2 Stark. 249; and see 6 B. & C. 169, 178.

In the specification of a substance, the thing itself should be accurately ascertained, the materials of which it is composed, the method by which it is made, and the use to which it is to be applied, correctly developed and particularly described.

4. *Remedies for an infringement of a patent, &c.*—Formerly monopolies and patent rights were investigated in the Star Chamber. 3 Inst. 183. But the 21 Jac. 1. enacted, that they should thenceforth be determined according to the common law.

The remedies now resorted to are, an action at law for damages, or proceedings in equity for an injunction and account.

When a patent is invalid, as being contrary to the statute, or from some defect in the specification, &c. the king may have a *scire facias* to repeal his own grant. 4 Inst. 88.

A subject also, who is prejudiced by a patent, may of right petition the king to use his name for its repeal; and as all persons are injured by its existence, it follows that every one may petition for a *scire facias* to have it cancelled. *Dyer, 276 b*; 2 Vent. 344; 3 Lev. 220.

Between subject and subject, each having a patent for the same thing, the first patentee may generally have a *scire facias* to repeal the second. 4 Inst. 88; *Dyer, 197 b, 198 a*; but the second patentee cannot bring a *scire facias* to repeal the first patent, though the better right should be in him. *Dyer, 276 b*; 277 a. For the second grant is necessarily bad, even if the first, by some informality, be rendered invalid.

For further information on this subject, see *Godson's Law of Patents*, from which the above sketch is chiefly abridged; and see *Literary Property, Monopoly, Sculpture*.

PATENTS or LETTERS PATENTS. The king's writings, sealed with the great seal, having their name from being open, and they differ from writs. *Crompt. Jur.* 126.

The king is to advise with his council touching grants and patents made of his estate, &c.: and in petitions for lands, annuities, or offices, the value is to be expressed; also a former patent is to be mentioned where the petition is for a grant in reversion, or the patents thereupon shall be void. 1 Hen. 4. c. 6; 6 Hen. 8. c. 15.

Patents, which bear not the date and day of delivery of the king's warrants into Chancery, are not good. 18 Hen. 6. c. 1. Where the king's patent creates a new estate, of which the law doth not take knowledge, the patents are void. 8 Rep. 1; 5 Rep. 93. But patents shall not be avoided by nice constructions: if a patent may be taken to two intents, and is good as to one, and not as to the other, it is valid. *Jenk. Cent.* 138.

When the king would pass a freehold, it is necessary that the patent be under the great seal; and it ought to be granted *de adversamento* of the chancellor of the exchequer and lord treasurer in the usual manner. *Fitzgib.* 291. See *Grants of the King, Scire Facias*.

For patents of peerage, see *Peer*. For patent of precedence, see *Barrister*.

PATRIA. The country: the men of a neighbourhood: thus when it is said *inquiratur per patriam*, a jury of the neighbourhood is meant. In like manner, *assisa vel recognitio per assisam, idem est quod recognitio patriæ*. *Cowell*. See *Assise, Jury*.

PATRIARCH. Is the chief bishop over several countries or provinces, as an archbishop is of several dioceses, and hath several archbishops under him. *God. 20*.

PATRIMONY. An hereditary estate or right descended from ancestors. The legal endowment of a church, or religious house, was called *ecclesiastical patrimony*; and the lands and reversions united to the See of Rome are called *St. Peter's Patrimony*. *Cowell*.

PATRINUS. A godfather, as *matrina* is a godmother. *LL. H. 1*.

PATRITIUS. An honour conferred on men of the first quality in the time of the English Saxon kings. *Mon. Angl. i. 13*.

PATRON. He who hath the disposition of an ecclesiastical benefice.

The patron's right is the most worthy and first act and part of a promotion to a benefice, and is granted and pleaded by the name of *libera dispositio ecclesiæ*. *Hob. 152*. But during the vacancy of a church, the freehold of the glebe is not in the patron, for it is in abeyance. *8 Hen. 6. 24; Lit. 144*. A patron shall not have an action for trespass done when the church is vacant; and if a man who hath a right to glebe lands, releaseth the same to the patron, that is not good, because the patron has not any estate in the land, *11 Hen. 6. 4*. If the patron grants a rent out of a church, it is void even against himself. *38 Edw. 3. c. 4*. See further, *Admanson, Parson, Vicar, &c.*

PAVAGE, pavagium. Money paid towards paving the streets or highways. *Rex concessit pavagium villæ de Huntingdon per quinquennium. Pla. Parl. 35 Edw. 1*.

PAVING. See *London, Scavengers, Police*.

PAUPER. A poor man: according to which we have a term in law, to sue *in formâ pauperis*.

Before a person is admitted to sue *in formâ pauperis*, he must have counsel's hand to his petition, certifying the judge to whom the petition is directed, that he conceives the petitioner hath good cause of action; he must also annex an affidavit to his petition, that he is not worth five pounds, all his debts paid, except wearing apparel, and his right to the matter in question. *Lit. Reg. 633*.

None ought to be admitted to sue *in formâ pauperis* in an action on the case for words. *Ibid.*

A person admitted to sue *in formâ pauperis* can only sue in that cause for which he is admitted, *et sic toties quoties. Ibid.*

It seems that after the statutes which introduced costs, neither plaintiffs nor defendants could sue or defend *in formâ pauperis*; for that would be a means of depriving the other party of the costs given him by statute; and as the *11 Hen. 7. c. 12*, enables persons only to sue as paupers, and as the *23 Hen. 8. c. 15*, excepts only plaintiffs, who are paupers, from paying costs; it seems, that one cannot be admitted in a civil action to defend as a pauper. But it hath been adjudged, that a person may be admitted to defend an indictment *in formâ pauperis* for a misdemeanor, such as a conspiracy, keeping a disorderly house, &c., for in such proceedings there being no costs, the judges have a discretionary power of admitting or refusing them by the common law. *Pasch. 9 Geo. 2. The King v. Wright*.

It is said, that paupers ought not to be admitted to remove causes out of inferior courts, but ought to satisfy themselves with the jurisdiction within which their actions properly lie. *1 Mod. 368*.

By the orders of the courts, if the party admitted to sue

in formâ pauperis give any fee or reward to his counsel or attorney, or make any contract or agreement with them, he shall from thenceforth be dispaupered, and not be afterwards admitted again in that suit to prosecute *in formâ pauperis*. *Ord. Cur. 94*.

Also, if it shall be made appear to the court that any person prosecuting *in formâ pauperis* hath sold or contracted for the benefit of the suit, or any part thereof, while the same depends, such cause shall be from thenceforth totally dismissed the court. *Ord. Cur. 95. Formâ Pauperis*. See further, *Costs, II*.

Several poor persons having claimed the property of an intestate, as his next of kin, an issue was directed to try the rights of the parties. The Court of Equity allowed a portion of the fund in court to those whose claims had been allowed by the master, to enable them to proceed in the issue, but refused to make any such allowance to those whose claims had been disallowed. *Gregg v. Taylor, 4 Russ. 277*.

There must be special circumstances to entitle a party to prosecute *in formâ pauperis*. *1 D. P. C. 536*.

A defendant, in an indictment for perjury, was allowed to plead *in formâ pauperis*, on the usual affidavit. *1 D. P. C. 507*.

So in an excise information, the court will admit the party to defend *in formâ pauperis*, on the common affidavit, without a certificate of merits (*3 & 4 Wm. 4. c. 53. § 97*). But on an application of the defendant for a copy of the information, *gratis*, the court held he was only entitled to have the information read over to him by the officer, and that he might either plead instantly or at a future day. *2 C. & M. 593*.

PAWN, pignus. A pledge or gage for payment of money lent; it is said (*risum teneatis?*) to be derived a pugno, *quæ res quæ pignori dantur, pugno vel manu traduntur. Lit. Dict.*

The party who pawns goods hath a general property in them; they cannot be forfeited by the pawnee or party who hath them in pawn, for any offence of his; nor be taken in execution for his debt; neither may they otherwise be put in execution till the debt for which they are pawned is satisfied. *Lit. Rep. 332*. For the absolute property is in the lender; therefore they are not alienable, nor, by consequence, forfeitable, because they cannot be forfeited without loss and danger to the absolute owner, and all qualified possessors do take the property under the restriction to preserve the property of the right owner. *Bro. tit. Attachment in Assise 24*.

If a man pawns goods for money, and afterwards a judgment is had against the pawner at the suit of one of the creditors, the goods in the hands of the pawnee shall not be taken in execution until the money is paid to the pawnee because he had a qualified property in them, and the judgment creditor only an interest. *3 Bulst. 17*. And when a person hath jewels in pawn for a certain sum, and he who pawned them is attainted, the king shall not have the jewels unless he pay the money. *Plond. 187*. For the alienation of the general property doth not alter the special property in the pawnee. *2 H. 7. 1; 1 Bulst. 29*.

If a man pledge goods and then is outlawed, he cannot redeem them; because then the absolute property is in the king; but if the outlawry is reversed, then the person is reinstated in his property, as if there had been no outlawry and therefore may redeem them. *1 Bulst. 29*.

The pawnee of goods hath a special property in them, to detain them for his security, &c., and he may assign the pawn over to another, subject to the same conditions: and if the pawnee die before redeemed, his executors shall have it upon the like terms as he had it.

If goods pawned are perishable, and no day being set for payment of the money, they lie in pawn till spoiled, without any default in him who hath them in keeping, the party who pawned them shall bear the damage; for it shall be ad-

to judge his fault that he did not redeem them sooner; and he to whom pawned may have action of debt for his money; also, if the goods are taken from him, he may have action of trespass, &c. *Co. Lit.* 89, 208; *Yelv.* 179.

Where goods are pawned for money borrowed, without a day set for redemption, they are redeemable at any time during the life of the borrower. They may be redeemed after the death of him to whom pawned, but not after the death of him who pawned the goods. *2 Cro.* 245; *Noy.* 137; *1 Bulst.* 9. But where a day is appointed, and the pawn is due before the day, his executors may redeem the pawn at the day, and this shall be assets in their hands. *1 Bulst.* 30, 31. If goods are redeemable at a day certain, it must be strictly observed, and the pawnor, in case of failure of payment at the day, may sell them. *1 Rol. Rep.* 181, 215. But still the right owner has his redemption in equity, as in case of a mortgage. *1 Inst.* 297; *Shp.* 106.

He who borrows money on a pawn, is to have the pledge again when he repays it, or he may have action for the detainer, and his tender of the money revests the special property. *2 Cro.* 244. And it hath been held, that where a broker or pawnee refuses (upon tender of the money) to redeliver the goods in pawn, he may be indicted; because, being secretly pawned, it may be impossible to prove a delivery for want of witnesses, if trover should be brought for them. *3 Salk.* 268.

If the vendor of a leasehold estate deliver the conveyance as an escrow, to take effect on payment of the residue of the purchase-money; the property in the title-deeds of the estate is so vested in the vendee, that the vendor obtaining possession of those, and pawning them, does not confer on the pawnee a right to detain them, after tender of the purchase-money. *6 Taunt.* 12.

And see the statutory provision against wilful detention, *in Pawnbrokers.*

Adjudged, that if goods are lost, after the tender of money, the pawnee is liable to make them good to the owner, for after tender he is a wrongful detainer; and he who keeps goods wrongfully must answer for them at all events; his wrongful detainer being the occasion of the loss. *Cro. Jac.* 28; *Yelv.* 149; *1 Bulst.* 29; *Bro. Bailment*, 7; *1 Rol. Rep.* 179; *1 Inst.* 89. But if they are lost before a tender, it is otherwise; the pawnee is not liable, if his care of keeping them was exact; and the law requires nothing of him, but only that he should use an ordinary care in keeping the goods, that they may be restored on payment of the money for which they were deposited; and in such case if the goods are lost, the pawnee hath still his remedy against the pawnor for the money lent. *2 Salk.* 522; *3 Salk.* 268.

If the pawn is laid up, and the pawnee robbed, he is not generally answerable; though if the pawnee useth the thing, as a watch, &c. that will not be the worse for wearing. If he may do, it is at his peril; and if he is robbed, he is answerable to the owner, as the using occasioned the loss. *2 Salk.* 522; *3 Salk.* 268; see *Co. Lit.* 89 a; *3 Inst.* 44; *4 Co.* 83; *Palm.* 551; *Ow.* 123; *Yelv.* 178; *Cro. Jac.* 24; *1 Bulst.* 29, 30; *1 Rol. Rep.* 181.

Remember, that where goods pledged have been destroyed by fire without the pawnbroker's negligence or default, he is not liable to make compensation. *1 Nev. & M.* 35.

If the pawn is of such a nature that the keeping is a charge to the pawnee, as a cow, or a horse, &c. he may milk the one or ride the other; and this shall go in recompense for its keeping. Things which will grow the worse by usage, as apparel, &c., he may not use. *Owen*, 124.

Where money is lent on a pledge, the borrower is personally liable to the payment, unless there be an agreement to the contrary. *Str.* 919.

A person borrowed 100*l.* on the pawn of jewels, and took a note from the lender, acknowledging them to be in his

hands, for securing the money; afterwards he borrowed several other sums of the same person, for which he gave his notes, without taking any notice of the jewels. As in this case it was natural to think the lender would not have advanced the sums on note only, but on the credit of the pledge in his hands before, it was decreed in equity, that if the borrower would have his jewels, he must pay all the money due on the notes. *Pre. Chan.* 419, 421.

He to whom goods are delivered for safe custody cannot pawn them. *Str.* 1187. There can be no market-overt for pawning them. *Ibid.*

As to the pledging of goods by factors, see *Factor*. See further *tit.* *Bailment*, *Pawnbrokers*.

PAWNAGE or PANNAGE. In woods and forests for swine. See *Pannage*.

PAWNBROKERS. By the stamp acts, pawnbrokers are annually to take out a licence on a stamp.

By the 39 & 40 *Geo. 3. c.* 89, rates of profit are allowed to pawnbrokers; and regulations are made to prevent oppression by them, viz.

For every pledge upon which there shall have been lent not exceeding 2*s.* 6*d.* one halfpenny is allowed as interest, &c. for any time during which the said pledge shall remain in pawn, not exceeding one calendar month; and the same for every month afterwards, including the current month in which such pledge shall be redeemed, although such month shall not be expired: for 5*s.* one penny; 7*s.* 6*d.* one penny halfpenny; 10*s.* two pence; 12*s.* 6*d.* two pence halfpenny; 15*s.* three pence; 17*s.* 6*d.* three pence halfpenny; 1*l.* four pence; and so on progressively and in proportion for any sum not exceeding 40*s.*; and for any intermediate sum between 2*s.* 6*d.* and 40*s.* at the rate of 4*d.* for 20*s.*

And for every sum exceeding 40*s.* and not exceeding 42*s.* eight pence; and for every sum exceeding 42*s.* and not exceeding 10*l.* at the rate of three pence and no more for the loan of every 20*s.* of such money lent by the calendar month; and so in proportion for every fractional sum. § 1—3.

A party applying for the redemption of goods pawned, within seven days after the expiration of any month, may redeem them without paying any thing for the seven days, and applying after seven and within fourteen days, pays the profit for month and a half of another month; but after the expiration of the first fourteen days the pawnbroker may take for the whole month. § 5.

Entries to be made and duplicates given. § 6, 7.

Any person fraudulently pawning the goods of another, and convicted before a justice, shall forfeit from 20*s.* to 5*l.* and also the value of the goods pawned, &c. to be ascertained by the justice; and on failure of payment may be committed to the house of correction for not more than three months, and be publicly whipped; the forfeitures, when paid, to be applied towards making satisfaction to the party injured, and defraying the costs; the overplus, if any, to the poor of the parish. § 8.

Any person counterfeiting or altering a duplicate, may be seized and taken before a justice, who is to commit the party to the house of correction, for not more than three months nor less than one. § 9.

If any person shall offer to pawn any goods, refusing to give a satisfactory account of himself and the goods; or if there shall be reason to suspect that such goods are stolen; or if any person not entitled shall attempt to redeem goods pawned, they may be taken before a justice, who shall commit them for further examination; and if it appears that the goods were stolen, or illegally obtained, or that the person offering to redeem the same has no title or pretence to them, the justice is to commit him to be dealt with according to law, where the nature of the offence shall authorize such commitment by any other law, or otherwise for not more than three months. § 10.

PAWNBROKERS.

The power of imprisonment given by this section does not extend to cases of embezzlement, loss, or damage, provided for by § 24. 1 *Nev. & M.* 24.

Persons buying or taking in pledge unfinished goods, or any linen, &c. entrusted to be washed, shall forfeit double the sum lent, and restore the goods. § 11.

A justice may grant a search warrant, in executing which peace officer may break open doors; and the goods, if found, shall be restored to the owner. § 12, 13.

Pawnbrokers refusing to deliver up goods pledged within the year, on tender of the money lent and interest, on conviction, a justice is empowered to commit the offender till the goods be delivered up, or reasonable satisfaction made. § 14.

Persons producing notes, are to be deemed owners, unless on notice to the contrary from the real owner. § 15.

Duplicates being lost, the owners, on oath before a justice, shall be entitled to another from the pawnbroker. § 16.

Goods to be sold by public auction after the expiration of one year; being exposed to public view, and catalogues thereof published, and two advertisements of sale by the pawnbroker to be inserted in some newspaper two days at least before the first day's sale under penalty of 10*l.* to 40*s.* to the owner. § 17.

Pictures, prints, books, statues, &c. shall be sold only four times in a year. § 18.

Pawnbrokers receiving notice from the owners of goods before the expiration of a year, shall not dispose of them, until after the expiration of three months from the end of the said year. § 19.

Pawnbrokers to enter an account of sales in their books of all goods pawned for upwards of ten shillings; and in case of any overplus by the sale, upon demand within three years, it shall be paid to the owner, the necessary costs, principal, and interest being deducted; persons possessing duplicates entitled to the inspecting of the book; and in case the goods shall have sold for more than the sum entered, or the further entries not made, or the overplus is refused to be paid, the offender shall forfeit 10*l.* and treble the sum lent, to be levied by distress. § 20.

Pawnbrokers shall not purchase goods whilst in their custody, or suffer them to be redeemed for that purpose; nor lend money to any person appearing to be under twelve years of age, or intoxicated, or purchase duplicates of other pawnbrokers, or buy any goods before eight in the forenoon, and after seven in the evening; nor receive any goods in pawn before eight in the forenoon or after eight at night, between Michaelmas and Lady-day, and before seven o'clock in the forenoon, and after nine at night during the remainder of the year; except till eleven o'clock on the evenings of Saturday, and that preceding Good Friday and Christmas-day; nor carry on the trade on any Sunday, Good Friday, or Christmas-day, or any Fast or Thanksgiving-day. § 20.

Pawnbrokers are to place in their shops a table of rates allowed by this act. § 21.

Pawnbroker's christian and surname, and business, to be written over the door; under a penalty of 10*l.*, half to the informer and half to the poor. § 23.

Pawnbrokers having sold goods illegally, or having embezzled or injured goods, justices may award reasonable satisfaction to the owners, in case the same shall not amount to the principal and profit; or if it does, the goods shall be delivered to the owner, without paying any thing, and pawnbroker to pay the excess of damage also, under a penalty of 10*l.* § 24.

Pawnbrokers to produce their books before any justice, if required, under a penalty of 10*l.* to 5*l.* § 25.

Penalty on pawnbrokers neglecting to make entry 10*l.*, and for every offence against this act, where no penalty is provided, 40*s.* to 10*l.* half to the informer, the remainder to the poor. § 26.

PAYMENT.

Complaint shall, in all cases, be made within twelve months. § 27.

No person convicted of a fraud or felony may be an informer under this act. § 29.

Churchwardens to prosecute for every offence at the expense of the parish, on notice from a justice. § 28.

This act does not extend to persons lending money upon goods at 5 per cent. interest.

This act to extend to the executors, &c. of pawnbrokers and pawners. § 31.

The form of conviction is settled by § 33; and an appeal given to the quarter sessions. § 35.

PAYMENT of money before the day appointed, is in law payment at the day; for it cannot, in presumption of law, be any prejudice to him, to whom the payment is made, to have his money before the time; and it appears, by the party's receipt of it, that it is for his own advantage to receive it then, otherwise he would not do it. Yet it is said, that defendant must not plead, that the plaintiff accepted it in full satisfaction; but that he paid it in full satisfaction. 5 *Rep.* 117.

Payment of a lesser sum, in satisfaction of a greater, cannot be a satisfaction for the whole; unless the payment be before the day: though the gift of an horse, or robe, &c. in satisfaction may be good. *Ibid.* And where damages are uncertain, a less thing may be done in satisfaction of a greater. 4 *Mod.* 89.

Upon *solvit ad diem* pleaded, it is good evidence to prove payment at any time after the day, and before action brought; and payment, although after the day, may be pleaded to any action of debt, upon bill, bond, or judgment, or *scire facias* upon a judgment, 2 *Lil. Abr.* 287; 4 & 5 *Ann.* c. 16. But see 1 *Str.* 652; where, on such a plea, proof was made of interest paid two years after the day, whereby the plea was falsified; which was made on presumption only; as the debt had not been demanded for thirty years. And though payment after the day is good by way of discharge, it will not be so by way of satisfaction. 4 *Mod.* 250. Payment is no plea to debt on covenant, or an obligation, without acquittance; but if the obligation have a condition, it is otherwise. *Dyer*, 25, 169. If a bond, &c. be for payment of money, and no day is set, damages cannot be recovered till a den and is made. *Bridge*, 20. See *Bond*.

For payment of rent, there are said to be four times 1. A voluntary time, that is not satisfactory, and yet good to some purpose, as where a lessee pays his rent before the day. This gives seisin of the rent, and enables him to whom paid to bring his assize (now abolished) for it. 2. A time voluntary and satisfactory in some cases; when it is paid in the morning of the last day, and the lessor dies before the end of the day, this is a good payment to bind the heir or executor, but not the king. 3. The legal, absolute, and satisfactory time, which is a convenient time before the last instant of the last day, and then it must be paid. The 4th is satisfactory, and not voluntary, but coercive when forced and recovered by suit at law. *Co. Litt.* 200; 10 *Rep.* 127; *Plowd.* 172 See *Rent*.

A bill drawn on A. to pay money for value received, is a good discharge of a debt, though the bill be not paid, unless the creditor return the bill in convenient time. *Shon.* 155 A. gives B. a bill of exchange on C. in payment of a former debt, this is not allowable as evidence on non *assumpsit* unless paid; for a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so. 1 *Salk.* 124. When a merchant draws a bill upon a correspondent, who accepts it, this is payment: for it makes him debtor to another person, who may bring his action. 10 *Mod.* 37. See *Bill of Exchange*.

Payment of money shall be directed by him who pays it, and not by the receiver, &c., 5 *Rep.* 117; *Cro. Eliz.* 8. If the payer does not apply the payment, the receiver may, but

le must not apply it to an uncertain demand, as to a debt from a testator. *Strange*, 1194.

A creditor receiving money, without any specific appropriation thereof by the debtor, shall be permitted in a court of law, to ascribe his receipt to the discharge of a prior and purely equitable debt, and to sue his debtor at law for a subsequent legal debt. 6 *Taunt.* 597.

In the payment of a testator's debts by executors, they are to pay first judgments, mortgages, rent due by lease, &c. then bonds and bills, &c. 1 *Roll. Abr.* 927. See *Executor*, v. 6.

PAYMENT INTO COURT. See *Money into Court*.

PEACE, *pax*. In the general signification, is opposite to war or strife. but particularly in law, it intends a quiet behaviour towards the king and his subjects.

And if any man is in danger from another, and makes oath of it before a justice of the peace, he shall be secured by good bond, which is called binding to the peace. *Lamb. lib. 1. c. 2, 77, Comp. Just of Peace*, 118, 120. And also from pledge and conservation of the peace. Time of peace is, when the courts of justice are open; and judges and ministers of the same may, by law, protect men from wrong, and administer justice to all. *Co. Litt.* 249.

All authority for keeping the peace comes originally from the king, who is the supreme magistrate for preservation thereof; though it is said the king cannot take a recognizance of the peace; because it is a rule in law that no one can take any recognizance, who is not either a justice of record, or by commission: also it is certain, that no duke, earl, or baron, as such, have any greater power to keep the peace, than mere private persons. *Lamb. lib. 1. c. 3; Dult. c. 1.* But the lord chancellor, or lord keeper of the great seal, the lord high steward, the lord marshal, and every justice of the king's bench, have, as incident to their offices, a general authority to keep the peace throughout the realm, and to award process for surety of the peace, and take recognizances for it. And every court of record hath power to keep the peace within its own precinct; as have likewise sheriffs, who, being entrusted with the custody of the counties, consequently have by it an implied power of keeping the peace within the same; and coroners may bind persons to the peace, who make an affray in their presence; but may not grant process of the peace, &c. 2 *Hank. P. C.*

Peace shall be kept, and justice and right duly administered to all persons. 1 *R. 2. c. 2, &c.*—Breakers of the peace to be imprisoned, and to find sureties, &c. 2 *Edw. 3. c. 6; 34 Edw. 3. c. 1.* Recognizances for keeping the peace to be certified to the quarter sessions. 3 *H. 7. c. 1.*—The chancery and king's bench restrained from granting process of the peace or behaviour without motion and affidavit; and to give costs and damages to persons wrongfully vexed by such process, and restrained from granting *supradias*, unless the process is granted in the manner required by the statute. The said courts to punish insufficient sureties. 21 *Jac. 1. c. 8.* Actions against peace-officers made local. 21 *Jac. 1. c. 12.* And the general issue pleadable. 7 *Jac. 1. c. 5; 21 Jac. 1. c. 12.* See *Justices of Peace; Peace of the King; and Society of the Peace*.

PEACE OF GOD AND THE CHURCH, *pax Dei et ecclesiae*.] Was anciently used for that cessation which the king's subjects had from trouble and suit of law between the terms, and on Sundays and holidays. See *Vacation*.

PEACE OF THE KING, *pax regis*, mentioned in 6 *R. 2. c. 1. c. 13.* Is that peace and security both for life and goods, which the king promiseth to all his subjects, or others taken into his protection. And where an outlawry is reversed, a person is restored to the king's peace, and this is termed *ad pacem redire*. *Bract. lib. 3. c. 11.* This point of policy seems to have been borrowed by us from the *Feudists*, which, in the second book of the *Feuds*, cap. 53. entitled, *De Pace tenenda*, &c. *Hotoman* proveth. Of this

Hoveden setteth down many branches. *Annal. H. 2. fol. 144, 330.*

The peace of the king's highway is the immunity that the king's highway hath to be free from annoyance or molestation. The peace of the plough whereby the plough and the plough cattle are secured from distresses. *F. N. B. 90.* And fairs have been said to have their peace; because no man might be troubled in them for any debt contracted elsewhere.

As to the peace of the church, see *Sanctuary*.

PECIA. A piece or small quantity of ground. *Paroch. Antiq.* 240.

PECTORALE. A word often met with in old writings. Most authors agree that it is the same with that garment called *rationale*, which the high priest in the old law wore on his shoulders, as a sign of perfection. It is worn also by the high priest of the new law, as a sign of the greatest virtue. *Quæ gratia et ratione perficitur*; for which reason it is called *rationale*. It is by some taken to be that part of the pall which covers the breast of the priest, and from thence called *pectorale*. But all agree that it is the richest part of that garment, embroidered with gold, and adorned with precious stones. *Cowell*.

PECTORAL. Armour for the breast, a breast-plate or petral, for a horse; from the Lat. *pectus*; it is mentioned in 13 & 14 *Car. 2. c. 3.*

PECULIAR, *Fr. peculiar*, i. e. private.] A particular parish or church, that hath jurisdiction within itself, and power to grant administration or probate of wills, &c. exempt from the ordinary.

Exempt jurisdictions are so called, not because they are under no ordinary, but because they are not under the ordinary of the diocese, but have one of their own. These are therefore called peculiar, and are of several sorts. 1 *Still.* 336.

There are royal peculiars, and archbishops' peculiars: the king's chapel is a royal peculiar, exempted from all spiritual jurisdiction, and reserved to the immediate government of the king; there are also some peculiar ecclesiastical jurisdictions belonging to the king, which formerly appertained to monasteries and religious houses. It is an ancient privilege of the see of Canterbury, that wherever any manors or advowsons belong to it, they forthwith become exempt from the ordinary, and are reputed peculiars of that see; not because they are under no ordinary, but because they are not under the ordinary of the diocese, &c. For the jurisdiction is annexed to the Court of Arches, and the judge thereof may originally cite to these peculiars of the archbishop. *Wood's Inst.* 501.

The Court of Peculiars of the Archbishop of Canterbury, hath a particular jurisdiction in the city of London, and in other dioceses, &c. within his province: in all, fifty-seven peculiars. 4 *Inst.* 338; 22 & 23 *Car. 2. c. 15.*

Where a man dies intestate, leaving goods in several peculiars, it has been held, that the archbishop is to grant administration. *Sid.* 90; 5 *Mod.* 239.

There are some peculiars which belong to deans and chapters, or a prebendary, exempted from the archdeacon only: they are derived from the bishop of ancient composition, and may be visited by the bishop in his primary or triennial visitation: in the mean time, an official of the dean and chapter or prebendary is the judge; and from hence the appeal lies to the bishop of the diocese. *Wood*, 504.

The dean and chapter of St. Paul's have a peculiar jurisdiction; and the dean and chapter of Salisbury have a large peculiar within that diocese; so have the dean and chapter of Litchfield, &c. 2 *Nels. Abr.* 1240, 1241.

There is mention in our books of peculiars of archdeacons; but they are not properly peculiars, only subordinate jurisdictions; and a peculiar is *prima facie* to be understood of him who hath a co-ordinate jurisdiction with the bishop. *Hob.* 185; *Mod. Ca.* 308. If an archdeacon hath a peculiar

authority by commission, this shall not take away the authority of the bishop; but, if he hath authority and jurisdiction by prescription, it is said it shall. *2 Roll. Rep. 357.*

Appeal lieth from other peculiar courts to the king in chancery. *25 H. 8. c. 19.*

And as to other statutes concerning peculiars, see *25 H. 8. c. 21. § 21*, with respect to the visitation of places exempt, and the *59 G. 3. c. 99. § 78*, whereby the powers given by that act for enforcing residence, &c. may be exercised by the archbishop or bishop within whose province or diocese any peculiar lies. See further, *16 Vin. Abr. tit. Peculiars*; and title *Courts Ecclesiastical, 4.*

PECUNIA. Properly money, but anciently used for cattle, and sometimes for other goods as well as money. So we find often in Domesday, *pastura ibidem ad pecuniam villæ*, that is, pasture-ground for the cattle of the village. *Cowell.*

PECUNIA SEPULCHRALIS, *Ll. Canuti, 102.* Money anciently paid to the priest at the opening of the grave, for the good of the deceased's soul. This the Saxons called *saulescat, saulscot*, and *animæ symbolum*. *Spel. de Concil. t. 1. f. 517.* See *Mortuary.*

PECUNIARY. All punishments of offences were anciently pecuniary, by mulct, &c. See *Fine.*

PECUNIARY CAUSES, cognizable in the Ecclesiastical Courts, are such as arise either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby damage accrues to the plaintiff, towards obtaining a satisfaction for which he is permitted to institute a suit in the Spiritual Court. For the principal of these causes, see *3 Comm. 88*; and titles *Courts Ecclesiastical, Tithes, Spoliation, Dilapidation.*

PECUNIARY LEGACY. See *Executor, Legacy.*

PEDAGE, *pedagium.* Money given for the passing by foot or horse through any country. *Spelm.*

PEDALE. A foot cloth, or piece of tapestry laid on the ground to tread on, for greater state and ceremony. *Ingulph. p. 41.*

PEDIS ABCISSIO. Cutting off the foot; a punishment on criminals, anciently inflicted, instead of death; as appears by the laws of *William*, called the *Conqueror*, c. 7; so in *Ingulphus*, p. 856; *Fleta*, lib. 1. c. 38; *Bracton*, lib. 3. c. 32; *Monast. tom. 1. p. 166.*

PEDLARS. See *Hawkers.*

PEDONES. Foot-soldiers. *Sim. Dunelm. an. 1085.*

PEERAGE. The dignity of the lords or peers of the realm. See *Peers of the Realm.*

PEERS, *pares*,] signify, in law, those who are empanelled in an inquest upon a man, for convicting or clearing him of any offence; the reason is, because the custom of the realm is to try every man in such case by his peers or equals. See *st. Westm. 1. § E. 1. c. 6*; *Mag. Char. c. 29.* And in this sense it is in use with other nations. *Cowell.*

And as every one of the nobility, being a lord of parliament, is a peer, or equal to all the other lords, though of several degrees; so the Commons are peers to one another, although distinguished as knights, esquires, gentlemen, &c. *2 Inst. 29*; *3 Inst. 31.* See *post, Peers of the Realm.*

PEERS or FEES. The word peer denoted originally one of the same rank; afterwards, it was used for the vassals or tenants of the same lord, who were obliged to serve and attend him in his courts, being equal in function; these were termed peers of fees, because holding fees of the lord, or because their business in court was to sit and judge, under their lord, of disputes arising on fees; but if there were too many in one lordship, the lord usually chose twelve, who had the title of peers, by way of distinction; whence, it is said, we derive our common juries, and other peers. *Cowell.*

PEERS OF THE REALM.

PARES REGNI; PROCERES. The nobility of the kingdom, and lords of parliament; who are divided into dukes, mar-

quises, earls, viscounts, and barons. And the reason why they are called peers is, that notwithstanding a distinction of dignities in our nobility, yet in all public actions they are equal; as in their votes of parliament, and trial of any nobleman. *S. P. C. lib. 3.* The appellation seems to have been borrowed from France, from those twelve peers that Charlemagne instituted in that kingdom, called *Pares, vel Patres Franciæ.*

I. *Of the Titles and Origin of the several Degrees of Nobility.*

II. *The Manner in which they may be created and limited, and how forfeited.*

III. *Of the Privileges of Peers (and see Privilege.)*

IV. *The Mode of their Trial in Capital Cases.*

I. ALL degrees of nobility and honour are derived from the king as their fountain, and he may institute what new titles he pleases. Hence it is that all degrees of nobility are not of equal antiquity.

A duke, though he be in England, in respect of his title of nobility, inferior in point of antiquity to many others; yet is superior to all of them in rank, his being the first title of dignity after the royal family. *Cambden Britan. tit. Ordines* Among the Saxons the Latin names of dukes, *duces*, is very frequent; and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they call *hepetoze*; and in the laws of Henry I. as translated by *Lambard*, they are called *heretochii*. But after the Norman conquest, which changed the military polity of the nation, the kings themselves continuing for many generations dukes of Normandy, they would not honour any subjects with the title of duke till the time of Edward III.: who, claiming to be king of France, and thereby losing the Ducal in the royal dignity in the eleventh year of his reign, created his son, Edward the Black Prince, Duke of Cornwall; and many of the royal family especially were afterwards raised to the like honour. This reason, however, does not seem very satisfactory, as in fact this order of nobility was created about a year before Edward III. assumed the title of King of France. *J. D. 1337. Henry's Hist. Eng. viii. 135. (8vo., Statutes Duke, King, II.)*

In the reign of Queen Elizabeth, A. D. 1572, the whole order became utterly extinct; *Cambden. Britan. tit. Ordines Spelman. Gloss. 191*; but it was revived about fifty years afterwards by her successor, who was remarkably proud of honours, in the person of George Villiers, Duke of Buckingham. *1 Comm. c. 12.*

A marquis (*marchio*) is the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the frontiers and limits of the kingdom, which were called the marches, from the Teutonic word *marche*, a limit; such as, in particular, were the marches of Wales and Scotland, while each continued to be an enemy's country. The persons who had commanded there were called lord-marchers or marquises; whose authority, with respect to the marches of Wales, was abolished by the 27 *H. 8. c. 20.*, while that of the lord-marchers on the Scotch frontiers existed until the accession of James I. to the English crown; see *4 Inst. 281*; though the title had before been made a mere ensign of honour, Robert Vere, Earl of Oxford, being created Marquis of Dublin by Richard II. in the eighth year of his reign. *2 Inst. 5*; see the *Marquis.*

An earl is a title of nobility so ancient, that its origin cannot be clearly traced out. Thus much seems tolerably certain; that among the Saxons they were called *ealdormen*, quasi elder men, signifying the same as senior or senator among the Romans; and also *sciremen*, because they had each of them the civil government of a several division or shire. On the irruption of the Danes they changed the names to *eorles*, which, according to *Camden*, signified the same in *Jer-*

language. *Brit. title Ordines.* But see *Turner's Hist. Angl. Sac. l. viii. c. 7.*

In Latin they are called *comites*, (a title first used in the empire,) from being the king's attendants; *à societate nomen sumperunt, reges enim tales sibi associant.* *Bracton. l. 1. c. 8; Flet. l. 1. c. 5.* After the Norman conquest, they were for some time called counts or countesses, from the French; but they did not long retain that name themselves, though their shires are from thence called counties to this day. The name of *earls* or *comites* is now become a mere title; they having nothing to do with the government of the county, which is now entirely devolved on the sheriff, the earl's deputy or *vicecomes*. In writs and commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually styles him "trusty and well-beloved cousin," an appellation as ancient as the reign of Henry IV.; who, being either by his wife, his mother, or his sisters, actually related or allied to every earl then in the kingdom, artfully and constantly acknowledged that connection in all his letters and other public acts; from whence the usage has descended to his successors, though the reason has long ago failed. See *Earl*.

The name of *vicecomes*, or *viscount*, was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it, by Henry VI., when, in the eighteenth year of his reign, he created John Beaumont a peer, by the name of Viscount Beaumont; which was the first instance of the kind. 2 *Inst. 5.* See *Barrington on the Ancient Statutes, l. 1. § 10.*

The title of baron is the most general and universal title of nobility; for originally every one of the peers of superior rank had also a barony annexed to his other titles. 2 *Inst. 5.*

But it hath sometimes happened that, when an ancient barony hath been raised to a new degree of peerage, in the course of a few generations, the two titles have descended differently; one perhaps to the male descendants, the other to the heirs-general, whereby the earldom, or other superior title, hath subsisted without a barony; and there are also modern instances where earls and viscounts have been created, without annexing a barony to their other honours; so that the rule doth not hold universally, that all peers are barons. The original and antiquity of baronies have occasioned great inquiries among our English antiquaries. The most probable opinion seems to be, that they were the same with our present lords of manors; to which the name of court-baron (which is the lord's court, and incident to every manor), gives some countenance. It may be collected from King John's *Magna Charta, c. 14.* that originally all lords of manors, or barons, that held of the king in *capite*, had seats in the great council or parliament, till about the reign of that prince, the conflux of them became so large and troublesome, that the king was obliged to divide them, and summon only the greater barons in person; leaving the small ones to be summoned by the sheriff; and (as it is said) to sit by representation in another house; which gave rise to the separation of the two houses of parliament. *Gillb. Hist. of Exch. c. 3; Seld. Title of Hon. 2, § 21.* See title *Parliament*. By degrees the title came to be confined to the greater barons, or lords of parliament only; and there were no other barons among the peerage but such as were summoned by writ, in respect of the tenure of their lands or baronies, till Richard I. first made it a mere title of honour, by conferring it on divers persons by his letters-patent. 1 *Inst. 9; Seld. Jan. Angl. 2, § 11.*

Before the time of King Edward III. there were but two titles of nobility, viz. earls and barons; the barons were originally by tenure, afterwards created by writ, and after that by patent; but earls were always created by letters-patent. *Seld. 536.* See 1 *Comm. c. 12. p. 398. in n.* And Henry VI. created Edmund of Hadham earl of Richmond by patent, and granted him precedency before all other earls. Mary I.

likewise granted to Henry Ratchiff, Earl of Sussex, a privilege by patent beyond any other nobleman, viz. that he might at any time be covered in her presence, like unto the grandees of Spain; and some few others of our nobility have had this honour. *Diet.*

The st. 31 Hen. 8. c. 10. settles the precedency of the lords of parliament and great officers of state; after whom, the dukes, marquises, earls, viscounts, and barons, take place according to their ancients; but it is declared, that precedency is in the king's disposition. See *Precedence*.

A dignity of earl, &c. is a title by the common law; and if a patentee be disturbed of his dignity, the regular course is to petition the king, who indorses it, and sends it into Chancery. *Stawnd. Prærog. 72; 22 Edm. 3.*

There are now no feudal baronies; but there are barons by succession, and those are the bishops; who, by virtue of ancient baronies held of the king, (into which the possessions of their bishoprics have been converted) are called by writ to parliament, and have place in the House of Peers as lords spiritual; the temporal possessions of bishops are held by their service to attend in parliament when called; and that is in the nature of a barony. See *post, II. III.*

II. The right of peerage seems to have been originally territorial; that is, annexed to lands, honours, castles, manors, and the like; the proprietors and possessors of which were (in right of those estates) allowed to be peers of the realm, and were summoned to parliament to do suit and service to their sovereign; and, when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the House of Lords in right of successions to certain ancient baronies annexed, or supposed to be annexed, to their episcopal lands. *Glan. l. 7. c. 1.* And thus, in 11 Hen. 6. the possession of the castle of Arundel was adjudged to confer an earldom on its possessor. *Seld. Title of Hon. b. 2. c. 9. § 5.* Afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and, instead of territorial, became personal. Actual proof of a tenure by barony became no longer necessary to constitute a lord of parliament; but the record of the writ of summons to him, or his ancestors, was admitted as a sufficient evidence of the tenure. 1 *Comm. c. 12.* The estates and dignities attached to the castle of Arundel are now inalienably vested in the family of the Duke of Norfolk. See *Private Acts, 3 Car. 1. c. 4; 37 Geo. 3. c. 40; 41 Geo. 3. (U. K.) c. xv.*

One of the last cases in which a barony by tenure was endeavoured to be established, was that of de Roos or Ros of Hameslake, Irebute, and Belvoir, in 1805, when the Duke of Rutland claimed the barony in right of his castle of Belvoir, as a barony by tenure, in opposition to the claim of lady Henry Fitzgerald, who claimed as co-heir of lady Frances Manners, one of the two daughters and coheirs of John Earl of Rutland. The barony was created by a writ of summons to Robert de Ros in 40 Henry III., not referring to either of the three territorial baronies. The House of Lords resolved, 1806, that the duke was not entitled to the barony. See *Cruise on Dignities, 51;* and see the Claim in respect of the Castle of Berkley, p. 183.

Peers are now created either by writ or by patent; for those who claim by prescription must suppose either a writ or patent made to their ancestors, though, by length of time, it is lost. The creation by writ, or the king's letter, is a summons to attend the House of Peers, by the style and title of that barony which the king is pleased to confer; that by patent is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby, unless he actually takes his seat in the House of Lords; and some are of opinion, that there must be at least two writs of summons, and a sitting in two distinct parliaments, to evidence an hereditary barony.

Whitelocke of Parl. ch. 114. The most usual way therefore, because the surest, is to grant the dignity by patent; which enures to a man and his heirs according to the limitations thereof, though he never himself makes use of it. *Co. Litt. 16.* Yet it is frequent to call up the eldest son of a peer to the House of Lords by writ of summons, in the name of his father's barony; because in that case there is no danger of his children's losing the nobility, in case he never takes his seat, for they will succeed to their grandfather. And where the father's barony is limited by patent to him and the heirs-male of his body, and his eldest son is called up to the House of Lords by writ, with the title of this barony, the writ in this case will not create a fee or a general estate tail, so as to make a female capable of inheriting the title; but upon the death of the father the two titles unite, or become one and the same. *Ex parte Eliz. Perry, Bro. P. C.* Creation by writ has also one advantage over that by patent; for a person created by writ holds the dignity (in tail) to him and his heirs, without any words to that purport in the writ; but in letters-patent there must be words to direct the inheritance, else the dignity enures only to the grantee for life. *Co. Litt. 9, 16.* For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all, or descend only to some particular heirs; as where a peerage is limited to a man, and the heirs male of his body, by Elizabeth his present lady; and not to such heirs by any former or future wife. And it is to be observed, that though the opinion of Lord Coke is to the contrary, it is now understood that a creation by writ does not confer a fee-simple in the title, but only an estate-tail-general; for every claimant of the title must be descended from the person first ennobled. *1 Woodd. 37; 1 Comm. c. 12. & n.*

In case of creation by patent the person created must have the inheritance limited by apt words; as to him and his heirs, or the heirs male of his body, heirs of his body, &c. otherwise he shall have no inheritance. *2 Inst. 48.*

The king may create either man or woman noble for life only; and peerage may be gained for life by act of law; as if a duke take a wife, she is a duchess in law by the intermarriage; so of a marquis, earl, &c. *1 Inst. 16; 9 Rep. 97.* Also the dignity of an earl may descend to a daughter, if there be no son, who shall be a countess; and if there are many daughters, it is said the king shall dispose of the dignity to which daughter he pleases. *1 Inst. 165; Wood's Inst. 42.* See *Peers, Descent, III.* If a person is summoned as a baron to parliament by writ, and, sitting, die, leaving two or more daughters, who all dying, one of them only leaves issue a son, such issue has a right to demand a seat in the House of Peers. *Skin. 441.*

Thomas de la Warre was summoned to parliament by writ, anno 3 Hen. 8; and William his son, anno 3 Edw. 6. was disabled by attainder to claim any dignity during his life, but was afterwards called to parliament by Queen Elizabeth, and sat there as puisne lord, and died; then Thomas, the son of the said William, petitioned the queen in parliament to be restored to the place of Thomas his grandfather; and all the judges to whom it was referred were of opinion that he should, because his father's disability was not absolute by attainder, but only personal and temporary during his life; and the acceptance of the new dignity by the petitioner shall not hurt him, so that when the old and new dignity are in one person, the old shall be preferred. *11 Rep. 1.*

Where nobility is gained by writ or patent, without descent, it is triable by record; but when it is gained by matter of fact, as by marriage, or where descents are pleaded, nobility is triable *per pais*. *22 Assis. 24; 3 Salk. 243.* A person petitioned the lords in parliament to be tried by his peers; the lords disallowed his peerage, and dismissed the petition; and it was held in this case that the defendant's right stood upon his letters-patent, which could not be cancelled but by *scire facias*; and that the parliament could not give judgment

in a thing which did not come in a judicial way before that court. *2 Salk. 510, 511; 3 Salk. 243.* Where peerage is claimed *ratione baronii*, as by a bishop, he must plead that he is *unus parium regni Angliæ*; but if the claim is *ratione nobilitatis*, he need not plead otherwise than pursuant to his creation. *4 Inst. 15; 3 Salk. 243.*

When a lord is newly created, he is introduced into the house of peers by two lords of the same rank in their robes garter king at arms going before; and his lordship is to present his writ of summons, &c. to the lord chancellor, which being read, he is conducted to his place: and lords by descent, where nobility comes down from the ancestors, and is enjoyed by right of blood, are introduced with the same ceremony, the presenting of the writ excepted. *Lex Constitutionis, 79.*

A nobleman, whether native or foreigner, who has his nobility from a foreign state, although the title of dignity be given him, (as the highest and lowest degrees of nobility are universally acknowledged,) in all our legal proceedings no notice is taken of his nobility; for he is no peer; and the law of England prohibits all subjects to receive any hereditary title of honour or dignity from any foreign prince without consent of the sovereign. *Lex Constitutionis, 80, 81.*

An earldom consists in office for defence of the kingdom and of rents and possessions, &c.; and may be entailed as any other office may, and as it concerns land; but the dignity of peerage cannot be transferred by fine, because it is a quality affixed to the blood, and so merely personal that a fine cannot touch it. *2 Salk. 509; 3 Salk. 244.*

A peer cannot lose his nobility but by death or attainder; though there was an instance in the reign of Edward IV. of the degradation of George Neville, Duke of Bedford, by act of parliament, on account of his poverty, which rendered him unable to support his dignity. *4 Inst. 355; Rot. Parl. 17 Edm. 4. nu. 6.* But this is a singular instance, which serves at the same time, by having happened, to show the power of parliament; and, by having happened but once, to show how tender the parliament hath been in exerting so high a power. It hath been said, indeed, that if a baron wastes his estate so that he is not able to support the degree, the king may degrade him; but it is expressly held by later authorities, that a peer cannot be degraded but by act of parliament. *Moor, 678; 12 Rep. 107; 12 Mod. 56.*

George Neville, Duke of Bedford, was degraded by act of parliament, 16th June, 17 Edw. 4. The preamble of the act reciting that the said George hath not, nor may have, any livelihood to support his name, estate, and dignity, or any name of estate; and that it is oftentimes seen when a peer is called to high estate, and hath not convenient livelihood to support the dignity, it induceth great poverty, and often causeth great extortion, embracery, and maintenance, to the great trouble of all such counties where such estate shall happen to be; wherefore the king, by advice of his lords and commons, ordaineth, establisheth, and enacteth, that from henceforth the same creation and making of the said duke, and all the names and dignity given to the said George, or to John Neville, his father, be from henceforth void and of none effect, &c. *Rot. Parl. 17 Edw. 4. nu. 6.*

In which act these things are to be observed: First, That although the duke had not any possessions to support his dignity, yet his dignity could not be taken from him without an act of parliament. Secondly, The inconveniences attending a great estate and dignity is, and no livelihood to maintain it. Thirdly, it is a good reason to take away such dignity by act of parliament; therefore the statute *De Absentibus* made at a parliament holden at Dublin, in Ireland, the 10th of May, 28 Hen. 8. by reason of the long absence of George, Earl of Shrewsbury, out of that realm, shall be expounded according to the general words of the writ, to take away such inconvenience. *12 Rep. 106, 107. Earl of Shrewsbury's Case.*

Though dignities of peerage are granted from the crown, yet they cannot be surrendered to the crown, except it be in order to new and greater honours; nor are they transferable, unless they relate to an office; and notwithstanding there are instances of earldoms being transferred, and wherein one branch of a family sat in the house of peers by virtue of a grant from the other branch, particularly in the reigns of Henry III. and Edward II. these precedents have been disallowed. *Lex Constitutionis*, 85, 86, 87. And it seems now to be settled that a peerage cannot be transferred (unless we consider the summoning of the eldest son of a peer by writ as a transfer of one of his father's baronies) without the concurrence of parliament; at least in those cases where the noble personage has no barony to remain in himself; as otherwise on the transfer he would himself be deprived of his peerage, and be made ignoble by his own act. It is a maxim that the whole nation is interested in each individual peer, and that a peer cannot be deprived of his peerage but by act of parliament. See *Watkins's Notes on Gilbert's Tenures*, note xi. on p. 11. and p. 361.

A personal honour or dignity may be forfeited on committing treason, &c.; for it is implied by a condition in law that the person dignified shall be loyal; and the office of an earl, &c. is *ad consulendum Regem tempore pacis et defendendum tempore belli*, therefore he forfeits it when he takes counsel or arms against the king. 7 *Rep.* 38.

By the 24th article of the union between Scotland and England (see tit. *Scotland*) "of the peers of Scotland at the time of the Union, sixteen shall be the number to sit in the House of Peers of Great Britain, and the words of the Statute Act, incorporated into stat. 5 *Ann.* c. 8. and recited in § 14. are, "that the said sixteen peers, &c. shall be named by the said peers of Scotland, whom they represent, &c." In consequence of these expressions it is understood that the king cannot create a new Scotch peerage with the elective right, as this would be an intrusion on the rights of the existing electors; for this reason,—Scotch peers are never made except in the case of the younger branches of the royal family, though extinct peerages are revived, or forfeited peerages restored.

With respect to the limitation of the number of the peers of Ireland, see tit. *Ireland, Parliament*.

III. Of the privileges of peers as members of the upper house of parliament, see tit. *Parliament*.

A. peers of the realm are also looked upon as the king's hereditary councillors, and may be called together by the king to impart their advice in all matters of importance to the realm, either in time of parliament, or, which hath been their principal use, when there is no parliament in being. *Co. Litt.* 110.

Instances of conventions of the peers to advise the king have been in former times very frequent, though now fallen into disuse by reason the more regular meetings of parliament. Many instances of this kind of meeting are to be found under our ancient kings; though the former method of convoking them had been so long left off, that when Charles I. in 1640, issued out writs under the great seal to call a great council of all the peers of England, to meet and attend his majesty at York, previous to the meeting of the Long Parliament, the Earl of Clarendon mentioned it as a new invention, not before heard of; that is, as he explains himself, so old, that it had not been practised in some hundreds of years. But though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet in cases of emergency our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together; as was particularly the case with King James the Second, after the landing of the Prince of Orange; and with the Prince of Orange himself, before he called that conven-

tion-parliament which afterwards called him to the throne. 1 *Comm.*

Besides this general meeting, it is usually looked upon to be the right of each particular peer of the realm to demand an audience of the king, and to lay before him with decency and respect such matters as he shall judge of importance to the public. And, therefore, in the reign of Edward III. it was made an article of impeachment in parliament against the two Hugh Spencers (father and son), for which they were banished the kingdom, "that they by their evil covin would not suffer the great men of the realm, the king's good councillors, to speak with the king, or to come near him, but only in the presence and hearing of the said Hugh the father and Hugh the son, or one of them, and at their will, and according to such things as pleased them." 4 *Inst.* 53. See 1 *Comm.* 227—229.

We are next to consider the general privileges which attach to the persons of peers in their individual capacity.

Peers are created for two reasons: 1. *Ad consulendum*; 2. *Ad defendendum Regem*; for which reasons the law gives them certain great and high privileges, such as freedom from arrests, &c. even when no parliament is sitting; because the law intends that they are always assisting the king with their council for the commonwealth, or keeping the realm in safety by their prowess and valour. 1 *Comm.* 227.

In certain criminal cases, that is to say, on indictments for treason and felony, and misprision thereof, a nobleman shall be tried by his peers; but in all misdemeanors, as libels, riots, perjuries, conspiracies, &c. he is to be tried, like a commoner, by a jury. 3 *Inst.* 30; 2 *Hawk. P. C.* c. 44. § 13. So in case of an appeal of felony he was to be tried by a jury. 9 *Rep.* 30; 2 *Inst.* 49; 10 *Edw.* 4. b. 6; 3 *Inst.* 30.

The indictments of peers for treason or felony are to be found by freeholders of the county; and then the peers shall plead before the lord high steward, &c. 1 *Inst.* 156; 3 *Inst.* 28. See post, IV.

The 1 *Edw.* 6. c. 12. which took away benefit of clergy from persons convicted of house-breaking, highway robbery, horse stealing, and robbing of churches, by § 14. enacted, that in all cases where benefit of clergy was allowed to commoners, and also for the above offences, (the only crimes excepted being wilful murder and poisoning of malice prepense,) peers claiming the benefit of the act, though they could not read, should, without any burning in the hand, loss of inheritance, or corruption of blood, be adjudged for the first time as in the case of clerks convict who might make purgation.

Under this act, therefore, peers were invested with a perfect impunity in the commission of every crime except treason and murder, which they continued to enjoy until the passing of the 7 & 8 *Geo.* 4. c. 27. whereby all the statutes relating to benefit of clergy were repealed, and, among others, the above extraordinary enactment.

The privilege of peers extends only to the peers of Great Britain; so that a nobleman of any other country, or a lord of Ireland, hath not any other privileges in this kingdom than a common person; also the son and heir apparent of a nobleman is not entitled to the privilege of being tried by his peers, which is confined to such person as is a lord of parliament at the time; but it seems that an infant peer is privileged from arrests, his person being held sacred. *Co. Litt.* 156; 2 *Inst.* 48; 3 *Inst.* 30. See *Arrest, Privilege, Process*.

The peers of Scotland or Ireland had no privilege in this kingdom before the Union; but by clauses in the respective articles of Union the elected peers have all the privileges of peers of parliament; also all the rest of the peers of Scotland and Ireland have all the privileges of the peerage of England, excepting only that of sitting and voting in parliament. See tit. *Ireland, Parliament, Scotland*.

The right of trial by their peers, it seems now generally admitted, does not extend to bishops; though the reason

given for this exception, viz. that they are not ennobled in blood, and consequently not peers with the nobility, does not seem sufficiently satisfactory. And it has been suggested, that if any instances of trials of this sort by a jury had occurred in remote times, the bishops could not have demanded a trial in parliament without admitting themselves subject to temporal jurisdiction; from which they then claimed exemption; and hence it may be conjectured the bishops have lost their right to be tried in parliament, though only two instances can be found of their being tried by jury, viz. those of Archbishop Cranmer and Bishop Fisher. 2 *Hawk. P. C.* c. 44. § 12.

Some bishops have been tried by peers of the realm, but it hath been when impeached by the House of Commons, as upon special occasions many others have been who have not been peers. The bishops may, however, claim all the privileges of the lords temporal, except that they cannot be tried by the peers, and that they cannot, in capital cases, pass upon the trial of any other peers, they being prohibited by canon to be judges of life and death, &c. They usually therefore withdraw voluntarily, but enter a protest, declaring their right to stay.

A long and ingenious note in chap. viii. of *Hallam's Middle Ages* contains what the author pleases to call "a curious speculative question, and such only we may presume it will long continue, whether the bishops are entitled, on charges of treason or felony (against them), to a trial by the peers." This question is very fully considered, and the conclusion that they are *not* so entitled, is stated to be drawn from the great plurality of law-books; and it is suggested that "there cannot be much doubt that whenever the occasion shall occur this will be the decision of the House of Lords." See further, tit. *Bishops*, and 4 *Comm.* c. 19.

A peer or peeress (either in her own right or by marriage,) cannot be arrested in civil cases. *Finch. L.* 355; 1 *Ventr.* 298. And this privilege extends to all peers, although not having seats in the house; as in the case of Irish and Scotch peers; and in like manner to all peeresses, English, Scotch, or Irish. This is now settled in a report from the Lords' committee, specially appointed to search for precedents.

A subpoena shall not be awarded against a peer out of the Chancery, in a cause; but a letter from the lord chancellor, or lord keeper, in lieu thereof. See *Chancery*. A peer may not be empannelled upon any inquest, though the cause hath relation to two peers; and if a peer be returned on a jury, a special writ shall issue for his discharge from service. The houses of peers shall not be searched for conventicles but by warrant under the sign manual, or in the presence of the lord lieutenant, or one deputy lieutenant, and two justices of the peace. 22 *Car. 2. c. 1*; and it was expressly provided by 19 & 14 *Car. 2. c. 1*, against non-conformists, that for every third offence, which was punishable by transportation, lords of parliament should be tried by their peers.

A nobleman menacing another person, whereby such other person fears his life is in danger, no writ of *supplicavit* shall issue, but a subpoena; and when the lord appears, instead of surety, he shall only promise to keep the peace. 35 *Hen. 6. See Surety of the Peace*.

In ejectment a special verdict was found on a trial at bar, and judgment for defendant, and costs taxed; and after affidavit of the demand of costs, a motion was made for an attachment against the duchess, (the duke being dead,) she being one of the lessors, for non-payment of costs; and it was alleged, that if the court did not grant it, the defendant would be remediless; for though in other cases a *distringas* issues against peers, yet in this case no process can go but an attachment. The court refused to grant an attachment against the person of the duchess, but ordered her to show cause why an attachment, as to her goods and chattels, should not be issued; which rule was afterwards made absolute. *Rep. of Pract. in C. B.* 7, 8. See *Attachment*.

A peer, or lord of parliament, cannot be an approver, for it is against *Magna Charta* for him to pray a coroner. 3 *Inst.* 129. c. 56; 2 *Hawk. P. C.* c. 24. § 3.

If a bill in Chancery be exhibited against a peer, the course is first for the lord keeper to write a letter to him; and if he doth not answer, then a subpoena; then an order to show cause why a sequestration should not go; and if he still stands out, then a sequestration. And the reason is, because there can be no process of contempt against his person. 2 *Ventr.* 342. See *Chancery, Privilege*.

The Ecclesiastical Court pronounced an Irish peer in contempt for non-payment of costs, and directed such contempt to be signified, leaving it to the lord chancellor to order the writ *de contumace capiendo* to issue or not. *Westmeath v. Westmeath*, 2 *Hagg.* 653.

Distringas is the first process against a peer on an information for an intrusion on the king's lands, or for a conversion of the king's goods. 2 *Hawk. P. C.* c. 27. § 12. cites *Co. Ent.* 587.

If a peer be impleaded by a commoner, yet such cause shall not be tried by peers, but by a jury of the country; for though the peers are the proper *pares* to a lord of parliament in capital matters, where the life and nobility of a peer is concerned; yet in matter of property the trial of fact is not by them, but by the inhabitants of those counties where the facts arise; since such peers living through the whole kingdom could not be generally cognizant of facts arising in several counties as the inhabitants themselves where they are done; but this want of having noblemen for their jury was compensated as much as possible by returning persons of the best quality; therefore it was formerly necessary that a knight should be summoned in any cause where a peer was party. *G. Hist. C. B.* 78, 79. See *Jury*.

See further as to the privilege of peers in cases of act and against them, tit. *Parliament*.

Peers have also many peculiar privileges annexed to their peerage in the course of judicial proceedings. A peer, sitting in judgment, gives not his verdict upon oath, like an ordinary jurymen, but upon his honour. 2 *Inst.* 49. He answers a writ to bills in chancery upon his honour, and not upon his oath. 1 *P. Wms.* 146; but when he is examined as a witness either in civil or criminal cases, or on interrogatories in chancery, he must be sworn (whether in inferior courts, or in the high court of parliament); for the respect which the law shows to the honour of a peer does not extend so far as to overturn a settled maxim, that in *judicio non creditur nisi juratis*. *Dank.* 512; *Cro. Car.* 64.

In the pleas of parliament, 18 *Edw. 1.* between the Earl of Gloucester and Earl of Hereford, on long debate whether John de Hastings, a baron, ought to be sworn, because he was a peer of the realm, it was resolved that he ought to lay his hand on the book. The like was resolved, 10 *Car. 1. B. R.* by the court, where the Lord Dorset's testimony was requisite. See *Dy.* 314, b. *marg. pl.* 98.

The privilege of a peer is so great in respect of his person, that the king may not restrain him of his liberty, without the order of the House of Lords, except it be in cases of treason &c. A memorable case wherein was that of the Earl of Arundel imprisoned by the king in the reign of King Charles I.

The honour of peers is, however, so highly tendered by the law, that it is much more penal to spread false reports of them and of certain other great officers of the realm, than of other men; scandal against them being called by the peculiar name of *scandalum magnatum*, and subjected to peculiar punishments by divers ancient statutes. *West. 1. 3 Edw. 1. c. 34*; 2 *Rich. 2. st. 1. c. 5*; 12 *Rich. 2. c. 11*. See *Libel, Privilege, Scandalum Magnatum*.

At common law it was lawful for any peer to retain as many chaplains as he would, but by 21 *Hen. 8. c. 13.* her number is limited. See *Chaplain*. In many cases, the

protestation of honour shall be sufficient for a peer, as in trial of peers they proceed upon their honour, not upon oath; and if a peer is defendant in a court of equity, he shall put in his answer upon his honour (though formerly it was to be on oath); and in action of debt upon account, the plaintiff being a peer, it shall suffice to examine his attorney, and not himself on oath; but where a peer is to answer interrogatories, or make an affidavit, as well as where he is to be examined as a witness, he must be upon his oath. *Bract. lib. 5. c. 9*; *9 Rep. 49*; *3 Inst. 29*; *W. Jones, 152*; *2 Salk. 512*.

And as to the general privileges of peers, see further *Privilege*.

With respect to the privileges of peeresses, see *Peeresses*.

IV. Blackstone says, that in the method and regulation of its proceedings, the trial by the House of Peers differs but little from the trial *per patriam*, or by jury; except that no special verdict can be given in the trial of a peer; because the lords of parliament, or the lord high steward, (if the trial be had in his court,) are judges sufficiently competent of the law that may arise from the fact. *Hutt. 116*. And except as to that the peers need not all agree in their verdict, but the greater number, consisting of twelve at the least, will conclude and bind the minority. *Kilgus, 56*; *7 Wm. 3. c. 3. § 10*; *Foster, 247*. During a trial before the House of Peers a parliament, every peer present on the trial is to judge both of the law and the fact. *Post. 112*. In cases of the impeachment of a peer for treason, a lord high steward is usually, though not necessarily appointed, rather in the nature of a speaker to regulate the proceedings than as a judge. *4 Comm. 200*; *Post. 145*. But in the court of the high steward, which is held in the recess of parliament, he alone is to judge in all points of law and practice, and the peeresses are merely judges of the fact. *Post. 113*.

All the barons of parliament shall be tried for treason, felony, misprision, or as accessory, at the suit of the king, by their peers. See *Magna Charta, 2 Hen. 3. c. 29*; *2 Inst. 49*; *2 C. 10. 6*; *Sta. 152, 153*. So all the nobility who are peers of parliament by the common law, which is now affirmed by *2 Hen. 6. c. 9*. And a peer cannot waive the trial by his peers. *Kel. 56, in marg. 621*; *1 St. Tr. 265*; *2 Rush. 94*.

Trial by peers is very ancient. In the reign of William I. the Earl of Hereford, for conspiring to receive the Danes into England, and depose the Conqueror, was tried by his peers, and found guilty of treason, *per judicium parium suorum*. *2 Inst. 50*. The Duke of Suffolk, anno 2 Hen. 6. being accused of high treason by the commons, put himself upon the king's grace, and not upon his peers, and the king alone judged him to banishment; but he sent for the lord chancellor, and the lords who were in town, to his palace at Westminster, and also the duke, and commanded him to enter the kingdom in the presence of the lords, nevertheless, entered a protest to save the privilege of their peerage; and this was deemed no legal banishment, for the king's judging in that manner was no judgment; he was extrajudicially bid to absent himself out of the realm, and in doing it, he was taken on the sea and slain. The case of the Lord Cromwell, in the reign of King Henry VIII. was very extraordinary; the lord was attainted in parliament, and condemned and executed for high treason, without being allowed to make any defence. It need only be observed, that this attainder was by a parliament under the power and influence of Henry VIII. See *Parliament. Hist. vol. 3. 163*. And several great persons during this reign were brought to trial before lords commissioners. Anno 32 Car. 2. the Lord Stafford was tried for treason; and after evidence given for the king, and the prisoner made his objections to the king's evidence, he was allowed upon several points of law, viz. That no overt act was alleged in his impeachment; that they were not competent witnesses who swore against him, but that they swore for money; and whether a man could be condemned for

treason by one witness, there not being two witnesses to any one point, &c. But the points insisted upon being over-ruled, he was found guilty by a majority of twenty-four votes; fifty-five against thirty-one for him. *3 St. Tr. 311*. He was executed; but in 1685 the attainder was reversed by an act of parliament, reciting, that he was innocent of the treason laid to his charge, and that the testimony whereon he was found guilty was false.

It was adjudged that if a peer on arraignment before the lords refused to put himself on his peers, he should be dealt with as one who stood mute; for it was as much the law of the land that a peer should be tried by his peers, as a commoner by commoners. But see now the *7 & 8 Geo. 4. c. 28. § 2*, and tit. *Mute*.

If one who has a title to peerage be indicted and arraigned as a commoner, and plead not guilty, and put himself upon his country, it hath been adjudged that he cannot afterwards suggest that he is a peer, and pray trial by his peers. *2 Hawk. P. C. c. 44. § 19*.

By the *7 Wm. 3. c. 3. § 10*, it is enacted, that upon the trial of any peers or peeresses, for treason or misprision, all the peers who have a right to sit and vote in parliament, shall be duly summoned twenty days at least before the trial, and every peer so summoned and appearing shall vote in the trial, first taking the oaths of allegiance and supremacy.

Formerly lords triers were appointed by the crown in the trial of peers, but this was at length found such an inlet to oppression, as to be deservedly abolished by the above stat. *7 Wm. 3. See Treason*. And it seems that this act extends to every proceeding in full parliament, for the trial of a peer in the ordinary course of justice. *Post. 247*.

By *6 Ann. c. 23. § 12*, peers shall be indicted in Scotland as in England.

By the acts for the Union of Great Britain and Ireland, (*39, 40 Geo. 3. c. 67. (British)*; *40 Geo. 3. c. 38. (Irish)*;) Irish peers sitting in the House of Commons, shall not be entitled to the privilege of peerage, but are declared liable to be sued, indicted, and proceeded against, and tried as commoners for any offence with which they may be charged. In other cases they shall be sued and tried as peers of the United Kingdom. See *Article IV. of the Union*.

The peer being indicted for the treason or felony, before commissioners of oyer and terminer, (or in the King's Bench, if the treason, &c. be committed in the county of Middlesex,) then the king, by commission under the great seal, constitutes some peer (generally the lord chancellor) lord high steward, who is judge in these cases; and the commission commands the peers of the realm to be attendant on him, also the lieutenant of the Tower, with the prisoner, &c. A certiorari is awarded out of Chancery, to remove the indictment before the lord high steward; and another writ issues to the lieutenant of the Tower, for bringing the prisoner; and the lord high steward makes his precepts for that purpose, assigning a day and place, as in Westminster Hall, inclosed with scaffolds, &c., and for summoning the peers, of whom there are to be twelve and above, at least, present; at the day, the lord high steward takes his place under a cloth of state; his commission is read by the clerk of the crown, and he has a white rod delivered him by the usher; which being returned proclamation is made, and command given for certifying of indictments, &c. and the lieutenant of the Tower to return his writ, and bring the prisoner to the bar; after this, the serjeant at arms returns his precept with the names of the peers summoned, and they are called over, and, answering to their names, are recorded, when they take their places; the clerk only thus adjusted, the lord high steward declares to the prisoner at the bar the cause of their assembly, assures him of justice, and encourages him to answer without fear; then the clerk of the crown reads the indictment, and arraigns the prisoner, but is not to insist on his holding up his hand, and the high steward gives his charge to the peers; this be-

ing over, the king's counsel produce their evidence for the king; and if the prisoner hath any matter of law to plead, he shall be assigned counsel; after evidence given for the king, and the prisoner's answer heard, the prisoner is withdrawn from the bar, and the lords go to some place to consider of their evidence; but the lords can admit no evidence but in the hearing of the prisoner; they cannot have conference with the judges, or demand it, (who attend on the lord high steward, and are not to deliver their opinions beforehand,) but in the prisoner's hearing; nor can they send for the opinions of the judges, or demand them, but in open court; and the lord steward cannot collect the evidence, or confer with the lords, but in the presence of the prisoner; who is at first to require justice of the lords, and that no question or conference be had but in his presence. Nothing is done in the absence of the prisoner until the lords come to agree on their verdict; and then they are to be together as juries until they are agreed, when they come again into court and take their places; and the lord high steward publicly in open court demands of the lords, beginning with the puisne lord, whether the prisoner, calling him by his name, be guilty of the treason, &c. whereof he is arraigned; who all give in their verdict; and he being found guilty by a majority of votes, such majority being more than twelve, is brought to the bar again, and the lord steward acquainting the prisoner with the verdict of his peers, passes sentence and judgment accordingly; after which an *O Ye!* is made for dissolving the commission, and the white rod is broken by the lord high steward, whereupon this grand assembly breaks up, which is esteemed the most solemn and august court of justice upon earth. 2 *Hawk. P. C. c. 44*; and see 4 *Comm. c. 19*.

The lord high steward gives no vote himself on a trial by commission; but only on a trial by the House of Peers, while the parliament is sitting. Where a peer is tried by the House of Lords in full parliament, the house may be adjourned as often as there is occasion, and the evidence taken by parcels; and it hath been adjudged that where the trial is by commission, the lord steward, after a verdict given, may take time to advise upon it, and his office continues till he gives judgment. But the triers may not separate upon a trial by commission, after evidence given for the king; and it hath been resolved, that the peers in such case must continue together till they agree to give a verdict. *State Trials*, ii. 702, iii. 657; and see more fully 2 *Hawk. P. C. c. 44*, § 1—8.

It is said, a writ of error lies in the King's Bench of an attainer of a peer before the lord high steward. 2 *Hawk. P. C. c. 50*, § 16, cites 1 *Sid.* 208. If a peer be attainted of treason or felony, he may be brought before the court of B. R. and demanded what he has to say why execution should not be awarded against him? And if he plead any matter to such demand, his plea shall be heard, and execution ordered by the court, upon its being adjudged against him. 1 *Hen. 7. 22. pl. 15*; *Bro. Coro.* 129; *Fitz. Coro.* 49. Likewise the Court of King's Bench may allow a pardon pleaded by a peer to an indictment in that court, to save the trouble of summoning the peers merely for that purpose. But that court cannot receive his plea of not guilty, &c. but only the lord steward on arraignment before the lords, 2 *Inst.* 42.

See Mr. Amos's Disquisition on the Court of the Lord High Steward, annexed to the second volume of *Phillips's State Trials*; and tit. *Lord High Steward*.

The sentence against a peer for treason is the same as against a common subject, though the king generally pardons all but beheading, which is a part of the judgment; for other capital crimes, beheading is also the general punishment of a peer; but anno 23 *Hen. 8.* the Lord Daeres was attainted of murder, and had judgment to be hanged; and anno 3 & 4 *P. & M.* the Lord Stourton, being attainted of murder, had judgment against him to be hanged, which

sentences were executed; and so in the case of Lord Ferrers, 10 *St. Tr.* 478. In this latter case it was determined by all the judges that a peer convicted of felony and murder ought to receive judgment for the same, according to the provisions of 25 *Geo. 2. c. 37*. See *Homicide*, III. 3. *ad fin.* And, secondly, supposing the day appointed by the judgment for execution should lapse before such execution done, that a new time may be appointed for the execution, either by the high court of parliament, before which such peer shall have been attainted, although the office of high steward be determined, or by the Court of King's Bench, the parliament not then sitting, and the record of the attainer being properly removed into that court. *Fost.* 139.

If execution be not done, the lord steward may by precept command it to be done according to the judgment. 3 *Inst.* 31.

PEERESSES. As we have noblemen, so we have noblewomen, and these may be by creation, descent, or marriage. And first, Henry VIII. made Anne Bullen Marchioness of Pembroke. James I. created Lady Compton, wife to Sir Thomas Compton, Countess of Buckingham in the lifetime of her husband, without any addition of honour to him; and also made Lady Finch Viscountess of Maidstone, and afterwards Countess of Winchelsea, to her and the heirs of her body. George I. made Lady Sculiburgh Duchess of Kendal. If any English woman take to husband a French nobleman, she shall not bear the title of dignity; and if a German woman, &c. marry a nobleman of England, unless she be made denizen, she cannot claim the title of her husband, no more than her dower, &c. *Lex Constitution.* 80.

There was no precedent for the trial of peeresses, when accused of treason or felony, till after Eleanor Duchess of Gloucester, wife to the Lord Protector, was accused of treason and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of Cardinal Beaufort. This very extraordinary trial gave occasion to a special statute, 20 *Hen. 6. c. 9*, which declares the law to be, that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm. *Mor.* 769. 2 *Inst.* 50; 6 *Rep.* 52; *Staunf. P. C.* 152. This statute is said to be remarkable, as being the only instance of a legislative explanation of any part of *Magna Charta*. It recites a doubt which existed respecting the interpretation of that charter, from which it would seem that no precedent had occurred during the space of 200 years, in the most barbarous period of our history, of a peeress having been tried for a capital offence. See *Barrington's Obs. t. Hen. 6.*; 2 *Inst.* p. 50.

If a woman, noble in her own right, marries a commoner she still remains noble, and shall be tried by her peers; but if she be only noble by marriage, then, by a second marriage with a commoner, she loses her dignity; for as by marriage it is gained, by marriage it is also lost. *Dyer*, 79; *Co. Lit.* 16. Yet if a duchess dowager marries a baron, she continues a duchess still; for all the nobility are *pares*, and therefore it is no degradation. 1 *Inst.* 16. b.; 2 *Inst.* 50.

If a queen dowager takes a husband, noble or not noble, she, by her subsequent marriage, shall not lose her dignity. 2 *Inst.* 50. Yet if a woman, noble by descent, marries to an inferior degree of nobility, as if the daughter of a duke marries a baron, she shall have precedence only as a baroness. *Ow.* 82.

It hath been agreed that a queen consort and queen dowager, whether she continue sole after the king's death, or take a second husband, and he be a peer or commoner, and also all peeresses by birth, whether sole or married to peers or commoners; and all marchionesses and viscountesses are entitled to a trial by the peers, though not expressly mentioned in the st. 20 *Hen. 6. c. 9*; 2 *Inst.* 50; *Crompt. Jur.* 33; 2 *Hawk. P. C. c. 44*, § 10, 11.

A woman, noble in her own right, or by a first marriage, marrying a commoner, communicates no rank or title to her

husband. 1 *Inst.* 326 b. There have been claims, and supported by authorities, by a husband after issue had, to assume the title of his wife's dignity, and after her death to retain the same as tenant by the curtesy, but it does not seem that such a claim would now be allowed. See 1 *Inst.* 29 b. in n.

A woman, noble by marriage, afterwards marrying a commoner, is generally called and addressed by the style and title which she bore before her second marriage; but this is only by curtesy, as the daughters of dukes, marquises, and earls are usually addressed by the title of lady; though in law they are commoners. In a writ of partition brought by R. pl. Howard and Lady Anne Powes, his wife, the court held that it was a mansioner, and that it ought to have been by R. pl. Howard and Anne his wife, late wife of Lord Powes, deceased. *Dy.* 79.

A countess or baroness may not be arrested for debt or trespass; for though, in respect of their sex, they cannot sit in parliament, yet they are peers of the realm, and shall be tried by their peers, &c. But a *capias* being awarded against the Countess of Rutland, it was held that she might be taken by the sheriff; because she ought not to dispute the authority of the court from whence the writ issued, but must execute it, for he is bound by oath so to do; and although by the writ itself it appeared that the party was a countess, against whom a *capias* would not generally lie, for that in some cases it may lie, as for a contempt, &c. therefore the sheriff ought not to examine the judicial acts of the court. 6 *Rep.* 52.

A bill was against a peeress to discover deeds, she answers on her honour and confesses deeds. She shall produce them only upon her honour, and not on oath. *Ch. Proc.* 92.

PEINE FORTE ET DURE. This punishment is now abolished. See *Mute*.

PELLA, a peel, pile, or fort. The citadel or castle in the Isle of Man was granted to Sir John Stanley by this name. *Pat.* 7 *Hen.* 4. m. 18. See *Man, Isle of*.

PELLS. Issues arising from or out of a thing. *Fitzh.* Just 205.

PELLE AND PELFRE, *peltra*.] In time of war, the earl marshal is to have of preys and booties, all the gelded beasts, except hogs, &c. which is called *pelfre*. *Old MS.* It is used for the personal effects of a felon convict. *Plac. in itin.* *episc. Cistr.* 14 *Hen.* 7.

PELLAGE. The custom or duty paid for skins of leather. *Rot. Parl.* 11 *Hen.* 4.

PELLICIA. A pilch, *tunica vel indumentum pelliceum*; *hinc super-pellicium*, a fur pilch, or surplice. *Spelm.*

PELLIPARIUS. A leatherseller or skinner. *Pat.* 15 *Edw.* 3. p. 2. m. 45.

PELOTA, *Fr. pelote*.] The ball of the foot. See 4 *Inst.* 208.

PELT-WOOL. The wool pulled off the skin or pelt of clean sheep. See *st.* 8 *Hen.* 6. c. 22.

PEN. A word used by the Britons for a high mountain, and also by the ancient Gauls; from whence those high hills which divide France from Italy are called the Appenines; and more to the purpose is the name of Penmaenmawr in Wales. *Cambd. Britan.*

PENAL LAWS are of three kinds, viz. *poena pecuniaria*, *poena corporalis*, and *poena exilii*. *Cro. Jac.* 415.

Penal statutes are made on various occasions, to punish and deter offenders; and they ought to be construed strictly, and not extended by equity; but the words may be interpreted beneficially, according to the intent of the legislators. 1 *Inst.* 54, 268. See 1 *Comm. Introd.* § 8. p. 89.

Where a thing is prohibited by statute under a penalty, if the penalty, or part of it, be not given to him who will sue for the same, it goes and belongs to the king. *Rast. Entr.* 43; 2 *Hank. P. C.* c. 26. § 17. But the king cannot grant to any person any penalty or forfeiture, &c. due by any statute before judgment thereupon had. *Stat.* 21 *Jac.* 1. c. 3.

Though after plea pleaded, justices of assize, &c. having power to hear and determine offences done against any penal statute, may compound the penalties with the defendant, by virtue of the king's warrant or privy seal.

The courts at Westminster (particularly the Court of King's Bench) frequently give leave on motion, and an affidavit of circumstances, &c. to compound penal actions. Compounding without such leave, is punishable by indictment.

The court will not permit a defendant to compound a penal action, where part of the penalty goes to the crown, unless counsel for the crown are instructed by the Treasury to consent. 5 *Taunton*, 268.

Where penalties are ordained by penal acts of parliament to be recovered in any court of record, this is to be understood only of the courts at Westminster, and not of the courts of record of inferior corporations. *Jenk. Cent.* 228.

The spiritual court may hold plea of a thing forbidden by statute upon a penalty, but they may not proceed on the penalty. 2 *Lev.* 222. See further titles *Information*, *Statutes*, *Action*; and as to the sanction of laws by penalties, 1 *Comm. Introd.* pp. 56, 57.

As to the time within which actions on penal statutes must be brought, see *Limitation of Actions*, II. 2.

PENANCE. An ecclesiastical punishment, which affects the body of the penitent, by which he is obliged to give a public satisfaction to the church for the scandal he hath given by his evil example. And in the primitive times, they were to give testimonies of their reformation before they were readmitted to partake of the mysteries of the church.

In the case of incest or incontinency, the sinner is usually enjoined to do a public penance in the cathedral or parish church, or public market, bare-legged and bare-headed, in a white sheet, and to make an open confession of his crime in a prescribed form of words, which is augmented or moderated according to the quality of the fault and the discretion of the judge.

So in smaller faults a public satisfaction or penance, as the judge shall decree, is to be made before the minister, churchwardens, or some of the parishioners, respect being had to the quality of the offence; as in the case of defamation, or laying violent hands on a minister, or the like. *God. Append.* 18; *Wood's Inst.* 507. Penance may be changed into a sum of money to be applied to pious uses, and this is called commuting. 3 *Inst.* 150; 4 *Inst.* 336. See *Articuli Cleri*, 9 *Edw.* 2. c. 4; *F. N. B.* 53; and tit. *Clergy*, *Excommunication*.

PENANCE at common law, where a person stands mute. See *Mute*.

PENERARIUS. An ensign bearer. John Parient was squire of the body, and *penerarius* to King Richard II.

PENITENTIARY HOUSES. See *Transportation*.

PENNY, *Sax. penig*,] an ancient current silver coin. 2 *Inst.* 575.

The Saxons had no other sort of silver coin. It was equal in weight to our threepence. Five made one shilling Saxon, and thirty made a mark, which they called *manse*, and weighed as much as three of our half-crowns.

The English penny called sterling is round, without clipping, and weighs 32 *grana frumenti in medio spicae*; twenty pence make an ounce, and twelve ounces make a pound. See *stats.* 20 *Edw.* 1; 27 *Edw.* 1. st. 3; 31 *Edw.* 1. and *Stat. antiq. inc. temp.* It was made with a cross in the middle, and broke into half-pence and farthings. *Cowell. Mat. Paris*, 1279. See *Denarius*.

PENNYWEIGHT. As every pound troy contained twelve ounces, each ounce was formerly divided into twenty parts, called pennyweights; and though the pennyweight be altered, yet the denomination still continues. Every pennyweight is subdivided into twenty-four grains. *Cowell*.

PENON. Mentioned in an ancient statute, 11 Ric. 2. c. 1. A standard, banner, or ensign, carried in war. *Cowell.*

PENSA SALIS, casei, &c. A wey of salt or cheese, containing 256 pounds. *Cowell.*

PENSAM, ad pensam.] The ancient way of paying into the Exchequer as much money for a pound sterling as weighed twelve ounces troy. Payment of a pound *de numero*, imported just twenty shillings; *ad scalam*, (see *Scalam*,) twenty shillings and six-pence; and *ad pensam* imported the full weight of twelve ounces. See *Lowndes's Essay on Coin*, p. 4.

PENSION, Fr. pension.] An allowance made to any one without an equivalent. *Johnson's Dict.* See *Pensioner*.

To receive a pension from a foreign prince or state, without leave of our king, has been held to be criminal, because it may incline a man to prefer the interest of such foreign prince to that of his own country. See *Contempt*.

All pensions are liable to certain duties annually imposed by parliament.

As to the incapacity of persons, having pensions from the crown, of being elected members of parliament, see *Parliament*, VI. (B.) 2.

PENSION OF CHURCHES. Certain sums of money paid to clergymen in lieu of tithes.

Some churches have settled on them annuities, pensions, &c. payable by other churches; which pensions are due by virtue of some decree made by an ecclesiastical judge on a controversy for tithes, by which the tithes have been decreed to be enjoyed by one, and a pension instead thereof to be paid to another; or they have arisen by virtue of a deed made by consent of the parson, patron, and ordinary; and if such pension hath been usually paid for twenty years, then it may be claimed by prescription, and be recovered in the spiritual court, or a parson may prosecute his suit for a pension by prescription, either in that court or at common law, by writ of annuity; but if he takes his remedy at law, he shall never afterwards sue in the spiritual court; if the prescription be denied, that must be tried by the common law. *F. N. B.* 51; *Hardr.* 280; *Ventr.* 120.

A spiritual person may sue in the spiritual court for a pension originally granted and confirmed by the ordinary; but where it is granted by a temporal person to a clerk, he cannot; as if one grant an annuity to a parson, he must sue for it in the temporal courts. *Cro. Eliz.* 675. See *tit. Corody, Courts-Ecclesiastical*.

PENSIONS OF THE INNS OF COURT. Annual payments made by each member to the houses; and also that which in the two Temples is called a parliament, and in Lincoln's Inn a council, is in Gray's Inn termed a pension; being usually an assembly of the members to consult of the affairs of the society.

PENSIONER, from pension; one who is supported by an allowance at the will of another; a dependant. It is usually applied (in a public sense) to those who receive pensions or annuities from government; who are chiefly such as have retired from places of honour and emolument.

PENSIONERS, pensionarii.] A band of gentlemen so called, who attend as a guard on the king's person; they were instituted anno 1539, and have an allowance of fifty pounds a-year to maintain themselves and two horses for the king's service. See *Stow's Annals*, 793.

They have been recently designated, by order of his majesty, the Honourable Body of Gentlemen at Arms.

PENSION-WRIT. When a pension-writ is once issued, none sued thereby in any Inns of Court shall be discharged or permitted to come into Commons, till all duties be paid. Order in Gray's Inn, wherein it seems to be a peremptory order against such of the society as are in arrear for pensions and other duties. *Cowell.*

PENTECOSTALS, Pentecostalia.] Pious oblations made at the feast of Pentecost by parishioners to their priest, and

sometimes by inferior churches or parishes to the principal mother-church. Which oblations were also called Whitsun-farthings, and were divided into four parts; one to the parish priest, a second to the poor, a third for repair of the church, and a fourth to the bishop. *Stephens's Procurations and Pentecostals.* See *Kennet's Glossary in Pentecostalia*.

These are still paid in some few dioceses, being now only a charge upon particular churches, where by custom they have been paid; *Ken. Par. Ant.* 596; *Deg. p. 2. c. 15*; and if they be denied when they are due, they are recoverable in the spiritual court. *Gibbs.* 977; 18 *Wm.* 657.

PERAMBULATION, perambulatio.] A travelling through, or over; as perambulation of the forest is the surveying or walking about the forest, and the utmost limits of it, by justices, or other officers thereto assigned to set down and preserve the metes and bounds thereof. *Stats.* 16 Car. 1. c. 16; 20 Car. 2. c. 3; 1 *Inst.* 50. See further *tit. Forest*.

Perambulation of parishes is to be made by the minister, churchwardens and parishioners, by going round the same once a year, in or about Ascension week, and the parishioners may well justify going over any man's land in their perambulation, according to usage; and it is said, may abate all nuisances in their way. *Cro. Eliz.* 441. See further *Parish*.

There is also a perambulation of manors; and a writ *de perambulatione facienda*, which lies where any encroachments have been made by a neighbouring lord, &c.; then, by the assent of the lords, the sheriff shall take with him the parties and neighbours, and make a perambulation, and settle the bounds; also a commission may be granted to other persons to make perambulation, and to certify the same in the Chancery, or the Common Pleas, &c. And this commission is issued to make perambulation of towns, counties, &c. *New Nat. Br.* 206.

If tenant for life of a lordship, and one who is tenant at fee-simple of another lordship adjoining, sue forth the writ or commission, and by virtue thereof a perambulation is made, the same shall not bind him in reversion; nor shall the perambulation made with the assent of tenant in tail, bind his heir. And it is said this assent of the parties to the perambulation ought to be acknowledged and made personally in Chancery, or by *dedimus potestatem*; and being certified, the writ or commission issues, &c. *New N. Br.* 206. The writ begins thus: "The King to the Sheriff, &c. We command you, that taking with you twelve discreet lawful men of your county, in your proper person you go to the land of A. B. of, &c. and the land of C. D. of, &c. and upon their oath you cause to be made perambulation betwixt the lands of the said A. in, &c. and of the said C. in, &c.; so that it be made by certain metes, or bounds and divisions, &c. And make known to our justices at Westminster, &c."

If perambulation be refused to be made by a lord, the other lord, who is grieved thereby, shall have a writ against him called *de rationabilibus divisis*. See *F. N. B.* 128, 153. *Reg. Orig.* 157; and *Rationabilibus Divisio*.

Questions as to boundaries, limits, &c. are now, however, in general determined by actions of trespass, ejectment &c.

Actions upon writs of perambulation were authorized in Scotland by the act 1697, c. 79, to settle the bounds of disputed properties adjoining each other.

PERANGARIA. See *Angaria*.

PERCA, for *particu*, a perch of land. *Mon. Angl.* n. 87.

PERCAPTURA. A place in a river made up with banks, &c. for the better preserving and taking fish. *Paroch. Antiq.* 120.

PERCH. A rod or pole of sixteen feet and a half in length, whereof forty in length and four in breadth make an acre of ground. *Crompt. Jurisd.* 222.

But by the customs of several counties, there is a difference in this measure; in Staffordshire it is twenty-four feet; and in the forest of Sherwood twenty-five feet, the foot there being eighteen inches long; and in Herefordshire a perch, of

ditching is twenty-one feet; the perch of walling sixteen feet and a half; and a pole of denshired ground is twelve feet, &c. *Skene*.

Now, by the 5 *Geo. 4. c. 74.* the perch is fixed at five yards and a half of the standard yard. See *Measure*.

PER, CUI, ET POST. Writs of entry so called, but now abolished. See *Entry*.

PERDINGS. The dregs of the people, viz. men of no substance. *Leg. Hen. 1. c. 29.*

PERDONATIO UTLAGARIÆ. A pardon for a man, who, for contempt in not yielding obedience to the process of the king's court, is outlawed, and afterwards of his own accord surrenders. *Reg. Orig. 28; Leg. Ed. Confess. c. 18, 19.*

PEREMPTORY, *peremptorius*, from the verb *perimere*, to cut off. Joined with a substantive, as action or exception, signifies a final and determinate act, without hope of renewing or altering. So *Fitzherbert* calleth a peremptory action; *Nat. Brev. 35, 38, 104, 108*; and nonsuit peremptory. *Idem. 5, 11.* A peremptory exception. *Bracton, l. 4. c. 20. Smith de Rep. Anglor. l. 2. c. 18.* calleth that a peremptory exception, which makes the state and issue in a cause. *Cowell*.

A peremptory day is when business by rule of court is to be spoke to at a precise day; but if it cannot be spoken to then, the court, at the prayer of the party concerned, will give a farther day without prejudice to him. See *Motion in Court, Practice*.

PEREMPTORY CHALLENGE OF JURORS. See *Jury, l. IV.*

PEREMPTORY MANDAMUS. See *Mandamus*.

PEREMPTORY WRIT. See *Optional Writ, Original*.

PERINDE VALERE. A term in the ecclesiastical law, signifying a dispensation granted to a clerk, who being defective in capacity for a benefice, or other ecclesiastical function, is *de facto* admitted to it; and it hath the appellation from the words, which make the faculty as effectual to the party dispensed with, as if he had been actually capable of the thing for which he is dispensed with at the time of his admission. In *stat. 25 Hen. 8. c. 21.* it is called a writ. See *Gibbs. 87.*

PERINDINARE. To stay, remain, or abide in a place. *Matt. West. an. 1016; Fortesc. c. 36.*

PERIPHRAISIS. Circumlocution; use of many words to express the sense of one. *Johns.*

No periphrasis, or circumlocution, will supply words of art, which the law hath appropriated for the description of offences in indictments. No periphrasis, in indictment or composition, shall make good an indictment which doth not bring the fact within all the material words of a statute; unless the statute be recited, &c. *Cro. Eliz. 535, 749.* See *Indictment*.

PERJURY,

AND SUBORNATION THEREOF.

PERJURY, *perjurium* *mandatum cum juramento firmatum*, is defined to be a crime committed, when a lawful oath is administered, by any who hath authority, to a person in any judicial proceeding, who swears wilfully, absolutely, and falsely, in a matter material to the issue or cause in question, by their own act, or by the subornation of others. *3 Inst. 153, 164.*

PERJURY, by the common law, is defined a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely, in a matter of some consequence to the point in question, whether he be believed or not. *1 Hawk. P. C. c. 69. § 1.*

SUBORNATION OF PERJURY, by the common law, is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath; but if the person induced to take such oath do not actually take it, the person, by

whom he was so incited, is not guilty of subornation; yet he is liable to be punished not only by fine, but also by infamous corporal punishment. *1 Roll. Abr. 41, 57; Yelv. 72; Cro. Jac. 158; 2 Keb. 399; 3 Mod. 122; 1 Hawk. P. C. c. 69. § 10.*

I. *Of Perjury by the Common Law, and how restrained and punished.*

II. *Of the punishment of Perjury by Statute.*

I. 1st, It is necessary, to constitute the offence of perjury, that the false oath be taken wilfully, viz. with some degree of deliberation; and it must also be corrupt (that is, committed *malò animo*); it must be wilful, positive, and absolute; not merely owing to surprise or inadvertency, or a mistake of the true state of the question. *5 Mod. 350; 4 Comm. 137; 1 Hawk. P. C. c. 69. § 2.* See *1 T. R. 69.*

2dly, The oath must be taken either in a judicial proceeding, or in some other public proceeding of the like nature, wherein the king's honour or interest is concerned, or before commissioners appointed by the king to inquire of the forfeitures of his tenants, or of defective titles wanting the supply of the king's patents; but it is not material whether the court in which a false oath is taken be a court of record or not, or whether it be a court of common law or a court of equity or civil law, &c., or whether the oath be taken in face of the court or out of it, before persons authorized to examine a matter depending on it, as before the sheriff on a writ of inquiry, &c.; or whether it be in relation to the merits of a cause, or in a collateral matter; as where one, who offers himself to be bail for another, swears that his substance is greater than it is, &c.; but neither a false oath in a mere private matter, as in making a bargain, &c., nor the breach of a promissory oath, whether public or private, are punishable as perjury. *1 Hawk. P. C. c. 69. § 3.*

The law takes no notice of any perjury but such as is committed in some court of justice having power to administer an oath, or before some magistrate or proper officer invested with a similar authority, in some proceedings relative to a suit or a criminal prosecution; for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason it is much to be questioned how far any magistrate is justifiable in taking a voluntary affidavit in any extrajudicial matter, as is now too frequent upon every petty occasion, since it is more than possible that by such idle oaths a man may frequently in *foro conscientie*, incur the guilt, and at the same time evade the temporal penalties of perjury. *4 Comm. c. 10. p. 137; see 15 Geo. 3. c. 39, and Burn's Just. tit. Oath, 1.*

Where the proceedings are *coram non judice*, however false the oath may be, the party cannot be indicted for perjury; thus a false oath taken in a court of requests, on a matter concerning lands, has been holden not to be indictable, that court having no jurisdiction in such cases. *3 Salk. 269.*

An indictment for perjury assigned on an affidavit sworn before the court of B. R., need not state, nor is it necessary to prove, that the affidavit was filed of record or exhibited to the court, or in any manner used by the party. *7 T. R. 315.*

3dly, The oath ought to be taken before persons lawfully authorized to administer it; for if it be taken before persons acting merely in a private capacity, or before persons pretending to a legal authority of administering such oath, but having no such authority, it is not punishable as perjury; yet a false oath taken before commissioners, whose commission at the time is in strictness determined by the demise of the king, is perjury, if taken before such time as the commissioners had notice of such demise; for it would be of utmost ill consequence, in such case, to make their proceedings wholly void. *1 Hawk. P. C. c. 69. § 4.*

But it has been held, though there seems no satisfactory ground for the decision, that a false oath taken before a

surrogate in Doctors' Commons, in order to procure a marriage licence, will not support a prosecution for perjury. *R. & R. 459*; and see *1 Leach, 63, 64*; *2 Deacon's Crim. Dig. 1001*.

It is remarkable that the House of Commons have no power to administer an oath, except in a few particular instances, where that power is granted to them by express statute; as in cases of election petitions, &c. It is supposed that the reason they have never obtained the general authority of administering an oath, is owing to the jealousy of the upper house, which, by securing this privilege to itself, prevents the commons from participating in the judicature of parliament. *4 Comm. c. 10, in note*.

4thly, The oath ought to be taken by a person sworn to depose the truth; therefore a false verdict comes not under the notion of perjury, because the jurors swear not to depose the truth, but only to judge truly of the depositions of others; but a man may be as well perjured by an oath in his own cause (e.g. in an answer in Chancery, or in an answer to interrogatories concerning a contempt, or in an affidavit, &c.) as by an oath taken by him as witness in another's cause. *1 Hawk. P. C. c. 69. § 5*.

5thly, It is not material whether the thing sworn be true or false, or whether the person who swears it in truth knows nothing of it. *1 Hawk. P. C. c. 69. § 6*. But see *1 T. R. 69*, that the oath must be false.

6th, The oath must be taken absolutely and directly; therefore if a man only swears as he thinks, remembers, or believes, he cannot be guilty of perjury. *1 Hawk. P. C. c. 69. § 7*. But a man may be indicted for perjury in swearing that he believes a fact to be true, which he must know to be false. *Leach, 270*.

7thly, The thing sworn ought to be some way material; for if it be wholly foreign from the purpose, or immaterial, and neither pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give credit to the substantial part of the evidence, it cannot amount to perjury, because it is wholly insignificant; as where a witness introduces his evidence with an impertinent preamble of a story, concerning previous facts, no ways relating to what is material, and is guilty of a falsity as to such facts; but a witness may be guilty of perjury in respect to a false oath, concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence; as if in trespass for spoiling the plaintiff's close, with defendant's sheep, a witness swears that he saw such a number of defendant's sheep in the close, and being asked how he knew them to be defendant's, swears that he knew them by such a mark, which he knew to be the defendant's, where in truth defendant never used any such mark. *1 Hawk. P. C. c. 69. § 8*. And it is incumbent on the prosecutor to prove the materiality of the perjury. *Ibid. in note*.

8thly, It is not material whether the false oath was credited or not, or whether the party in whose prejudice it was taken was in the event damaged by it; for the prosecution is not grounded on the damage to the party, but on the abuse of public justice. *1 Hawk. P. C. c. 69. § 9*. On the trial, the oath will be taken as true until it be disproved; and therefore to convict a man of perjury, one probable credible witness is not enough; for the evidence must be strong, clear, and more numerous on the part of the prosecution, than the evidence on the other side: therefore the law will not permit a man to be convicted of perjury, unless there are two witnesses at least. *10 Mod. 195*. Nor shall the party prejudiced by the perjury be admitted as a witness to prove it. *Lord Raym. 396*.

With respect to subornation of perjury, if the person incited to take a false oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury, but he is nevertheless liable to be punished as for a

gross misdemeanor in attempting to pervert the course of justice. *1 Hawk. P. C. c. 69. § 10*.

The punishment of perjury and subornation at common law has been various: it was anciently death; afterwards banishment, or cutting out of the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony. *3 Inst. 163*. The *5 E. 2 c. 9*. (see *post, II.*), if the offender be prosecuted thereon, inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the suborner; and in default of payment, imprisonment for six months, and to stand in the pillory. Perjury itself is by that statute, punished with six months' imprisonment, perpetual infamy, and a fine of 20*l.*, or not paying the fine, to have both ears nailed to the pillory. See *post, II.* The prosecution, however, is usually carried on for the offence at common law (by indictment at the assizes, or in the King's Bench), especially as to the penalties before inflicted, the *2 Geo. 2. c. 25*, superadds a power of punishment, by committing the offender to the house of correction, and transportation for seven years. *4 Comm. c. 10*. See *post, II.*

A consequence of a conviction for perjury, though it forms no part of the judgment, is the incapacity of the offender ever more to give evidence in a court of justice. *4 Comm. 137*. See the provisions of the *5 Eliz. c. 9*; *post, II.*

If perjury be committed in a temporal cause, it is punishable only in the temporal courts; but where it is committed in a spiritual cause, the spiritual judge has authority to inflict canonical punishment, and prohibition will not go. *Ciba. 1013*; *1 Ought. 9*; and see *5 Eliz. c. 9. § 11*; *post, II.*

It has sometimes been wished, that perjury, at least upon capital accusations, whereby another's life has been, or might have been, destroyed, was rendered capital, upon a principle of retaliation; and certainly the odiousness of the crime seems to plead strongly in behalf of such a law. Where indeed, the death of an innocent person has actually been the consequence of such wilful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment, which our ancient laws in fact inflicted. *Brit. c. 5*. But *Ciba* says expressly, it is not holden for murder at this day. *3 Inst. 48*; and see *Fost. 121, 132*; *4 Comm. c. 10. p. 38, 39 c. 14. p. 196*.

II. By the English act, *5 Eliz. c. 9. § 3*. (made perpetual by the *29 Eliz. c. 5. § 2*, and *21 Jac. 1. c. 28. § 8*.) and by the Irish act, *28 Eliz. c. 1*, "Whoever shall unlawfully and corruptly procure any witness to commit any wilful and corrupt perjury, or shall unlawfully or corruptly procure or suborn any witness, who shall be sworn to testify in perpetuum rei memoriam, shall, for such offence, being thereto lawfully convicted or attainted, forfeit the sum of 40*l.* And if such offender so convicted or attainted, shall not have goods, &c. to the value of 40*l.*, then such person shall suffer imprisonment by the space of one half-year, without bail, and stand upon the pillory the space of one hour in some market town next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed.

§ 5. No person so convicted or attainted, shall be received as a witness in any court of record till such judgment shall be reversed; and that on such reversal the party aggrieved shall recover damages against the party who procured the judgment so reversed to be first given.

§ 6. If any person shall, either by the subornation, unlawful procurement, sinister persuasion, or means, of any other, or by their own act, consent, or agreement, wilfully and corruptly commit wilful perjury, that then every offender being duly convicted, shall forfeit 20*l.* and have imprisonment by the space of six months, without bail; and the oath of such offender shall not from thenceforth be received in any court of record, until such judgment be reversed, &c.

on which reversal, the party grieved shall recover damages in the manner before mentioned.

§ 7. If such offender shall not have goods or chattels to the value of 20*l*. then he shall be set on the pillory, where he shall have both ears nailed.

§ 8. One moiety of the forfeitures to the king, the other to the person grieved, who will sue for the same, &c., and (§ 9.) as well the judge of every court where any suit shall be, and wherein any such perjury shall be committed, as also the justices of assize and gaol delivery, and justices of peace at their quarter sessions, may inquire of, hear, and determine offences against the act.

§ 11. The act shall no way extend to any spiritual or ecclesiastical court; but every offender shall be punished by such civil laws as are used in the said courts.

§ 12. The statute shall not restrain the authority of any judge having absolute power to punish perjury before the making thereof; but every such judge may proceed in the punishment of all offences punishable before making the statute, as they might have done to all purposes, so that they set not on the offender less punishment than contained in the act.

In the construction of the English statute, the following opinions have been holden:

That every indictment or action on this statute must exactly pursue the words of it; therefore if it allege that the defendant deposed such a matter *falso et deceptivè*, or *falso et corruptè*, or *falso et voluntariè*, without saying *voluntariè et corruptè*, it is not good, though it conclude that *sic voluntariè et corruptè commisit perjurium contra formam statuti*, &c. Also it is necessary expressly to show that the defendant was sworn; and it is not sufficient to say that *facto per se sacro evangelio deposuit*. *Cro. Eliz.* 147; *Heil.* 12: *Sac.* 43; 2 *Leon.* 211; 1 *Show.* 198; *Cro. Eliz.* 105; 1 *Hawk. P. C.* c. 69, § 17.

But there is no need to show whether the party took the false oath through the subornation of another, or of his own act, though the words of the statute are, "If persons by subornation, &c. or their own act, &c. shall commit wilful perjury," for there being no medium between the branches of this distinction, they express no more than the law would have implied; therefore operate nothing. 3 *Bulst.* 147; 1 *Hawk. P. C.* c. 69, § 18.

It hath been adjudged that a man cannot be guilty of perjury within this statute, in any case wherein he may not possibly be guilty of subornation of perjury within it; for it is reasonable to give the whole statute the same construction; and it can be well intended that the makers of the statute meant to extend its purview farther as to perjury, which they seem to esteem the *lesser* crime, than to subornation of perjury, which they seem to esteem the *greater*: therefore, since the clause concerning subornation of perjury, mentioning only matters depending by writ, bill, plaint, or information, concerning hereditaments, goods, debts, or damages, &c. extends not to perjury on an indictment or criminal action, the clause concerning perjury, though pointed in more general words, hath been adjudged to come under the like restriction; also since the clause concerning subornation of perjury relates only to perjury by *witnesses*, that concerning perjury shall extend only to the like perjury; therefore, no perjury in an answer in Chancery; or in swearing the oath against a man; or in any presentment by homage in a court Baron; or in wager of law, or in swearing before commissioners of inquiry of the king's title to lands, and by the opinions of some, a false affidavit against a man in a court of justice is not within the statute, but it such affidavit be by a third person, and relate to a cause depending before the court, and either of the parties in variance be grieved in respect of such cause, by reason of the perjury, it may strongly be argued, that it is within the pur-

view of the statute; also a false oath before the sheriff, on a writ of inquiry, is within the statute. 5 *Co.* 99; *Cro. Jac.* 120; 3 *Inst.* 164; 2 *Leon.* 201; *Yelv.* 120; *Cro. Eliz.* 148; 2 *Rol. Abr.* 77; 1 *Hawk. P. C.* c. 69, § 19, 21.

But it has been decided, that any court may punish such an offence committed in the face of the court, under this statute, 5 *Eliz.* c. 9. Therefore where one made an affidavit in the Court of Common Pleas, and confessed it was false, the court recorded his confession, and sentenced him to the pillory; and the objections that the court had no jurisdiction, and that the offender ought to have been brought before the court by indictment, were over-ruled. 8 *Mod.* 179; 1 *Hawk. P. C.* c. 69, § 21, *in note*.

It hath been collected from the clause which gives an action to the party grieved, that no false oath is within the statute, which does not give some person a just cause of complaint; therefore, if the thing sworn be true, though it be not known by him who swears it to be so, the oath is not within the statute, because it gives no just cause of complaint to the other party, who would take advantage of another's want of evidence to prove the truth; from the same ground, no false oath can be within the statute, unless the party against whom it was sworn suffered some disadvantage by it; therefore, in every prosecution on the statute, you must set forth the record wherein you suppose the perjury to have been committed, and must prove at the trial that there is such a record, either by actually producing it, or an attested copy; also in the pleadings you must not only set forth the point wherein the false oath was taken, but must also show how it conduced to the proof or disproof of the matter in question; and if an action on the statute be brought by more than one, you must show how the perjury was prejudicial to each of the plaintiffs. But it seems that a perjury which tends only to aggravate or extenuate the damages, is as much within the statute as a perjury which goes directly to the point in issue; and a perjury in a cause wherein an erroneous judgment is given, is a good ground of prosecution upon the statute till the judgment be reversed. 1 *Hawk. P. C.* c. 69, § 22.

If perjury be committed that is within this statute, but the indictment concludes not *contra formam statuti*, yet it is good at common law, but not to bring one within the corporal punishment of the statute. 2 *Hale's Hist. P. C.* c. 69, § 191.

The statute of Elizabeth did not alter the nature of the offence of perjury, but merely enlarged the punishment. It is however seldom resorted to in the present day, on account of the difficulty in convicting offenders under its enactments. See further, 2 *Dencon's Crim. Dig.* 1006.

By the British acts, 2 *Geo.* 2. c. 25, § 2. (revived and made perpetual by 9 *Geo.* 2. c. 18,) and by the Irish act, 3 *Geo.* 2. c. 4, § 2 (see also 17 & 18 *Geo.* 3. c. 36; 31 *Geo.* 3. c. 44,) the more effectually to deter persons from committing wilful and corrupt perjury or subornation of perjury, it is enacted, "that besides the punishment to be inflicted by law for so great crimes, it shall be lawful for the court or judge before whom any person shall be convicted of wilful and corrupt perjury or subornation of perjury, to order such person to be sent to some house of correction for a time not exceeding seven years, there to be kept to hard labour during the time; otherwise to be transported for a term not exceeding seven years, as the court shall think proper; therefore judgment shall be given that the person convicted shall be committed or transported accordingly, besides such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws in being; and if transportation be directed, the same shall be executed in such manner as is provided by law for transportation of felons; and if any person so committed or transported shall voluntarily escape or break prison, or return from transportation, before the expiration of the time, such person, being lawfully convicted, shall suffer death as

a felon, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended." The British act does not extend to Scotland.

Now, by the 4 & 5 Wm. 4. c. 67, capital punishment is taken away in case of returning from transportation.

By various acts the penalties of perjury are extended to false oaths taken before competent jurisdictions, and in matters relating to the revenue, &c.

By the British act, 23 Geo. 2. c. 11, which extends only to England and Wales, and by the Irish act, 31 Geo. 3. c. 18, for Ireland, "in every information or indictment for perjury, it shall be sufficient to set forth the substance of the offence charged, and by what court, or before whom the oath was taken (averring such court or person to have authority to administer the same,) together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, and without setting forth the commission or authority of the court or person before whom the perjury was committed." § 1.

"In every information or indictment for subornation of perjury, it shall be sufficient to set forth the substance of the offence charged, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, and without setting forth the commission or authority of the court or person before whom the perjury was committed or agreed to be committed." § 2.

"It shall be lawful for any justice (sitting the court, or within twenty-four hours after) to direct any person examined as a witness before them, to be prosecuted for perjury, in case there appear a reasonable cause, and to assign the party injured, or other person undertaking such prosecution, counsel, who shall do their duty without fee: and every prosecution so directed shall be carried on without payment of any tax, and without payment of any fees in court, or to any officer of the court: and the clerk of assize, or his associate or prothonotary, or other officer of the court attending when such prosecution is directed, shall, without fee, give the party injured, or other person undertaking such prosecution, a certificate of the same being directed, with the names of the counsel assigned him; which certificate shall be deemed sufficient proof of such prosecution having been directed: provided that no such direction or certificate shall be given in evidence upon any trial against any person upon a prosecution so directed." § 3.

By the 56 Geo. 2. c. 138, "For abolishing the punishment of the pillory, except in particular cases," it is expressly provided, that all laws in force, whereby any person is subject to punishment for the taking any false oath, or for committing any manner of wilful and corrupt perjury, or for the procuring or suborning any person so to do, or for wilfully, falsely, or corruptly affirming or declaring, or procuring or suborning any other person so to affirm and declare, in any matter or thing, which, if the same had been deposed in the usual form, would have been wilful and corrupt perjury, shall continue in full force and effect.

In an indictment for perjury on a trial formerly had, it is not necessary, under the above statute, to set forth so much of the proceedings of the trial as will show the materiality of the question on which the perjury is assigned; it is sufficient to allege generally, that the particular question became a material question. But where the prosecutor undertakes to set out more than he need of the proceedings, he must set them out correctly. 5 T. R. 318.

In general the court will oblige the defendant to plead or demur, even to a defective indictment for this offence. 2 Hawk. P. C. c. 25. § 146. They are also very cautious in granting a *certiorari* to remove it. 2 Hawk. P. C. c. 27. § 28. And permission has been refused in Chancery to amend an answer, where an indictment for perjury had only been threatened; even where the party, having no interest, could

not be supposed to make the false oath intentionally. 1 Br. P. C. 419. For it is the province of the grand jury to judge of the intention; and what the grand jury may find, the court will never expunge. Hardw. 203.

The two witnesses necessary to prove perjury are sufficiently satisfied by the production of one *vivâ voce* witness, and also of a document written by the defendant, contradicting his statement on oath. 6 C. & P. 315.

By the 8 Geo. 1. c. 6. "a false affirmation made by Quakers shall be liable to the same punishment as wilful perjury." The like provision is made in Ireland, by the Irish act 19 Geo. 2. c. 18.; and it has been introduced into all the statutes subsequently passed, relieving Quakers, &c. from the necessity of taking oaths. See *Oaths, Quakers, Separatists*.

In Scotland the punishment of perjury is directed by statute, the last of which, 1555, c. 47. declares perjury to be punishable by confiscation of moveables, piercing the tongue, and infamy; to which the judge, in aggravated cases, may add any other penalty that the case seems to require. By the same act, subornation of perjury is punishable as perjury.

PERMISSIVE WASTE. See *Waste*.

PERMIT, from *permitto*.] A licence or warrant for persons to pass with and sell goods, on having paid the duties of customs or excise for the same.

By the 2 W. 4. c. 16. the laws regulating the granting and issuing of permits for the removal of goods under the excise laws were consolidated and amended.

By § 2. the commissioners of excise are to provide moulds for making paper to be used for, and plates and types for printing permits.

§ 3. Unauthorized persons making paper in imitation of excise paper, and persons forging or counterfeiting such plates and types, are guilty of felony, punishable with seven years transportation, or imprisonment for not less than two years.

§ 3. Forging or counterfeiting permits, or uttering forged or counterfeited permits, is a misdemeanor subjecting the offender to transportation for seven years, or fine and imprisonment.

PERMUTATIONE *archidiaconatus et ecclesiarum eodem annexæ cum ecclesiis et præbendis*. A writ to an ordinary, commanding him to admit a clerk to a benefice, upon exchange made with another. *Reg. Orig.* 307.

PERMUTATION or BARTER, being the exchange of one moveable subject for another, may, by the law of Scotland, be completed by consent. See *Exchange*.

PER MY ET PER TOUT. By the half and the whole. See *Joint-Tenants*.

PERNANCY, from the Fr. *prendre*.] A taking or receiving; as tithes in pernancy, are tithes taken, or that may be taken, in kind. So, *pernancy* of the profits means the taking the profits. See the next title.

PERNOR OF PROFITS. He who receives the profits of lands, &c. and is all one with *cestui que use*. 1 Rep. 1. The king has the *pernancy* of the profits of the lands of a outlaw, in personal actions; and by seizure shall hold against the alienation of such outlaw, &c. *Raym.* 17. See *Co. L.* 589 b; and *st.* 12 R. 2. c. 15.

PERPARS. A part of the inheritance. *Fleta*, lib. 2. c. 54. par. 19.

PERPETUAL CURACIES. See *Parson, Vicar*.

By the 1 & 2 W. 4. c. 38. churches or chapels built and endowed by particular individuals shall have districts assigned to them, and be deemed perpetual curacies, and the right of nomination thereto shall be vested in the person so building and endowing.

PERPETUATING THE TESTIMONY or WITNESSES. If witnesses to a disputable fact are old and infirm, it is usual to file a bill in Chancery, to perpetuate the testimony of those witnesses, although no suit is depending; for, it may be, a man's antagonist only waits for the death of some of them to commence his suit. 3 Comm. 450.

A bill *in perpetuum rei memoriam* is filed for the purpose of preserving the evidence of witnesses, touching a matter which cannot be immediately investigated in a court of law, or where the evidence of a material witness is likely to be lost by his death, or departure from the realm, before the facts can be investigated. *Mut. 51.* Witnesses cannot be examined in *perpetuum rei memoriam* without a bill being filed. *Lord Bacon's Ordinances, Beam. Ord. 32.* The bill prays leave to examine the witnesses touching the matter so stated, to the end that their testimony may be preserved and perpetuated. *Mut. 51.* A bill to perpetuate must state that no action can be immediately brought, or it is demurrable. *1 S. & S. 83.*

PERPETUITY. A perpetuity is, where, though all who have interest should join in a conveyance, yet they could not bar or pass the estate. But if, by concurrence of all having interest, the estate-tail may be barred, it is no perpetuity. *Ch. Cas. 213.* And see *3 Ch. Ca. 35.*

A perpetuity is a thing odious in law, and destructive to the commonwealth; it would put a stop to the commerce, and prevent the circulation of the property of the kingdom. *Vern. 164.*

It is absolutely against the constant course of Chancery to decree a perpetuity, or give any relief in that case. *1 Chan. Rep. 144.*

Perpetuities are absolute or qualified. And estates-tail from the time of the statute *de donis*, till common recoveries were found out, were looked upon as perpetuities. *12 Mod. 232.*

Various have been the attempts to establish perpetuities, by controlling the exercise of that right of alienation which is inseparable from the estate of a tenant in tail. The chief of them are brought together in *Taylor d. Atkins v. Horde*, *1 Burr. 84*, where it is observed, that the power to suffer a common recovery is a privilege inseparably incident to an estate-tail. It is a *potestas alienandi*, which is not restrained by the statute *de donis*; and has been so considered ever since *Tadnam's case*, *12 E. 1. 11. b. p. 16*; and this power to suffer a common recovery cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. *Trent v. n. c. 3. § 5. in n.*

Common recoveries are, however, abolished by a recent statute, for which see *Five of Lands; Tail.*

Every executory devise is a perpetuity, as far as it goes, in an estate inalienable, though all mankind join in the conveyance. *1 Salk. 229.* See *Executory Devise, Limitation of Estates, Tail, &c.*

PERPETUITY OF THE KING. See *King, V. 2.*

PER QUÆ SERVITIA, was a judicial writ issuing from the note of a fine, and lay for cognisee of a manor, seignory, church, or other servages, to compel him who was tenant of the land at the time of the fine levied to attend the court. *West. Symbol. part 2. title Fines, sect. 126. Old Nat. Brev. 155.* See *16 Im. Abr. title Per quæ Servitia.*

PERQUISITES, *perquisitum*.] Any thing gotten by industry, or purchased with money, different from that which descends from a father or ancestor; and so *Bacon* uses it, when he says *perquisition facere*, *lib. 2. cap. 30. num. 3.* and *ib. 4. c. 22.* See *Purchase.*

PERQUISITES or COURTS. Are commonly those profits which arise to lords of manors, from their court baron, as the yearly revenue of the land, as fines of copyholds, heriots, amerciaments, &c. *Perk. 20, 21.*

PERQUISITES or OFFICES. See *Fees.*

PER QUOD, *by which, whereby*.] Words made use of by a plaintiff in his declaration, in the averring of particular things to have happened, without which his action would not have been maintainable. As in slander, to say that such a clergyman is a bastard, (which formerly was a disqualification for lay orders,) he cannot for this bring any action against me, unless he can show some special loss by it; in which case he may bring his action against me for saying he

was a bastard, by which (*per quod*) he lost the presentation to such a living. *4 Rep. 17; 1 Lev. 248; 3 Comm. 124.* So in a declaration in trespass, for an injury to a wife or servant, the plaintiff states *per quod*, whereby he lost consortium of the one, or servitium of the other.

PERSON. A man or woman; also, the state or condition whereby one man differs from another.

PERSON, INJURIES TO, are such as relate to life, limb, body, health, or reputation. See *3 Comm.*; and this Dictionary, under the appropriate titles.

PERSONABLE, *personabilis*.] Enabled to maintain plea in court; *e.g.* the defendant was judged *personable* to maintain this action. *Old Nat. Brev. 142.*

The tenant pleaded that the wife was an alien, born in Portugal, and judgment was demanded whether she should be answered: the plaintiff saith, she was made personable by parliament, *i.e.* as the civilians would speak it, *habere personam standi in judicio*. *Kitch. 214.* Personable also signifies to be of capacity to take any thing granted or given. *Plowd. 27.*

PERSONAL, *personalis*.] Being joined with the substantives things, goods, or chattels, as things personal, goods personal, chattels personal, signifies any moveable thing, quick or dead. *West. Symbol. part 2. sect. 58.* Thus theft is an unlawful felonious taking away of the moveable personal goods of another. See *Felony, Larceny.*

PERSONAL ACTION. See *Action, Personal.*

PERSONAL SERVICES. See *Tenures.*

PERSONAL TITHES. Are tithes paid of such profits as come by the labour of a man's person; as by buying and selling, gains of merchandise, and handicrafts, &c. See *Tithes.*

PERSONALITY, *personalitas*.] An abstract of personal; the action is in the personality, *i.e.* it is brought against the right person, or the person against whom in law it lies. *Old Nat. Brev. 92.* Or it is to distinguish actions and things personal, from those that are real.

PERSONATE. See *False Personation*, and further *Bail, Fine of Lands, Forgery, Fraud, Navy, 11.*

PERSONS, are divided by law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations, or bodies politic. *1 Comm. 123, 407.*

As to the rights of persons, see *Liberty.*

PERTICATA TERRÆ. The fourth part of an acre. See *Perch.*

PERTINENTS. The Scotch term for appurtenances. See that title.

PERVISE. According to *Somner*, the Palace-yard at Westminster. *Somn. Gloss.* See his *Gloss.* in *10 Scriptores, verbo Triforium*; and see *Wood's Hist. of Oxford, 2 par. fol. 6; and ante, Parvise.*

PESA, *pensa, pisa*.] A wey or weigh, or certain weight and measure of cheese and wool, &c. containing two hundred and fifty-six pounds. *Cowell.*

PESAGE, *pesagium*.] A custom or duty paid for weighing merchandise or other goods. *Seld. tit. Hon.*

PESSONA. Mast of oaks, &c. or money taken for mast, or feeding hogs. *Mon. Ang. ii. 213.* See *Mast.*

PESSURABLE, PESTARBLE, or PESTARABLE WARES. Seem to be such wares or merchandise as pester, and take up much room in a ship. See (repealed) *stat. 32 Hen. 8. cap. 14.*

PETER-CORN. Is mentioned in some of the ancient registers of our bishops, particularly in that of St. Leonard de Ebor, which contains a grant thereof by King Athelstane, &c. *Collect. Dodsm. MS.*

PETER-PENCE, *denarii Sancti Petri*.] Otherwise called in the Saxon tongue *Romescoth*, the fee of Rome, or due to Rome; also *Romescot* and *Rome-penning*, was a tribute given

by Ina, King of the West Saxons, being in pilgrimage at Rome, in the year of our Lord 720, which was a penny for every house. *Lamb. Explication of Saxon Words*, verbo *Nummus*.

And the like was given by Offa, King of the Mercians, through his dominions, in anno 794, not as a tribute to the Pope, but in sustentation of the English school or college there, and it was called Peter-pence, because collected on the day of St. Peter ad Vincula. *Spelm. de Concil. tom. i. fol. 2, 3*. And see *St. Edward's Laws*, num. 10; *King Edgar's Laws*, 78, c. 4; *Stow's Annals*, p. 67. It amounted to 300 marks and a noble yearly. *Leg. Hen. 1. cap. 1*.

It was first prohibited by the statute of Carlisle, 35 E. 1; and afterwards by *Edw. 3*. It was abrogated by the 25 Hen. 8. c. 21; but revived by the 1 & 2 Ph. & Mar. c. 8. and at length wholly abrogated by the 1 Eliz. c. 1.

PETER AD VINCULA. See *Gule of August*.

PETITION, *petitio*.] A supplication made by an inferior to a superior, and especially to one having jurisdiction. *S. P. C. c. 15*. It is used for that remedy which the subject hath to help a wrong done by the king, who hath a prerogative not to be sued by writ; in which sense it is either general, that the king do him right, whereupon follows a general indorsement upon the same, "Let right be done the party;" or it is special, when the conclusion and indorsement are special, for this or that to be done, &c. *Staunf. Prærog. c. 22*. See *Monstrans de Droit*.

By the 13 Car. 2. stat. 1. c. 5. the soliciting, labouring, or procuring the putting the hands or consent of above twenty persons to any Petition to the King or either House of Parliament, for alterations in Church or State; unless by assent of three or more justices of the peace of the county, or a majority of the grand jury, at the assizes or sessions, &c. and repairing to the king or parliament to deliver such petition, with above the number of ten persons, is subject to a fine of 100*l*. and three months' imprisonment; being proved by two witnesses, within six months, in the court of B. R. or at the assizes. See *Liberty*.

By the Bill of Rights (1 W. & M. stat. 1. c. 2.) it is declared that the subject hath a right to petition, and that all commitments and prosecutions for such petitioning are illegal. On the trial of Lord George Gordon it was contended, that this article of the Bill of Rights had virtually repealed the provision of the act 13 Car. 2. This, however, was denied by Lord Mansfield in the name of the court. *Douglas' Rep. 592*.

To subscribe a petition to the king, to frighten him into a change of his measures, intimating that, if it be denied, many thousands of his subjects will be discontented, &c. is included among the contempts against the king's person and government, tending to weaken the same, and punishable by fine and imprisonment. 1 Hawk. P. C. c. 23. § 3.

PETITION IN CHANCERY. A request in writing, directed to the lord chancellor or master of the Rolls, showing some matter whereupon the petitioner prays somewhat to be granted him. *Pr. C. 269*.

Most things, which may be moved for of course, may be petitioned for.

Sometimes it is upon a collateral matter only, as it has relation to some precedent suit, or to an officer of the court, as to have a clerk or solicitor's bill taxed, or to oblige him to deliver up papers. *Pr. C. 270*.

Petitions are either *cause* petitions, or petitions *ex parte*. The former are, when the petitioner is a party to a suit to which the petition relates, or at least derives a right or title from some such party, in which last case it may properly be termed both a *cause* and an *ex parte* petition united. But petitions exclusively *ex parte* are those which relate only to the petitioner, and where no suit exists.

Petitions are either of course, or special. *Ex parte* petitions are always of the latter kind; *cause* petitions, of both.

Cause petitions, of course, are for those matters of course which in general may also be obtained by motions of course for the ordinary purposes of forwarding a suit, such as for time to plead, answer, or demur, for a commission and such like; and now by the 21st Order, of April, 1828, for confirming a report nisi; and are for the most part presented at the Rolls, some few only being usually presented to the lord chancellor, such as for setting down pleas, demurrers, or exceptions, to be argued, and concerning special orders made by himself, and for rehearings, (though the master of the Rolls may also be petitioned to rehear a cause heard before himself.) *Harr. 419*. And these petitions of course (the orders on which, and on motions of course, are termed common orders, or orders of course,) when at the Rolls can always be presented whether in or out of term, and whether the courts are sitting or not. So indeed may the petitions of course to the lord chancellor.

Special petitions, whether not in a cause, but strictly *ex parte*; or in a cause, and yet concerning a person who is not in it, as they always implicate more or less, or at least are always supposed so to implicate the rights of others, besides the petitioner, are therefore never granted without being heard in Court or at the Rolls, to whichever of those judges they were presented, *vis.* to the lord chancellor or master of the Rolls. 1 *Grant's Chan. Pr. 160*.

PETITION OF RIGHT. An act, 3 Car. 1. cap. 1 is thus called; by which it was provided, that none should be compelled to make or yield any gift, loan, benevolence, tax, and such like charge, without consent by act of parliament, nor, upon refusal so to do, be called to make answer, take any oath not warranted by law, give attendance, or be confined, or otherwise molested concerning the same, &c. And that the subject should not be burdened by the quartering of soldiers or mariners; and all commissions for proceeding by martial law, to be annulled, and none of like nature to be issued, lest the subject (by colour thereof) be destroyed or put to death, contrary to the laws of the land, &c. See *Liberty*.

PETIT CAPE (now abolished). See *Cape*.

PETIT LARCENY. The distinction between grand and petit larceny is now abolished by 7 & 8 Geo. 4. c. 29. § 2. See *Larceny*.

PETIT SERJEANTY, *parva serjeantia*.] To hold by petit serjeanty, is to hold lands or tenements of the king, yielding him a knife, a buckler, an arrow, a bow with a string, or other like service, at the will of the first feoffee. None and there belongs not to it ward, marriage, or relief. None can hold by grand or petit serjeanty but of the king. But see stat. 12 Car. 2. c. 24. for the abolition of tenures; and *post*, title *Serjeanty, Tenures*.

PETIT SESSION. In both corporations and counties at large, there is sometimes kept a special or petty sessions, by a few justices, for despatching smaller business in the neighbourhood between the times of the general sessions; as, for licensing alehouses, passing the accounts of parish officers, and the like. See *Justices of the Peace, Sessions*.

PETIT TREASON, *parva prodition*.] See *Treason*. Treason of a lesser kind; for as high treason is an offence against the security of the commonwealth, so was petit treason, though not so expressly. Petit treason was if a servant killed his master, a wife her husband, a secular or religious man his prelate. Stat. 25 Ed. 3. stat. 5. c. 2. Now by the 9 Geo. 4. c. 31. § 2. every offence which before the passing of the act would have amounted to petit treason, shall be deemed murder only. See further *Homicide*, III. 4. *Treason*.

PETRA. A stone weight. *Cowell*. See *Stone*.

PETRARIA. Is sometimes taken for a quarry of stones, and in other places for a great gun called Petard; it is often mentioned in old records and historians in both senses. *Cowell*.

PETTY-BAG. An office in the Court of Chancery for

suits for and against attorneys and officers of that court; and for process and proceedings, by extents on statutes, recognizances, *ad quod damnum*, &c. *Termes de la Ley*. See *Chancery*.

PEWS. In a church, are somewhat in the nature of an heir-loom, and may descend by immemorial custom, without any ecclesiastical concurrence, from the ancestor to the heir. 3 *Inst.* 202; 12 *Rep.* 105; 2 *Comm.* 429.

The right to sit in a particular pew in the church arises either from prescription as appurtenant to a messuage, or from a faculty or grant from the ordinary, for he has the disposition of all pews which are not claimed by prescription. *Gibbs Cod.* 221.

An exclusive title to pews and seats in the body of the church may be maintained in virtue of a faculty, or by prescription, which is founded on the presumption that a faculty has been theretofore granted. All other pews and seats in the body of the church are the property of the parish; and the churchwardens, as the officers of the ordinary, and subject to his control, have authority to place the parishioners thereon. No precise rules are prescribed for the government of churchwardens in the use of this power, for its due exercise must depend on a sound judgment and discretion applied to the circumstances of the parish. *Report of Eccl. Comm.* Feb. 1832, p. 48.

By the general law, and of common right, all the pews in a parish church are the common property of the parish; they are for the use in common of the parishioners, who are all entitled to be seated, orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens, as the officers, subject to the control of the ordinary. 12 *Rep.* 105; 3 *Inst.* 202; 3 *Hagg. Eccl. Rep.* 733.

The general right then being in the parish and the ordinary, any particular rights in derogation of these are *stricti juris*; and the policy of the law that few of these exclusive rights should exist, because it is the object of the law that all the inhabitants should be accommodated, and it is for the general convenience of the parish that the occupation of pews should be altered from time to time, according to circumstances.

A possessory right is not good against the churchwardens and the ordinary; they may displace and make new arrangements, but they ought not without cause to displace persons in possession, if they do, the ordinary will reinstate them. A possessory right, however, is sufficient to maintain a suit against a mere disturber. 1 *Phill. Rep.* 324.

A prescriptive right must be clearly proved, the facts must not be left equivocal, and they must be such as are not inconsistent with the general right.

To exclude the jurisdiction of the ordinary from the disposition of a pew, it is necessary, not merely that possession should be shown for many years, but that the pew should have been built and repaired time out of mind. 1 *T. R.* 428.

The strongest evidence of that kind is the building and repairing time out of mind; but mere repairing for thirty or forty years will not exclude the ordinary. The possession must be ancient, and going beyond memory, though on this subject the high legal memory, even before the recent Prescription Act, 2 & 3 *Wm.* 4. c. 71. § 2. for which see *Prescription*, was not required. 1 *Hagg. Cons. Rep.* 322.

Previous to the recent Prescription Act the uninterrupted possession of a pew in a church for twenty years afforded conclusive evidence of a legal title by prescription, or by faculty against a wrong doer. 2 *Wms. Saund.* 175 c. But if the claim were claimed as appurtenant to an ancient messuage, the claim was rebutted by proof that the pew began to exist within time of legal memory. 5 *T. R.* 296.

As well priority in the seat, as the seat itself, may be claimed by prescription; and an action on the case for a disturbance lies at common law. *Carleton v. Hutton, Noy*, 78. And a pew in the body of the church may be prescribed for

as appurtenant to a house out of the parish. *Forr. R.* 14; 1 *Y. & J.* 583. And see 5 *B. & A.* 356.

And the right to sit in a pew may be apportioned. Where a messuage to which a pew had been annexed by a faculty was divided, the occupier of the lesser house, which formed a very small part of the original messuage, was held to have some right to the pew, by virtue whereof he might maintain an action against a wrong doer. 2 *B. & Ad.* 164.

Where the action is brought against a stranger, the plaintiff is not bound to state in his declaration that he has repaired the pew, though it is otherwise when the action is brought against the ordinary; in which case a title or consideration must be shown in the declaration, and proved, as the building or repairing of the pew. 1 *Wils.* 326; 3 *Lev.* 73; *Com. Dig. tit. Action upon the Case for Disturbance*, (A. 3); *Gibbs*, 197, 198. See further *Shelford's Real Prop. Acts*, 72.

Extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title, and therefore if they sue in the Ecclesiastical Court to be quieted in the possession of such seats, the Court of K. B. will grant a prohibition, and it seems that such persons cannot establish such a claim even by prescription. 5 *B. & C.* 1; *S. C.* 7 *Dowl. & Ry.* 561.

A pew annexed by prescription to a certain messuage, cannot, as is often erroneously conceived, be severed from the occupancy of the house, but passes with the messuage, the tenant for the time being has *de jure* for the time being the prescriptive right to the pew, (1 *Hagg. Cons. R.* 319,) which cannot be sold nor let without a special act of parliament. 1 *Hagg. Eccl. R.* 29. Where an occupier of a pew ceases to be an inhabitant of the parish, he cannot let the pew with and thus annex it to his house, but it reverts to the disposal of the churchwardens. *Id.* 34.

Where a pew is claimed as annexed to a house by faculty or prescription, and in that case only, the courts of common law exercise jurisdiction, on the ground of the pew being an easement to the house, and the proper remedy for a disturbance is an action on the case. 5 *B. & A.* 361. The Ecclesiastical Court has jurisdiction in all suits respecting pews, but where prescriptive rights come in question prohibition will be granted on the application of either party, for the purpose of having the prescription tried by a jury. *Report of Eccl. Comm.* p. 49.

A grant of part of the chancel of a church, by a lay-impropriator to A., his heirs and assigns, is not valid in law. And therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down a pew or pews there erected. 1 *B. & A.* 498.

PHAROS, from *Pharus*, a small island in the mouth of the Nile, wherein stood a high watch-tower.} A watch-tower or sea-mark. No man can erect a pharos, light-house, beacon, &c. without lawful warrant and authority. 3 *Inst.* 204. See *Beacon*.

PHILOSOPHER'S STONE. Henry VI. granted letters-patent to certain persons, who undertook to find out the philosopher's stone, and to change other metals into gold, &c. to be free from the penalty of the *stat. 5 Hen. 4. c. 4.* made against the attempts of chymists of this nature. *Pat.* 34 *Hen. 6*; 3 *Inst.* 74. See *Multiplication of Gold and Silver*.

PHYSICIANS. No person within London, or seven miles thereof, shall practise as a physician or surgeon, without licence from the Bishop of London, or Dean of St. Paul's; who are to call to their assistance four doctors of physic, on examination of the persons, before granted; and in the country, without licence from the bishop of the diocese, on pain of forfeiting 5*l.* a month. *Stat. 3 Hen. 8. c. 11.*

The charter for incorporating the College of Physicians is confirmed; they have power to choose a president, and have perpetual succession, a common seal, ability to purchase lands, &c. Eight of the chiefs of the college are to be called elects, who from among themselves shall choose a president yearly:

and if any practise physic in the said city, or within seven miles of it, without licence of the college under their seal, he shall forfeit 5*l*. Also persons practising physic in other parts of England, are to have letters testimonial from the president and three elects, unless they be graduate physicians of Oxford or Cambridge, &c. 14 & 15 Hen. 8. c. 5. confirmed and enlarged by 1 Mary, st. 2. c. 9.

The 32 Hen. 8. c. 40, ordains that four physicians (called censors) shall be yearly chosen by the college, to search apothecaries' wares, and have an oath given them for that purpose by the president; apothecaries denying them entrance into their houses, &c. incur a forfeiture of 5*l*. And physicians refusing to make the search are liable to a penalty of 40*s*. And every member of the college of physicians is authorized to practise surgery.

In the case of Dr. Bonham, 7 Jac. 1, is shown the power of the college of physicians, in punishing persons for practising physic without licence. They imprisoned the doctor for practising without licence; but it was adjudged that they could not lawfully do it, for in such case they had no power by the statute to commit, but they ought to sue for the penalty of 5*l*. per month, *qui tam*, &c. But in case of mal-practice, the censors have power to commit, for they may in such case fine and imprison by their charter, and they are judges of record, and not liable to an action for what they do by virtue of their judicial power. 8 Rep. 107; Carth. 494.

One who has taken his degree of doctor of physic in either of the universities, may not practise in London, and within seven miles of the same, without licence from the college of physicians; by reason of the charter of incorporation, confirmed by 14 & 15 Hen. 8. c. 5, penned in very strong and negative words. As to the testimonials granted by the universities, on a person's taking the doctor's degree, these may have the nature of a recommendation, and give a man a fair reputation, but confer no right; consequently those statutes which have confirmed the privileges of the universities would revive or confirm nothing but the reputation that this testimonial might give such graduates. And as to the last clause of this statute, that "none shall practise in the country without licence from the president and three elects, unless he be a graduate of one of the universities;" all the inference from that would be, that possibly two licences may be necessary where a person is not a graduate. In the case of Dr. Levett, Lord Chief Justice Holt did not think this question worth being found specially. The college of physicians, without doubt, are more competent judges of the qualifications of a physician than the universities; and there may be many reasons for taking particular care of those who practise physic in London. 10 Mod. 353, 354.

A doctor of physic, who has been licensed by the college of physicians to practise physic in London, and within seven miles, cannot claim as a matter of right to be examined by the college in order to his being admitted a fellow of the college. 7 T. R. 282.

If an apothecary takes upon him to administer physic, without advice of a doctor, this has been adjudged practising physic within the statutes; though no fee was given the apothecary. 2 Salk. 451. But this judgment was afterwards reversed in the House of Lords. Mod. Cas. 44. See Bro. P. C. title Physicians.

It hath been solemnly resolved, that *mala praxis* in a physician, surgeon, or apothecary, is a great misdemeanor and offence at common law, whether it be for curiosity or experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. Lord Raym. 214.

If a physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or

ignorance; Mirr. c. 4. § 16.; but it hath been holden, that if it be not a regular physician or surgeon who administers the medicine, or performs the operation, it is manslaughter at the least. Britt. c. 5; 4 Inst. 251; 1 Hawk. P. C. c. 31. § 62. Yet Sir Matthew Hale very justly questions the law of this determination. 1 Hale, P. C. 430. See 4 Comm. c. 14. p. 197; and see the recent decisions, title Homicide, 8.

A physician cannot maintain an action for his fees. 4 T. R. 317. See Fees; also Apothecaries, Surgeon.

PICARDS. A sort of boats, of fifteen tons or upwards, used on the river Severn, mentioned in an ancient statute, 34 & 35 Hen. 8. c. 3. Also a fisher-boat, mentioned in 13 Eliz. c. 11.

PICCAGE, *piccagium*, from the Fr. *piquer*, i. e. *effodere*.] A consideration, paid for the breaking up ground to set up booths, stalls or standings, in fairs; payable to the lord of the soil.

PICKERY. The stealing of trifles which is liable to arbitrary punishment. Scotch Dict.

PICLE, *picellum*.] A small parcel of land inclosed with a hedge; a little close: this word seems to come from the Italian *picciola*, i. e. *parvus*; and in some parts of England it is called pightel.

PIE POWDER COURT, *curia pedis pulverizati*, the court of dusty-foot, from the Fr. *pied*, *pes*, and *poudreux*, *pulverulentus*.] A court held (*de hora in horam*) in fairs, to administer justice to buyers and sellers, and for redress of disorders committed in them.

Skene, *De Verbor. Signif.*, *Verbo Pes-pulverosus*, says, the word signifies a vagabond; especially a pedlar, who hath no dwelling, therefore must have justice summarily administered to him, viz. within three ebblings and three flowings of the sea. Bracton, lib. 5. tract. 1. c. 6. num. 6. calleth it *Justitiam populdrous*. Of this court, read the 17 Edw. 4. c. 2; 4 Inst. 27. and Crompt. Jur. 221.

This among our old Saxons, was called *ceapung-gemet*, i. e. a court of merchandise, or handling matters of buying and selling. It is mentioned in *Doctor and Student*, c. 5, which says, it is a court incident to fairs and markets, to be held only during the time that the fairs are kept. Cancell.

The fair of St. Giles, held on the hill of that name, near the city of Winchester, by virtue of letters-patent of King Edward IV. hath a court of Pie-powder of a transcendent jurisdiction; the judges whereof are called Justices of the Pavillion, and have their power from the Bishop of Winchester. See *Justices of the Pavillion*. See further, *Court of Pie-powders*; and 7 Vin.

PIER, Fr. *piere*, *saxum*; from the materials of which it is composed.] A fortress or rampart made against the force of the sea or great rivers, for the better security of ships that lie at harbour in any haven. See Harbours. Pierage is the duty for maintaining such piers and harbours.

PIES, *freres-pies*.] Were a sort of monks; so called because they wore black and white garments, like magpies. They are mentioned by Hutsingham, p. 124. See Monks.

PIETANTIA. } See *Pittance*.

PIETANTIARIUS. }

PIG OF LEAD. See *Fother*.

PIGEONS. By the 7 & 8 Geo. 4. c. 27, the statutes of 2 Jac. 1. c. 27. § 2; and 2 Geo. 3. c. 29, relating to house-doves and pigeons, are repealed.

By the 7 & 8 Geo. 4. c. 29. § 33, if any person shall unlawfully kill, wound, or take any housedove or pigeon under such circumstances as shall not amount to larceny at common law, he shall, on conviction thereof before a justice, forfeit above the value of the bird any sum not exceeding two pence.

To steal wild pigeons in a pigeon-house, shut up so that the owner may take them, is felony. 1 Hawk. P. C. c. 33. § 26.

PIGEON-HOUSE. A place for safe-keeping pigeons. A lord of a manor may build a pigeon-house or dove-cot

upon his land, parcel of the manor; but a tenant of the manor cannot, without the lord's licence. *3 Salk. 148.* Formerly none but the lord of the manor, or the parson, might erect a pigeon-house; though it has been since held, that any freeholder may build a pigeon-house on his own ground. *5 Rep. 101; Cro. Eliz. 518; Cro. Jac. 382, 410.* A person may have a pigeon-house or dove-cot, by prescription.

PIGHIEL. See *Picle*.

PILA. That side of money which was called *pila*, because it was the side on which there was impression of a church built on piles;—He who brought an appeal of robbery against another must have shown the certain quantity, quality, price, weight, &c. *valorem et pilum*, where *pilum* signifies *figurum monete*. *Fleta, lib. 1. c. 89.*

PILETTUS. Anciently used for an arrow, which had a round knob, a little above the head, to hinder it from going far into a mark; from the Lat. *pila*, which signifies generally any round thing like a ball. *Et quod forestarii non portabunt sagittas barbatas, sed pilatos. Chart. 31 Hen. 3.* Persons might shoot without the bounds of a forest with sharp or pointed arrows; but within the forest, for the preservation of the deer, they were to shoot only with blunts, bolts, or piles; and *sagitta pileta* was opposed to *sagitta barbata*; as blunts to sharps, in rapiers. *Mat. Paris.*

PILEUS SUPPORTATIONIS. A cap of maintenance. Pope Julius sent such a cap, with a sword, to Henry VIII. anno 1514. *Holling. 827.* Mention of such a cap is made by *Hoveden, p. 856*, at the coronation of Richard the First. *Cowell.*

PILLORY, *collistrigium, collum stringens; pilloria*, from the Fr. *pilleur*, i. e. *depeculator*; or *pelori*, derived from the Græc. *πύλην, janua*, a door, because one standing on the pillory puts his head, as it were, through a door, and *opus, telum*. An engine made of wood, to punish offenders, by exposing them to public view, and rendering them infamous. By the statute of the pillory, *51 Hen. 3. stat. 6* it was appointed for bakers, forestallers, and those who used false weights, perjury, forgery, &c. *3 Inst. 219.* Lords of leets were to have a pillory and tumbrel, or it was cause of forfeiture of the leet, and a vill might be bound by prescription to provide a pillory, &c. *2 Hawk. P. C. c. 11. § 5.*

By *56 Geo. 3. c. 138*, the punishment of pillory is abolished in all cases except perjury and subornation thereof, (see *Perjury*); but in all cases where the punishment of the pillory has hitherto formed the whole or part of the judgment, the court may pass sentence of fine and imprisonment, or both, in lieu of the pillory.

PILOT. He who hath the government of a ship, under the master.

The name of pilot or steersman is applied either to a particular officer, serving on board a ship during the course of a voyage, and having the charge of the helm or the ship's route; or to a person taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port. *Abbot on Ship. 148.*

It is to the latter description of persons that the term pilot is now usually applied; and pilots of this sort are established in various parts of the country by ancient charters of incorporation, or by particular statutes. The most important of these corporations are those of the Trinity House, Deptford and London; the fellowship of the pilots of Dover, Deal, and the Isle of Thanet, commonly called the *Cinque Port Pilots*; and the Trinity Houses of Hull and Newcastle. A corporation for the regulation and licensing of pilots in Liverpool was established by the *5 G. 4. c. 73.*

The *6 G. 4. c. 125*, consolidated the law with respect to the licensing, employment, duties and fees of pilots.

The act imposes penalties on masters of ships acting themselves as pilots, or employing any unlicensed person, after a licensed pilot has offered himself. The statute, however, excepts the masters of colliers and some other vessels, so

long as they are not assisted by any unlicensed pilot or other person than the ordinary crew.

The principle of the law respecting pilots seems to be, that where the master is bound by act of parliament to place his ship in the charge of a pilot, and does so accordingly, the ship is not to be considered as under the management of the owners or their servants; but when it is in the election or discretion of the master to take a pilot or not, and he thinks fit to take one, the pilot so taken is to be considered as a servant of the owner. See *Abbot on Ship. 160.*

As to pilots in Ireland, see the Irish Act, *27 Geo. 3. c. 25. § 9, 10.*

The laws of Oleron ordain, That if any pilot designedly misguide a ship, that it may be cast away, he shall be put to a rigorous death, and hung in chains; and if the lord of the place where a ship be thus lost, abet such villains, in order to have a share in the wreck, he shall be apprehended, and all his goods forfeited for the satisfaction of the persons suffering; and his person shall be fastened to a stake in the midst of his own mansion, which being fired on the four corners, shall be burnt to the ground, and he with it. *Leg. Ol. c. 25.* It hath been said, if the fault of a pilot be so notorious, that the ship's crew see an apparent wreck, they may lead him to the hatches and strike off his head; but the common law denies this hasty execution. An ignorant pilot is sentenced to pass thrice under the ship's keel by the laws of Denmark. *Lex Mercat. 70.*

Before the ship arrives at her place or bed, while she is under the charge of the pilot, if she or her goods perish, or be spoiled, the pilot shall make good the same: but after the ship is brought to the harbour, then the master is to take charge of her, and answer all damages, except that of the act of God, &c. *Leg. Ol. c. 23.*

PIMP-TENURE—*Wilhelmus Hoppeshor tenet dimidiam virgatum terræ in Rockhampton de domino rege, per servitium custodiendi sex demissellas, scil. meretrices, ad usum dom. Reg. 12 Edw. 1. viz. by pimp-tenure. Blount's Ten. 39.*

PINENDEN. See *Sharnburn.*

PINNAS BIBERE, or, *ad pinnas bibere.* The old custom of drinking brought in by the Danes was to fix a pin in the side of the wassal bowl, and to drink exactly to the pin; as now is practised in a sealed glass, &c. This kind of drunkenness was forbid the clergy, in the council at London, anno 1102. *Cowell.*

PIPE, *pipa*.] A roll in the exchequer, otherwise called *The Great Roll*, anno 37 Edw. 3. c. 4. See *Clerk of the Pipe.*

PIQUANT. A French word for sharp, made use of to express malice or rancour against any one. *Law Fr. Dict.*

PIRATES, *piratæ*.] Common sea rovers, without any fixed place of residence, who acknowledge no sovereign and no law, and support themselves by pillage and depredations at sea: but there are instances wherein the word *pirata* has been formerly taken for a sea captain. *Spelm.*

The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed on land, would have amounted to felony there. *1 Hawk. P. C. c. 37. § 10.*

Formerly this crime was only cognizable by the admiralty courts, which proceed by the rules of the civil law. But, it being inconsistent with the liberties of the nation, that any man's life should be taken away, unless by the judgment of his peers, or the common law of the land, the statute *28 Hen. 8. c. 15*, established a new jurisdiction for this purpose, which proceeds according to the course of the common law. *1 Comm. 71.*

By this statute *28 Hen. 8. c. 15*, all felonies, robberies, and murders committed by pirates, shall be inquired of, heard and determined in any county of England, by the king's commissioner of oyer and terminer, as if the offences had been committed on land; and such commission shall be directed to the lord admiral, and other persons, as shall be

named by the lord chancellor, who shall determine such offences, after the common course of the laws of the kingdom, used for felonies and robberies, &c. and award judgment and execution as against felons for any felony done on the land; and the offenders shall suffer death, loss of lands and goods, as if they had been attainted of such offence committed on land, &c.

The commissioners under the above act are the admiral or his deputy, and three or four more, among whom two common law judges are usually appointed: the indictment being first found by a grand jury of twelve men, and afterwards tried by a petty jury: the judge of the admiralty presiding. See 4 *Comm. c. 19. p. 268.* and title *Homicide*, III. 3.

The 11 & 12 *Wm. 3. c. 7.* (made perpetual by 6 *Geo. 1. c. 19.*) enacts, That all piracies, committed on the sea, or in haven, &c. where the admiral hath jurisdiction, may be tried at sea, or on the land, in any of his majesty's islands, &c. abroad, appointed for that purpose, by commission under the great seal, or seal of the admiralty, directed to such commissioners as the king shall think fit; who may commit the offenders, and call a court of admiralty, consisting of seven persons at least, or for want of seven, any three of the commissioners may call others; and the persons so assembled may proceed according to the course of the admiralty, pass sentence of death, and order execution, &c. And commissions for trial of offences within the Cinque Ports, shall be directed to the warden of the Cinque Ports, and the trial to be by the inhabitants of the ports. And if any natural born subjects, or denizens, shall commit piracy against any of his majesty's subjects at sea, under colour of any commission from any foreign prince, they shall be adjudged pirates: if any master of a ship, or seaman, give up the ship to pirates, or combine to yield up, or run away with any ship; or any seaman lay violent hands on his commander, or endeavour a revolt in the ship, he shall be adjudged a pirate, and suffer accordingly; also, if any person discover a combination for running away with a ship, he shall be entitled to a reward of 10*l.* for every vessel of 100 tons, and 15*l.* if above: and all persons who set forth any pirate, or be assisting to those committing piracy, or that conceal such pirates, or receive any vessel of goods piratically taken, shall be deemed accessory to the piracy, and suffer as principals. The 4 *Geo. 1. c. 11.* (which excluded the principal from the benefit of clergy,) provides, that offenders under the 11 & 12 *Wm. 3.* may be tried and judged according to the form of the 28 *Hen. 8. c. 15.* See as to Ireland, the Irish acts, 11 *Jac. 1. c. 2*; 13 & 14 *Geo. 3. c. 16*; 23 & 24 *Geo. 3. c. 14.*

By the 8 *Geo. 1. c. 24.* (made perpetual by the 2 *Geo. 2. c. 28.*) the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in anywise consulting, combining, confederating, or corresponding with them, or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing overboard any of the goods, shall be deemed piracy; triable according to the 28 *Hen. 8. c. 15*; 11 & 12 *Wm. 3. c. 7.* and such accessories to piracy as are described by the 11 & 12 *Wm. 3.* are declared to be principal pirates; and all pirates convicted by virtue of this act, are made felons without benefit of clergy.—Ships fitted out with a design to trade with pirates, and the goods therein, shall be forfeited.

By several statutes (and see 22 & 23 *Car. 2. c. 11.* and post, tit. *Seamen*) to encourage the defence of merchant vessels against pirates, the commanders and seamen wounded, and the widows of such seamen as are slain in any piratical engagement, shall be entitled to a bounty, to be divided among them, not exceeding two per cent. or one fiftieth part of the value of the cargo on board; and such wounded seamen shall be entitled to the pension of Greenwich Hospital, which no other seamen are, except such as have served in a ship of war. And if the commander,

officers, or mariners shall behave cowardly, by not defending the ship, if she carries guns or arms; or shall discourage the other officers or mariners from fighting, so that the ship falls into the hands of pirates; such commander, officer, or mariner shall forfeit all his wages, and suffer six months' imprisonment.

By 18 *Geo. 2. c. 30.* any natural born subject or denizen who, during any war, shall commit hostilities on the sea against any of his majesty's subjects, by colour of any commission from the enemy, or adhere, or give aid to the enemy upon the sea, may be tried as a pirate, in the court of admiralty, on ship-board or on land, and being convicted shall suffer death, &c. as other pirates, &c. But persons, convicted on this act, shall not be tried for the same crime as for high treason; but if not tried on this act, may be tried for high treason on the 28 *Hen. 8. c. 15.* The adherence to the king's enemies was thought to make the offence high treason; this statute was made therefore to remove the doubt. See *Staud. P. C. 10*; 3 *Inst. 112*; 2 *Hale's Hist. P. C. 369, 370*; 1 *Hawk. P. C. c. 37. § 21.*

By the 5 *Geo. 4. c. 113. § 9.* the carrying away or shipping of any person for the purpose of being sold as a slave is declared piracy, and is punishable with death.

The crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society, a pirate being, according to Coke, *hostis humani generis*, 3 *Inst. 113.* As therefore he hath renounced all the benefits of society and government, and has reduced himself almost to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do for any invasion of his person or personal property. 4 *Comm. 71.*

Pirates are enemies to all; they are denied succour by the law of nations; and by the civil law, a ransom promised to a pirate, if not complied with, creates no wrong; for the law of arms is not communicated to such; neither are they capable of enjoying that privilege, which lawful enemies are entitled to in the caption of another. *Lex Mercat. 183.* If a pirate enters a port or haven, and assaults and robs a merchant ship at anchor there, this is not piracy, because it is not done upon the high sea; but it is a robbery at the common law, the act being *infra corpus comitatus*: and if the crime be committed either *super alium mare*, or in great rivers within the realm, which are looked upon as common highways, there it is piracy. *Moor, 756.*

If a ship be riding at anchor at sea, and the mariners part in their ship-boat, and the rest on shore, so that none are left in the ship; and a pirate attack her, and commits a robbery, it is piracy. 14 *Edm. 3.* And where a pirate assaults a ship, and only takes away some of the men in order to be taken for slaves, this is piracy: and if a pirate make an attack on a ship, and the master, for the redemption, is compelled to give his oath to pay a certain sum of money, though there be no taking, the same is piracy by the marine law; but, by the common law, there must be an actual taking, as in case of robbery on the highway. *Lex Mercat. 185.* But the taking by a ship at sea, in great necessity of victuals, clothes, ropes, &c. out of another ship, is no piracy; if that other ship can spare them, and paying or giving security therefore. *Ibid. 183.*

If a pirate takes goods upon the sea, and sells them, the property is not altered, no more than if a thief on land had stolen and sold them. See 27 *Edm. 3. st. 2. c. 13*; *Crab. 193.* Yet, by the laws of England, if a man commit piracy upon the subjects of any other prince, (at enmity with England,) and brings the goods into England, and sells them in a market-overt, the same shall be binding, and the owners be concluded. *Hob. 79.*

When goods are taken by a pirate, and afterwards the pirate, making an attack upon a vessel ship, is conquered and taken by the other, by the marine law the admiral may make restitution of the goods to the owners, if they are fellow-subjects of the captors, or belong to any state in amity with his sovereign, on paying the costs and charges, and making the captor an equitable consideration for his service. *Lex Mercat.* 184. See 6 Geo. 4. c. 49, post.

If a pirate at sea assault a ship, and in the engagement kills a person in the other ship, by the common law, all the persons on board the pirate ship are principals in the murder, although none enter the other ship; but, by the marine law, they who give the wound only shall be principals, and the rest accessories, if the parties can be known. *Felo.* 135. It has been holden, that there cannot be an accessory in piracy; but if it happens, that there is an accessory upon the sea, such accessory may be punished by the civil law before the lord admiral; and it was made a doubt, whether an accessory at land to a felony at sea, was triable by the admiral, within the purview of 28 Hen. 8. c. 15. Though this is settled by 11 & 12 Wm. 3. c. 7, which provides that accessories to piracy, before or after, shall be inquired of, tried, and adjudged according to the said statute. 2 Hawk. P. C. c. 25, § 46. See post.

In cases the subjects of a prince, in amity with the crown of England, enter themselves sailors on board an English pirate, and a robbery is committed by them, who are afterwards taken; it is felony in the English, but not in the strangers; but in ancient times it was petit treason in the English, and felony in the strangers; and if any Englishman commits piracy upon the subjects of any prince or state in amity with England, they are within the statute 28 Hen. 8. c. 15. If the subjects of any nation or kingdom, in amity with England, shall commit a piracy on the ships or goods of the English, the same is felony, and punishable by this statute; and piracy committed by the subjects of France, or any other country in friendship with us, upon the British seas, is properly punishable by the crown of England only. *Lex Mercat.* 186, 187; 1 Hawk. P. C. c. 37. § 1. in n.

A piracy is attempted on the ocean, if the pirates are overcome, the takers may immediately inflict a punishment by hanging them up at the main-yard end; though this is understood where no legal judgment may be obtained. *Lex Mercat.* 184.

By the ancient common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance; and, by an alien, to be felony only; but now, since the statute of treasons, 25 Edm. 3. c. 2, it is held to be only felony in a subject. 3 Inst. 1. 3. See ante.

No attainer for this offence corrupts the blood, the statute mentioning only that the offender shall suffer death, loss of lands, &c. as if he were attainted of a felony at common law; but says not, that the blood shall be corrupted. 3 Inst. 1. 2. And the offender's lands are not forfeited by the civil law. 1 Lill. Abr.

In the construction of the 28 Hen. 8. c. 15. the following opinions have also been holden.

That it does not alter the nature of the offence, so as to make that, which was before a felony only by the civil law, now become a felony by the common law; for the offence is still be alleged as done upon the sea, and is no way cognizable by the common law, but only by virtue of this statute; which, by ordaining that in some respects it shall have the like trial and punishment as are used for felony by common law, shall not be carried so far as to make it also agree with it in other particulars which are not mentioned; from hence it follows, that this offence remains, as before, of a special nature, and that it shall not be included in a general pardon of all felonies. 3 Inst. 112; 2 Hale's Hist. P. C. 27. Moor, 756; Co. Litt. 391; 1 Hawk. P. C. c. 37. § 6.

From the same ground it follows, that no persons, in respect of this statute, be construed to be, or punished as,

accessories to piracy before or after, as they might have been, if it had been made felony by the statute; whereby all those would incidentally have been accessories in the like cases in which they would have been accessories to a felony at common law; therefore accessories to piracy, being neither expressly named in the statute, nor by construction included, remain as they were before, and were triable by the civil law, if their offences were committed on the sea; but on the land, by no law, until 11 & 12 Wm. 3. c. 7, for 2 & 3 Edm. 6. c. 24, which provides against accessories in one county to a felony in another, extends not to accessories to an offence committed in no county, but on the sea; but by 11 & 12 Wm. 3. c. 7, they are triable in like manner as the principals are by 28 Hen. 8. c. 15. 3 Inst. 112; 1 Hawk. P. C. c. 37. § 7. (But now, as has been already stated, accessories to piracy are made principals by 8 Geo. 1. c. 24.)

It hath been holden, that the indictment for this offence must allege the fact to be done at sea, and must have the words *felonice et piratice*; and that no offence is punishable by virtue of this act as piracy, which would not have been felony if done on the land; consequently taking an enemy's ship, by an enemy, is not within the statute. 3 Inst. 112; 1 Roll. Rep. 175; 1 Hawk. P. C. c. 37.

It is agreed, that this statute extends not to offences done in creeks or ports within the body of a county, because they are, and always were, cognizable by the common law. Moor, 756; 1 Roll. Rep. 175; 1 Hawk. P. C. c. 37.

The 28 Hen. 8. c. 15, did not, it seems, authorize the trial of marine felonies created by subsequent statutes. 2 East, P. C. 807. But by the 30 Geo. 3. c. 37, provision was made for the trial of all subsequent offences whatsoever committed upon the high seas.

By the 6 Geo. 4. c. 49. § 1, the treasurer of the navy is to pay to officers, seamen, marines, &c. on board any ship of war at the taking, sinking, &c. of any pirate ship, 20*l.* for each piratical person taken or killed during the attack, and 5*l.* for each man not taken or killed who was alive on board at the beginning of the attack. By section 3, vessels and other property found in the possession of pirates, shall be adjudged by court of admiralty to be restored to the owners on payment of salvage of one-eighth of value. See further Admiralty.

PIRATES' GOODS. In the patent to the admiral, he has granted him *bona piratorum*: the proper goods of pirates only pass by this grant; and not piratical goods. So it is of a grant *de bonis felonum*; the grantee shall not have goods stolen, but the true and rightful owner. But the king shall have piratical goods, if the owner be not known. 10 Rep. 109; Dyer, 269; Jenk. Cent. 325.

PISCARY, piscaria, vel privilegium piscandi.] A right or liberty of fishing in the waters of another person. See Fishing, Right of.

PISCENARIUS. A fishmonger. Pat. 1 E. 3. p. 8. m. 13.

PIT. A hole wherein the Scots used to drown women thieves; and to say condemned to the pit, is as when we say condemned to the gallows. Skene.

PIT AND GALLOWS. See Furca et Fossa.

PITCHING-PENCE. Money (commonly a penny) paid for pitching, or setting down every bag of corn or pack of goods, in a fair or market.

PITTANCE, pittance modicum.] A little repast, or refection of fish or flesh, more than the common allowance; and the pittance was the officer who distributed this at certain appointed festivals. Rot. Chart. ad Hospital. S. Salvator. Sancti Edmundi, &c. An. 1 Reg. Johan. p. 2; Lib. stat. L. c. l. Sti. Pauli Lond. A. D. 1298.

PLACARD, Fr. plaquant; Dutch, placecart.] Hath several significations: in France, it formerly signified a table, wherein laws, orders, &c. were written and hung up: in Holland, an edict or proclamation: also it signifies a writing of safe conduct; with us it is little used, but is mentioned as a licence

to use certain games, &c. in the 2 & 3 P. & M. c. 9; and see 33 Hen. 8. c. 6.

PLACE, locus.] Where a fact was committed, is to be alleged in appeals of death, indictments, &c. And place is considerable in pleadings in some cases: where the law requires a thing to be set down in a certain place, the party must, in his pleadings, say, it was done there. *Co. Lit.* 282. When one thing comes in the place of another, it shall be said to be of the same nature; as in case of an exchange, &c. *Shep. Epit.* 700. See *Local Pleading*.

PLACITA. Pleas, pleadings, or debates and trials at law. *Placita* is a word often mentioned in our histories and law books; at first it signified the public assemblies of all degrees of men where the king presided, and they usually consulted upon the great affairs of the kingdom; and these were called *generalia placita*, because *generalitas universorum majorum tam clericorum quam laicorum ibidem conveniebat*: this was the custom in France, as well as here, as we are told by Bertinian, in his *Annals of France*, in the year 767. Some of our historians, as Simeon of Durham, and others, who wrote above 300 years afterwards, tell us, that those assemblies were held in the open fields; and that the *placita generalia*, and *curia regis*, were what we now call a parliament: it is true, the lords' courts were so called, viz. *placita generalia*, but oftener *curiæ generales*; because all their tenants and vassals were bound to appear there. See *Parliament*.

We also meet with *placitum nominatum*; i. e. the day appointed for a criminal to appear and plead, and make his defence. *Leg. H. 1. c. 29, 46, 50. Placitum fractum*; i. e. when the day is past. *Leg. H. 1. c. 59.* Lord Coke says, that the word is derived from *placendo, quia bene placitare super omnia placet*; this seems to be a very fanciful derivation of the word, which appears rather to be derived from the German *plats*, or from the Latin *plateis*; i. e. fields or streets, where these assemblies or courts were first held. But this word *placita* did sometimes signify penalties, fines, mulcts, or emendations, according to Gervase of Tilbury, or the *Black Book* in the Exchequer, lib. 2. tit. 13. *Placita autem dicimus pœnas pecuniarias in quas incidunt delinquentes.* So in the laws of Hen. 1. c. 12, 18. Hence the old rule or custom, *comes habet tertium denarium placitorum*, is to be thus understood; the earl of the county shall have the third part of the money due upon mulcts, fines, and amerciaments imposed in the assizes and county courts. *Cowell*.

Placita is the style of the court at the beginning of the record of Nisi Prius. *Tidd's Pract. c. 37.* In this sense pleas, *placita*, are divided into Pleas of the Crown and Common Pleas; Pleas of the Crown are all suits in the king's name for offences committed against his crown and dignity, and also against the peace; Common Pleas are those that are agitated between common persons in civil cases. *Stamf. P. C. 1; 4 Inst. 10.*

PLACITARE, i. e. litigare et causas agere.] To plead; and the manner of pleading before the Conquest was, *coram aldermanno et proceribus et coram hundredariis, &c.* *MS. in Bibl. Cotton.*

PLACITATOR. A pleader. Ralf Flambard is recorded to be *totius regni placitator.* *Temp. Will. 2.* See *supra*, under title *Placita*.

PLAGII CRIMEN. The stealing of human creatures. This, in Scotland, was anciently punishable with death as a treasonable usurpation of the royal authority in detaining his majesty's liege subjects. The same punishment has been applied to the stealing of children in Scotland, of which there was an instance in the trial and condemnation of Margaret Irvine, 24th Sept. 1784. *Bell's Scotch Dict.*

PLAGUE. See *Quarantine*.

PLAINT, Fr. plainte; Lat. querela.] The exhibiting any action in writing; and the party making his plaint is called the plaintiff. *Kitch. 231.* A plaint in an inferior court is the entry of an action, after this manner: A. B.

complaints of C. D. of a plea of trespass, &c. and there are pledges of prosecuting, that is to say, John Doe and Richard Roe.

The first process in an inferior court is a plaint, which is in the nature of an original writ, because therein is briefly set forth the plaintiff's cause of action; and the judge is bound, of common right, to administer justice therein without a special mandate from the king; 3 *Comm. c. 18. p. 273*; and on this plaint there may issue a *pone*, till the return of a *nihil*, upon which a *capias* will lie against the body of the defendant. 2 *Lill. Abr. 294.*

Where a plaint is levied in an inferior court, the defendant must be first distrained for non-appearance by something of small value; then, if he doth not appear, a farther distress is to be taken to a greater value, and so on; if all his goods are distrained on the first distress, attachment may be issued out of B. R. against the officers, &c. 2 *Lill. Abr.* See further, tit. *County Court*.

Plaint, in a superior court, is said to be the cause for which the plaintiff complains against the defendant, and for which he obtains the king's writ; for as the king denies his writ to none, if there be cause to grant it, so he grants not his writ to any without there be cause alleged for it. 2 *Lill. 294.* See *Original*.

PLAINTIFF. He that sues or complains in an assize or action personal. *Termes de la Ley.* In an action real he is termed *Demandant*.

PLAISTERERS. Not to exercise the art of a painter in London. 1 *Jac. 1. c. 20.* See *Painters*.

PLANCHIA. A plank of wood. *Cowell.*

PLANTATION, plantatio, colonia.] A place where people are sent to dwell; or a company of people transplanted from one place to another, with an allowance of land for their tillage. *Lit. Dict.*

Perhaps it may more fully, if not accurately, be defined a district, settlement, or colony; frequently a whole island in some foreign part, dependant on a mother country, with whose inhabitants it was originally peopled, or by whom it was conquered or acquired.

In glancing over the settlements on the coast of Africa, the settlements of the East India Company in India, the China trade, Nootka Sound, and many other places, we see lands and territories under very different circumstances, and dependant upon political considerations of infinite variety respecting some of which it must be extremely difficult to determine whether they are within the stat. 7 & 8 *W. 3. c. 22.* (for regulating the plantation trade) as colonies or plantations; or, indeed, which is a further doubt, whether they are within any part of the Act of Navigation, as lands, islands, or territories to his majesty belonging, or in his possession. These are questions of great importance to the navigation system, and deserve a serious attention.

As to the terms Colony, or Plantation, whatever distinction may at one time have been made between them, there seems now to be none at all. The word Plantation first came into use. The plantations of Ulster, Virginia, Maryland, and other places, all implied the same idea of introducing, instituting, and establishing, where every thing was desert before. Colony did not come much into use till the reign of Charles II. and it seems to have denoted the sort of political relation in which such plantations stood to this kingdom. Thus the different parts of New England were, in a great measure, voluntary societies planted without the direction or participation of the English government, so that, in the time of Charles II. there were not wanting persons who pretended to doubt of their constitutional dependance upon the crown of England, and it was recommended, in order to put an end to such doubts, that the king should appoint governors, and so make them colonies. A colony, therefore, might be considered as a plantation, when it had a governor and civil establishment, subordinate to the mother country. All the

plantations in America, except those of New England, had such an establishment; and they were, upon that idea, colonies as well as plantations. Those terms seem accordingly to be used without distinction in the 7 & 8 Will. 3. and in those made afterwards. *Reeves's Law of Shipping, &c.* p. 136, 138; p. 133, et seq. and p. 521. And see *ante*, *Navigation Acts*.

Plantations or colonies in distant countries (says *Blackstone*), are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest or ceded by treaties. And both these rights are founded upon the law of nature, or, at least, upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birth-right of every subject, are immediately there in force. *Salk.* 411, 666; *3 Mod.* 159; *4 Mod.* 225, 226; *2 P. Wms.* 75. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted, and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided, in the first instance, by their own provincial judicature, subject to the revision and control of the king in council; the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but till he does actually change them, the ancient laws of the country remain in force, unless such as are against the law of God, as in the case of an infidel country. *7 Rep.* 17; *Coleman's Case*, *Shew. Parl. C.* 71. See also, in the case of *Campbell v. Hall*, an elaborate argument of Lord Mansfield, to prove the king's legislative authority, by his prerogative alone, over a ceded or conquered country. *Corp.* 94. Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives, or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions. They are subject however to the control of the parliament, though like the Isle of Man and the rest, not bound by any acts of Parliament, unless particularly named. *1 Comm. Introd.* § 4. p. 108, 109.

With respect to their interior polity, our colonies are stated by *Blackstone* to be properly of three sorts:—1. Provincial Establishments, the constitutions of which depend on the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions; under the authority of which provincial assemblies are constituted, with the power of making local ordinances, not repugnant to the laws of England. 2. Proprietary Governments of feudatory principalities, with all the inferior regalities and subordinate powers of legislation which formerly belonged to the owners of counties palatine; yet still with these express conditions, that the ends for which the grant was made

be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother country. 3. Charter Governments; in the nature of civil corporations, with the power of making bye-laws for their own interior regulation, not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation. The form of government in most of them is borrowed from that of England. They have a governor named by the king (or in some proprietary colonies by the proprietor), who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the king and council here in England. Their general assemblies, which are their House of Commons, together with their council of state, being their upper house, with the concurrence of the king or his representative, the governor, make laws suited to their own emergencies. But it is particularly declared by 7 & 8 Will. 3. c. 22. that all laws, bye-laws, usages, and customs, which shall be in practice in any of the plantations, repugnant to any law made or to be made in this kingdom relative to the said plantations, shall be utterly void and of none effect. And because several of the colonies had claimed the sole and exclusive right of imposing taxes upon themselves, the stat. 6 Geo. 3. c. 12. was passed, expressly declaring that all his majesty's colonies and plantations in America have been, are, and of right ought to be, subordinate to and dependant upon the imperial crown and parliament of Great Britain, who have full power and authority to make laws and statutes of sufficient validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever. This authority was afterwards enforced by 7 Geo. 3. c. 50. for suspending the legislation of New York, and by several subsequent statutes; but in the year 1782, by 22 Geo. 3. c. 46. his majesty was empowered to conclude a truce or peace with the colonies of New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, the Three Lower Counties or Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, in North America; and for that purpose to repeal or to suspend the operation of any acts of parliament so far as they related to the said colonies. A peace was soon after concluded, and the independence which the above-mentioned colonies had before declared was allowed to them under the title of the United States of America.

Stat. 5 Geo. 2. c. 7. regulates suits in the courts of law and equity in the plantations, and makes houses, lands, negroes, and real estates, assets to pay debts; 13 Geo. 3. c. 14. enforces mortgages of estates in the West India Colonies, and the mode of proceeding to foreclose the same (and see *Mortgage*, IV.); 22 Geo. 3. c. 75. declares that offices in plantations shall only be granted by patent during the residence of the grantee and *quandiu se bene gesserit*; and on absence or misbehaviour the officer is removable by the governor and council, who may also give leave of absence.

By 11 & 12 Will. 3. c. 12. confirmed and extended by 42 Geo. 3. c. 85. all offences committed by governors of plantations, or any other persons in the execution of their offices, in any public service abroad, may be prosecuted in the Court of King's Bench in England. The indictment is to be laid in Middlesex; and the offenders are punishable as if the offence had been committed in England, and may also, by judgment of the court, be incapacitated from holding any office under the crown. The Court of K. B. is empowered to award a mandamus to any court of judicature, or to the governor, &c. of the country where the offence was committed, to obtain proofs of the matter alleged; and the evidence is to be transmitted back to that court, and there admitted on the trial. And when the party injured proceeds by action for damages, the fact may be laid to be committed in Westminster, or in any county where the defendant resides.

By the 1 Will. 4. (sess. 2.) c. 4. all powers vested in the

governors of plantations or colonies, or any officers there by patent or commission determinable by the demise of the preceding monarch, George IV. were continued in force until new patents were issued and made known there. § 1. And no patent, commission, warrant, or authority, within any of the king's plantations or possessions abroad, determinable at the pleasure of the crown, shall on any future demise of the crown be vacated or become void until eighteen months after such demise. § 2.

As to the limits and government of the province of Quebec, see 14 Geo. 3. c. 83; 31 Geo. 3. c. 31. 1 Will. 4. c. 20.

Courts of civil jurisdiction in Newfoundland, and islands adjacent, were established and regulated by 33 Geo. 3. c. 76; 51 Geo. 3. c. 45. And see 5 Geo. 4. c. 67; 2 & 3 Will. 4. c. 78.

A court of criminal jurisdiction in Norfolk Island, on the eastern coast of New South Wales, whither felons are now transported, was established and regulated by 27 Geo. 3. c. 2; 34 Geo. 3. c. 45; 35 Geo. 3. c. 18. See now 4 Geo. 4. c. 96; 9 Geo. 4. c. 83.

The conveyance of passengers to North America is now regulated by the 9 Geo. 4. c. 21; and the trade of the British possessions abroad by the 3 & 4 Will. 4. c. 59. See also *Navigation Acts*; and further, *East India Company*.

By the 4 & 5 Will. 4. c. 95, his majesty is empowered to erect South Australia into a British province or provinces, and to provide for the colonization and government thereof.

For a summary of colonial law, and an account of the courts and particular laws of the various colonies belonging to this country, see *Clark on Colonial Law*.

PLANTS. See *Gardens*.

PLASTERER. See *Plasterer*.

PLATE. Vessels and utensils of gold and silver. By the 29 Geo. 2. c. 14, a tax was laid on all persons possessed of plate; but that act was repealed by the 17 Geo. 3. c. 89.

By the 7 & 8 Will. 3. c. 19. § 5. public-houses were prohibited from using plate. This clause was repealed by the 9 Geo. 3. c. 11.

In Ireland a duty of excise is imposed of 4s. per oz. on all gold and silver wrought plate. See 47 Geo. 3. st. 1. c. 18; and st. 2. c. 15. See further, *Gold*.

PLAYHOUSE. Playhouses were originally instituted with a design of recommending virtue, and exposing vice and folly; therefore are not in their own nature nuisances. See *Nuisance*.

If any persons in plays, &c. jestingly or profanely use the name of God, they forfeit 10*l*. 3 Jac. 1. c. 21. And players speaking any thing in derogation of the Book of Common Prayer, are liable to forfeitures and imprisonment. 1 Elis. c. 2. § 9. Also acting plays or interludes on a Sunday is subject to penalties by 1 Car. 1. c. 1. See *Sunday*.

By 10 Geo. 2. c. 28, no person shall act any new play or addition to an old one, &c. unless a true copy thereof, signed by the master of the playhouse, be sent to the lord chamberlain fourteen days before acted, who may prohibit the representing any stage play; and persons acting contrary to such prohibition forfeit 50*l*. and their licences, &c. And no licence is to be given to act plays but in the city and liberties of Westminster, or places of his majesty's residence. But by 28 Geo. 3. c. 30, the General or Quarter Sessions may licence theatres in country towns and places, for sixty days at a time, under certain restrictions; and by special acts of parliament playhouses are permitted to be erected in various places.

By the above statute (10 Geo. 2. c. 28.) every actor for hire (if he shall have no legal settlement where he acts), without authority from the king or the lord chamberlain, shall be deemed a rogue and a vagabond, and be punished as such, or forfeit 50*l*.; and plays acted in any place where liquors are sold, shall be deemed to be acted for hire.

Players are no longer within the Vagrant Acts. See 5 Geo. 4. c. 83; *Burn's Just.* 659 (25th ed.); *Bac. Ab. Nuisance*, A. (7th ed.)

The 10 Geo. 2. c. 28. § 2. prohibits acting plays, &c. for gain without patent from the king, or licence from the lord chamberlain. § 5. provides that no person shall be authorized by patent or licence to act except within the liberties of Westminster or where the king shall reside. Held, that the prohibition in § 2. is not merely coextensive with the exempting power as limited by § 5. but prevails throughout the kingdom. *Rees v. Kemble*, 1 Barn. & Adol. 489.

Tumbling is not an entertainment of the stage within the meaning of this statute. 6 T. R. 286.

PLAYS AND GAMES. See *Gaming*, *Nuisance*.

PLEA, *placitum*.] That which either party alleges for himself in court in a cause there depending to be tried.

PLEADABLE BRIEFS. Are precepts directed to the sheriffs, who thereupon cite parties, and hear and determine, and this citation must be particular according to the old custom. *Scotch Dict.*

PLEADING. In a large sense, contains all the proceedings from the declaration till issue is joined; but is, in its immediate sense, taken for the defendant's answer to the declaration.

PLEADINGS are the mutual altercations between the plaintiff and defendant in a suit, which at present are set down and delivered into the proper office in writing; though formerly they were usually put in by their counsel *ore trans* or *viva voce* in open court, and then minuted down by the chief clerks or prothonotaries; whence, in the old law French, the pleadings are frequently denominated the *parol*. 3 Comm. c. 20.

These oral proceedings were delivered either by the party himself, or his pleader (called *narrator* and *advocator*) *Bract*. 412 a, 372 b. And it seems that the rule was then already established, that none but a regular advocate (or, according to the more modern term, barrister) could be a pleader in a cause not his own. *Steph. on Pleading*, 24 3rd ed.

I. The general Principles of Pleading in Civil Cases in the Common Law Courts.

1. As to the Declaration and other Proceedings previous to the Plea.
2. Of the Plea and other Proceedings previous to the Issue.
3. Of the Issue and Record, of Repleader, and of the Language of Pleadings, &c.
4. The Practice of the Courts as to the time and manner of entering Pleas.

II. Of Pleadings in Criminal Cases; and see *tit. Judgment* (Criminal), *Execution*, and *Reprieve*.

[For the general Principles of Pleadings in Equity, see *Chancery*, *Equity*.]

I. 1. The pleadings commence with the declaration or count, anciently called the *tale*, which is a statement on the part of the plaintiff of his cause of action. In a real action, it is more properly called the count; in a personal one, the declaration. The latter, however, is now the general term, being that commonly used when referring to real and personal actions, without distinction. In the declaration the plaintiff states the nature and quality of his case; and in proceedings by original it is a rule that the statement of it must be in strict conformity with the tenor of that instrument; any substantial variance between them being a ground of objection.

It was formerly usual in actions upon the case to set forth several cases, by different counts, in the same declaration, so that if the plaintiff failed in the proof of one he might succeed in another. Thus, in an action on a warranty of a horse, one count stated the warranty to be on an executory consideration, "in consideration that plaintiff would buy the horse," &c.; and another count on an executed consideration,

"in consideration that plaintiff had bought the horse, the defendant undertook, &c. that the horse was sound," &c. And if he proved the case laid in any one of his counts, though he failed in the rest, he recovered proportionable damages. Now by the general rules of *H. T. 4 Wm. 4.* several counts shall not be allowed unless a distinct subject-matter of complaint is intended to be established in respect of each. Therefore counts founded on one and the same principal matter of complaint, but varied in statement, descriptions, or circumstances only, are not to be allowed.

Where the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration. *1 T. R. 274.* Assumpsit and trover cannot be joined. *Ibid.*

But to a declaration against a common carrier, upon the custom of the realm, a count in trover may be added. *Ibid.*

A count for beating the plaintiff's servant, *per quod servitium amisit*, may be joined with counts on trespass. *2 M. & S. 436.* See further *Joinder in Action.*

The first count of a declaration in assumpsit, stating an agreement between two persons, omitted the mutual promises. On motion on arrest of judgment, held that the agreement imported a promise. *2 New Rep. C. P. 62.*

In assumpsit brought by an administrator, *de bonis non*, the promise may be laid to have been made to the first administrator. *7 T. R. 182.*

It is not necessary in a declaration on a bill of exchange, to aver that the maker delivered it; it is sufficient to state that he made it. *7 T. R. 596.*

Trespass for assault and false imprisonment may be laid at divers days and times. *2 Bos. & Pull. 425.*

But a declaration charging that the defendant on such a day, and on divers other days and times, &c. made an assault on the plaintiff, is bad, as one assault cannot be laid on different days. *6 East, 595.* But it is otherwise if the word "assaulted" had been used.

The declaration always concludes with these words, "and thereupon he brings suit," &c. "*inde producit sectam*," &c. By which words, *suit* or *secta* (*a sequendo*), were anciently understood the witnesses or followers of the plaintiff. *Seld. on Fortesc. c. 21.* For in former times the law would not put the defendant to the trouble of answering the charge till the plaintiff had made out at least a probable case. *Bract. fol. 142, l. 2, c. 6.* But the actual production of the suit, *the secta*, or followers, hath been totally disused, at least ever since the reign of Edward III. though the form of it still continues. *3 Comm. c. 20.*

By rule of *M. T. 3 Wm. 4. r. 15.* the declaration in an action commenced by the process prescribed by the Uniformity of Process Act, (*2 Wm. 4. c. 39.*) "shall in future be intitled in the proper court, and of the month and year on which it is filed or delivered;" and the same rule also points out the forms of the commencement of declarations, and declares "that the entry of pledges to prosecute at the conclusion of the declaration shall in future be discontinued." Besides this rule as to the title of the declaration, the rule of *H. T. 4 Wm. 4. r. 1.* orders that "every pleading, as well as the declaration, shall be intitled of the day of the month and year when the same was pleaded, and shall bear no other date; and every declaration, and other pleading, shall be entered on the record made up for trial, and on the judgment-roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or judge."

To avoid unnecessary expense to parties by reason of the length of declarations in actions on bills of exchange, promissory notes, and causes of action recoverable under the common counts, the courts have, by rule of *T. T. 1 Wm. 4.* prescribed forms of declarations in such actions, and ordered

that the declaration shall not exceed in length such of the forms as may be applicable to the case.

When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his defence, and to put in a plea; else the plaintiff will at once recover judgment by default or *nihil dicit* of the defendant. See *Judgment.*

As to the true meaning of this word *defence*, and the nature of it in various actions, see *Defence*; also *Chit. on Pleading*; and *Steph. on Pleading*, 2nd ed.

Now by the rules of *H. T. 4 Will. 4.* no formal defence shall be required in a plea which is to commence in the manner therein prescribed.

Before any defence made, however, if at all, cognizance of the suit must be claimed or demanded, when any person, or body corporate hath the franchise, not only of holding pleas within a particular limited jurisdiction, but also of the cognizance of pleas; and that, either without any words exclusive of other courts which entitles the lord of the franchise, whenever any suit that belongs to his jurisdiction is commenced in the courts at Westminster to demand the cognizance thereof; or with such exclusive words which also entitle the defendant to plead to the jurisdiction of the court. *2 Ld. Raym. 886; 10 Mod. 126.* Upon this claim of cognizance, if allowed, all proceedings shall cease in the superior court, and the plaintiff is left at liberty to pursue his remedy in the special jurisdiction. It must be demanded before full defence is made, or imparlance prayed; for these are a submission to the jurisdiction of the superior court, and the delay is a laches in the lord of the franchise; and it will not be allowed if it occasion a failure of justice, or if an action be brought against the person himself, who claims the franchise, unless he hath also a power in such case of making another judge. See *Rast. Ent. 128; 2 Vent. 363; Hob. 87; Bac. Ab. tit. Universities*, 7th ed. See further *ante*, *Cognizance, Courts of the Universities*; and *post*, 4.

Before he defended, the defendant was formerly in certain cases entitled to demand one imparlance or *licentia loquendi*; and might before he pleaded have had more granted by consent of the court; to see if he could end the matter amicably without farther suit, by talking with the plaintiff; but imparlances seem to be now abolished in all actions commenced under the Uniformity of Process Act. See *Imparlance.*

There are also many other previous steps which may be taken by a defendant before he puts in his plea. He may, in real actions, demand a view of the thing in question, in order to ascertain its identity and other circumstances. See *View.* He may craveoyer of the bond, or other specialty upon which the action is brought; that is, to hear it read to him. See *Oyer.* In real actions also the tenant may pray in aid, or call for assistance of another, to help him to plead, because of the feebleness or imbecility of his own estate. Thus a tenant for life may pray in aid of him that hath the inheritance in remainder or reversion; and an incumbent may pray in aid of the patron and ordinary; that is, that they shall be joined in the action and help to defend the title. See *Aid Prayer.*

2. The plaintiff having declared (i. e. delivered his declaration), it is for the defendant to concert the manner of his defence. For this purpose he considers whether, on the face of the declaration, and supposing the facts to be true, the plaintiff appears to be entitled, in point of law, to the relief he seeks, and in the form of action which he has chosen. If he appears to be not so entitled in point of law, and this defect, either in the substance or the form of the declaration, i. e. as disclosing a case insufficient in the merits, or as framed in violation of any of the rules of pleading, the defendant is entitled to except to the declaration on such ground. In so doing, he is said to demur; and this kind of objection is called a *demurrer.*

A demurrer, (from the Latin *demorari*, or French *demorror*, 2 U 2

to "wait or stay.") imports, according to its etymology, that the objecting party will not proceed with the pleading, because no sufficient statement has been made on the other side, but will wait the judgment of the court whether he is bound to answer.

If the defendant does not demur his only alternative method of defence is to oppose or answer the declaration by matter of fact. In so doing he is said to plead (by way of distinction from demurring) and the answer of fact, so made, is called the *plea*.

Pleas are divided into pleas *dilatory* and *peremptory*; and this is the most general division to which they are subject.

Subordinate to this is another division. Pleas are either to the jurisdiction of the court,—in suspension of the action,—in abatement of the writ or declaration,—or in bar of the action; the three first of which belong to the dilatory class; the last is of the peremptory kind.

A plea to the jurisdiction is one by which the defendant excepts to the jurisdiction of the court to entertain the action.

A plea in suspension of the action is one which shows some ground for not proceeding in the suit at the present period, and prays that the pleading may be stayed until that ground be removed. The number of these pleas is small, and none of them is of ordinary occurrence in practice.

A plea in abatement is one which shows some ground for abating or quashing the original writ in a real or mixed action, or the declaration in a personal action, and makes prayer to that effect. The grounds for such plea are any matters of fact tending to impeach the correctness of the writ or declaration, i. e. to show that they are improperly framed, without at the same time tending to deny the right of action itself.

Besides these pleas in abatement, properly so called, there are others which take exception to the personal competency of the parties to sue or to be sued; these are not founded on any objection to the writ or declaration, and, therefore, do not fall within the definition which has been given of pleas in abatement; but as they offer, like them, a sort of formal objection, and do not tend to deny the right of action itself, they are considered as of the same general with that class of pleas, and pass under the same denomination.

The effect of all pleas in abatement, if successful, is, that the particular action is defeated. But, on the other hand, the right of suit itself is not gone; and the plaintiff, on resorting to a better form of writ or declaration, may maintain a new action, if the objection were founded on the form or tenor of those instruments; or if the objection were to the ability of the party, (as in last of the above examples,) a new action may be brought when that disability is removed.

Such is, in its principle, the doctrine of pleas in abatement; but the actual power of using these pleas has been much abridged, and the whole law relating to them consequently rendered of less prominent importance than formerly by the effect of modern alterations. Of these the principal are as follow: 1. A large proportion of these pleas was in former times founded on objections applying to the frame of the original writ exclusively of the declaration. By the recent statute (2 Wm. 4. c. 39.) abolishing the original writ in personal actions, this species of the plea is, in personal actions of course, absolutely extinguished; and in actions of every kind it had long been practically abrogated by certain rules of court in the reigns of George II. and George III. providing that over should no longer be granted of the original writ, that is, that the defendant should no longer be permitted to demand to hear it read in court for the purpose of founding an objection to its tenor. 2. One of the most frequent pleas in abatement has hitherto been that of misnomer, viz. that the plaintiff or defendant was misnamed in the writ or declaration. This plea of misnomer is abolished in personal actions by the late act 3 & 4 Wm. 4. c. 42. § 11. and a new mode of taking

the objection substituted. See *Misnomer*. 3. Another plea in abatement of the most ordinary occurrence was that of non-joinder of necessary party, of which an example is above given. This plea having been often adopted where the omitted party was abroad, or his residence unknown to the plaintiff, and its operation being in such cases of a very unfair kind, it is now provided by the same statute (§ 8.) that it shall henceforth be disallowed unless it contain an allegation that the defendant resides within the jurisdiction of the court, and be accompanied with an affidavit stating the place of residence. The effect of that provision will probably be to render the use of the plea of non-joinder considerably less frequent. See *Non-joinder*.

A plea in bar of the action may be defined as one which shows some ground for barring or defeating the action. A plea in bar is, therefore, distinguished from all pleas of the dilatory class, as impugning the right of action altogether, instead of merely tending to divert the proceedings to another jurisdiction, or suspend them or abate the particular writ or declaration. It is, in short, a substantial and conclusive answer to the action.

It follows from this property, that in general it must either deny all, or some essential part of, the averments of fact in the declaration; or, admitting them to be true, allege new facts which obviate or repel their legal effect. In the first case, the defendant is said, in the language of pleading, to traverse the matter of the declaration; in the latter, to confess and avoid it. Pleas in bar are consequently divided into pleas by way of traverse, and pleas by way of confession and avoidance. *Steph. on Plead.* 44—52.

A confession of the whole complaint is not very usual for then the defendant would probably end the matter sooner, or not plead at all, but suffer judgment to go by default. Yet sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt, and plead the tender; adding that he has always been ready, *tout temps prêt*, and still is ready, *encore prêt*, to discharge it. See *Tender*. But frequently the defendant confesses one part of the complaint (by a *cognovit actionem* in respect thereof,) and traverses or denies the rest, in order to avoid the expense of carrying that part to a formal trial which he has no ground to litigate. A species of this sort of confession is the payment of money into court. See *Money into Court*. To this head may also be referred the practice of what is called a set-off, whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand, b. & on the other, sets up a demand of his own, to counterbalance that of the plaintiff either in the whole or in part. See further *Set-off*.

Pleas that totally deny the cause of complaint, are either the general issue or a special plea in bar.

The general issue or general plea was, what traversed and denied at once the whole declaration, without offering any special matter whereby to evade it. As in trespass *contra vi et armis*, or on the case, not guilty in debt upon contract *nil (nil) debet*, "he owed nothing;" on an *assumpsit*, *non assumpsit*, "he made no such promise." These pleas were called the general issue; because, by importing an absolute and general denial of what was alleged in the declaration, they amounted at once to an issue; by which was meant a fact affirmed on one side and denied on the other. See further, *Issue*.

Formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a special plea; which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. But, special pleading

having been frequently perverted to the purposes of chicane and delay, the courts in some instances, and the legislature in many more, permitted the general issue to be pleaded, which left every thing open, the fact, the law, and the equity of the case; and allowed special matter to be given in evidence at the trial.

All effects having arisen from such laxity in pleading, the strictness of the ancient practice has been restored, and by the rules of *H. T. 4 Wm. 4.* the general issues are in effect abolished, for the traverses in personal actions heretofore known under that name are restricted to the denial of one or two points, instead of putting the whole declaration in issue, as was formerly the case. See *Issue, Non-assumpsit, Not Guilty, &c.*

The alteration, however, does not extend to cases where the general issue may be pleaded by statute, and the special matter given in evidence, as they are expressly excepted from the operation of the above rules.

Special pleas in bar of the plaintiff's demand are very various, according to the circumstances of the defendant's case. As, in real actions, which are now, with a few exceptions, abolished, a general release may destroy and bar the plaintiff's title; or, in personal actions, an accord, arbitration, conditions performed, nonage of the defendant, or some other fact which precludes the plaintiff from his action. A justification is likewise a special plea in bar; as in actions of assault and battery, *see assault de morte*, that it was the plaintiff's own original assault; in trespass that the defendant did the thing complained of in right of some office which warranted him so to do; or, in an action of slander, that the plaintiff is really as bad a man as the defendant said he was. See further, *Justification*.

The statutes of limitation may also be pleaded in bar, and cannot be given in evidence on the general issue; that is, the time limited by certain acts of parliament, beyond which no plaintiff can lay his cause of action; as to which see *Limitation of Actions*.

An estoppel is likewise a special plea in bar; which happens where a man hath done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary. See *Estoppel*.

No matter of defence arising after action brought can properly be pleaded in bar of the action generally, but it ought to be pleaded in bar of the further maintenance of the suit. *1 East, 502.*

The conditions and qualities of a plea (which, as well as the doctrine of estoppels, will also hold equally, *mutatis mutandis*, with regard to other parts of pleading), are: 1. That it be single and containing only one matter; for duplicity brings confusion. 2. That it be direct and positive, and not argumentative. 3. That it have convenient certainty of time, place, and persons. 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of trial.

Special pleas are usually in the affirmative, sometimes in the negative, but they always advance some new fact not mentioned in the declaration; and then they formerly must have been averred to be true, in the common form:—"and as he is ready to verify," which was not necessary in pleas of the general issue; those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

Now, by the rules of *H. T. 4 Wm. 4.* all special traverses, or traverses with an inducement of affirmative matter, shall now preclude the opposite party from pleading over to the defendant when the traverse is immaterial.

If a plea in bar, the defendant in the beginning formerly said, "That the plaintiff ought not to have or maintain his action against him;" and concluded to the action, viz. "He prays judgment if the plaintiff ought to have or maintain his

action against him," &c.; but these formal parts are no longer necessary.

A plea of a record ought to conclude, "And this he is ready to verify by the record," &c.

It is said, that the conclusion makes the plea; for if it begins in bar, and concludes in abatement, it is a plea in abatement. *Id. Raym. 337.*

It is a rule in pleading, that no man be allowed to plead specially such a plea as amounts only to the general issue, or a total denial of the charge; but in such case he shall be driven to plead the general issue, in terms; whereby the whole question is referred to a jury. But if the defendant, in an action of trespass, be desirous to refer the validity of his title to the court rather than the jury, he must state his title specially, and at the same time give colour to the plaintiff, or suppose him to have an appearance or colour of title, bad indeed in point of law, but of which the jury are not competent judges. See *Colour*; see also *Steph. on Plead.*

It hath already been observed, that duplicity in pleading must be avoided. Every plea must be simple, entire, connected, and confined to one single point; it must never be entangled with a variety of distinct independent answers to the same matter; which must require as many different replies, and introduce a multitude of issues upon one and the same dispute. For this would often embarrass the jury, and sometimes the court itself, and at all events would greatly enhance the expense of the parties.

But by the *4 Anne, c. 16. § 14.* a defendant in an action, or a plaintiff in replevin, with leave of the court, may plead as many several matters as he shall think necessary to his defence; and for that purpose he must apply for a rule to a judge, (*Rule T. T. 1 Will. 4.*) who has a discretion either to grant or refuse the application.

The *32 Geo. 3. c. 58. § 1.* enabling defendants in *quo warranto* to plead double, is, as well as the *9 Ann. c. 20.* confined to corporate officers. *9 East, 469.*

The court continues to exercise an authority over applications for pleading several matters only in order to prevent an oppressive use being made of the liberty given by the statute. *2 Bos. & Pull. 12.*

They will not allow non-assumpsit and alien enemy to be pleaded together. *2 Bos. & Pull. 72.*

To trespass and false imprisonment a plea of alien enemy not allowed to be pleaded, together with a special justification inconsistent therewith, and the general issue. *12 East, 206.*

A plea of tender to one count and of alien enemy to another cannot be pleaded together. *10 East, 326.*

Now by the rules of *H. T. 4 Wm. 4.* it is no longer necessary to state in a second or other plea or avowry that it is pleaded by leave of the court, or according to the form of the statute, or to that effect.

By the same rules, pleas, avowries, and cognizances founded on one and the same principal matter, but varied in statement, description, or circumstances only, (and pleas in bar in replevin are within the rule,) are not to be allowed.

Formerly it frequently was expedient to plead in such a manner as to avoid any implied admission of a fact which would not with propriety or safety be positively affirmed or denied. And this was done by what was called a protestation; whereby the party interposed an oblique allegation or denial of some fact, protesting (*protestando*) that such a matter did, or did not, exist; and at the same time avoiding a direct affirmation or denial. But by the rules of *H. T. 4 Wm. 4.* no protestation shall hereafter be made in any pleadings, but either party shall be entitled to the same advantages, in that or other actions, as if a protestation had been made. See *Protestation*.

When the plea of the defendant is thus put in, if it does not amount to an issue or total contradiction of the declaration, but only evades it, the plaintiff may plead again, and reply to the defendant's plea; either traversing it, that is,

totally denying it, as if on an action of debt upon bond the defendant pleads *solvit ad diem*, "that he paid the money when due," here the plaintiff in his replication may totally traverse this plea by denying that the defendant paid it; or he may allege new matter in contradiction to the defendant's plea, as when the defendant pleads no award made, the plaintiff may reply, and set forth an actual award, and assign a breach, or the replication may confess and avoid the plea, by some new matter or distinction, consistent with the plaintiff's former declaration; as, in an action for trespassing upon land whereof the plaintiff is seised, if the defendant shows a title to the land by descent, and that therefore he had a right to enter, and gives colour to the plaintiff, the plaintiff may either traverse and totally deny the fact of the descent; or he may confess and avoid it, by replying, that true it is that such descent happened, but that since the descent, the defendant himself demised the lands to the plaintiff for term of life. See *Replication, Traverse*. To the replication the defendant may rejoin, or put in an answer called a rejoinder. The plaintiff may answer the rejoinder by a sur-rejoinder; upon which the defendant may rebut, and the plaintiff answer him by a sur-rebutter. See for further information those titles in this Dictionary; also *Steph. on Plead.*; and 1 *Chit. on Plead.*

The whole of this process is denominated the pleading; in the several stages of which it must be carefully observed, not to depart or vary from the title or defence which the party has once insisted on. For this (which is called a departure in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the plea, without departing out of it. See *Departure*.

Yet in many actions the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh with all its specific circumstances, in such manner as clearly to ascertain and identify it consistently with his general complaint; which is called a new or novel assignment.

In consequence, however, of the recent alteration in pleading, new assignments will now be rarely necessary. See *New Assignment*.

In trespass, *quare clausum fregit*, if the defendant plead soil and freehold in another, by whose command he justifies the trespass, such command may be traversed by the plaintiff. 10 *East*, 65.

That which is alleged by way of inducement to the substance of the matter, need not be as certainly alleged as the substance itself. *Plond.* 81. He who pleads in the negative is not bound to plead so exactly as he who pleads in the affirmative. And that which a man cannot have certain knowledge of, he is not bound certainly to plead. *Plond.* 33, 80, 126, 129.

Where the matter is indifferent to be well or ill, and the party pleads over, the court will intend it well. *Mod. Cas.* 136. If there be a repugnancy in pleading, it is error. 2 *And.* 182; *Jenk. Cent.* 21. And a man shall not take advantage of his own wrong, by pleading, &c. *Cro. Jac.* 588. A man cannot plead anything afterwards which he might have pleaded at first. *Ibid.* 318. Surplusage shall never make the plea vicious, but where it is contrary to the matter before. *Raym.* 8.

Every man must plead such plea as is proper; but that need not be pleaded on one side which will come properly on the other. *Hob.* 3, 78, 162.

Where it is doubtful between the parties whether a plea be good or not, it cannot be determined by the court on motion, but there ought to be a demurrer to the plea; and on arguing thereof, the court will judge of the plea, whether good or bad; and no advantage can be had of double pleading, without special demurrer. But though the court is to judge of

pleading, they will not direct any person how to plead, notwithstanding the matter be difficult; for the parties must plead at their peril, and counsel are to advise, &c. *Lutw.* 322.

A plea may be amended, if it be but in paper, and not entered, paying costs. If, after the defendant hath pleaded, the plaintiff alters his declaration, the defendant may alter his plea. See *Amendment*.

Falsehood in a plea, if not hurtful to plaintiff nor beneficial to defendant, doth no injury; as it doth where detrimental to plaintiff, &c. 2 *Lil.* 297. Though if an attorney pleads a false plea by deceit, it is against his oath, and he may be fined. 1 *Salk.* 515.

Where a sham plea was pleaded calculated to raise issues requiring different modes of trial, the court suffered the plaintiff to sign judgment as for want of a plea, and made the defendant, or his attorney, pay the costs occasioned by the plea, and the costs of the rule for correcting the proceedings. 2 *B. & A.* 197. So also where the sham plea was such as to make it necessary for the plaintiff's attorney to consult counsel, and thereby cause delay and expense, the court suffered the plaintiff to sign judgment, and made the attorney pay the costs. 2 *B. & A.* 199.

Difficult questions are not allowed to be pleaded as sham pleas. 1 *Taunt.* 225. And see 10 *East*, 237; 1 *B. & C.* 286; 2 *B. & C.* 81.

Sham pleas are now very rarely in use, owing to the discouragement of the courts (see the cases above) and to the Writ of Error Act, 6 *Geo. 4. c.* 96. requiring bail in all cases of writs of error; for before that act the common course for delaying the plaintiff was to plead a sham plea, then withdraw it, and suffer judgment by default, and then bring a writ of error, on which formerly no bail, in general cases, was requisite. But now, bail being in all cases required, writs of error for delay are less frequent, and sham pleas are consequently much disused.

It is a common rule that a replication, when entire, which is bad as to part, is bad as to the whole. 1 *T. R.* 40. But the rule does not apply to any case where the objection is merely on account of the surplusage. 3 *T. R.* 374.

A replication to a plea of *ne unquus accouché*, in dower, alleging a marriage in Scotland, may conclude to the contrary; and in such replication it is not necessary to state that the marriage was had at any place in England, by way of venue. 2 *H. Black.* 145.

In replying to a plea of infancy the plaintiff must show enough in his replication to maintain every part of the declaration. 1 *T. R.* 40.

3. In any stage of the pleadings, when either side traverses or denies the facts pleaded by his antagonist, he usually tenders an issue, as it is termed; the language of which is different, according to the party by whom the issue is tendered, for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "and of this he puts himself upon the country;" thereby submitting himself to the judgment of his peers; but if the traverse lies upon the plaintiff, he tenders the issue, or prays the judgment of the peers against the defendant in another form; thus, "and this he prays may be inquired of by the country."

But if either side, (as, for instance, the defendant,) pleads a special negative plea, not traversing or denying any thing that was before alleged, but disclosing some new negative matter, as where the suit is on a bond, conditioned to perform an award, and the defendant pleads, negatively, that no award was made, he tenders no issue upon this plea; because it does not yet appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award, but when the plaintiff replies, and sets forth an actual specific award, if then the defendant traverses the replication, and denies the making of any such award, he then, and not before, tenders an issue to the plaintiff. For when in the course of pleading they come to a point, which is affirmed

on one side, and denied on the other, they are then said to be at issue; all their debates being at last contracted into a single point, which must then be determined either in favour of the plaintiff or of the defendant. *Raym.* 199.

An issue upon matter of law is called a demurrer; as to which see *Demurrer*.

An issue of fact is where the fact only, and not the law, is disputed. And when he that denies or traverses the fact, pleaded by his antagonist, has tendered the issue thus,—“and thus he prays may be inquired of by the country;” or, “and of this he puts himself upon the country,”—it may immediately be subjoined by the other party, “and the said A. B. doth the like.” Which done, the issue is said to be joined; both parties having agreed to rest the fate of the cause upon the truth of the fact in question. And this issue of fact is, generally speaking, determined not by the judges of the court, but by some other method; the principal of which methods is that by the country, *per pais*, (in Latin, *per patriam*), and, by jury. See *Jury, Trial*.

During the whole of the proceedings, from the time of the defendant's appearance in obedience to the king's writ, it is necessary that both the parties be kept or continued in court from day to day, till the final determination of the suit. For the court can determine nothing, unless in the presence of both the parties, in person or by their attorneys, or upon default of one of them, after his original appearance, and a time prefixed for his appearance in court again. Therefore in the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the time allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be nonsuit, or not to follow and pursue his complaint, and shall lose the benefit of his writ; or, if the negligence be on the side of the defendant, judgment may be had against him for such his default. And lately, after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day was continually given, and entered upon the record, for the parties to appear on from time to time, as the exigence of the case required. The giving of this day was called the continuance, whereby the proceedings were continued without interruption from one adjournment to another. If these continuances were omitted, the cause was thereby discontinued, and the defendant discharged *sine die*, without a day, for that term; for by his appearance in court he had obeyed the command of the king's writ, and, unless he were adjourned over to a certain day, he was no longer bound to attend upon that writ, but he must have been warned afresh, and the cause must have begun *de novo*.

Now, by the rules of *H. T. & Wm. 4.* no entry of continuance by way of *imparlance*, *curia advisari vult*, *vicecomes non venit*, or otherwise, shall be made, except the *jurata* upon the *jurata* in respectu, which is to be retained, but such regulation is not to alter or affect the times of proceeding in the cause.

It may sometimes happen that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter which it is proper for the defendant to plead, as that the plaintiff, being a *jointure*, is since married, or that she has given the defendant a release, or the like; here, if the defendant takes advantage of this new matter as early as he possibly can, viz. at the day given for his next appearance, he is permitted to plead it at what is called a *plea puis darrein continuance*, or, “since the last adjournment.” For it would be unjust to exclude him from the benefit of this new defence, when it was not in his power to make when he pleaded the former. But it is dangerous to rely on such a plea without due consideration, for it confesses the matter which was before in dispute between the parties. *Cro. Eliz.* 49. And it is not allowed to be put in, if any continuance has intervened between the arising of this fresh

matter and the pleading of it; for then the defendant is guilty of neglect, and is supposed to rely on the merits of his former plea. Also it is not allowed after a demurrer is determined, or verdict given; because then relief may be had in another way, namely, by writ of *audita querela*. *Cro. Jac.* 646. And these pleas, *puis darrein continuance*, when brought to a demurrer in law, or issue of fact, shall be determined in like manner as other pleas.

As to pleas *puis darrein continuance*, see further, *Tidd's Pract.* 847. (9th ed.)

In consequence of the abolition of continuances the rules of *H. T. & Wm. 4.* provide, that in all cases in which a plea *puis darrein continuance* was by law pleadable, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be; but no such plea is to be allowed unless accompanied by an affidavit that the matter arose within eight days next before the pleading, or unless the court or a judge shall otherwise order.

If, by the misconduct or inadvertence of the pleaders, the issue be joined on a fact totally immaterial, or insufficient to determine the right, so that the court, upon the finding, cannot know for whom judgment ought to be given, the court will award a *repleader*, *quod partes replacent*. As if, in an action on the case in assumpsit against an executor, he pleads that he himself (instead of the testator) made no such promise. *2 Vent.* 196. So if, in an action of debt on bond, conditioned to pay money on or before a certain day, the defendant pleads payment on the day; which issue, if found for the plaintiff, would be inconclusive, as the money might have been paid before. *Str.* 994. Unless it appears from the whole record that nothing material can possibly be pleaded in any shape whatsoever, and then a repleader would be fruitless. *4 Burr.* 301, 302. And whenever a repleader is granted, the pleadings must begin *de novo* at that stage of them, whether it be the plea, replication, or rejoinder, &c. wherein there appears to have been the first defect or deviation from the regular course. *Raym.* 453; *Salk.* 579. See further, tit. *Repleader*.

The pleadings were formerly all written, as indeed all public proceedings were, in Norman or law French; and even the arguments of the counsel and decisions of the court were in the same barbarous dialect. An evident and shameful badge, it must be owned (says Blackstone), of tyranny and foreign servitude, being introduced under the auspices of William the Norman and his sons. This continued till the reign of Edward III., who, having employed his arms successfully in subduing the crown of France, thought it unbeseeming the dignity of the victors to use any longer the language of a vanquished country. By the 36 *Edw. 3.* c. 15. it was therefore enacted, that for the future all pleas should be pleaded, shown, defended, answered, debated, and judged in the English tongue, but be entered and enrolled in Latin. The practisers, however, being used to the Norman language, and therefore imagining that they could express their thoughts more aptly and more concisely in that than in any other, still continued to take their notes in law French; and of course, when those notes came to be published under the denomination of reports, they were printed in that dialect. *3 Comm.* c. 21.

The learned commentator then proceeds to show the necessity, and in some measure the propriety, of these ancient law languages; and afterwards thus proceeds in the history of the change of that used in pleadings and records —

This technical Latin continued in use from the time of its first introduction till the subversion of our ancient constitution under Cromwell, when, among many other innovations in the law, some for the better, and some for the worse, the language of our records was altered and turned into English. But at the restoration of King Charles II. this novelty was

no longer countenanced; the practisers finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued, without any sensible inconvenience, till about the year 1730, when it was again thought proper that the proceedings at law should be done into English; and it was accordingly so ordered by stat. 4 Geo. 2. c. 26. This provision was made, according to the preamble of the statute, that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings, the judgment and entries in a cause. Which purpose has, it is to be feared, not been very completely answered. On the other hand, these inconveniences have already arisen from the alteration, that now many clerks and attorneys are hardly able to read, much less to understand, a record, even of so modern a date as the reign of George I. And it has much enhanced the expense of all legal proceedings; for since the practisers are confined (for the sake of the stamp duties, which are thereby considerably increased) to write only a stated number of words in a sheet; and as the English language, through the multitude of its particles, is much more verbose than the Latin, it follows that the number of sheets must be very much augmented by the change. The translation also of technical phrases, and the names of writs and other process, were found to be so very ridiculous (a writ of *nisi prius*, *quare impedit*, *feri facias*, *habeas corpus*, and the rest, not being capable of an English dress with any degree of seriousness) that in two years' time it was found necessary to make a new act, 6 Geo. 2. c. 14; which allows all technical words to continue in the usual language, and has thereby almost defeated every beneficial purpose of the former statute.

What is said of the alteration of language by stat. 4 Geo. 2. c. 26. will hold equally strong with respect to the prohibition of using the ancient immutable court hand in writing the records or other legal proceedings, whereby the reading of any record that is fifty years old is now become the object of science, and calls for the help of an antiquarian. But that branch of it, which forbids the use of abbreviations, seems to be of more solid advantage in delivering such proceedings from obscurity.

Demurrers, or questions concerning the sufficiency of the matters alleged in the pleadings, are to be determined by the judges of the court, upon solemn argument; and to that end a demurrer-book is made up, containing all the proceedings at length, which are afterwards entered on record; and copies thereof, called paper-books, are delivered to the judges to peruse. But no entry on record of the proceedings in error is now necessary before setting down the case for argument.

An issue of fact takes up more form and preparation to settle it; for here the truth of the matters alleged must be solemnly examined and established by proper evidence in the channel prescribed by law. To which examination of facts the name of trial is usually confined. As to which see titles, *Trial*, *Jury*, &c.

4. It is now settled, that where the defendant has appeared, or filed bail, upon any kind of process, returnable the first or second return of any term, if the plaintiff declare in London or Middlesex, and the defendant live within twenty miles of London, the declaration should be delivered or filed absolutely, with notice to plead within four days; or in case the plaintiff declare in any other county, or the defendant live above twenty miles from London, within eight days exclusive after the delivery or filing thereof; and the defendant must plead accordingly, or in default thereof the plaintiff may sign judgment. *Rule Trin. 5 & 6 Geo. 2. (a.)*

Where the defendant has not appeared, or filed bail, the rule is, that "upon all process returnable before the last return of any term, where no affidavit is made and filed of the cause of action, the plaintiff may file or deliver the de-

claration *de bene esse*, at the return of such process, with notice to plead in eight days exclusive, after the filing or delivery thereof;" *Rule Trin. 22 Geo. 3.* (and see *Rule Mich. 10 Geo. 2.*) being the same time as is allowed for the defendant to appear and file common bail; and "if the defendant do not file common bail, and plead within the said eight days, the plaintiff, having filed common bail for him, may sign judgment for want of a plea." *Rule Trin. 22 Geo. 3.* But if the declaration be not filed until after the return of the process, the defendant has eight days to plead, from the time of filing it, whenever it may be. And "upon all such process, where an affidavit is made and filed of the cause of action, the declaration may be filed or delivered *de bene esse*, at the return of such process, with notice to plead in four days after the filing or delivery, if the action be laid in London or Middlesex, and the defendant live within twenty miles of London; and in eight days, if the action be laid in any other county, or the defendant live above twenty miles from London;" *Rule Trin. 22 Geo. 3.* being the same time as is allowed for pleading where the declaration is delivered or filed absolutely. And, "if the defendant put in bail, and do not plead within such times as are respectively before mentioned, judgment may be signed." *Same Rule.* But in all the foregoing cases the declaration should be delivered, or filed, and notice thereof given, four days exclusive before the end of the term; a rule to plead duly entered, and a plea demanded, when necessary. *Rules Tr. n. 5 & 6 Geo. 2. b.; Mich. 10 Geo. 2. Reg. 2.; Trin. 22 Geo. 3.*

Formerly, unless the plaintiff declared within certain prescribed times, the defendant was entitled to an imparlance, or, in other words, was allowed another term to plead in. But since the 2 Will. 4. c. 39. it is conceived that in actions commenced by the process prescribed by that act, these imparlances are wholly put an end to, and such at least is the present practice. 1 *Archbold's Pract. by Chitty*, 232.

To prevent surprise on the defendant, if four terms have elapsed since the delivery or filing of the declaration, the defendant shall have a whole term's notice to plead before judgment can be entered against him. *Rule Trin. 6 & 6 Geo. 2. b.* Unless the cause have been stayed by injunction or privilege; and the notice in such case must be given before the first day of term; but it does not extend beyond the term; and therefore a rule to plead may be entered, and judgment signed, in the vacation. 2 *1 R.* 10.

It remains to be observed, within what time the defendant must plead after changing the venue, demand of oyer, or amending the declaration. After changing the venue the defendant must plead to the new action, as he should have done in the other, without delay. *Rule Mich. 10 Geo. 2. § 5.* After the delivery of oyer, the defendant shall have the same time to plead as he had when he demanded it. See *Oyer*. And if the plaintiff amend his declaration, the defendant shall have two days, exclusive of the day of amendment, to enter his first plea, or plead *de novo*. *Rule Trin. 5 & 6 Geo. 2.*

When an order for the delivery of particulars has been drawn up and served, it operates as a stay of proceedings from the time of service until particulars have been delivered. 7 *D. & R.* 458; 4 *B. & C.* 970, *S. C.*; 5 *B. & C.* 769. A summons for particulars does not, of itself, operate as any stay of proceedings; but by a rule of *H. 1. 2* 16, "a defendant shall be allowed the same time for pleading after the delivery of particulars under a judge's order, which he had at the return of the summons; nevertheless judgment shall not be signed till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by a judge."

If the defendant be not ready to plead by the expiration of the time allowed him for that purpose, his attorney or agent should take out a summons and serve it upon the plaintiff's attorney or agent, requiring him to attend a judge,

and show cause why the defendant should not have further time to plead. When the summons is taken out, and made returnable before the expiration of the time for pleading, it is a stay of proceedings pending the application; but it is otherwise when taken out or made returnable after the expiration of the time for pleading; nor will it operate as a stay of proceedings where the object of it is collateral to the time for pleading; as to discharge the defendant out of custody upon common bail, &c.

The plaintiff's attorney or agent, on being served with the summons, either endorses his consent to an order being made upon it, attends the judge, or makes default. In the latter case, the defendant's attorney or agent, after waiting an hour, should take out a second summons, and after that a third (if necessary), which should be respectively served and attended as the first. And if default be made upon three summonses, the judge, on affidavit thereof, will make an order *ex parte*. But if any one of the summonses be attended, the judge will make an order upon, or discharge it, as he sees cause; and if he make an order for a month's time to plead, it is understood to mean a lunar, and not a calendar month.

The order of a judge for time to plead must be served in like manner as the summons. And it is either upon or without terms. The usual terms are, pleading *issuably*, rejoining *gratis*, and taking short notice of trial or inquiry. And where the defendant is an executor or administrator, he must undertake not to plead any judgment obtained against him, since his time for pleading was out; for otherwise he might confess judgments in the mean time, and plead them in bar to the plaintiff's demand.

An issuable plea is a plea in chief to the merits, upon which the plaintiff may take issue, and go to trial. Therefore a plea in abatement is not an issuable plea, nor a false plea of judgment recovered, or other plea which does not go to the merits. But a plea of tender has been deemed an issuable plea, and also a plea of the statute of limitations, or that a bail-bond was taken for ease and favour. As to demurrers, there is a distinction between a real and fair demurrer and a demurrer without good cause: the former is an issuable plea, within the meaning of a judge's order; the latter is not, but only an evasion of it. By rejoining *gratis*, is meant rejoining without the common four-day rule to rejoin. Short notice of trial, in country causes, must be given at least four days before the commission-day; one day exclusive, and the other day inclusive. *Rule East. 30 Geo. 3: H. T. 2 Wm. 4.* In town causes two days' notice seems to be sufficient; but it is safer to give as much more as the time will admit of. The defendant, however, is not precluded by these terms from demurring to the replication, if there be good cause. *Rule Trin. 5 & 6 Geo. 2. b.*

Where the defendant is under a judge's order to plead *issuably*, and pleads a plea which is not issuable, the plaintiff may consider it as a mere nullity, and sign judgment; and where several pleas are pleaded, one of which is not issuable, it will vitiate all the others. But where it is doubtful whether the plea be issuable, the better way, in term time, is to move the court to set it aside.

Of the Rule to plead, and Demand of a Plea.

If a defendant be bound by rule of court, or order of a judge, to plead by a time therein limited, it is incumbent on him to do so, although the plaintiff do not enter any rule to plead, or call for a plea. *Rule Trin. 5 & 6 Geo. 2.* With a single exception, the plaintiff must in all cases enter a rule to plead, whether the defendant have appeared or not; and where the defendant has appeared, he must also demand a plea before he can sign judgment.

The Rule to plead is the order of the court, and may be entered, at any time after the delivery, or filing or notice of the declaration, in term, or within four days after; and San-

day is a day within this rule, unless it be the first or last. Anciently there were two rules given, of four days each; the first *ad respondendum*; the second, *ad respondendum peremptoriè*. These were afterwards converted into one eight-day rule; but now, "four days only shall be allowed the defendant from the time of giving any rule to plead;" *Rule Trin. 1 Geo. 2*; which four days expire before, with, or after the time for pleading. If they expire before, the plaintiff must wait till the expiration of the time for pleading, before he can sign judgment for want of a plea; but if they expire with or after that time, "the plaintiff is at liberty to sign his judgment the day after the rule for pleading is out; the declaration having been regularly delivered or filed, and the defendant or his agent being called upon for a plea." *Rule Hil. 2 Geo. 2. Reg. 3.*

When a rule to plead has been once entered, and the cause stands over to another term, without any further proceeding, a new rule to plead should regularly be entered in that term to entitle the plaintiff to sign judgment; for all judgments must be entered the same term in which rules are given. Where the declaration is amended, if a rule to plead be entered the same term the amendment is made, though before such amendment, it is sufficient; otherwise a new rule to plead must be entered. And where the plaintiff, after giving a rule to plead, has been delayed by injunction, he may sign judgment after the injunction is dissolved, without a new rule.

The demand of plea is a notice in writing from the plaintiff's attorney; and, except where the defendant is in custody of the sheriff, &c. must be made in every case where the defendant has appeared. But before the defendant has appeared, or after the plaintiff has entered an appearance, or filed common bail for him, according to the statute, or where the defendant is in custody of the sheriff, &c. the demand of a plea is unnecessary. It is usually made pending the time for pleading; and the plaintiff cannot sign judgment till the expiration of twenty-four hours from the time of making it.

By one of the rules of *H. T. 2 Wm. 4.* "judgment for want of a plea after demand may, in all cases, be signed at the opening of the office in the afternoon of the day after that in which the demand was made, but not before.

II. WHEN a criminal is indicted for felony, &c. he ought not to be allowed to plead to the indictment till he holds up his hand at the bar, which is in nature of an appearance. See *Trial*.

The plea of a prisoner, or defensive matter alleged by him on his arraignment, if he does not confess or stand mute, may be either a Plea to the jurisdiction, a Demurrer, a Plea in Abatement, a special Plea in Bar, or the General Issue. See *4 Comm. c. 26.*

Formerly there was another plea, that of Sanctuary, now abrogated; and as to which see tit. *Sanctuary*.

The Benefit of Clergy used also formerly to be pleaded before trial or conviction, and was called a *Declaratory Plea*; which was the name also given to that of Sanctuary. *2 Hal. P. C. 236.* But as the prisoner upon a trial had a chance to be acquitted and totally discharged, and, if convicted of a clergyable felony, was entitled equally to his clergy after as before conviction, this course was extremely disadvantageous, and therefore the benefit of clergy was very rarely pleaded; but if found requisite, was prayed by the convict before judgment was passed upon him.

By the 7 & 8 Geo. 4. c. 28. § 6. benefit of clergy was altogether abolished. See *Judgment (Criminal), Clergy, Benefit of*.

A Plea to the Jurisdiction is, where an indictment is taken before a court that has no cognizance of the offence; as if a man be indicted for a rape at the sheriff's tourn, or for treason at the Quarter-sessions: in these or similar cases, he

may except to the jurisdiction of the court, without answering at all to the crime alleged. 2 *Hal. P. C.* 256.

A *Demurrer* is incident to criminal cases as well as to civil. See *Demurrer to Indictments*.

A *Plea in Abatement* was principally for a misnomer, a wrong name, or a false addition to the prisoner. Now, however, by the 7 *Geo. 4. c. 64. § 19.* no indictment or information shall be abated by misnomer, or want of addition, or wrong addition of the defendant; but the court may forthwith cause the indictment, &c. to be amended according to the fact.

Special Pleas in Bar go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: A *former Acquittal*; A *former Conviction*; A *former Attainder*, or A *Pardon*.

First, The plea of *autrefois acquit*, or a *former acquittal*, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal on an appeal was formerly a good bar to an indictment on the same offence. And so also was an acquittal on an indictment a good bar to an appeal by the common law; and, therefore, in favour of appeals, a general practice was introduced, not to try any person on an indictment of homicide, till after the year and day, within which appeals may be brought, were passed; by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which inconvenience the stat. 3 *Hen. 7. c. 1.* enacted, that indictments should be proceeded on immediately, at the king's suit, for the death of a man, without waiting for bringing an appeal; and that the plea of *autrefois acquit* on an indictment should be no bar to the prosecuting of any appeal. See *Appeal*, I. (now abolished); and, at large, 2 *Hawk. P. C. c. 35.*

The true test by which the question, whether such a plea is a sufficient bar in any particular case may be tried, is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. 1 *B. & B.* 473. And see 9 *East*, 437; 2 *C. & P.* 634.

Secondly, The plea of *autrefois convict*, or a *former conviction*, for the same identical crime, though no judgment was ever given, or perhaps will be, is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held, that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. See 2 *Hawk. P. C. c. 36. § 10, &c.*

It is to be observed, that the pleas of *autrefois acquit*, and *autrefois convict*, or a *former acquittal*, and *former conviction*, must be upon a prosecution for the same identical act and crime.

But the case was otherwise in the plea of *autrefois attaind*, or a *former attainder*; which, until recently, was a good plea in bar, whether it were for the same or any other felony. For wherever a man was attainted of felony, by judgment of death, either upon a verdict or confession, by outlawry, or, heretofore, by abjurcation; and whether upon an appeal or an indictment; he might have pleaded such attainder in bar to any subsequent indictment or appeal for the same or for any other felony. 2 *Hawk. P. C. c. 36. § 1.* And this because generally such proceeding on a second prosecution could not be to any purpose; for the prisoner was dead in law by the first attainder, his blood was already corrupted,

and he had forfeited all that he had; so that it was absurd and superfluous to endeavour to attain him a second time. But to this general rule, however, as to all others, there were some exceptions; wherein *cessante ratone, cessat et ipso iure*. As, where the former attainder was reversed for error, for then it was the same as if it had never been. And the same reason held where the attainder was reversed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. Where the attainder was upon indictment, such attainder was no bar to an appeal, for the prior sentence was pardonable by the king; and if that might be pleaded in bar of the appeal, the king might in the end defeat the suit of the subject, by suffering the prior sentence to stop the prosecution of a second; and then, when the time of appealing was elapsed, granting the delinquent a pardon. An attainder in felony was no bar to an indictment of treason, because not only the judgment and manner of death were different, but the forfeiture was more extensive and the land went to different persons. Where a person attainted of one felony was afterwards indicted as principal, in another, to which there were also accessories, prosecuted at the same time; in that case it was held, that the plea of *autrefois attaind* was no bar, but he should be compelled to take his trial for the sake of public justice; because the accessories to such second felony could not be convicted till after the conviction of the principal. *Poph.* 107. But see *Accessory*. And from these instances it might be collected that the plea of *autrefois attaind* was never good, but when a second trial would be quite superfluous. See 2 *Hawk. P. C. c. 36. § 1—10.*

Now, however, the plea of *autrefois attaind* is, in effect, at an end; for by the 7 & 8 *Geo. 4. c. 28. § 4.* attainder is no longer a bar, unless for the same offence as that charged in the indictment.

Lastly, A pardon may be pleaded in bar; as at once destroying the end and purpose of the indictment by releasing that punishment which the prosecution is calculated to inflict. See *Pardon*.

Though in civil actions, when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another, if that be determined against him: (as, for an action of debt, the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, *nil debet*, as he might at first, or he has made his election what plea to abide by, and it was his own folly to choose a rotten defence;) yet in criminal prosecutions, *in favorem vite*, as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court; still he shall not be concluded or convicted thereon, but shall have judgment of *respondent dabit*, and may plead over to the felony the general issue, *not guilty*. 2 *Hal. P. C.* 239. For the law allows many pleas by which a prisoner may escape death; but only one plea in consequence whereof it can be inflicted; viz. on the general issue, after an impartial examination and decision of the facts, by the unanimous verdict of a jury.

The general issue, or plea of *Not Guilty*, then, is the only plea upon which the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot plead that he was in his own defence against a robber on the highway or a burglar; but he must plead the general issue, *Not guilty*, and give this special matter in evidence. For (besides that these pleas do in effect amount to the general issue, since, if true, the prisoner is most clearly not guilty,) as the facts of treason are laid to be done *proditore et contra tigeantem sua debitum*; and, in felony, that the killing was done *fel m. et* these charges, of a traitorous or felonious intent, are the points and very gist of the indictment, and must be answered

of Magna Charta; if they are distrained, they shall have a special writ on the statute to discharge them. *Magna Charta*, 9 Hen. 3. c. 8. But if the plaintiff sue the sureties in C. B., where the principal is sufficient to pay the debt, whether the sureties may plead that, and aver that the principal debtor is sufficient to pay it, or whether they shall have a writ to the sheriff not to distrain in such a case, hath been made a question. *New Nat. Br.* 306. It was adjudged (*Pasch. 43 Edw. 3.*) that the writ *de plegiis acquietandis* lieth without any specialty showed thereof, as it has been held, that a man shall have an action of debt against him who becometh pledge for another, upon his promise to pay the money, without any writing made of it. *New Nat. Br.* 270, 304.

But notwithstanding these old authorities, there seems now little doubt that a man may maintain his action against the surety, as soon as the cause of action accrues, without any regard to the circumstances of the principal. And it hath been determined, that if a surety in a bond pays the debt of the principal, he may recover it back from the principal, in an action of assumpsit for so much money paid and advanced to his use. 2 T. R. 105.

PLENA FORISFACTURA. A forfeiture of all that one hath, &c. See *Forfeiture*.

PLENARTY. The abstract of the adjective *plenus*, and is used in common law in matters of benefices, where a church is full of an incumbent; plenarty and vacation, or avoidance, being direct contraries. *Staundf. Prærog.* c. 8. f. 32; *stat. Westm.* 2. c. 5. A clerk inducted may plead his patron's title, and being instituted by the space of six months, his patron may plead plenarty against all common persons. *Plowd.* 501. Institution by six months, before a writ of *quare impedit* brought, is a good plenarty against a common person; but plenarty is no plea against the king, till six months after induction. *Co. Lit.* 119, 344. Plenarty for six months is not generally pleadable against the king, because he may bring *quare impedit* at any time, and *nullum tempus occurrit regi*; though if a title devolves to the king by lapse, and the patron presents his clerk by usurpation, who is instituted and inducted, and enjoys the benefice for six months, this is such a plenarty as deprives the king of his presentation. 2 Inst. 361. And plenarty by six months after institution is a good plea against the queen consort, although she claims the benefice of the king's endowment. *Wood's Inst.* 160. Upon collation of a bishop by lapse, plenarty is not pleadable; for the collation doth not make a plenarty, by reason the bishop would be judge in his own cause; the bishop must certify whether the church is full or not; and his collation is interpreted to be no more than to supply the cure till the patron doth present; and it is for this cause a plenarty by collation cannot be pleaded against the right patron; but, by collation, plenarty may be a bar to any lapse of the archbishop and to the king, though it is no bar to the right patron. 6 Rep. 50; *Co. Lit.* 344; *Cro. Jac.* 207. Plenarty or not shall be tried by the bishop's certificate, being acquired by institution, which is a spiritual act; but in a *quare impedit*, the plenarty must be tried by a jury. 6 Rep. 49.

By the common law, where a person is presented, instituted, and inducted to a church, the church is full, though the person presented be a layman; and shall not be void but from the time of the deprivation of the incumbent for his incapacity. *Count. Pars. Compan.* 99. See *Adwoson, Parson, Quare Impedit*.

PLENE ADMINISTRATIVIT. A plea pleaded by an executor or administrator, where they have administered the deceased's estate faithfully and justly before the action brought against them. See further, *Executor*, VI. 1, 2.

PLEVIN. See *Replevin*.

PLIGHT. An old English word, signifying sometimes the estate, with the habit and quality of the land; and extends to rent-charge, and to a possibility of dower. *Co. Lit.* 221 b.

PLONKETS. A kind of coarse woollen cloth. See 1 Rich. 3. c. 8.

PLOUGH-ALMS, elemosyna aratralis. Anciently 1d. paid to the church for every plough-land. *Mon. Angl.* i. 256.

The plough-alm was a kind of oblation, being most commonly a penny for every plough, to be paid between Easter and Whitsuntide. 2 Sult. 177.

PLOUGH-BOTE. A right of tenants to take wood to repair ploughs, carts, and harrows, and for making rakes, forks, &c. See 2 Comm. 35.

PLOUGH-LAND. Is the same with a hide of land; and a hide or plough-land, it is said, do not contain any certain quantity of acres; but a plough-land, in respect of repairing the highway, was settled at 50l. a year, by the 7 & 8 H. 3. c. 29.

PLOUGH-SILVER. In former times was money paid by some tenants, in lieu of service to plough the lord's lands. *W. Jones*, 280. See *Socage, Tenure*.

PLURALITY, pluralitas. Signifies the plural number; mostly applied to such clergymen who have more benefices than one; and *Selden* mentions trialities and quadralities, where one person hath three or four livings. *Seld. Tit. Hon.* 687.

Plurality of livings is where the same person claims two or more spiritual preferments, with cure of souls; in which case the first is void *ipso facto*, and the patron may present to it, if the clerk be not qualified by dispensation, &c.; for the law enjoins residence, and it is impossible that the same person can reside in two places at the same time. *Count. Pars. Compan.* 94.

By the canon law, no ecclesiastical person can hold two benefices with cure *simul et semel*; but that upon taking the second benefice, the first is void; but the Pope, by usurpation, did dispense with that law; and at first, every bishop had power to grant dispensations for pluralities, till it was abrogated by a general council, held anno 1273; and this constitution was received till the statute 21 Hen. 8. c. 13 *Moor*, 119.

By 21 Hen. 8. c. 13, if any parson having one benefice with cure, of the yearly value of 8l. or above, in the king's books, accept of another benefice with cure, and is instituted and inducted, the first benefice is declared void; so that there may be a plurality within the statute, and a plurality by the canon law. 2 Lutw. 1306. By 36 G. 2. c. 33, curacies augmented by Queen Anne's bounty are to be considered as benefices.

The power of granting dispensations to hold two benefices with cure, &c. is vested in the king by the aforesaid statute; and it has been adjudged, that a dispensation is not necessary for a plurality, where the king presents his chaplain to a second benefice; for such a presentment imports a dispensation, which the king hath power to grant, as supreme ordinary; but if such a chaplain be presented to a second benefice by a subject, he must have a dispensation, before he is instituted to it. 1 Salk. 161.

The archbishop's dispensation and king's confirmation regularly are necessary to hold pluralities; and the 21 Hen. 8. c. 13. ought to be construed strictly, because it introduces non-residence and plurality of benefices against the common law. *Jenk. Cent.* 272.

A man, by dispensation, may hold as many benefices without cure as he can get, and likewise so many with cure as he can get, all of them, or all but the last, being under the value of 8l. per annum in the king's books, if the person to be dispensed withal be not incapable thereof. Yet if a dispensation is made to hold three benefices with cure, whereof the first is of the yearly value of 8l., the dispensation is void, unless it be in case of the king's chaplains, &c. who may hold three benefices with cure, above the value of 8l. a year, where one of them is in the king's gift. *Hob.* 148.

If there be two parsons of one church, and each parson

hath the entire cure of the parish, and their benefices be severally of the value of 8*l.* per annum, if one dies, and the other succeeds, this is a plurality within the statute. *Cro. Car.* 456. And though the act mentions instituted and inducted, when one is instituted into the second church, the dispensation to hold two benefices comes too late, though he be afterwards inducted; for by institution the church is full of the incumbent. 4 *Rep.* 79.

By the statute, if the first benefice be of the value of 8*l.* a year or more, by the acceptance of a second it is actually void to all intents; but benefices under that value, being not within the statute, are only avoidable by accepting a second, and not void on such plurality without a declaratory sentence, &c. *Mull. v. Q. Impet.* 104. In these cases it hath been held, that the value of livings, to make a plurality, shall be determined by the king's books in the First-fruits Office; though the court hath been divided whether the value should be taken as it was in the king's books, or according to the true value of the living. 2 *Lutw.* 1801.

The 59 *Geo.* 3. c. 40. secured spiritual persons in the possession of benefices in certain cases which had occurred, where being possessed of two benefices (under dispensation) they had afterwards, without previously resigning either of such benefices, obtained a new dispensation to hold another benefice, with one of their former benefices, by which means such second dispensation might have become invalid, and one or both of such benefices rendered void.

See further, *Advowson, Chaplain, Parson, Residence, Taxatio Ecclesiastica.*

PLURIES, many times.] A writ that issues in the third place, after two former writs have been disobeyed. See *Capas*.

POCKET SHERIFF. A person appointed by the king himself to be sheriff, who is not one of the three nominated in the Exchequer. See *Sheriff*.

POCKET OF WOOL. A quantity of wool, containing half a sack. 3 *Inst.* 96.

POUNDING. The Scotch term for taking goods, &c. in execution, or by way of distress. It is defined to be "the diligence (process) which the law hath devised for transferring the property of the debtor to the creditor in payment of his debt." It is either real or personal, not that any interest is conveyed by pounding; but real pounding is a power of carrying off the effects on the ground in payment of such debts as are *debta fundi* or heritable; personal pounding is the pounding of moveables for debt, or for rent, &c. There is also a species of pounding by attaching cattle trespassing. See 3 *Geo.* 3. c. 74. § 5; and tit. *Distress*.

POISON. The killing a person by poisoning was heretofore held more criminal than any other murder, because of its secrecy, which prevents defence against it, whereas most open murders give the party killed some opportunity of resistance. For this reason, offenders guilty of poisoning any person, were anciently judged to a severer punishment than other offenders. See 3 *Nels. Abr.* 363.

Richard Roose (otherwise Cooke) was attainted of high treason, for putting poison into a pot of pottage boiling in the Bishop of Rochester's kitchen, by which two persons were poisoned; and there was a particular statute made for his punishment, viz. by the 22 *Hen.* 8. c. 9, it was enacted, that he should be boiled to death; and that in future wilful murder, by poisoning, should be adjudged treason; but this act was repealed by the general operation of the acts of Edward VI. and Queen Mary, repealing all new treasons. See *Treason*.

If a man persuade another to drink a poisonous liquor, under the notion of a medicine, who afterwards drinks it in his absence; or if A., intending to poison B., put poison into a flagon, and deliver it to D., who knows nothing of the matter, to be by him delivered to B., and D. innocently delivers it accordingly, in the absence of A., in this case the procurer

of the felony is as much a principal as if he had been present when it was done. And so likewise all those seem to be, who are present when the poison was infused, and privy and consenting to the design; but persons, who only abet their crime by command, counsel, &c., and are absent when the poison was infused, are accessories only. 2 *Hawk. P. C.* c. 29. § 11. See further, *Accessory, Homicide, II.*

POLE. See *Perch*.

POLEIN. Was a shoe sharp or picked, and turned up at the toe; it first came in use in the reign of William Rufus, and by degrees became of that length, that in Richard the Second's time they were tied up to the knees with gold or silver chains; they were restrained anno 4 *Edm.* 4, but not wholly laid aside till the reign of Henry VIII. See *Mabne. in Vit. Wil.* 2.

POLICE, not improbably from Πολις, a city.] The term public police and economy is applied by Blackstone to signify the due regulation and domestic order of the kingdom; but is more generally applied to the internal regulations of large cities and towns, particularly of the metropolis, whereby the individuals of the state, generally speaking, or of any town or city within itself, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners, and to be decent, industrious, and inoffensive in their respective situations. See 4 *Comm.* c. 13. p. 162.

The police of the metropolis (says an author who wrote on this subject with great accuracy, and after much research,) is a system highly interesting to be understood; but a vast proportion of those who reside in the capital, as well as the multitude of strangers who resort to it, have no accurate idea of the principles of organization which move so complicated a machine—establishing those conveniences and accommodations, and preserving that regularity which prevails in the particular branches of power, which may be denominated municipal regulations. These relate to paving, watching, lighting, cleansing, and removing nuisances, furnishing water, the mode of building houses, the system established for extinguishing fires, and for regulating coaches, carts, and carriages, with a variety of other useful improvements tending to the comfort and convenience of the inhabitants. See *Colquhoun's Treatise on the Police of the Metropolis*.

To administer that branch of the police which is connected with the prevention and suppression of crimes, twenty-six magistrates, namely, the lord mayor and aldermen, sit in rotation every forenoon, and take cognizance of all complaints within the ancient jurisdiction of the city of London. See *London*.

Provisions were made to prevent depredations on the Thames, by the acts 39 & 40 *Geo.* 3. c. 87; 42 *Geo.* 3. c. 76; 47 *Geo.* 3. c. 1. c. 37; and 54 *Geo.* 3. c. 187, usually called the *Thames Police Acts*. And see 3 & 4 *Wm.* 4. c. 49. *post*.

The duty of these stipendiary magistrates (in conjunction with the county magistrates) extends also to several judicial proceedings, where, in various instances, they are empowered and required to hear and determine offences in a summary way; particularly in cases relating to the customs and excise, game-laws, pawnbrokers, labourers, and apprentices, &c. They act ministerially in licensing and regulating public-houses, punishing vagrants, removing the poor, &c. &c. And ex parte into complaints in criminal cases, capital and others, for the purpose of sending them to superior tribunals for trial.

These extensive duties, and others, which it is to be wished these magistrates could perform towards the prevention of crimes, the author of the above treatise thinks would be much facilitated, by the establishment of a fund, from whence to bestow rewards on constables and others for detecting, and on accomplices for discovering, offenders.

The following abstract of the *Civil Municipal Regulations* of the police of the metropolis above alluded to, and the

various statutes by which they are regulated, is extracted and corrected from the same author:—

The metropolis having by degrees been extended so far beyond its ancient limits, every parish, hamlet, liberty, or precinct, now contiguous to the cities of London and Westminster, may be considered as a separate municipality; where the inhabitants regulate the police of their respective districts, raise money for paving the streets, and assess the householders for the interest thereof, as well as for the annual expense of watching, cleansing, and removing nuisances and annoyances. These funds, as well as the execution of the powers of the different statutes creating them, (excepting where the interference of magistrates is necessary,) are placed in the hands of trustees; of whom, in many instances, the churchwardens or parish officers, for the time being, are members *ex officio*; and, by these different bodies, all matters relating to the immediate safety, comfort, and convenience of the inhabitants, are managed and regulated; under the provisions of statutes made in the last and present reign, as well public as private, applicable to the metropolis in general, and to the various parishes, hamlets, and liberties in particular; former statutes for these purposes having been found inadequate.

The 10 Geo. 2. c. 22, established a system for paving, lighting, cleansing, and watching the city of London; but the statute which removed signs and sign-posts, balconies, spouts, gutters, and those other encroachments and annoyances which were felt as grievances by the inhabitants, did not pass till the year 1771. The 11 Geo. 3. c. 29, contains a complete and masterly system of that branch of the police which is connected with municipal regulations; and may be considered as a model for every large city in the empire. This statute extends to every obstruction by carts and carriages, and provides a remedy for all nuisances which can prove, in any respect, offensive to the inhabitants; and special commissioners, called commissioners of sewers, are appointed to ensure a regular execution. This statute is improved by 33 Geo. 3. c. 75, by which the power of the commissioners is increased, and some nuisances, arising from butchers, dustmen, &c. further provided against.

Various acts are from time to time passed for local improvements in streets, squares, docks, &c.

In the city and liberty of Westminster also many new and useful municipal regulations have been made within the present century. The 27 Eliz. and 16 Car. 1. (private acts), divided the city and liberties into twelve wards, and appointed twelve burgesses to regulate the police of each ward, who, with the dean or high steward of Westminster, were authorized to govern this district of the metropolis.

The 29 Geo. 2. c. 25, enabled the dean or his high steward to choose eighty constables in a court leet; and the same act authorized the appointment of an annoyance-jury of forty-eight inhabitants, to examine weights and measures, and to make presentments of every public nuisance either in the city or liberty. The 31 Geo. 2. c. 17, 25, improved the former statute, and allowed a free market to be held in Westminster. The 2 Geo. 3. c. 21, amended by 3 Geo. 3. c. 23, extended and improved the system for paving, cleansing, lighting, and watching the city and liberty, by including six other adjoining parishes and liberties in Middlesex. The 5 Geo. 3. c. 13, 50; 11 Geo. 3. c. 22; and particularly 14 Geo. 3. c. 90, for regulating the nightly watch and constables, made further improvements in the general system; by which those branches of police in Westminster are at present regulated. See also 44 Geo. 3. c. 61; 45 Geo. 3. c. 113; 46 Geo. 3. c. 89; 48 Geo. 3. c. 187; 50 Geo. 3. c. 119; and 54 Geo. 3. c. 154, under which many improvements have been made in Westminster, with a view to the convenience and dignity of the courts of justice and houses of parliament.

In the borough of Southwark also, the same system has been pursued: the 23 Geo. 2. c. 9; 8 Geo. 3. c. 24; 11 Geo.

3. c. 17; and 44 Geo. 3. c. 86, having established a system of regulation applicable to this district of the metropolis, relative to markets, hackney-coach stands, paving, cleansing, lighting, watching, marking streets, and numbering houses; and placing the whole under management of commissioners.

In contemplating the great leading features of municipal regulation, nothing places England in a situation so superior to most others, with regard to cleanliness, as the system of the sewers; under the management of special commissioners in different parts of the kingdom; introduced so early as by 6 Hen. 8. c. 5, and organized by 6 Hen. 8. c. 10; 23 Hen. 8. c. 5; 25 Hen. 8. c. 10, afterwards improved by 3 & 4 Edw. 6. c. 8; 1 M. st. 3. c. 11; 13 Eliz. c. 9; 3 Jac. 1. c. 14; 7 Ann. c. 10. See *Sewers*.

Sewers being early introduced into the metropolis, as well as other cities and towns, in consequence of the general system, every offensive nuisance was removed through its medium; and the inhabitants early accustomed to the advantages and comforts of cleanliness.

Another feature, strongly marking the wisdom and attention of our ancestors, was the introduction of water, for the supply of the metropolis, in the reign of King James I. in 1604. The improvements which have been since made, extending the supplies, by means of the New River, and also by the accession of the Thames water through the medium of the London-bridge, Chelsea, York-buildings, Sladwell, and other water-works, it is not necessary to detail.

The 9 Ann. c. 23, first established the regulations with regard to hackney-coaches and chairs, which were improved and extended by several subsequent statutes; enlarging the power of the magistrates of the city of London, to compel the appearance of hackney coachmen residing out of their immediate jurisdiction; all of which statutes were repealed and the law consolidated by the 1 & 2 Wm. 4. c. 22.

Carts and other carriages have also been regulated by different statutes, viz. 1 Geo. 1. st. 2. c. 57; 18 Geo. 2. c. 43, 24 Geo. 2. c. 43; 30 Geo. 2. c. 22; 7 Geo. 3. c. 44; 21 Geo. 3. st. 2. c. 27; which contain a very complete system relative to this branch of police: by virtue of which all complaints arising from offences under these acts are cognizable by the magistrates in a summary way. See also the provision in the 3 & 4 Wm. 4. c. 79, *post*.

The 34 Geo. 3. c. 65, established an improved system with regard to watermen plying on the river Thames, at which this act was repealed, and the law consolidated by the 7 & 8 Geo. 4. c. 75. See *Watermen*.

Offences relative to the driving of cattle improperly, usually termed bullock-hunting, are also determinable by the magistrates in the same summary way, under the authority of 21 Geo. 3. c. 67, by which every person is authorized to seize delinquents guilty of this very dangerous offence. And by the 3 & 4 Wm. 4. c. 19, § 28, the penalties for this offence are increased.

The last great feature of useful police to be here mentioned, consists in the excellent regulations relative to buildings, projections and fires; first adopted after the fire of London in 1666, and extended and improved by several statutes from that time down to the 14 Geo. 3. c. 78. This statute repeals all former acts, and besides regulating the mode of building houses in future, so as to render them ornamental, commodious, and secure against the accidents of fire, established other useful rules for the prevention of this dreadful calamity, by rendering it incumbent on the churchwardens to provide engines and ladders; to fix fire plugs at convenient distances on all the main pipes in the parish; to fix a mark in the street where they are to be found, and where there is a key ready to open the plugs; rewards are also payable to persons bringing the engines to a fire. See *Fire*.

These outlines will explain, in some measure, by what means the system of the police in most of its great features, is conducted in the metropolis: to which it may be necessary

to add, that the beadles of each parish are the proper persons to convey informations, in case of any inconvenience or nuisance, by which a stranger may have it removed. The city and police magistrates, in their respective courts, if not immediately authorized to remedy the wrong complained of, will point out how it may be effected.

By the Middlesex Police Act, 10 Geo. 4. c. 44, reciting that offences have increased in and near the metropolis, and that the local establishments of nightly watch and nightly police have been found inadequate to the prevention of crime, his majesty was empowered to cause a new police office to be established in the city of Westminster, and to appoint two fit persons as justices of peace of Middlesex, Surrey, Herts, Essex, and Kent, to execute the duties of a justice of peace at the said office, and the said justices need not have any qualification by estate: the said justices salary not to exceed $\$7$. The whole of the city and liberties of Westminster, and such parishes, townships, precincts, and places in Middlesex, Surrey, and Kent, as are mentioned in the schedule, to be called the Metropolitan Police District, and a sufficient number of fit and able men, by the direction of a secretary of state, shall be appointed as a police force for the whole of such district; and to have within the aforesaid counties the powers and authorities of constables, and to obey all lawful commands of the said justices. The said justices shall subject to the approbation of the secretary of state, make orders and regulations for the government of the men, their residence, classification, rank, arms, horses, &c. and may suspend or dismiss any man for negligence of duty. Victuallers, or keepers of liquor-shops, harbouring or entertaining such men during the time of their duty are subject to a penalty of $\$1$. The police force may apprehend all loose, idle, and disorderly persons disturbing the public peace, or whom they shall suspect of evil designs, or found between sunset and eight in the morning lying or loitering in any highway, yard, or other place, and not satisfactorily accounting for themselves, and deliver such person to the constable at the nearest watchhouse in order to be secured till he can be brought before a justice to be dealt with according to law. Any person assaulting or resisting the police force in the execution of their duty, or aiding or assisting others so to do, or resist, shall forfeit $\$1$. The constable at the watchhouse may, if he deem it prudent, take bail from persons charged with paltry misdemeanors, without warrant of justice, to appear before a justice at ten in the morning following. His majesty may appoint a "Receiver for the Metropolitan Police District," to receive all sums applicable to the purposes of the act; who shall give security, in a bond with two sureties, for such sum as the lords of the treasury shall direct, conditioned for faithful performance of his duty and the due application of all monies paid him: and the receiver shall pay all sums received by him to the Bank of England, and shall draw out of the Bank all monies necessary for payment of salaries, wages, and allowances, as after mentioned, to the police force, and all charges of carrying the act into execution. The salary of the receiver shall not exceed 700*l*. and he shall pay to the police force such salaries, wages, &c. and at such periods as one of the secretaries of state shall direct; and also all such extraordinary expenses as they shall have necessarily incurred in apprehending offenders and executing the act, and any further sums which a secretary of state shall direct to be paid to them as a reward for extraordinary diligence, a compensation for wounds, or an allowance to those so killed, and all other expenses which a secretary of state shall direct, to be paid for carrying the act into execution. No justice of peace or receiver, under the act, shall be capable of sitting in the House of Commons; and no justice, receiver, or person belonging to the police force shall vote at the election of a member for Middlesex, Surrey, Hertford, Essex, or Kent, or for any city or borough within the police district, under penalty of 100*l*. The watchmen and night

police already appointed in any parish, &c. are to continue to act till it shall be notified by the justices under the act that the new police is ready to take the charge of such parish, &c. The justices under the act, subject to the approbation of one of the secretaries of state, may order watch-boxes to be placed in the highways, &c. where convenient. As soon as the new police take charge of any parish, township, &c. the justices under the act may forthwith, subject to the approbation of a secretary of state, issue a warrant to the overseers of the parish, &c. commanding them, out of the money collected for relief of the poor, to pay the amount in the warrant for the purposes of the new police, or to levy such amount as part of the rate for relief of the poor in such parish, &c.; and the overseers shall pay the amount to the receiver within forty days from delivery of the warrant; the sum not to exceed in any year eightpence in the pound on the full and fair value of all property rateable to the poor within the parish, &c. The overseers are to pay such money out of any money in their hands collected for the relief of the poor, and, if no such money, shall levy the amount as part of the rate for relief of the poor. If the sum is not paid to the receiver within the time specified, the justices under the act may order a distress on the goods of the overseer. In case of neglect or default of the overseers, or in any case where a secretary of state shall direct, the justices under the act may appoint two or more persons to act as overseers in any parish, &c. for levying the money for the purposes of the act. Where messuages, &c. are occupied by ambassadors or public ministers, &c. the landlord shall be deemed the occupier and liable to the payment of the money due, under the act. An account of all monies received and expended under the act, is to be laid annually before both houses of parliament. The inhabitants and occupiers of all messuages, &c., not rated or rateable for the relief of the poor, shall be liable to contribute to the expenses of the act as if they were rated to the relief of the poor, the sum levied not to exceed eightpence in the pound. The act provides the mode of assessing the money in such cases, and of appealing, &c. His majesty may order any parishes, &c. in the aforesaid counties, and within twelve miles of Charing Cross, to be added to the police district, which shall then be subject to all the provisions of the act.

See the 3 Geo. 4. c. 55, and 6 Geo. 4. c. 21, which are not to be affected or altered by the above act.

By the 3 & 4 Wm. 4. c. 49, intitled "An act for the more effectual Administration of Justice in the office of a Justice of the Peace in the several Police Offices established in the Metropolis, and for the more effectual prevention of depredations on the river Thames and its vicinity;" and which act is to continue for three years; the police offices now established in the parishes of Saint Margaret Westminster, Saint James Westminster, Saint Mary-le-bone, Saint Andrew Holborn, Saint Leonard Shoreditch, Saint Mary Whitechapel, and Saint John of Wapping, in the county of Middlesex, and Saint Saviour in the county of Surrey, are continued; and the persons appointed to execute the duties of a justice of the peace at such police offices are to continue to execute the same at the said police offices, together with any other justice of the peace for the counties of Middlesex and Surrey who may think proper to attend.

By § 2. one or more of the said justices so appointed shall attend at each of the said police offices every day from ten in the morning until eight in the evening, and at such other times and places as shall be directed by one of the secretaries of state, and two of the said justices shall in like manner attend together at each of the said offices from twelve at noon until three in the afternoon: provided, that no such attendance shall be given on Sunday, Christmas-day, Good-Friday, or any day appointed for a public fast or thanksgiving, unless in cases of urgent necessity, or when it shall be directed by such principal secretary of state.

By § 5. a sufficient number of constables shall be em-

ployed, by the direction of the secretary of state, within the counties of Middlesex, Surrey, Essex, and Kent, and all liberties therein.

By § 6. the justices appointed to the Thames police office, shall (subject to the approbation of a secretary of state) appoint, and employ any number of fit men, who, under the name of Thames Police Surveyors, shall have, within the counties and liberties aforesaid, the powers, privileges, and advantages of a constable, and shall direct and inspect the conduct of the constables attached to the Thames police office, and of all persons employed in and about vessels in the said river Thames, or in or on the several creeks, docks, wharfs, quays, and landing places thereto adjacent, and shall have power to enter by night and day, into and upon every ship, or other vessel (not being then actually employed in his majesty's service) for the purpose of inspecting and directing the conduct of any constable stationed on board of any such vessel, and of inspecting and observing the conduct of all other persons employed on board of any such vessel in the lading or unlading thereof, and for the purpose of providing against fire and other accidents, and preserving peace and good order on board of any such vessel, and for the effectual prevention or detection of any felonies or misdemeanors.

By § 7. the officers and patrols of Bow Street office are to act as constables.

By § 9. the justices may appoint constables for special purposes: and by § 10. have power to punish constables for neglect of duty or other misconduct.

By § 11. justices are to be allowed a salary of 800*l.* per annum.

By § 12. no justice shall take fees but at the public office, Bow Street, and at the police offices, under the penalty of 100*l.* Summons for persons to appear at any place without the limits specified in this act, are declared void.

§ 13. directs a table of fees to be hung up in each office.

By § 22. fairs held without lawful authority within ten miles of Temple Bar may be inquired into, and if declared unlawful, booths, &c. to be removed; but on entering into recognizance, question as to right of title to fair may be tried in the King's Bench.

By § 23. no shop, or place of public resort where ready-made coffee, tea, or other liquors are sold or consumed within the city of London or the liberties thereof, or the limits of the bills of mortality, or within any of the parishes hereinbefore mentioned, shall be kept open after eleven at night during any part of the year, nor open before the hour of four in the morning between Lady Day and Michaelmas, or before five in the morning between Michaelmas and Lady Day; and that no shop, room, or place of public resort where any refreshments or any liquors not subject to any duties of customs or excise are consumed within the city of London and the liberties thereof, or within the said limits and parishes, shall be kept open after one in the morning or before five in the morning, under a penalty not exceeding 10*l.*

§ 24. prohibits the blowing of horns, for the purpose of hawking, selling, or distributing any article whatsoever, under a penalty not exceeding 40*s.*

§ 25. Negligence or wilful misbehaviour of drivers of carriages, &c. in the streets or highways, may be punished by a penalty not exceeding 40*s.*; and the parties may be further ordered to pay a compensation for hurt or damage not exceeding 5*l.*

§ 26. empowers the court of aldermen, or two justices, to regulate the route and conduct of persons driving stage carriages, cattle, &c. during the hours of divine service.

By § 29. any person within five miles of Temple Bar, keeping or acting in the management of any premises for the purpose of fighting or baiting of bears, cock-fighting, baiting or fighting of badgers or other animals, shall, on conviction, forfeit any sum not exceeding 5*l.*, and in default of immediate payment be liable to be imprisoned and kept to hard labour

for any time not exceeding two months, unless the penalty shall be sooner paid.

By § 31. constables, &c. may apprehend any suspected person or reputed thief in any public place, or in any warehouse, &c., and convey him before a justice, who, if he sees just ground, may deem him a rogue and vagabond, under the 5 Geo. 4. c. 83.

By § 35. the Thames police surveyors having just cause to suspect felony may enter on board vessels and take up suspected persons.

By § 36. unlawful quantities of gunpowder may be seized on board of vessels.

By § 37. boats or carriages having stolen property may be searched and detained, and persons suspected of having such goods may be taken before a justice.

By § 38. on information that there is reasonable cause for suspecting that any goods, &c. have been unlawfully obtained, and are concealed, a justice may, by special warrant, authorize any Thames police surveyor, or constable, to search houses, &c. and to break open doors, &c.

By § 39. the party from whom stolen goods are received to be examined by the justice. If goods are unlawfully obtained, the person having possession of them shall be deemed guilty of a misdemeanor; and the possession of the servant shall be deemed the possession of employer.

By § 40. framing a false bill of parcels to escape detection deemed a misdemeanor.

By § 41. any person found in or upon any canal, dock, warehouse, wharf, &c. and unlawfully possessing instruments for procuring and carrying away wine, &c. shall be deemed guilty of a misdemeanor.

§ 42. declares breaking, &c. packages, with an intent that the contents may be spilled, a misdemeanor; and by § 43. wilfully letting fall articles into the Thames, or into a boat, &c. with fraudulent intention, is deemed a misdemeanor.

By § 44. for offences declared misdemeanors, and for which no penalty is appointed, offenders shall forfeit not exceeding 5*l.*, or be imprisoned (with or without hard labour).

By § 49. disputes about wages for labour done on the river, &c. (except by Trinity ballast-men) may be settled by justices, provided the sum in question does not exceed 5*l.*; but by § 50. nothing therein contained shall authorize any justice, except the lord mayor, aldermen, and recorder of the city of London for the time being, to hear and determine any complaints in respect of employment or work done within the city of London, or the suburbs thereof, or on board of any ship, or other vessel, on the north side of the river, between the tower of London and the western extremity of the Temple.

POLICY OF ASSURANCE, or Insurance, from the Ital. *polizza*, i. e. *schedula et assicuratio*.] An instrument entered into by insurers of ships and merchandise, &c. to merchants, obligatory for the payment of the sum insured, in case of loss. *Merch. Dict.* See Insurance.

POLLARDS, or Pollengers. Such trees as have been usually cropped, therefore distinguished from timber-trees. *Plowd.* 469.

POLL. A deed poll is distinguished from one indented, the latter being polled or shaved quite even. See Deed.

POLLS. Where one or more jurors are excepted against, it is called a challenge to the polls. *Co. Lit.* 156. See Jury.

POLL-TAX. A tax formerly not unfrequently assessed by the head on every subject according to their respective ranks. See Taxes.

POLYGAMY, *polygamia*.} The having a plurality of wives or husbands at once. See Bigamy.

PONDUS, poundage; which duty, with that of tonnage, was anciently paid to the king according to the weight and measure of merchants' goods. *Cowell.*

PONDUS REGIS. The standard weight appointed by our ancient kings. And what we now call troy weight, was

this *poundus regis*, or *le roy weight*, with the scales in *equilibrio*: whereas the *aver du pois* was the fuller weight, with a declining scale. *Comell. See Troy Weight, Weights.*

PONE. A writ whereby a cause depending in the county, or other inferior court, is removed into the Common Pleas; and sometimes into the King's Bench: as when a replevin is sued by writ out of Chancery, &c. then if the plaintiff or defendant will remove that plea out of the county-court into C. P. or K. B. it is done by pone. *F. N. B. 4, 69; 2 Inst. 39.* The writ pone lies to remove actions of debt, and detinue, and formerly writ of right, nuisance, &c. *New Nat. B. R.*

A pone to remove causes is of this form: "For at the petition of A. B. before our justices at Westminster, [the day, &c.] the plea which is in your court by our writ, between the said A. B. and C. D. of, &c. and summon the said C. that he be then there to answer the said A. &c." This form is only applicable to the Common Pleas; but if the writ of pone be to remove a cause into K. B. it should be worded thus: "put at the petition of, &c. before us, wheresoever, &c. the plea, &c."

Pone is also a writ willing the sheriff to summon the defendant to appear and answer the plaintiff's suit on *les puttees* in sureties to prosecute: it is so called from the words of the writ *pone per ralem et sic os plegis*. "Put, by gage and safe pledges, A. B. the defendant." This is a writ not issuing out of Chancery, but out of the Court of Common Pleas, being grounded on the non-appearance of the defendant, at the return of the original writ: and thereby the sheriff is commanded to attach him, by taking gage, that is, certain of his goods, which he shall forfeit if he doth not appear, or by making him find safe pledges or sureties, who shall be answer'd in case of his non-appearance. *Fouch. L. 345; Id. Rouns. 278; Dalt. Sher. c. 52. See Process.*

Previous to the Uniformity of Process Act, this was also the first and immediate process, without any previous summons, upon actions of trespass *real actions*, or for other injuries, which, though not forcible, were yet trespasses against the peace, as deceit and conspiracy; where the violence of the wrong required a more speedy remedy, and therefore the original writ commanded the defendant to be at once attached, without any precedent writ. *3 Comm. c. 19, p. 289, cites F. N. B. L. 50, 351. See Original.*

PONENDIS IN ASSISTIS. A writ formerly granted by the statute of *Westm. 2. 13 E. 1. st. 1. c. 38*, which statute appointed what persons sheriff's ought to command upon, seize and juries. *Reg. Orig. 175; 1 N. B. 105.* This act was repealed by the *6 Geo. 4. c. 51 § 63. See Jury.*

PONENDUM IN BALLIUM. A writ commanding that a prisoner be bailed in cases bailable. *Reg. Orig. 133.*

PONENDUM SIGILLUM AD EXCEPTIONEM. A writ by which justices are required to put their seals to exceptions, exhibited by defendant against the plaintiff's evidence, verdict, or other proceedings before them, according to the statute *Westm. 2. 13 E. 1. st. 1. c. 31. See Bid of Exceptions.*

PONE PER VADIUM. See *Pone.*

PONTAGE, pontagium.] A contribution towards the maintenance, or re-edifying bridges. *Stat. Westm. 2. c. 25.* It may also signify toll taken to this purpose of those who pass over bridges. *1 Hen. 8. c. 9; 22 Hen. 8. c. 5; 30 Eliz. c. 25. See Trinoda Necessitas.*

PONTIBUS REPARANDIS. A writ directed to the sheriff, &c. requiring him to charge one or more, to repair a bridge, to whom it belongeth. *Reg. Orig. 153. See Pontage.*

POOR.

PAUPER.] A poor person, who is a burden and charge upon a parish. The poor our law takes notice of, are, 1st. poor by infirmity and defect; as the aged or decrepid, fatherless or motherless; poor under sickness, and persons who are idiots, lunatics, lame, blind, &c.—these the overseers of the poor are to provide for.

POOR.

2dly, Poor by casualty; such as house-keepers, decayed or ruined by unavoidable misfortunes: poor persons overcharged with children; labourers disabled; and these, having ability, are to be set to work; but if not able to work, they are to be relieved with money.

3dly, Poor by prodigality and debauchery, also called thrifless poor; as idle slothful persons, pilferers, vagabonds, strumpets, &c. who are to be sent to the house of correction, and be put to hard labour, to maintain themselves; or work is to be provided for them, that they do not perish for want; and if they become impotent by sickness, or if their work will not maintain them, there must be an allowance by the overseers of the poor for their support. *Dalt. c. 73. § 35.*

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply, sufficient to all the necessities of life, from the more opulent part of the community, by means of the several statutes enacted for relief of the poor. *1 Comm. 131.*

The poor of England, till the time of Henry VIII. subsisted entirely upon private benevolence and the charity of well-disposed Christians; and the poor in Ireland have, to this day, no relief except from private charity. By an ancient statute, *3 Edw. 3. c. 7*, it was enacted, that none should give alms to a beggar able to work. It appears by the *Mirror*, that at the common law the poor were to be "sustained by parsons, rectors of the church, and the parish officers; so that none of them die for default of sustenance." *Mirr. c. 1. § 3.* And by *15 Rich. 2. c. 6; 4 Hen. 4. c. 12*, impropriators were obliged to distribute a yearly sum to the poor parishioners, and to keep hospitality. (See *Parson, Appropriators*.) By *12 Rich. 2. c. 7; 10 Hen. 7. c. 12*, the poor were directed to abide in the cities and towns wherein they were born, or such wherein they had dwelt for three years: which seems to be the first rudiment of parish settlements.

No compulsory method, however, was marked out for the relief of the poor, till the *27 Hen. 8. c. 25*, under which provision was ordered to be made for the impotent poor.—Before that time, the monasteries were their principal resource; and among other bad effects, which attended these institutions, it was not perhaps one of the least, (though frequently esteemed quite otherwise,) that they supported and fed a very numerous and very idle poor; whose sustenance depended upon what was daily distributed in alms at the gates of the religious houses. But upon the total dissolution of these, the inconvenience of thus encouraging the poor in habits of indolence and beggary, was quickly felt throughout the kingdom; and abundance of statutes were made in the reign of King Henry VIII. and his children, for providing for the poor and impotent; which, the preambles to some of them recite, had of late years greatly increased. These poor were principally of two sorts; sick and impotent, and therefore unable to work; idle and sturdy, and therefore able, but not willing to exercise any honest employment. To provide, in some measure, for both of these, in and about the metropolis, Edward VI. founded three royal hospitals; Christ's and St. Thomas's, for relief of the impotent, through infancy or sickness; and Bridewell, for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large: and therefore, after many other fruitless experiments, by *43 Eliz. c. 2*, overseers of the poor were appointed in every parish; whose office and duty are principally these: 1st, to raise competent sums for the necessary relief of the poor, impotent, old, blind, and such other being poor, and not able to work, and them only; and, 2dly, to provide work for such as are able and cannot other-

wise get employment: but this latter part of their duty, which, according to the wise regulations of that salutary statute, should go hand in hand with the other, is now most shamefully neglected. 1 *Comm. c. 9. pp. 359, 460.*

The learned commentator then proceeds to state the evils arising from what he considers as a deviation from the original purpose of the poor laws, by accumulating all the poor in one workhouse; a practice which he condemns as destructive of the industry and domestic happiness of the poor. He also reprobates the subdivision of parishes; the plan of confining the poor to their respective districts; and the laws passed since the Restoration; as having given birth to the intricacy of our poor laws, by multiplying and rendering more easy the methods of gaining settlements: and, in consequence, creating an infinity of expensive law-suits between contending neighbourhoods, concerning those settlements and removals. He then proceeds to state the general heads of the law relative to the settlement of the poor; which, he truly observes, by the resolutions of the courts of justice thereon, within a century past, are branched into a great variety. "And yet," he concludes, "notwithstanding the pains that have been taken about these laws, they still remain very imperfect, and inadequate to the purposes they are designed for: a fate that has generally attended most of our statute laws, where they have not the foundation of the common law to build upon. When the shires, the hundreds, and the tithings were kept in the same admirable order in which they were disposed by the great Alfred, there were no persons idle, consequently, none but the impotent that needed relief: and the 43 *Eliz. c. 2.* seems entirely founded on the same principle. But when this excellent scheme was neglected and departed from, we cannot but observe, with concern, what miserable shifts and lame expedients have from time to time been adopted, in order to patch up the flaws occasioned by this neglect. There is not a more necessary or certain maxim, in the frame and constitution of society, than that every individual must contribute his share, in order to the well-being of the community; and surely they must be very deficient in sound policy, who suffer one half of a parish to continue idle, dissolute, and unemployed; and at length are amazed to find that the industry of the other half is not able to maintain the whole." 1 *Comm. c. 9. ad finem.*

The poor laws have been most materially altered by a recent statute (4 & 5 *Wm. 4. c. 76.*), under which a board of commissioners has been appointed to carry the act into execution. These commissioners are invested with very extensive powers, which will be hereafter noticed. Several heads of settlement have been altogether abolished; but as all settlements gained previous to the passing of the act, (14th August, 1834,) with the exception of those acquired by estate, or by apprenticeship in the sea service, are unaffected by the alteration, it is still necessary to be acquainted with the old law. The outline therefore of the latter, contained in the former edition of this work, will still be preserved, and will be followed by an abstract of the principal provisions of the late statute.

In Scotland the poor are distinguished into the idle and the infirm. Several acts have been made for the punishment of sturdy beggars and vagabonds, by whipping and burning in the ear. Those who from age or infirmities are unable to maintain themselves, are maintained by a tax levied on the parish.—Birth is the original rule of settlement; but which may be superseded by three years' continued residence in any other parish. The collection and management of the poor's fund, is placed in the Heritors and Kirk sessions. In parishes where a sufficient fund cannot be raised for all the poor, either by taxation or voluntary contribution at the church-doors, the magistrates are authorized to give them badges as a warrant to ask alms within the limits of their parishes. See *Bell's Scotch Dict.*

In Ireland, by the Irish Act 11 & 12 *Geo. 3. c. 30.* a corporation is erected in every county, county of a city and

town, of which the bishop and member of parliament are presiding members: and who are empowered to relieve poor parish vagabonds, to apprentice children, &c. with great discretionary powers, which are varied and enlarged by several subsequent acts, as well local as general.

I. Of Overseers of the Poor.

1. *Their Appointment.*
2. *Their Accounts.*
3. *Their Indemnity and Punishment.*

II. Of Poor-Rates.

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2. *The Manner and Purpose of raising them.*
3. *Of Appeals against and of Quashing Rates.*
4. *How to be levied; and of rating in Aid.*

III. 1. Of relieving and maintaining the Poor.

2. *Of Relations maintaining each other.*

IV. Of the Settlements of Poor People.

1. *By Birth.*
2. *By Parentage.*
3. *By Marriage.*
4. *By Residence, in particular Cases.*
5. *By renting a Tenement.*
6. *By Payment of public Taxes.*
7. *By serving an Office.*
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V. Of Certificate.

VI. Of the Removal of Poor Persons.

VII. The recent Statute (4 & 5 *Wm. 4. c. 76.*)

1. *The Provisions relating to the Commissioners and the assistant Commissioners.*
2. *General Rules for the management of the Poor.*
3. *As to Workhouses.*
4. *Of Uniting Parishes.*
5. *As to Overseers, &c.*
6. *As to Relief and by whom to be administered.*
7. *As to the Liability of Relations.*
8. *The Provisions repealing, altering, or affecting Settlements.*
9. *As to illegitimate Children.*
10. *Regulations touching Removals and Appeals.*

I. 1. THE CHURCHWARDENS of every parish, and four, three, or two substantial householders there, shall be nominated yearly in Easter-week, or within a month after Easter, under the hands and seals of two justices of the county, to be overseers of the poor of that parish. 43 *Eliz. c. 2 § 1.*

By the 54 *Geo. 3. c. 91.* the appointment of overseers shall be made on March 25 yearly, or within fourteen days after.

The words substantial householders are to be understood relatively. 2 *T. R. 395.*

In the counties of Lancashire, and others specified, and any other counties, where the parishes by reason of the extent cannot reap the benefit of the said 43 *Eliz. c. 2.* two or more overseers shall be yearly chosen and appointed, according to the directions of the said 43 *Eliz.* within every township or village within such county. 13 & 14 *Car. 2. c. 12. § 21.* This statute extends to towns and villages, in extra-parochial places, as well as within parishes; and, by an equitable construction, to all counties, though not named in the statute. An appointment of one overseer only for a township is bad, the statute requiring at least two. 2 *East, 168.*

If any overseer so appointed shall die, or remove from the place, or become insolvent before the expiration of his office, two justices, on oath made thereof, may appoint another in his stead, until new overseers are appointed. 17 *Geo. 2. c. 38. § 3.*

The mayor and magistrates of every city, being justices of the peace, shall have the same authority within their respective jurisdictions as is given to two or more justices of the peace. 43 Eliz. c. 2. § 8.—If any parish happen to extend into more counties than one, or part to lie within a city, and part without, the magistrates of the city and justices of the county shall only intermeddle in so much of the parish as lies within their several jurisdictions respectively; but the churchwardens and overseers of such parish shall nevertheless duly execute their office, without dividing themselves, in all places within the said parish. § 9. If in any place there be no nomination of overseers, every magistrate in the division, and every mayor, alderman, and head officer of the corporation where the default shall happen, shall forfeit 5*l*. § 10.

By 59 Geo. 3. c. 12. § 6. persons assessed to the poor-rates and resident out of the parish (but within two miles of the church) may be appointed overseers; and by § 7. of the same act assistant overseers may be nominated by the parish, in vestry, with a yearly salary, who shall receive their appointment under the hands and seals of two justices.

The appointment must expressly state that the persons named in it are appointed "Overseers of the Poor." It must also state that they are "substantial householders there," that is, within the parish; and the county in which the parish lies must be named. An appointment to a *prebend* is not good; but an appointment to a *hamlet* is: the appointment need not state the justice to be of the division, or that one of the justices is of the quorum. 26 Geo. 2. c. 27.

The appointment of overseers must be under the hands and seals of two justices, pursuant to the direction of the 43 Eliz. c. 2; and therefore it cannot be made by the sessions, nor by the mayor of a corporation, conjointly with the justice of a county; but if there should happen to be only one justice in a county, perhaps he alone may appoint. It is however completely determined that the two justices must sign and seal the appointment in the presence of each other, for it is not merely a ministerial but a judicial act wherein the justices are to exercise their discretion. 3 T. R. 38.

The appointment, though made on a Sunday, is good, provided it be within Easter-week, or within a month after; but if the Sunday be Easter Sunday, the court will take it to be *prima facie* clandestine and bad; but it will be good unless so void as to be made to appear, although Sunday is considered as an improper day for making an appointment of overseers. An order also, appointing overseers in obedience to a *mandamus*, is good, although made above a month after Easter; so also an appointment of an overseer for the year next ensuing, will be understood to be for the overseer's year. 4 T. R. 778.

All persons, of whatever age or sex, are *prima facie* liable to serve, unless they can show some legal exemption to except them out of it. That a woman may be appointed overseer, see 2 T. R. 395. It is said that all peers of the realm, by reason of their dignity; clergymen, by reason of their order; members of parliament, by reason of the privileges of parliament; and attorneys, by reason of the necessity of their attendance at Westminster Hall,—are exempted from being chosen overseers, even where there is a special custom in the parish for every inhabitant to serve: it is admitted that practising barristers also have the same privilege for the like reason. The clerk of the treasury of the Court of Common Pleas was held not compellable to serve the office of overseer, the duties of that office being incompatible with his necessary personal attendance on the court. *Ex parte Jeffries*, 6 Bing. 10. It has also been held that an alderman of London ought to be discharged from serving parish offices, on account of his necessary attendance on the duties of the corporation. Persons also of particular professions and descriptions are exempted, by divers statutes, from serving the office of over-

seer. The president and members of the College of Physicians, in London. 32 Hen. 8. c. 40. Surgeons, being free-men of the Corporation of Surgeons, in London, for so long a time as they shall practise. 18 Geo. 2. c. 15. And it is said that surgeons in general are exempted by special custom at common law. Apothecaries, free of the Apothecaries' Company, and every person using and exercising the said art, who has served as an apprentice to it for seven years, while they practise. 6 & 7 Wm. 3. c. 4. Dissenting ministers, who shall conform to the directions of the Toleration Act; 1 W. & M. c. 18; and dissenters in general, are allowed to serve the office by deputy. See *Dissenter*. Soldiers serving in the militia during the time of service. 26 Geo. 3. c. 107. § 193. And perhaps it may be considered that those who are exempted from serving the office of churchwarden, are also exempted from serving the office of overseer. See *Churchwarden*. It has also been said, that persons who are only occasional residents in a parish ought not to be appointed: and it seems clear that absentees, or persons who do not reside, but only hold land in the parish, cannot be chosen. But it is settled that a woman, or a justice of the peace, or an officer upon half-pay, may be appointed, if there are no other more substantial or proper persons in the parish, who are eligible to the office. But, unless there is a positive exemption, the justices have a discretionary power to appoint such persons in the parish as they think most proper to execute the office.

It seems to be settled that no overseers can be appointed for any place that is not, in contemplation of law, a vill; and therefore, if a place that is extra-parochial come within the notion of a vill, overseers may be appointed for the purpose of obliging the inhabitants to provide for their own poor. But it is a subject that has been much litigated what kind of place shall be so considered. Coke describes a vill thus: "*Villa est ex pluribus mansionibus vicinata*," and it seems to be taken generally, that wherever there is a constable, the place over which he presides shall be considered a township. It has been determined, that a place consisting of two houses, or of a castle and an ale-house, or of a capital mansion house, and three keepers' lodges in the parish adjoining, though the lodges were converted into farms, were not vill. The number of houses, however, or the size of the place, is not the only distinguishing feature of a vill; for where a place consisted of a capital mansion house, and a large farm house thereto belonging, of the yearly value of 200*l*., and also of three other large farm houses, with three other farms, the court refused to grant a *mandamus* to appoint overseers, because it did not appear that the place had ever had a constable, or even been reputed to be a vill. So also it has been determined, that the sites of ancient cathedrals, colleges, and inns of court, are extra-parochial; and not being vill, either legally or by reputation, cannot have overseers appointed to them. But if an extra-parochial place be a vill by reputation, it may have overseers appointed, although it consist only of a mansion house and a farm house, occupied by different persons, and the property of one; and where the sessions, on an appeal from an appointment of overseers, adjudge the place to be a vill, this is conclusive; for then it is perfectly immaterial of what number of houses or persons it consists; but if the sessions set forth the facts upon which their judgment is founded, the Court of King's Bench will consider whether they have rightly concluded the place to be a vill.

The justices cannot appoint more than four overseers for any parish, unless the parish be divided into two or more divisions or townships, each separately maintaining its own poor. After an appointment of four overseers by magistrates at one meeting, the magistrates are *functi officio*; and no other magistrates can afterwards, upon a claim of exemption by one of the persons so appointed, appoint another in his place; but the party must appeal to the sessions to get his discharge;

and such objection to the second appointment may be disclosed to the Court of K. B. on affidavit upon the removal of the appointment thither by *certiorari*, and the court will thereupon quash the appointment. 2 *East*, 244.

The justices ought not to appoint separate overseers for distinct parts of a parish, under 13 & 14 *Car. 2. c. 12.* unless such separate appointments are necessary; and this necessity can only be evinced by the inability of a parish to reap the benefit of the 43 *Eliz. c. 2*; of which inability the circumstances of a township having for sixty or seventy years had separate overseers, and maintained its own poor, independently of the parish at large, is pregnant evidence; and therefore, where a parish consists of several townships, some of which have immemorially maintained their own poor, the court will grant a *mandamus* for the appointment of separate overseers for the remaining townships. And when a parish is thus divided into separate townships, each township is to be considered as a distinct parish. But it is decided that a parish shall not be thus divided unless the sessions find it as a fact that the parish could not reap the benefit of the 43 *Eliz. c. 2*; and this in a case where the parish had immemorially been divided into two separate districts, making separate rates which were afterwards blended together, and divided in certain proportions; and there had been more than four overseers, and a constable for the hamlet part of the parish.

The two districts of which a parish consisted had from 43 *Eliz.* down to the 13 & 14 *Car. 2.* maintained their poor jointly, and at the time of passing the act 13 & 14 *Car. 2. c. 12.* agreed to separate in the maintenance of their poor, and that separate overseers should be appointed, upon condition that the rateable property in the parish, whether situated in the one or the other district, should be rated where the occupiers resided. In consequence of that agreement they had ever since uniformly maintained their own poor separately, and had had separate overseers, constables, &c. Held, that this clearly showed that the parish, at the time of the agreement, could not reap the full benefit of the statute of *Eliz.*; and that therefore the separation of the two districts was valid, and that an appointment of overseers for the whole was now bad. Held, also, that the agreement consisted of two distinct parts, and that the invalidity of the latter part, as to rating property not situate within the district rated, did not affect the question on the former part. 2 *B. & A.* 157.

By 59 *Geo. 3. c. 95.* after reciting that various towns corporate, or franchises, situate within one or more parish or parishes, and not being co-extensive therewith, have heretofore, for a long time, been separately assessed (assessed separately) from the parish in which they are situate; and that overseers of the poor for such town or franchise have been appointed distinct and apart from the overseers for the parish; that such assessments and appointments have, in some cases, been made without sufficient authority; it is enacted that all such separations of towns corporate, or franchises, from the parish or parishes in which they are situate, and the separate appointment of overseers, shall be deemed lawful to all intents and purposes, as if they had taken place under the authority of the 43 *Eliz. c. 2*; unless where it shall appear that such separation commenced within sixty years before the act.

See now *post*, VII., as to the uniting of parishes.

Persons aggrieved by any thing done or omitted by the churchwardens or overseers, or the two justices, may, on giving reasonable notice to the churchwardens, &c. appeal to the next general or quarter sessions; and if it shall appear to the sessions that reasonable notice were not given, they shall adjourn it to the next quarter sessions, and then and there finally determine the same, giving reasonable costs, &c. 17 *Geo. 2. c. 38. § 4.* See *Sessions*.

The appointment cannot be removed into the court of K. B. before the time for appealing is expired, for it would deprive the party of his right of appeal. This appeal may be made

as well by the parishioners as by the persons who are appointed overseers. 3 *T. R.* 38.

The manner of appointing assistant overseers, together with their duties, is prescribed and limited by the 59 *Geo. 3. c. 12.* They are to be elected by the inhabitants in vestry assembled: their number is not restricted, and no qualification is required except that of being discreet persons.

2. It is provided that overseers shall, within four days after the end of their year, and after other overseers nominated, make and yield up to two justices true and perfect accounts of all monies by them received, or rated and assessed, and not received; and also such stock as shall be in their hands or in the hands of the poor to work; and of all other things concerning their office; and pay over the balance to the succeeding overseers. 43 *Eliz. c. 2. § 2.* The succeeding overseers may, by distress, levy the sums of money or stock which shall be behind upon any account so made; in default of distress the offender may be committed to the common gaol until payment of the arrears; two justices may commit overseers, who shall refuse to account, until they make a true account, and pay over the balance in their hands. § 4.

The overseers shall not bring into their account any money given to the relief of a poor person not registered in the parish books as a person entitled to receive collections, on pain of 5*l.* 19 *Geo. 1. c. 7. § 2.*

The overseers shall, within fourteen days after other overseers are appointed, deliver in to such succeeding overseers a true and just account, in writing, fairly entered in a book or books to be kept for that purpose, and signed by the overseers; such account to be verified on oath before one justice, who shall sign and attest the caption of the same at the foot of the account; and the overseers shall deliver over all the stock and pay the balance remaining in their hands to their successors; these books of account to be carefully preserved in some public place, and to be open at all seasonable times to the inspection of any person assessed, and copies thereof delivered if required. 17 *Geo. 2. c. 38. § 1.* If any overseer shall refuse or neglect to account and pay the balance, as aforesaid, two justices may commit such overseer until he complies. § 2. If an overseer shall remove, he shall previously deliver accounts and papers, and pay the balance aforesaid to the churchwarden or other overseer: and if any overseer shall die, his executors or administrators shall, within forty days after his decease, deliver all things concerning his office to the churchwarden or other overseer, and pay the balance out of assets, before any of the other debts are paid and satisfied. § 3. The succeeding overseers may levy arrears of rates due to their predecessors, and out of the money reimburse to their predecessors sums expended for the use of the poor, and which are allowed to be due to them upon their accounts. § 11.

By 50 *Geo. 3. c. 49.* in all cases when any such account is required to be made under 17 *Geo. 2.* it shall be submitted by the churchwardens and overseers to two justices at a special sessions within the 14 days; and such justices may examine into the matter of such account, and administer an oath to the party as to the truth thereof, and may disallow charges; which account shall be signed by such justices, overseers and churchwardens neglecting or refusing to yield up, submit, or verify, such accounts, or to deliver over to their successors, within ten days, any goods, &c. remaining in their hands, shall be committed to gaol until compliance; and upon neglecting to pay over within fourteen days money in their hands, it shall be levied by distress and sale of the goods; and in default of distress, shall be committed till payment. Parties aggrieved may appeal to quarter sessions. § 2, 3. Saving the rights of magistrates of corporations. § 4. This act not to extend to places exempted from accounting under former acts. § 6.

The provisions of this latter act are not a substitution in lieu of those in 17 *Geo. 2.* but are cumulative; and if the

overseer refuse to deliver in such accounts to his successor within fourteen days, he may be committed by two justices for that refusal. 16 *East*, 374.

If, after an order made by the justices under the act 50 Geo. 3. confirmed on appeal, the overseers refuse to pay such balance, the magistrates may, upon the application of one of the succeeding overseers, issue a warrant to levy the same, although the rest of the parish officers refuse to concur in such application. 2 *M. & S.* 343.

The court will not, upon removal of an order of sessions allowing overseers' accounts, which is good upon the face of it, go into the merits of those accounts upon affidavit. 2 *M. & S.* 321. See *Rex v. Glyde*, *ib. n.*

The authority given by the 43 *Eliz. c. 2.* to commit, upon the non-delivery of the account within the time limited, extends only to overseers, and not to churchwardens; and if the latter are committed for a default, as overseers, they must be so named. The power of stating and allowing the accounts at the end of the year must be executed by the justices themselves, for they can not delegate any other person to perform this office. The account delivered must be a particular account, and not merely what the overseer has received and paid in gross; but the justices cannot commit if an account be actually delivered, though it is objectionable, they must go into it, hear the objections, strike out what is wrong, and balance the account; and if, after the accounts are passed, they appear to be fraudulent, the remedy is to indict the overseers. After the justices have examined, they are to allow the account; and if they refuse to administer the oath prescribed by 17 *Geo. 2. c. 38.* in verification of the account, the overseer may have a *mandamus* to compel them. A *mandamus* will also lie on behalf of the new overseers to compel the old overseers to deliver over the book of poor's-rates and all other public books and papers in their custody relating to the office. Overseers must account yearly, although they may be appointed for several years successively.

If any persons shall find themselves aggrieved by any act done by the churchwardens and overseers, or by the two justices, they may, by 43 *Eliz. c. 2. § 1.* appeal to the general or quarter sessions. And also, by 17 *Geo. 2. c. 38. § 1.* (see ante 1.) if any person shall have any material objection to any account, or any part thereof, such person giving reasonable notice to the churchwardens, &c., may appeal to the next general or quarter sessions, and the justices there assembled shall receive such appeal, and finally determine the same.

The sessions, upon an appeal against the allowance of overseers' accounts, may, if they see reason, disallow of the account, and order the overseers to pay over such balances as they shall adjudge to be due to the parish; but if they refuse to do so, the sessions cannot commit, but must levy the arrears pursuant to the direction of the 43 *Eliz. c. 2. § 4.* So at the sessions may, upon an appeal, set aside the allowed account, and order a re-examination of the account by two justices, or the sessions cannot receive an appeal, and the allowance must appear on the face of the order; but objections may be made to the accounts before the appeal, if the inhabitants are aggrieved as soon as the money is assessed. Great doubts have been entertained as to the time when the appeal is to be brought; and it has been said, that the appeal must be to the next sessions; but that the accounts are passed before one justice, under 17 *Geo. 2. c. 38. § 1.* that the appeal must be to the next sessions; but that the accounts are passed before two justices, under the 43 *Eliz. c. 2. § 4.* an appeal may be at any distance of time; but with respect to a poor's-rate, it has been determined, that the latter statute repeals the former, and therefore the appeal must be in all such cases to the next sessions after the publication of the account.

If a person be appointed overseer for four successive years, and do not make any rate for the first three to reimburse

himself what he expended in those years, he cannot in the fourth year make a rate for that purpose. 6 *T. R.* 159.

It has been heretofore doubted how far overseers who have laid out their money upon the maintenance of the poor, were to be reimbursed after they were out of office. By 41 *Geo. 3. (U. K.) c. 23. § 9.* succeeding churchwardens and overseers are empowered to reimburse to their predecessors in office any money expended for relief of the poor while there was no rate, or during an appeal; and in default of such reimbursement, the quarter sessions, on application, shall make an order for that purpose.

The balance must be paid over to the succeeding overseers, notwithstanding a vestry may be willing to let the old overseers retain it, in order to discharge the expenses of a law-suit, or a surgeon's bill incurred on account of the poor; nor can they take credit in their accounts for money paid, as a salary to an assistant overseer, although such assistant overseer be appointed with such salary at a vestry meeting.

As overseers are not compellable, under 17 *Geo. 2. c. 38.* to give in their accounts until fourteen days after Easter, the sums of money they may receive in their official capacity, are not due until that time is expired; and therefore if an overseer become bankrupt, such money cannot be proved against his estate before his accounts are delivered in.

For the provisions of the recent statute with respect to the accounts, as well as the other duties imposed on overseers, see *post*, VII.

3. If any action of trespass or other suit shall be brought against any person taking a distress, making of any sale, or any other thing done by authority of the act, they may plead that it was done by virtue of the act; and if a verdict be for the defendant, or the plaintiff be nonsuit after appearance, the defendant shall recover treble damages and costs. 43 *Eliz. c. 2. § 19.*

If any action upon the case, trespass, battery, or false imprisonment shall be brought against any overseer, or any in aid of him, for any thing touching and concerning his office, the action shall be laid in the county where the fact was done, and he may plead generally; and on a verdict in his favour, or if the plaintiff be nonsuit, or after any discontinuance, or the fact is not proved to be committed within the county, the defendant shall have double costs. 7 *Jac. 1. c. 5; 21 Jac. 1. c. 12.*

Parish officers, or persons acting in their behalf, are not entitled under these statutes to double costs, upon judgment as in case of a nonsuit, in an action brought against them for goods purchased by them for the use of the poor, it being a mere non-feasance. 3 *M. & S.* 131; and see 3 *East*, 92.

When any distress shall be made for a poor's-rate, the distress itself shall not be deemed unlawful, nor the parties making it deemed trespassers on account of any defect or want of form in the warrant for the appointment of such overseers; or in the rate of assessment; or in the warrant of distress thereon; nor shall the party distraining be deemed a trespasser *ab initio*, on account of any subsequent irregularity; but the parties injured may have their action of trespass, or on the case, at their election; and if the plaintiffs recover, they shall have full costs; provided no such plaintiffs shall have any action for such irregularity, if tender of amends hath been made before action brought. 17 *Geo. 2. c. 38. § 8.*

No action shall be brought against any constable or other officer (and it has been decided that overseers are officers within this statute), or person acting under his authority, for any thing done under a warrant, under the hand and seal of any justice, until demand made, and left at the usual place of his abode, signed by the party demanding, of a perusal and copy of the warrant, and the same has been refused for six days; and after complying with such demand, if any action be brought, without making the justice, who signed it, defendant, on producing and proving the warrant at the trial, the jury shall find for the defendant, notwithstanding any defect

of jurisdiction; and if the action be brought *jointly* against the justice and the officer, then, on proof of such warrant, the jury shall find for such officer, notwithstanding such defect of jurisdiction; and if a verdict shall be given against the justice, the plaintiff shall recover against him the costs, which he is liable to pay to the officer acquitted. 21 Geo. 2. c. 44. § 6. And where in such case the plaintiff shall obtain a verdict against a justice, and the judge shall certify that the injury complained of was wilfully and maliciously committed, he shall have double costs. § 7. But no such action shall be brought unless commenced within six calendar months after the act committed. § 8.

It has been decided that the 7 Jac. 1. c. 5. and 21 Jac. 1. c. 12. giving double costs, do not extend to ecclesiastical matters; as if a churchwarden present a man upon a pretended crime of incontinency; or a constable present a person as an inhabitant of a parish, when he is only an occupier of lands therein, for non-payment of charges towards the repair of the church; and to entitle an overseer to the double costs, it must be certified by the judge who tries the cause, that the overseer was acting in the execution of his office; if, however, there is a special verdict in a case where an overseer is defendant, and it appears by the facts found in such verdict, that the act for which the action is brought was done by virtue or reason of his office, the master must tax double costs, though there is no certificate or allowance by the judge who tries the cause.

As the law hath provided these protections to overseers acting properly in their office, so also it has inflicted punishments on them for misbehaviour; besides those already noticed on their failing to deliver their accounts, and hereafter as to the removal of the poor.

The churchwardens and overseers shall meet together at least once a month in the church, upon a Sunday, in the afternoon, after divine service, to consider of business respecting the poor, upon pain of forfeiting 20s. for every neglect. 43 Eliz. c. 2. § 2.

The justice before whom any idle and disorderly person shall be convicted, may order the overseer to pay 5s. to the person who apprehended the offender, and if he shall refuse or neglect so to do, it may be levied by distress. 17 Geo. 2. c. 5. § 1.

If any overseer (or other officer of any parish) shall neglect or refuse to obey and perform the several orders and directions in the statute particularized, or any of them, if no penalty is specifically provided, he shall forfeit not exceeding 5l. nor less than 20s. 17 Geo. 2. c. 38. § 14.

If any overseer, intrusted to make payments for the use of the poor, shall make such payments in base or counterfeit coin, the offence may be heard in a summary way, and on conviction he shall forfeit from 10s. to 20s. for each offence. 9 Geo. 3. c. 37. § 7.

Overseers also may be indicted for refusing to accept of and undertake the office, or for refusing to make a rate to reimburse constables for the apprehending of vagrants, under 17 Geo. 2. c. 1. § 1. or for refusing to account within the time limited for the monies they have received for the relief of the poor; or for not relieving the poor; or for relieving them unnecessarily; or for disobeying a legal order of justices; or for not receiving a pauper when sent to their parish under an order of removal; or for cruelty in the removal of a poor woman with child: so also the court will grant an information against an overseer, for fraudulently contriving to remove a poor person in order to prevent him from becoming chargeable to the parish; or for contriving to marry a pauper, or for giving a man money to marry a woman who was with child, in order to prevent the child from being a burden to the parish; but the court will not grant an information against an overseer for making an alteration in a poor's-rate, after it had been allowed by two justices, if the alteration appear to have been made with the approbation of the justices. Nor

can an overseer be adjudged guilty of absenting himself from the monthly meetings appointed by 43 Eliz. c. 2. until he has had personal notice of his appointment; and if he be appointed under 13 & 14 Car. 2. c. 12. an overseer in an extra-parochial place, he is not liable to this penalty.

An information in nature of a *quo warranto* will not lie against overseers; nor can the justices in sessions award an attachment against those officers. See further, VII.

II. 1. THE churchwardens and overseers, or the greater part of them, shall take order from time to time, with the consent of two justices, to raise, weekly or otherwise (by taxation of every inhabitant, parson, vicar, and every other occupier of lands, houses, tithes impropriate, appropriations of tithes, coal-mines, or saleable underwood in the parish, in such competent sums as they shall think fit), 1, a sufficient stock of materials to set the poor on work; 2, competent sums of money to relieve the lame, impotent, old, blind, and indigent; 3, to put out poor children apprentices; and 4, for doing and executing all other things concerning the premises, as to the overseers shall seem convenient. 43 Eliz. c. 2. § 1. The mayors or other head officers of corporations, shall have the same authority within their respective jurisdictions, both in and out of sessions, as is given to county justices; and every alderman of London, within his ward. § 8.

As this latter clause restrains the magistrates and justices to the limits of their respective jurisdictions, the justices for a county cannot allow a rate made by the overseer of a borough. 2 Const. 62.

The justices of the counties in which separate overseers shall be appointed for particular townships and villages, shall have the like authority to raise and levy monies, and to do and execute every thing in such townships and villages, as is given them in any parish where the overseers are appointed, under 43 Eliz. c. 2; 13 & 14 Car. 2. c. 12. § 22.

The justices and parish officers of a distinct jurisdiction, as of the precinct of the cathedral church at Norwich, may therefore be compelled, by a mandamus, to make a rate for the relief of the poor. 1 Const. 61.

Public notice in the church shall be given, by the overseers, of every poor's-rate allowed by the justices, the next Sunday after such allowance; and no rate shall be valid to collect and raise the same, unless such notice shall have been given. 17 Geo. 2. c. 3. § 1.

In trespass on a distress for non-payment of a poor's-rate, the publication of the rate must be proved; and the court of K. B. will not grant a mandamus to compel justices to sign a warrant of distress under a poor's-rate, if it has not been duly published. But a special case, respecting the legality of a rate, is good, though it does not appear therein that that rate was duly published.

The overseers shall permit the inhabitants of the parish, &c. to inspect every such rate at all reasonable times, paying 1s., and shall give copies at the rate of 6d. for every twenty-four names; or, on refusal or neglect, forfeit 20l. 17 Geo. 2. c. 3. § 2, 3.

In an action against an assistant overseer for this penalty, for not permitting an inspection of the rate, it was held, 1, that a demand of inspection made by the plaintiff (and his attorney, who was not a parishioner), was valid; 2, that refusal to an inhabitant constitutes him a party grieved, without any actual injury to him; 3, that a notice that a rate would be collected forthwith, was a good publication, and necessarily implied allowance by the justices; 4, that a demand to see the rate was sufficient, there being no other rate in existence at the time; 5, that the refusal was complete, though the defendant said "he may see the books by going to the vestry;" 6, that an assistant overseer is within the statute. *Bennett v. Edwards*, 7 B. & C. 586, affirmed in *Cam. Scac.* 3 Y. & J. 458; 6 Bing. 230.

True copies of all poor's-rates shall be entered in a book, within fourteen days after the determination of all appeals, to be attested by the overseers, and kept for public perusal, under penalty of from 20s. to 5l. where no other penalty is provided. 17 Geo. 2. c. 38. § 13, 14. Overseers, where there are no churchwardens, may do, perform, and execute, and shall be liable as to all matters relating to the poor. § 15.

The rate which the churchwardens and overseers are by these statutes authorized to make, must be assessed only on the visible property, both real and personal, which the occupier or owner may have within the parish, and not according to the amount of the property which a person, rated as an inhabitant, may have out of the parish.

The general rule seems to be, that every species of property, lying within the parish, which has an occupier, and from which an annual profit arises, is rateable to the poor.

By 59 Geo. 3. c. 12. § 19—23. provisions are made for rating the owners of houses let at rents from 8l. to 20l. a-year, for less than a year, or at rents payable at a shorter period than three months; the goods of the occupier being made liable to the rate; and the amount, if levied on such goods, may be deducted out of the rent.

Land is to be rated according to its value, of which the improved rents may be taken as evidence. Therefore, if a person rent a quantity of land, together with a mineral spring thereout arising, at a gross yearly rent, it is rateable to the poor in respect of the whole of such rent; for the value of the land is improved by the profits of the spring. *Comp. 6, 2. 1 M. & S. 509.* But as the improved rent is supposed to be in proportion to the quantity of stock it keeps or furnishes, the value of the stock ought not to be assessed; unless, indeed, a farmer, under colour of keeping stock for the purposes of husbandry, or as the produce of his farm, do buy and sell articles, such as hay, corn, straw, or horses, in the way of trade. So also lands, though given to an hospital, are still rateable to the poor; for a man cannot, by appropriating his land to charitable purposes, exempt them from taxes to which they were before liable.

Tithes are, in contemplation of law, a tenement, and are sold on by the parson as an occupier; and, therefore, the parson is rateable for the amount of his tithes to the poor; but the assessment must be made personally on him, although he has leased them to one or more of the parishioners. So also, if a sum of money be paid annually in lieu of tithes, it is rateable to the poor; although the amount of such money be settled under a compromise between the parson and the parish, and confirmed by act of parliament. But if an act of parliament say, that the inhabitants of such a place shall pay tithes to the vicar, and give an option to the parishioners, either to pay such tithes personally, or to raise such a sum as will pay it to the vicar, "clear of all deduction or charges, whether parochial or parliamentary, in lieu of his tithes," this payment is not liable to the poor's rate. Tithes which are payable by custom only, as on fish, are liable to be rated to the poor.

Rents.—Quit-rents, it has been said, are rateable to the poor; but this opinion may be doubted; for it is positively laid down in one case, that the quit-rents and casual profits of a manor are not rateable to the poor's tax; for the property, though permanent, does not produce a regular annual profit, but is merely accidental: but ground-rents are certainly

Waste lands.—By 17 Geo. 2. c. 37. waste and barren lands, when improved, and adjudged assessable by the sessions, shall be assessed to the poor's rate of the nearest parish: and the justices, in general quarter sessions, may hear and determine disputes concerning the same. And it has been adjudged, that if a waste be inclosed in the parish of A. on which the holders of the parish of B. have right of common

appurtenant, the allotment, given in lieu of that right, shall be assessed to the poor of the parish of A.

Ferry.—The owner of a ferry, residing in a different parish, but taking the profits of the ferry on the spot, by his servants and agents, is not rateable for such tolls in the parish where they are collected. 12 East, 346.

Tolls, which a corporation is entitled to, and which yield a certain annual profit, are rateable to the poor. So also, it has been determined, that the grantee of the right of navigation of the river Ouse, between Erith and Bedford, is rateable to the poor in each of those parishes, in which a sluice is erected; and for the passing of which certain tolls are established, although the grantee live, and tolls are collected in a different parish. So also, where, by a navigation act, the proprietor was entitled to a toll of 4s. per ton for goods carried up the river Kennet, from Reading to Newbury, or down the river from Newbury to Reading, and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection; it was held, that the tolls for goods, carried the whole voyage from Reading to Newbury, were rateable in Newbury, though in fact they were collected at Aldermaston lock, in the parish of Padworth, about midway between Newbury and Reading, by the agent of the proprietor. So also, where a person is entitled to a dish or measure, by way of toll, of all tin gotten in certain lands, he is rateable to the poor in respect of the profits produced by his right of toll. So also, it has been determined, that the barge way in the hamlet of Hampton Wick, purchased by the city of London, for the more effectually completing the navigation of the Thames, is rateable to the poor in respect to the tolls and duties thereon collected. But where the right of using a certain path or way is a mere easement; or if A. has an exclusive right of using a way-leave over lands which he holds in common with B., paying B. certain sums yearly; and has the privilege of using another way-leave, occupied by C., paying to C. so much a ton for the goods carried over it; A. is not liable to be rated to the poor in respect of either of such way-leaves: nor are the tolls collected at a light-house, of all ships passing or coming into the harbour, rateable, unless it be found as a fact, that the person rated is the occupier of the house.

The tolls of a light-house, situate in a township, which are collected out of the township, are not rateable *quod* tolls in the township. 12 East, 46.

The lessee of tolls of a public bridge is not rateable as such, it not appearing that he was the occupier of any local visible property within the parish, nor that he was an inhabitant resident there, deriving profit there from such tolls beyond the rent paid by him for the same. 12 East, 416.

See further, on the rateability of incorporeal hereditaments, 1 Nolan, 85.

Chapels.—A house converted into a chapel, if not used for any other purpose than that of public worship, was not rateable to the poor; nor was the preacher of the sect, unless he were permitted by his congregation to dwell therein, rateable as the occupier thereof: but if a private building used, and, by covenant, always to be used, as a chapel, for religious purposes, were let out so as to produce an annual profit, either by the rent of the pews, or by any other means, such a building was then rateable to the poor.

Now by the 3 & 4 Wm. 4. c. 80. chapels and places exclusively appropriated to public religious worship, and duly certified as such, shall not be liable to be rated to the poor or church rates. Parts of buildings not so exclusively appropriated and from which any rent or profits are derived, are not exempted; but the using of chapels, &c., or any part thereof, for Sunday or infant schools, does not render them liable.

An almshouse wholly occupied by objects of the charity, and from which no profits arise, is not rateable to the poor; and if lands be given to a charitable purpose, as for building

a school or alms-house, by a private act of parliament, in which it is expressed, that such lands shall be free from "all public taxes," they are not liable to be rated to the poor. But the master of a free school, appointed by the minister and inhabitants, under a charitable trust, whereby a house, garden, &c. were assigned for his habitation, for the teaching of ten poor boys, is rateable for his occupation of the same. 6 T. R. 332.

Market and fair.—The lessee of a stall in a market town, to which the lessee resorts every market-day weekly, to sell his wares, is not liable to be rated to the poor in respect thereof; nor is a person liable to be assessed for the profits of a fair.

Palaces.—A bishop is liable to be rated to the poor in respect of his palace; for there can be no prescription against this rate. So also where the site of a royal palace is demised to a subject, for a certain permanent interest, the grantees that occupy it are rateable for such property to the poor. So also, though royal palaces, in the hands of the crown, are not rateable; yet, if they, or the respective apartments in them, are separately occupied, the occupiers are liable to be rated, whether they pay for such occupation by rent or services.

Army.—Stables rented by a colonel of a regiment, by order of the crown, for the use of the regiment, are not liable to be rated to the poor. So also, the battery-house, at Seaford, which is the property of the crown, is not liable to be rated, although the master-gunner live in the house; for, being removable at pleasure, he has no permanent occupation; but if the sessions find the fact positively, that he is the occupier, and rate him, such rate is good. But the owner of stables in the parish of Mary-le-bone, rented by a colonel of a troop of horse, by the authority of the king, for the use of the troop, is liable to be assessed for them, to the rates collected in that parish, under 10 Geo. 3. c. 23.

Where a canteen was demised to B. by the barrack-board for a year, at a rent of 15*l.* for the canteen and buildings; and also the farther sum of 510*l.* for the privilege of using the same as a canteen, and selling therein provisions and liquors, &c. usually sold by butlers, with power of distress for the aggregate sum; B. was held rateable to the relief of the poor, as occupier of the canteen, in respect of the 525*l.* aggregate rent; and not merely in respect of the 15*l.* 4 M. & S. 317.

Parks.—The ranger of a royal park is rateable, as such, to the poor; for all the inclosed lands therein, in the parish, yielding certain profits: and so also is the herbage and pannage of a park, if it yields a certain profit; but if they yield no profit, they are not rateable.

Chambers in the inns of court and chancery are not liable to be rated to the poor.

Hospitals.—The officers belonging to and lodging in Chelsea Hospital are rateable to the poor; but neither the trustees nor the servants attending St. Luke's Hospital; nor the governors of St. Bartholomew's Hospital, are liable to be rated. See 1 East, 584.

Mines, pits, and quarries.—The lessees of lead-mines, who pay no rent, but only a certain part of the ore raised, are not rateable to the poor: but the lessee of lead-mines, though held of the crown, is rateable for the profits arising from lot and cope; which are duties paid him by the adventurer without any risk on his part. See also 1 East, 534; 2 East, 164; 5 East, 478.

The lessor of coal-mines is liable to be rated, though he derive no profit from the mine, the mine being rateable property. 5 T. R. 593. But not where, becoming unproductive, it ceases to be worked, though the lessee is still bound to pay rent for it. *Aliter*, where the mine is productive, though worked at a loss. 8 East, 387.

Landlords not resident within the parish, having leased lead-mines and other minerals, reserving a certain annual rent, and certain proportions of the ore which should be

raised, are not rateable for the rent, no ore being raised 12 East, 353.

Iron-mines are not rateable. 5 East, 478.

A slate-quarry is rateable. 2 East, 164.

And so is a clay-pit. 8 East, 528. And lime-works. 1 East, 534.

The trustees under the will of a person seised in fee of two-third parts of a manor, subject to certain leases to a company of adventurers of the mines of lead, tin, and copper ore, and other minerals under the moors, commons, or wastes of the manor, at a rent certain, are not rateable to the relief of the poor at such rent; and, therefore, a rate by which they were rated in one gross sum for such rent, and also in respect of their being owners and occupiers of the moors, commons, and wastes within the manor, was held ill. 4 M. & S. 222.

Corporation.—A corporation is liable to be rated to the poor for profits arising from tolls; see *ante*: but a corporation established for the purposes of a public charity, such as the governors of St. Bartholomew's Hospital, are not rateable with respect to the hospital; for they cannot be considered as occupiers. A corporation, however, seised of lands in fee for its own profit, are inhabitants and occupiers, within the meaning of the 43 Eliz. c. 2. and are, in respect thereof, liable to be rated, in their corporate capacity, to the relief of the poor. So also, lands purchased by a company, not incorporated, and converted into a dock under an act of parliament, declaring that the shares of the proprietors shall be considered as personal property, are rateable to the poor in proportion to the annual profits. See also 5 East, 453, 456.

Woods consisting of timber trees, where the under-wood is left for standards, are not rateable to the poor.

Saleable under-woods are rateable in proportion to the value, though they should only be cut down once in twenty-one years, and their annual value may be estimated according to what they could be worth to rent for a lease of the duration of their intended growth. 10 East, 219.

Offices.—An officer of the Salt Office is not liable to be rated to the poor in respect of his salary.

Professions.—The profit arising from, are not rateable 7 T. R. 60.

Machines.—The profits of a weighing machine, on a turnpike road, are liable to be rated to the poor. So, a building called, "the engine-house," in which is a carding-machine for manufacturing cotton, is rateable to the poor, on its increased value by the working of the machine; although this engine is not fixed to the premises, but capable of being moved at pleasure; but the profits of a light-house are not rateable. See *ante*, Tolls.

Prisons.—The warden of the Fleet prison is liable to the poor's rates in respect of those profits which he derives from letting lodgings to prisoners, in the prison and the rules thereof.

Ships.—The owners of a coasting vessel are liable to be rated in respect of the profits accruing therefrom, in that parish where they themselves reside, and where the ship is registered, her cargoes are usually received, and delivered, and her freight paid, and which is the home of the vessel when unemployed, although at the time of making the rate, the ship was not actually within the parish. But they are not liable to be rated for a ship which was never locally within the parish, although the profits be there received by the owners. 1 B. & A. 109.

Stock in trade.—The general question, how far personal property is rateable to the poor, was long undetermined: and whether stock in trade were liable, was considered to depend, in a great measure, upon the particular circumstances of each case; for although there were not wanting authorities of a recent as well as more early date, to show that stock in trade, in general, was rateable to the poor; yet until of late years there was no express authority, in the instance of any one trade, adjudging the stock of that par-

icular trade to be liable, except in those places in which an usage to assess such stock was proved; though, in many boroughs, the stock in all trades had immemorially, and even from the very date of the *stat. 43 Eliz. c. 2.* been, in point of fact, rated. It seems, now, to be decided, that stock in trade, if it be the property of the person in possession, and productive, is ratable: the circumstance of its having been rated one year, is *prima facie* evidence that it is productive the next year; and, if not contradicted by other evidence, is sufficient to warrant the justices to decide that it should be then rated. See 6 *T. R.* 468. And stock in trade is rateable, although it never has been previously rated in the parish. 16 *East*, 350.

Silk throwsters, working up in their mills the silk of their employers sent to them for that purpose, are not liable to be rated in that respect as for their stock in trade. 8 *Eust*, 537.

A farmer shall be taxed for his stock in hand, in case it is more than necessary for the carrying on his farm and paying his rent, for then it is like a stock in trade; but for stock necessary for his farming, he shall not be taxed. *Vin. Abr. tit. Poor*, xvi. p. 426. See *ante*, *Land*.

2. The poor's-rate must be made by the overseers, and allowed by the justices; for the sessions have no original power to order an assessment to be made. The overseers, with the concurrence of the justices, may make the rate without the consent of the churchwardens; and when made, the justices must allow it, for this is merely a ministerial act; and if either the overseers neglect to make, or the justices to allow a rate, they may be compelled by *mandamus*.

The time for which a poor's-rate ought to be made, seems to be left to the discretion of the overseers. The *stat. 43 Eliz. c. 2.* says "weekly or otherwise." In one case, it is said that it ought to be monthly, because the possessors are to pay, and possessions frequently change; this rule is confirmed by *Burrow*, but denied by *Bott*, who states a *dictum* of Lord Mansfield, that a poor's-rate might as well be made for three months as for one month; and *Holt*, chief-justice, assigned as a reason against making poor's-rates quarterly, that by this means a man cannot move in the middle of the quarter but he must be twice charged. The legislature, however, has provided against this by *stat. 17 Geo. 2. c. 38. § 12.* which enacts, "that when any person shall come into, or occupy any premises, from which any person assessed shall be removed, or which, at the time of making the rate, were empty, every person, so removing or coming in, shall pay the rate in proportion to their respective occupations."

The purposes, also, for which a poor's-rate is made, must be conformable to the direction of the *stat. 43 Eliz. c. 2.* and therefore a rate cannot be made to reimburse former overseers for money expended to the use of the poor, or to defray law charges; for an overseer is not bound to lay out the money until he has it; nor can a rate be made to repay money borrowed to build a workhouse; but if the monies, on any rate made by preceding overseers, be not raised at the expiration of their office, the successors may, by *stat. 17 Geo. 2. c. 38. § 11.* raise it, and reimburse them; and overseers, before their office expires, may make a rate to reimburse themselves monies laid out in proceedings at law, provided such expense be not incurred wantonly and unnecessarily. See also 11 *Geo. 3. c. 25. post.* And by *stat. 11 Geo. 3. c. 12. § 18.* a rate may be made for reimbursing constables such monies as they shall have expended in relieving the poor, in conveying them with passes, and in carrying rogues, vagabonds, and sturdy beggars to houses of correction.

The rate, also, must be made in equal proportion on all the persons assessed, according to their respective properties; and therefore a pound-rate on the rent of lands and houses, and the amount of the interest of personal property, is said to be the most fair and reasonable assessment; but this is deemed to be the rule; for the circumstances of a man of

landed property may differ in proportion as his family is large or small, and personal property is in a continual state of fluctuation; and, therefore, neither rent nor land-tax ought to be considered in the making of a rate; but the overseers, taking their former assessments as their best guide, are to proportion rates according to their best discretion; and if they make it unequal, the sessions on appeal will correct it, for the sessions are the ultimate judges of the proportion and equality of the rate. A poor's-rate made upon three-fourths of the yearly value of land, and upon one moiety of the yearly value of houses, is not disproportionate or unequal. A rate made on one-half of the full yearly value or net rent of farms, and taking one-twentieth part of all stock, personal estate, and money out at interest, valuing the interest of such twentieth part at 4 per cent., and then rating one moiety of such twentieth part, varying the proportions as circumstances require, (for the overseers cannot make a standing rate,) is a good and equal rate. A rate on lands and houses, at one penny in the pound, without making any distinction between farm dwelling-houses and cottages, although they had been before rated in different proportions, is not an unequal rate; for whether houses are to be rated to the poor in a different proportion from land, must depend on local circumstances. But of those equalities and proportions the sessions are ultimately to judge; and therefore the Court of King's Bench, presuming *prima facie* that the inferior jurisdiction will not violate its duty, will not grant a *mandamus* to make an equal rate, or quash a rate, unless it evidently appear unequal on the face of it.

3. The appeal to the sessions may, by *43 Eliz. c. 2. § 4.* be to any general quarter sessions; but by *17 Geo. 2. c. 38. § 4.* it must be on reasonable notice given to the next sessions, general or quarter (see *ante*, 1. 1, 2); for it is by making the rate that the party is aggrieved, and the publication shall be taken from the time it is allowed; and if an appeal be lodged and dismissed for informality, the party cannot have a second appeal, but if it appears that reasonable notice has not been given, they may adjourn the appeal to the next quarter sessions, and there finally determine the same, and award the party, in whose favour it is determined, costs.

In all corporations which have not six justices, persons aggrieved may appeal against a poor's-rate to the next sessions for the county or division. (*Stats. 17 Geo. 2. c. 38. § 5.*; 1 *Geo. 4. c. 36.*) The overseer's book, in which all appeals from poor's-rate are directed to be entered, shall be produced at the sessions when any appeal is heard. § 13.

Upon all appeals from rates, the sessions may, by *stat. 17 Geo. 2. c. 38.* amend the rate, without altering it with respect to other persons. Upon an appeal from the whole rate, if it shall be found necessary, the sessions may, in their discretion, quash the rate, and direct the overseers to make a new equal rate. The sessions cannot strike out the name of a person from the poor's-rate; so, if the name of any person be omitted, the sessions must quash the rate, and cannot amend it by inserting his name. But it seems agreed, that, where a person is overcharged in a poor's-rate, the sessions may relieve him, on appeal, by lessening the sum assessed on him. A partitioner who is liable to be rated, but who in fact is not rated, is a competent witness to prove that the person, whose name is omitted, is liable to be rated.

The justices in sessions shall cause defects of form in appeals to be amended without costs; and determine the appeal on the merits of the case. *Stat. 3 Geo. 2. c. 19. § 1.*

By *stat. 41 Geo. 3. (U. K.) c. 23.* for the better collection of the poor's-rates, it is enacted, that on appeal from any poor-rate the quarter sessions may amend it without quashing it, or, if necessary to grant relief, they may quash it, but the sum assessed shall nevertheless be levied and applied in satisfaction of the next effective rate to be made. § 1. Notice of appeal shall not prevent distress being made for recovery of the rate, for a sum not exceeding the amount of

the last effective rate. § 2. Quarter sessions ordering a rate to be quashed, may direct any sum charged not to be paid, and stop proceedings for the levying of it. § 3. Notices of appeal shall be in writing, and shall specify the grounds of appeal; and this extends to appeals against overseers' accounts. § 4. 6. Appeals may be decided by consent without notice. § 5. The rate shall be levied as altered by the sessions. § 7. In case in the rate the name of any person shall be struck out, or any sum lowered, the sessions may order money unduly levied to be repaid with costs. § 8.

If a poor-rate be legal on the face of it, though stated to be made for illegal purposes, the courts will not quash the rate, but will leave the parties aggrieved to appeal against the allowance of the overseers' accounts. 5 T. R. 346.

When a person is *overcharged*, the sessions may relieve him on appeal, and amend the rate, by lessening the sum assessed on him. 2 T. R. 623.

But if the name of any person be omitted in the rate, the justices ought to quash the rate, and not amend it by adding the name. 1 T. R. 625; 6 T. R. 468.

Trespass will not lie for a distress for non-payment of the poor's-rate, if the objection to the rate be, that it is made for six months. The party ought to appeal. 6 T. R. 580.

If a party appeal on the ground that he has no rateable property in the parish, the respondents must first establish their case. 4 T. R. 475.

The party objecting to a poor's-rate may appeal to the next session, for which he is in time to give an effectual notice of appeal, after the publication of the rate. One intervening day between such publication and the next immediate quarter sessions, is not sufficient time for the purpose. 15 East, 256. See 4 T. R. 12.

An appeal in London or Middlesex must (as in all other counties) be made to the next practicable general quarter sessions; the *stat. 17 Geo. 2.* in its terms, gives the appeal to the next general or quarter sessions. 15 East, 692.

4. The present, as well as the subsequent overseers, may, by warrant from two justices, levy the sums of money assessed for the poor's-rates, and all arrears thereof, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the offender's goods, rendering the party the overplus; and, in defect of such distress, two justices may commit the defaulter till payment. *Stat. 43 Eliz. c. 2. § 4.*

The goods of any person assessed, and refusing to pay, may be distrained not only in the place for which the assessment is made, but in any other place within the same county or precinct; and if sufficient distress cannot be found there, on oath before a justice of any other county or precinct, goods in such other county or precinct may be distrained. *Stat. 17 Geo. 2. c. 38. § 7.* In case any person refuse to pay the present overseers, the succeeding overseers may levy arrears, and reimburse their predecessors. § 11. But persons succeeding tenants rated, or coming into houses empty at the time of the rate, shall only pay in proportion to the time they have occupied the premises; which proportion shall be settled by two justices. § 12.

By 54 Geo. 3. c. 170. § 12. the goods of persons neglecting for seven days to pay the poor's-rates, may be distrained not only within such district, but within any place in the same county; and if sufficient distress cannot be found in the same county, the goods of such person neglecting to pay the rates may be distrained in such other county where they shall be found. And see 59 Geo. 3. c. 12. § 19, 20.

Justices granting distress-warrants shall therein order the goods distrained to be sold within a certain time limited in the said warrant, not less than four, nor more than eight days, unless the penalty and charges of distress be sooner paid. *Stat. 27 Geo. 2. c. 20. § 1.* The officer making such distress may deduct his reasonable charges out of the money arising by the same, and also the penalty or sum distrained

for; and shall, if required, show the warrant of distress, and suffer a copy thereof to be taken by the person whose goods are distrained. § 2.

Justices acting for adjoining counties, and personally resident in one of them, may grant distress-warrants; and the acts of any constable or other officer, in obedience thereto, shall be as valid as if they had been granted by justices acting for the proper county only; but such warrants must be directed and given, in the first instance, to the constable or other officer of the county to which the same particularly relate; and the constable may take persons apprehended before justices of the adjoining county. *Stat. 28 Geo. 2. c. 19. See Justices.*

Justices may act in all matters relating to the poor laws, notwithstanding they are rated to, or chargeable with taxes or rates within the parish or place affected by the acts of such justices. *Stat. 16 Geo. 2. c. 18. § 1.*

A poor's-rate, after it is demanded and the party summoned, may be distrained for before the time for which the rate is made is expired; but if the landlord of the premises tender the rate, the overseers are bound to receive it, although the tenant is not rated; and if they make an excessive distress, they are liable to a special action on the case. The granting of such warrant of distress is a judicial, not a ministerial act; and the magistrates ought first to summon the party, and hear what he has to say in his defence. 7 T. R. 270.

Parishes also may be rated in aid; for, by the said *stat. 13 Eliz. c. 2.* if the justices perceive that the inhabitants of any parish are not able to levy, among themselves, sufficient sums of money for the purposes of the act, the said two justices may rate any other (inhabitants) of other parishes, or out of any parish within the hundred where the said parish is, to pay such sum or sums of money to the churchwardens and overseers of the poor parish as the said justices shall think fit; and if such parish so rated is not able to pay the sum assessed, then the sessions may rate any other (inhabitants) of other parishes, in or out of any parish within the county, for the purposes aforesaid. § 3.

The two justices or the sessions, as the case may happen to be, are, under this clause of the act, to order the *quantity* of money which they think ought to be raised in aid of the poor of the parish; but the overseer must make the rate on those who are to pay it. They may make the order either on particular persons, or on the whole parish, for the relief of a year; but the order must state that it was made by the justices, if the parish charged be within the hundred; and by the sessions, if the parish be within the county; but both these jurisdictions are original, and independent of each other, and therefore it is not necessary that the justices should adjudge the parish within the hundred incapable, before the sessions can rate a parish out of the hundred in aid. An extra-parochial place may be taxed in aid of a poor parish, and one vill may be ordered to contribute to the relief of another vill in the same parish, or any division of a county that is equivalent to the name of a hundred. It is also said, that the next able parish to the poor parish should be first rated, but one parish in a city cannot be made contributory to another parish in the same city, if not locally situated within a hundred or a county.

An order for taxing one parish in aid of another, under the said act 13 Eliz. was held good, although the two parishes were, by act of parliament, incorporated with others for the maintenance of the poor; there being a special proviso that nothing should extend to repeal the powers of 43 Eliz. as to taxing parishes in aid of others. 2 East, 417.

III. 1. The overseers are to set to work all such children whose parents shall not be thought able to maintain them; and all such persons, married or unmarried, who have no means to maintain themselves, and use no ordinary and daily trade to

act their living by; to relieve (as has been already noticed) the lame, impotent, old, blind, and such other among them, being poor and not able to work; and to put out poor children apprentices. 43 *Eliz. c. 2. § 1.* The overseers shall meet once a month in the church on Sunday afternoon, after divine service, to take some good course in the premises, on pain of 20s. § 2. (This clause does not extend to overseers of extra-parochial places. 8 *Mod. 40.*) The justices, or any one of them, may send to the house of correction, or common gaol, such poor persons as shall not employ themselves according to the direction of the overseers. § 4. The majority of the churchwardens and overseers, by leave of the lord of the manor, whereof any waste or common within the parish shall be parcel, and by order of sessions, may build on such waste or common, at the charge of the parish, convenient houses for the impotent poor. § 5.

The overseers, with the consent of two justices, may set up any trade or manufactory for the employment and relief of the poor. 3 *Car. 1. c. 4. § 22.*

The sessions may set poor prisoners on work, and expend the profit arising from their labour, towards their relief; but no parish shall be rated above 6d. a week on this account. 19 *Car. 2. c. 4.* Other provisions are also made by the same statute, for the relief and removal of sick prisoners.

There shall be kept in every parish, at the charge of the parish, a book or books wherein the name of all such persons who do or may receive collection, shall be registered, with the day and year when they were first admitted to have relief, and the occasion which brought them under that necessity. Yearly, in Easter week, or as often as it shall be thought convenient, the parishioners of every parish shall meet in vestry, before whom the said book shall be produced; and all persons receiving collections shall be called over, and the reasons of their taking relief examined, and a new list made and entered as shall be thought fit, to receive collection: and no person shall be allowed to have or receive parish collection, but by authority under the hand of a justice residing in the parish, or if none be there dwelling, in the parts near or next adjoining, or by order of quarter sessions, except in cases of pestilential diseases, and then only such families as are infected. 3 & 4 *Wm. & M. c. 11. § 11.* So much of this act as required the poor to wear badges was repealed by 50 *Geo. 3. c. 52.*

Every person who shall be upon the collection-books, and receive relief, and the wife and children of such person cohabiting in the same house, shall wear a badge, as described in the act, on pain of losing the usual allowance; and if any parish-officer shall relieve any person, not having such badge, he shall forfeit 20s. 8 & 9 *Wm. 3. c. 30. § 2.*; repealed by 50 *Geo. 3. c. 52.*

No justice shall order relief to any poor person, until oath be made before him of some matter which he shall judge a reasonable cause or ground for having such relief, and that the same person had applied to the parish for relief, and was refused: and until such justice has summoned two of the overseers to show cause why such relief should not be given. 9 *Geo. 1. c. 7. § 1.* The person, whom the justice shall order to be relieved, shall be entered in the books, as a person entitled to receive collections, as long as the cause of such relief continues, and no longer. § 2.

For the greater ease of parish in the relief of the poor, the churchwardens and overseers, or the major part of them, with the consent of the major part of the parishioners, may purchase houses, or contract with persons for the maintenance of the poor; and such persons shall have the benefit of their work and labour; and when any parish shall be too small to purchase or hire such workhouse, two or more such parishes, with the consent of the majority of their respective parishioners, may unite in purchasing or hiring such workhouse: and the churchwardens and overseers of a parish, where a workhouse is situated, may contract with the churchwardens

and overseers of any other parish, for the maintenance of any of the poor of such other parish. But no poor person so removed from one parish to the other, shall gain a settlement thereby. 9 *Geo. 1. c. 7. § 4.* By 45 *Geo. 3. c. 54.* no contract for maintaining the poor shall be valid, unless the contractor resides in the parish where the poor are to be maintained, and security is given for the due performance of the contract.

The 7th section of 9 *Geo. 1. c. 4.* was repealed, with respect to any parish, township, or place, which should adopt the provisions contained in 22 *Geo. 3. c. 83.* (explained by 33 *Geo. 3. c. 35.*) for the establishment of houses of industry, and incorporated societies, for the maintenance of the poor. That act laid down many excellent regulations for the furthering the wholesome purpose of protecting and relieving the poor; by appointing guardians of the poor, and governors and visitors of the poor-houses. See also the additional powers given to the acting guardians of the poor in the several places where the acts were put in execution, by 36 *Geo. 3. c. 10*; 39 & 40 *Geo. 3. c. 40*; 41 *Geo. 3. c. 9*; 41 *Geo. 3. c. 12*; and 52 *Geo. 3. c. 73.* And see 42 *Geo. 3. c. 74*; 43 *Geo. 3. c. 110.* for payment of debts incurred, under 22 *Geo. 3. c. 83.* for the building and enlarging of poor-houses, &c.

By 49 *Geo. 3. c. 124. § 5.* two justices in petty sessions, may direct the regulation of 22 *Geo. 3. c. 83.* to be executed in any parishes within their divisions, as fully as in those incorporated by that act.

By 50 *Geo. 3. c. 50.* two justices in special sessions may direct the regulations in the schedule of 22 *Geo. 3.* (with such additions as they may make,) to be observed in work-houses, poor-houses, or any houses set apart for that purpose, (although there should be no superintending master or mistress,) in any place within their divisions. Such justices may add to, or alter regulations previously made, provided they are not contradictory to the regulations established by 22 *Geo. 3.* and provided they shall not be repealed at the quarter sessions. § 1. Contractors for maintaining the poor, subjected to the jurisdiction of justices or overseers of the poor. § 3. Such justices may appoint the keeper of the workhouse to be the governor. § 3. Paupers embezzling, wasting, or damaging goods, clothing, &c. entrusted to their care, shall be punished by commitment to hard labour in the house of correction. § 4.

By 55 *Geo. 3. c. 137.* all goods, provisions, clothes, tools, and materials, provided for the use of the poor, are vested in the overseers for the time being, and their successors, who are enabled to bring actions, and prefer indictments for the same. § 1. Persons knowingly taking the same in pawn, or buying, or receiving the same in any way, or defacing marks thereon, punishable by fine before one justice. § 2.

Paupers refusing to work, or getting drunk, or otherwise misbehaving, may be committed to the gaol or house of correction, and kept at hard labour, not exceeding twenty-one days. § 5. Persons having the management of the poor, not to be concerned in contracts, on penalty of 100*l.* § 6.

By 54 *Geo. 3. c. 170. § 7.* no master, governor, or person superintending houses for the reception of poor persons, or churchwardens, overseers, or any other person having the management of the poor, shall punish corporally any adult person under his care, for any misbehaviour, nor confine any such person longer than twenty-four hours, or till they can be conveyed before a magistrate.

The 9 *Geo. 1. c. 7. § 4.* contained a clause, enacting, that poor persons who refused to be maintained and lodged in such workhouses, should be struck out of the book, and not entitled to any relief from the parish. But by the 36 *Geo. 3. c. 23.* after reciting the clause, and that it had been found to be inconvenient and oppressive, "inasmuch as it often prevents an industrious poor person from such occasional relief as is best suited to their peculiar case, and in certain cases holds out conditions of relief injurious to the domestic comfort and happiness of the poor;" it is enacted, that overseers

may, with the approbation of the parishioners, in vestry assembled, or of any justice of the district, relieve any industrious poor person at their own house, under circumstances of temporary illness or distress, and, in certain other discretionary cases; although such poor person shall refuse to be lodged and maintained in the poor-house. § 1. And a justice of the district may, at his discretion, make an order for the relief of such poor persons at their own houses; which the overseers must obey. But the special cause of such relief must be assigned on the face of the justice's order; which order is only to remain in force for one month, but is then renewable from month to month; and an oath of the necessity of such relief is to be administered to the poor person applying, and the overseer is to be summoned to show cause, if any there be, against it. § 2. See now, *post*, VII.

This act does not extend to any places where houses of industry are provided, under the 22 Geo. 3. c. 83. already mentioned, or under any special act.

Justices of peace, and physicians, apothecaries, or clergymen authorized by them, may visit parish workhouses; and two justices may make order for relieving the sick poor therein. 30 Geo. 3. c. 49.

See now the provisions of the recent statute, *post*, VII., with respect to workhouses, by which the provisions of the above acts are materially controlled and varied.

The sessions, as well as the single justice, may make original orders for the relief of the poor; for in this respect they have a concurrent jurisdiction. The order must be for the relief of the person in whose favour it is made; and, therefore, no order can be made to pay a surgeon for attending a pauper, or to pay a bill for the nursing a pauper sick in gaol; nor unless the oath required by 9 Geo. 1. c. 7. be first made. The order of relief must also state, that the party is poor and impotent. So also, if materials are required to set the poor on work, one order cannot be made for that purpose, under 43 Eliz. c. 2. and 19 Car. 2. c. 4. for as they are for distinct purposes, there must be distinct and several orders. An order, however, to pay a person so much "weekly and every week," is good, and the money is due at the beginning of every week. It was also settled, previously to 36 Geo. 3. c. 28. that when an order of relief is made to a poor person, such person only, and not any other of his family, is obliged to go into the workhouse; and when a bastard child is born in a parish, and the parents neglect to provide necessaries for its sustenance, the parish officer must afford it relief, although there is no order of justices for the purpose.

By 56 Geo. 3. c. 129. for repealing certain provisions in local acts for the maintenance and management of the poor; after reciting that divers local acts had passed, containing enactments relative to the maintenance and regulation of the poor, varying the general law with respect to particular parishes, &c.; it is enacted, that all enactments and provisions in any act passed since the beginning of the reign of King George I. of the following nature, should be repealed; viz. whereby any poor persons, not actually applying for, and receiving relief, are compellable to go or remain in any house of industry or workhouse; or may be kept therein, at the discretion of the governors or overseers, &c. after they are capable of maintaining themselves, or until the charges of the parish in the maintenance of them or their families shall be reimbursed; or whereby poor children are rendered liable to be apprenticed to the governor, &c. of any workhouse, &c. or whereby any parish, &c. at a greater distance than ten miles from the workhouse, &c. may become contributors thereto; or whereby governors, &c. of any workhouse, &c. are empowered to hire out the poor of full age, or to contract with any person for the profit of the labour of such poor.—And by the same act, it is enacted that it shall not be lawful for any governor, director, guardian, or master of any house of industry or workhouse, on any pretence, to chain, or

confine by chains or manacles, any poor person of sane mind.

By the 59 Geo. 3. c. 12. § 1—5. parishes were empowered to establish select vestries for the concerns of the poor, to consist of a certain number of householders (not more than twenty, nor less than five) elected by the parishioners at a vestry, and then appointed by the justices at sessions, together with the minister, churchwardens, and overseers; and such select vestry was authorized to examine into the state and condition of the poor, the proper objects for relief, the nature and amount of the relief to be given, and to inquire into and superintend the collection and administration of all money raised by poor-rates, and of all other funds and money raised, or applied by the parish for relief of the poor. The overseers were required to conform to the directions of the vestry; and not to give any relief, (except in cases of emergency, and under the order of a justice of peace,) other than ordered by the vestry. In parishes not having select vestries under this act all orders for relief of the poor were to be made by two justices, except in emergency, for fourteen days by one justice. By § 9. parishes were enabled to rent or purchase land for building or enlarging workhouses in the parish, or some adjoining parish; to provide land for the employment of the poor: the expensae not to exceed a rate of 1s. in the pound *per annum*. By § 24, 25. a summary remedy was provided, on application to two justices, for obtaining possession of any houses or lands belonging to parishes, upon one month's notice. § 27. facilitated the mode of obtaining relief, in cases of parishes incorporated, under 22 Geo. 3. c. 83. By § 29, &c. overseers were empowered to give relief by way of loan; and pensions for services in the army, navy, &c. and the wages of seamen, are made available, as a security or indemnity to the parishes affording relief to the parties entitled to such pensions or wages.

For the provisions of the new act for relieving the poor &c., see *post*, VII.

By the 1 & 2 Wm. 4. c. 60. for the better regulation of vestries, the vestries appointed under that act are not to consist of less than twelve, or more than one hundred and twenty householders, who are to exercise the authority of former vestries.

By the 1 & 2 Wm. 4. c. 59. churchwardens and overseers may, with the consent of the treasury, inclose crown lands not exceeding fifty acres, for the purpose of cultivating and improving the same for the benefit of their parish and the poor persons within the same.

By the 2 Wm. 4. c. 42. where allotments are made for the benefit of the poor, in any parish, under inclosure acts, such allotments may be let in portions to industrious cottagers.

2. The father and grandfather, and the mother and grandmother, and the children, of every poor, old, blind, lame, and impotent person, or other person, not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person, at the rate the justices at sessions shall assess, on pain of 20s. a month. 43 Eliz. c. 2. § 7. The penalties levied, for disobeying such order of maintenance, shall go to the relief of the poor. § 11.

The justices of the county or place in which the rich relation, and not where the poor relation, dwells, have alone authority to make this order, and to assess the rate of maintenance. The order must be made at a quarter, and not at a general session; in which it must be alleged, that the person to be relieved is poor, unable to work, and liable to become chargeable to the parish; and the person to relieve is of sufficient ability, and within the jurisdiction of the session. The justices have, in this case, an original jurisdiction; but they make it as well upon the complaint of the overseers, as upon the complaint of the poor relation; but they must order a sum of money to be paid; for they cannot order generally the rich person to relieve his poor relation.

By the 59 Geo. 3. c. 12. § 26. the order for relief on the rich relation may be made by two justices in petty sessions.

This statute extends only to natural relations, and not to relations in law; and it seems that, in default of one relation, another may be compelled to relieve the pauper; as in the case of grandfather, father, and child; the father being incapable of maintaining the child, the grandfather may be compelled, if of sufficient ability; and, therefore, a man is not obliged to maintain his son's wife, nor his wife's mother, nor his wife's child by a former husband. And it seems to be now settled, that it makes no difference whether the wife be alive or dead at the time her poor relations require relief, contrary to some former determinations on this subject. It is said also that a wife cannot be ordered to maintain her grandchild, nor the husband of a grandmother to maintain her grandchild; but if an order of maintenance be made on a grandmother, and she afterwards marries, the husband shall be liable (during her life) to the maintenance. It is also clear that the reputed grandfather of a poor orphan cannot be ordered to maintain it, for no order can, in this respect, be made for the maintenance of a bastard. See *Bastard*. But where this species of order is well and properly made, it may be nullified for disobeying it; and the money ordered to be paid becomes due at the beginning of each week.

By 11 & 12 Wm. 3. c. 4. the Protestant children of Popish parents might obtain relief by application to the Court of Chancery; and by 1 Ann. c. 30. the same was enacted with respect to the Protestant children of Jews.

The churchwardens and overseers, where any wife, child, or children, shall be left chargeable to the parish, on application to, and by warrant of, or order from, two justices, shall seize so much of the goods and chattels, and receive so much of the rents and profits of the lands and tenements of the husband, father, or mother, as the two justices shall direct, for and towards the discharge of the parish and relief of the family; and, on the order being confirmed at sessions, the goods may be disposed of, and the rents received, as the court shall direct. 5 Geo. 1. c. 8.

All persons who threaten to run away and leave their wives or children to the parish, are declared idle and disorderly persons, by 17 Geo. 2. c. 5. § 1. And all persons who run away and leave their wives or children so chargeable are declared rogues and vagabonds. § 2.

See the provisions of the new statute with respect to the liability of relations, *post*, VII.

IV. THE state of the poor in ancient times was slightly mentioned at the beginning of this long article. Previous to the recent statute there were ten modes whereby persons might gain a settlement; which entitled them to claim and receive relief from the parish in which they are settled, whenever such relief is necessary; and if it is happened while the pauper resided in a parish where he or she is not settled, they are to be removed to their place of settlement, under the regulations noticed in this and the two subsequent divisions.

Many alterations in the general law of settlements having been made by several local acts, it was by 54 Geo. 3. c. 170. enacted, that all enactments contained in any act of parliament since the commencement of the reign of George I. whereby any alteration is made in respect of gaining or not gaining a settlement within any particular district, parish, &c. shall be repealed; and that every person shall be deemed to have acquired and acquire a settlement in every such district or parish by any means they would or might have done or do, in case such acts had not been made. All such parishes, &c. therefore became subject to the general laws of settlement.

1. Before the late act the place of birth was the place of settlement of all illegitimate children; for a bastard, not

having any legal parents, could not be referred to their settlements, as a legitimate child might be; but this general rule was subject to the following exceptions:—1st. Where the mother was conveyed collusively and by fraud into the parish where the bastard was born: 2. Where a bastard was born in a house of industry, hospital, county gaol, or house of correction. See 13 Geo. 3. c. 82; 20 Geo. 3. c. 36; and see 13 Geo. 2. c. 29. as to the Foundling Hospital: 3. Where born while the mother was under an illegal order of removal: 4. Where born pending an appeal against an order of removal, which was afterwards reversed: 5. Where born, *in transitu*, while the mother was passing under an order of removal, or remaining under the suspension of such order. See *post*, VI. But a bastard born on the road while the mother was endeavouring to reach her own parish, without fraud, was settled where born. 6. Where born after an order of removal was made out, but before actual removal: 7. Where the mother returned to the place from which she was removed: 8. Where born in the streets while the mother was wandering in a state of vagrancy. 17 Geo. 2. c. 5. § 25. In all other cases the birth decided the settlement.

This rule also, that a bastard was settled where born, extended to the illegitimate offspring of persons certificated; see *post*, V.; although the certificate was in force at the time of the birth, and undertook to provide for the mother and her child, but not if it expressly undertook to provide for the child she is then pregnant with; for then the child, though born a bastard, should be settled in the certifying parish: and where a child was born a bastard, and its parents afterwards intermarried, and the father procured a certificate for himself, his wife, and his child, such bastard should have his father's settlement. Under 8 & 9 Wm. 3. c. 30. (see *post*, V.) the legitimate children of certificated persons shall not gain a settlement by birth in the certificated parish.

The parish where born is also *prima facie* the settlement of all legitimate children; but this, though the primary place of settlement, is only so until the settlement to which such child is entitled by parentage can be discovered. So also the place where a legitimate child is first found is the place of its legal settlement, until the place of its birth or its derivative settlement can be known.

By § 2. 3. of 54 Geo. 3. c. 170. children shall not acquire any settlement in any district, &c. by being born of any mother actually confined as a prisoner within a prison, or in any house licensed for the reception of pregnant women, or other place appropriated for the charitable reception of such women. And children born of poor persons in any house of industry, &c. locally situate in any district contributing to the expenses of maintaining the poor in such house, or in any other district not contributing to such expenses, shall be deemed born in the district by whom the mother of such person was sent to, and on whose account she was received and maintained in, such house.

Settlement by birth is now altered as regards illegitimate children; see *post*, VII.; but if the mother have no settlement, then it should seem that the place of birth shall be the place of settlement, unless she be confined at the time within the walls of a prison, &c. within the meaning of the above statute of 54 Geo. 3. c. 170.

2. All legitimate children are settled in the parish in which their father is last settled, wherever else he may have resided, or they may have been born; or if the father have no settlement, or if that cannot be traced, then in the place in which their mother is settled, until they are emancipated, or gain a new and distinct settlement for themselves. Foreigners, who have gained no settlement in England, cannot of course communicate this species of settlement to their children; and if the children are not born here they cannot resort to that primary settlement which is gained by birth; but they (and their parents, if necessary) must be maintained where found. The father's settlement is communicated to his legi-

timate child, though born after his death, or though it is an ideot; and this right, which children have to the father's settlement, is not taken away after his death, by their mother gaining a new settlement in her own right by marriage; nor can she, during the life of her husband, gain a different settlement for her children than that which they inherit from their father; but if a child above the age of nineteen, who possesses a derivative settlement from its father, go, after his death, with its mother into a different parish, and live there with her upon her own estate, they, both of them, gain a new settlement by their residence. See *post*, 10.

But children, after the age of seven years, (or perhaps before,) may become emancipated, and gain a settlement for themselves. Thus, where a child, on the removal of his father into another parish, was left behind, and continued distinct from his father's family, maintaining himself by his own industry, he was held to be emancipated. So also where a son, nineteen years of age, left his father's family, and went into another parish, where he married and had children. So also where a son, after he was one-and-twenty years of age, married and lived with his wife and family separately and distinct from his father's family, though in the same parish, he was held to be emancipated; but a child cannot be emancipated from its parents, either by marriage or living apart in a distinct habitation, unless such child has gained a settlement in its own right. A son, therefore, who at fifteen years of age, bound himself apprentice, served out part of his time, and worked about the country in the way of his business, but went to his father's house whenever it was convenient, was held not to be emancipated. So also where a son resided nine or ten years, by his father's direction, at the house of a friend, by whom he was supported; this was held not an emancipation. So also where a boy was hired out for seven years successively, but his father received the wages, and maintained him. So where a child was separated from its family by being maintained several years in a workhouse; or where a child leaves its father's family when only five years old, and lives with different relations till ten; or where a son, sixteen years of age, was bound apprentice for five years, and afterwards returned to his father's family, the indentures being void for want of a stamp; or where the son of a certificated person, at nineteen years of age, leaves his father's family, and serves a year under a hiring in an extra-parochial place, and then returns unmarried and under age to his father's family: for in all these cases the child, not being of age, nor having married, nor gained a settlement in his own right, nor contracted any relationship inconsistent with the idea of being part of his father's family, cannot be considered as emancipated, so as to lose the benefit of any settlement which his father may gain. It has however been held, that if a son enlist himself as a soldier, he thereby emancipates himself from his father's family, and cannot therefore change his original derivative settlement, by parentage, for a new settlement gained by his father.

So a son of age, and married, continuing to live with his father, does not follow such new settlement gained by the father, though he accompanies him as part of his household. 1 *East*, 526. But see 8 *T. R.* 479.

This head of settlement by parentage is not affected by the new act.

3. Settlement by marriage is acquired by construction of law, independently of any statute; and therefore, the moment a legal settlement takes place, the settlement of the husband is *ipso facto* transferred to the wife. It must however be a legal marriage, conformable to the directions of the Marriage Act, in force at the time; and therefore, where a woman under age was married without the consent of parents, it was held, (under the 26 *Geo. 2* c. 33,) that the children born during the connection were illegitimate, and, as such, could not gain a derivative settlement from their parents. So also where a marriage was celebrated in a chapel, in which banns had not

been usually published according to the direction of the then Marriage Act, it was held, previous to the 21 *Geo. 3* c. 53. (see tit. *Marriage*), that the wife gained no settlement by virtue of this union; and it is necessary that the marriage should be with all the legal forms, though both the parties are illegitimate (see tit. *Marriage*); but a marriage in Scotland is a legal marriage for the purposes of gaining a settlement. So also is a marriage, though procured by a third person by fraud; and a cohabitation, as man and wife, for thirty years, is such a presumptive proof of marriage as will entitle the children of the parties to the settlement of their parents. Indeed, the law, favouring settlements as much as possible, has, in many instances, precluded the fact of marriage from being controverted: thus, after an order of removal, stating the parties to be husband and wife, the fact of marriage can only be controverted upon appeal to the sessions. So also if a man and woman be certificated as husband and wife, the legality of their marriage cannot be controverted by the certifying parish; and it is not necessary for this purpose to prove a marriage in fact; evidence of cohabitation, reputation, and other circumstantial proof, is sufficient.

A person whose baptismal name was A. L. was married by banns by the name of G. S. having been known by that name only in the parish where he resided, for about three years, and was married; held, that the marriage was valid, and therefore the wife and children entitled to the husband's settlement. 3 *M. & S.* 270.

So a marriage by licence, not in the man's real name, but in the name which he had assumed because he had deserted, he being known by that name only where he lodged, and was married, and where he had resided sixteen weeks, was held a valid marriage for the like purpose. 3 *M. & S.* 537.

But although the husband's settlement is, if known, communicated to the wife, and retained after the husband's death, till she gain a new one, notwithstanding she never lived with him at the place in which he is settled; yet her own settlement, in certain cases, is not extinguished, but only suspended, during the coverture; and if her husband have no settlement, her own remains even during the coverture; or if he have a settlement, but it cannot be discovered, her settlement returns. The removal of a wife, therefore, imports, that it is to her husband's settlement; for it is incumbent on the parish to which she is removed to prove a different settlement, even though she be not removed as a wife.

An order for the removal of a married woman (not stating her to be such) and her children to Y. adjudging that the lawful settlement of her and her children is in Y., was held good, without adjudging that Y. was her husband's settlement; and proof by the mother of the husband that he had gained a settlement by hiring and service, was held sufficient, without calling the husband, although it appeared he was in this country. 4 *M. & S.* 52.

Settlement by marriage is not altered by the recent statute.

4. To prevent improper persons from gaining a settlement by residence, it was enacted by 13 & 14 *Car. 2* c. 12. § 1 "That it shall be lawful, upon complaint made by the churchwardens and overseers of the poor of any parish to any justice of the peace, within forty days after any poor person shall come to settle in any tenement, under the yearly value of .ol., for any two justices of the peace, of the division where any person likely to be chargeable to the parish shall come to inhabit, by their warrant to remove and convey such person to such parish where he or she were last legally settled, either as a native, householder, sojourner, apprentice, or servant, for the space of forty days at the least, unless he or she give sufficient security for the discharge of the said parish, to be allowed by the said justices."

By stat. 1 *Jac. 2* c. 17. § 3. "the forty days' continuance intended by stat. 13 & 14 *Car. 2* c. 12. to make a settlement, was to be accounted from the time of his or her delivery of

notice, in writing, of the house of his or her abode, and the number of his or her family, to one of the churchwardens or overseers of the poor of the parish to which they shall so remove."

By *stat. 3 & 4 W. & M. c. 11.* "the forty days were to be accounted from the publication of the notice, in writing: when the churchwardens or overseers were required to cause to be read publicly, immediately after divine service in the church or chapel of the said parish or town, on the next Lord's day, when there should be divine service in the same, which notice was to be registered and kept in the book of the poor's accounts, and if they neglected to read or register such notice, they were to forfeit £10. No solicitor, scrivener, scribe, &c. were to gain any settlement in any parish, by delivery and publication of such notice, unless after the admission of such person from the service." § 4.

By the same statute it is provided, that if any person shall execute an annual office, or, being properly rated, shall pay the public taxes; or shall be lawfully hired as a servant, and serve for a year; or shall be bound an apprentice in any parish; they shall respectively gain settlements thereby, though no such notice in writing was delivered or published as the statutes above recited require. §§ 6, 7, 8.

It is apparent, from these statutes, that the legislature was anxious to prevent a settlement being gained by constructive acts; it was therefore settled, by various determinations of the courts, that nothing could be equivalent to a notice, except those acts for which the statutes provide, and by *stat. 15 Geo. 3. c. 101. § 5.* it is expressly provided, "that no person shall, in future, be enabled to gain any settlement in any parish, township, or place into which they shall come, by delivery and publication of any notice in writing."

The forty days' residence, which is required to gain this species of settlement, need not be in the tenement which the party occupies; and therefore, when a person took a wind-mill of above 10*l.* a year, but resided in a distant cottage under 10*l.* a year, within the same parish, he thereby gained a settlement; nor need the residence be for forty days successively; but if, during his occupation of the tenement, he resided at different times any where within the parish for more than forty days, it is sufficient; and if he occupy two tenements in different parishes, and resided alternately in each parish above forty days in the whole, his settlement shall be in that parish in which he lodged the last night of the first forty days; but the occupation must be legal, for if he has obtained possession of the tenement by fraud, a residence without a single exception, that no person can be removed from residing upon his own estate, whatever likelihood there may be of his, or any part of his family, becoming chargeable. See *post*, 10.

By §§ 4, 5, and 6 of *stat. 54 Geo. 3. c. 170.* it is provided, that no person shall be deemed to gain a settlement by any residence in any district, whilst he shall be confined as a prisoner within such district on any civil process, or for any contract. Nor shall any gate-keeper, or toll-keeper of any turnpike-road or navigation, or persons renting the tolls, and residing in any toll-house of any turnpike-road or navigation, thereby gain a settlement in any district, &c. Nor shall any person gain a settlement by residence in any house, &c. provided by any charitable institution, while supported as objects of such institution.

By the construction of *stat. 11 & 14 Car. 2. c. 12. § 1.* not read in the preceding division, it is *enacted*, that whoever shall rent a tenement of the yearly value of 10*l.* in the parish, in which he shall come to inhabit, for the space of forty days, shall thereby gain a settlement.

But by *stat. 9 & 10 Wm. 3. c. 51. § 11.* it is provided, that no certificate person (see *post*, V.) shall be adjudged to gain a settlement by residence, unless he shall really and bona fide take a lease of a tenement of the value of 10*l.*

In the construction of this part of the statute, 9 & 10 Wm. 3. c. 51, it has been held, that where a certificate-man agreed with the lessee of a mill that he would occupy the mill, and, in pursuance of the agreement, occupied it for two years, this was a sufficient taking to avoid the certificate, though there was no under-lease or assignment; for the rent being reserved for a year, it is an absolute demise for a year; and if not, it is a lease at will, which is sufficient. And where it was stated that a certificate-man took a lease for seven years, the court said they would intend that it was by deed, for otherwise it would be no lease at all. And renting a tenement of 10*l.* a year, with a residence of forty days, will avoid a certificate, although the certificate be granted after the taking, and before the expiration of the forty days.

As to the kind of tenement, it has been held that the renting of a water-mill—a coney-warren—a piece of pasture-ground—a house within the rules of the Fleet prison—a wind-mill—a dairy of cows, with privilege of pasture for them—a potatoe ground—a first and second floor unfurnished—a shop occupied separately from the house to which it belongs—a furnished room hired for a particular purpose, though the landlord is to find fire, and have the use of it at other times—a land-sile colliery—a cattle gate—the usuary of a pond, with the spearsedge flags and rushes in and about the same—the hay-grass and after meath of meadow land—a rabbit-warren, though the party has no interest in the soil (except that of entering on the soil to kill the rabbits—the fogs and after-grass of a meadow-land—the hiring of twenty cows at 3*l.* 10*s.* per annum each, with privilege to feed them in particular fields for a certain part of the year, during which time no other cattle were to depasture there—are all of them tenements within the meaning of the statutes, and will, if above the value of 10*l.* a year, gain the party, who resides on them for forty days, a settlement in the parish in which each respectively lies. But no gate-keeper, or person renting the tolls of turnpikes, and residing in any toll-house belonging to the trustees, shall thereby gain a settlement. *Stat. 13 Geo. 3. c. 84. § 56.* But such person may gain a settlement by renting a tenement above 10*l.* a year, in the parish where he resides, in such toll-house. See *East*, 333.

The tenement must be entire; but formerly it was not necessary to this purpose that the tenement should be taken all of the same landlord, or that it should lie entirely in the same parish. Therefore a house rented at 7*l.* a year of one landlord, and a piece of land of 1*l.* a year of another landlord, or a house of 1*l.* a year rented of one landlord and stables of this landlord of another, were tenements sufficiently entire to give a settlement. So also an entire tenement of house and lands of the value of 12*l.* a year, lying in different parishes, although in neither parish the value amounts to 10*l.* a year, would gain a settlement, and so, though the taking were at different times, and the tenement was afterwards divided in part, or in the whole, to, and occupied jointly with, another person, and in these cases the settlement was in that parish in which the tenant lodged the last forty days.

The tenement also must be of the value of 10*l.* a year, and the value not depending upon the rent, but on the real worth it might be of at any one time during the occupation of the tenant; for though no rent was reserved, yet, if it were worth 10*l.* a year, it would formerly have gained a settlement. The rent, however, was good *pro â facta* evidence of its value, and conclusive, if no other evidence of value appeared. It was accordingly adjudged, that a house of the yearly value of 1*l.* 10*s.* a year, taken at the rent of 16*l.* a year, under a covenant that the landlord should make new buildings, was not of sufficient value, if those new buildings were never made. So a sole tenancy in a house of 5*l.* a year, and a joint tenancy in and of 3*l.* 15*s.* a year, were adjudged not of sufficient value. So also a house of 10*l.* a year, occupied jointly by two persons, or a farm of 14*l.* a year rented by

two persons jointly, although the rent be paid, the stock stinted, and the profits taken separately by each, was not of sufficient value to gain either of them a settlement; but a farm of 52*l.* a year, rented, occupied, and managed jointly by two tenants, was a tenement of sufficient value to each of them. A tenement of 10*l.* a year, taken without fraud, would formerly have gained a settlement, although the tenant lived only in one part of it, and underlet the remainder to different tenants.

As to the time of renting, the tenement need not have been, previous to the 59 *Geo. 3. c. 51.* taken for a whole year, and therefore a taking and occupying from the first of June to the Lady-Day following, was held sufficient to gain a settlement.

By *stat. 59 Geo. 3. c. 50.* reciting that many disputes had arisen respecting the settlement of the poor by the renting of tenements, it was enacted that no person should acquire a settlement in any parish, by dwelling for forty days in any tenement rented by such person, unless such tenement consisted of a house or building within such parish, being a separate and distinct dwelling-house or building, or of land within the parish, or of both, *bond fide* hired by such person at 10*l.* a year at least, for the term of one whole year; nor unless such house or building were held, and such land occupied, and the rent actually paid for the same, for one whole year at least by the person hiring the same; nor unless the whole of such land should be situate in the same parish (or township) as the house wherein the party hiring the same dwelt.

This statute was repealed by the 6 *Geo. 4. c. 57.* which provided that no person, after the 22d June, 1825, should acquire a settlement in any parish or township by reason of settling upon, renting, or paying parochial rates for any tenement, not being his own property, unless such tenement consisted of a separate and distinct dwelling-house or building, or of land, or of both, *bond fide* rented by such person, in such parish or township, for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house, or building, or land, should be occupied under such yearly hiring, and the rent for the same, to the amount of 10*l.* actually paid, for the term of one whole year at the least; provided, that it should not be necessary to prove the actual value of such tenement.

By the 1 *Wm. 4. c. 18.* after the passing of the act, no person shall acquire a settlement by reason of the yearly hiring of a dwelling-house or building, or of land, or of both, unless such house, &c. shall be actually occupied by the person hiring the same, for one whole year at the least, and unless the rent for the same, to the amount of 10*l.* at the least, shall be paid by the person hiring the same.

Now, by the recent act, no settlement by renting a tenement can be gained, unless the occupier be assessed to, and pay the poor-rate, in respect of such tenement, for one year. See *post*, VII.

To complete this species of settlement, there must be a residence of forty days either on the tenement, or in the parish where it lies.

6. If any person shall come into any town or parish to inhabit, and shall for himself, and on his own account, be charged with, and pay his share towards the public taxes or levies of the said town or parish, he shall be adjudged and deemed to have a legal settlement in the same. *Stat. 3 & 4 W. & M. c. 11. § 6.* But no person shall gain such settlement by paying taxes for any tenement of less than 10*l.* yearly value. *Stat. 35 Geo. 3. c. 101. § 4.*

As to the kind of taxes, the land-tax and the poor's-tax are public taxes within the meaning of this statute; but a tax assessed for the repair of a county bridge—or towards the repairs of the highways—or for the scavenger (*stat. 9 Geo. 1. c. 7. § 6.*)—or the duties on houses and windows (*stat. 21 Geo. 2. c. 10. § 13.*)—or the stoppage raised on the persons belonging to Sheerness yard for the relief of the poor—are

neither public taxes or levies within the meaning of the legislature; and therefore the paying them will not entitle the person to a settlement under this statute.

Payment by one who was assessed to a church-rate upon householders only, and not upon the parishioners at large, gained him a settlement; for it is not less a public tax because laid too narrowly, and it is charged and paid within the parish, which is all that is required by 3 & 4 *W. & M. 9 East, 203.*

The party must be both assessed to, and pay the tax, to gain a settlement; and payment of an assessment, which, as to other purposes, is illegal and void, will gain a settlement, so also, if it be made upon the house, and not upon the person, or on the occupier of such a house, or the farmer of such lands; and if the assessment continue in the rate-book in the name of a former tenant deceased, payment by the occupier is sufficient; for it is not necessary that the tenant should be rated by name; if he is virtually rated and has paid, it is sufficient. If the tenant be assessed, and he pay, he will thereby gain a settlement, although it is repaid to him by his landlord, or allowed in his rent; but if the landlord be assessed, payment by the tenant is not sufficient, although the tax is demanded of him by the officer who made the rate. So also where a father occupied a house, and was rated to the poor, but gave up the occupation to his son, with whom he continued to live merely as an inmate, a payment by the son, under this rating, will not gain him a settlement; but if the father had continued in the occupation, and the son, being the visible manager of his concerns, had been rated instead of his father, and had paid, he would have gained a settlement.

A custom-house officer who was rated for his salary towards the land-tax, and in fact paid the rate himself, though the money was either given to him beforehand or allowed him afterwards, thereby gained a settlement. 8 *East, 483.*

The rate-books are generally divided into different columns, and distinguished—"Landlords rated,"—"Names of occupiers;"—and therefore, if different persons be named in each, payment by the one will not gain a settlement, because in the one case he is not rated, and in the other has not paid, as where the landlord is assessed, and tenant pays; but in general where there is no name mentioned, or if both the names of landlord and tenant are inserted, but it does not appear which of them is rated—or if the tenant's name has been once introduced upon the rate-book, though taken off in consequence of his poverty, and at his own request, and no other name inserted—it shall be considered, in all these cases, as an assessment upon the tenant; for the land-tax is the tenant's tax, as between him and the public, and shall be so taken, unless it expressly appear that the landlord is rated, but whether landlord or tenant be rated, is a question of fact for the justices at session to decide.

A landlord cannot pay the tax for the tenant; and therefore where a farm was rated by a particular name, and neither the name of the landlord or tenant was on the rate, and the landlord paid the tax and received it again from the tenant, it was held, that this did not give the tenant a settlement; but if a tenant be rated and abscond, and his landlord desire the collectors to levy it by distress, lest he should lose the money, and on their going to the premises, a friend of the tenant pays it to him, this is equal to payment by the tenant himself, and he thereby gains a settlement. So also if the collectors of the land-tax demand payment of the tenant, and on his refusing to pay, they show him a paper-writing and read it, and tell him the sum he is to pay, and on his refusal levy the money by distress, and he afterwards pays such sum as an assessment on him, it shall be intended that he was in fact assessed, unless the contrary clearly appear.

By the 6 *Geo. 4. c. 57. § 2.* the tenement, in respect of which parochial rates were paid, was to possess the requisites therein mentioned, and which have been already stated; and further restrictions were imposed, as to the occupation and

payment of the rent, by the 1 Wm. 4. c. 18. By the provision of the new act, which has also been already noticed, requiring the occupier of a tenement to be assessed to, and pay the poor-rate, this head of settlement by payment of taxes seems now merged, so far as relates to tenants, in the settlement by renting a tenement; for the payment of the land-tax, and any other rate other than the poor-rate, by the occupier, will hereafter be insufficient to gain a settlement.

7. If any person, who shall come to inhabit in any town or parish, shall for himself, and on his own account, execute any public annual office, or charge, in the said town or parish, during one whole year, he shall have a legal settlement in the same. Stat. 3 & 4 W. & M. c. 11. § 6.

If a certificate person shall serve an annual office in such parish, being legally placed in such office, he shall thereby gain a settlement. Stat. 9 & 10 Wm. 3. c. 11.

The kind of office.—The office need not to be what is generally called a parish office, for if it be an annual office, and served in the parish, it is sufficient, and therefore, it has been held, that serving the office of warden of a borough; or the office of parish clerk, though chosen by the parson, and not by the parishioners, and although he has no licence from the ordinary, for the office is annual; or the office of collector of the land-tax; or the office of collector of the duties on births and burials; or the office of tithingman; or the office of constable of a city, although the election is not in the parishioners; or the office of petty constable, if sworn in at the leet, though served by deputy; or the office of bailiff or aleconner; or the office of sexton; or the office of hog-ringer, being annual offices, will gain a settlement:—but the office of deputy constable; or the office of school-master to a charity school, established by private donation; or the office of deputy tithingman; or the office of curate; are not annual offices, and therefore the serving them will not gain a settlement.

The party also must be regularly and legally appointed to the office, or the serving it will not be sufficient; and therefore, although an inhabitant of a parish has a tally left at his house, signifying that he is chosen borsholder or tithingman, yet if he is not presented and admitted in the court leet, he is not legally placed in the office, and cannot gain a settlement by serving it. So also, where a man was chosen constable, and even sworn in, yet not being presented at the leet, it was held that he gained no settlement by serving the office: but when a person was appointed a tithingman by the steward of the leet, and served the office for a whole year, it was held, that he thereby gained a settlement, although he was not sworn in until after the year was expired.

The office must be completely served for a year; and therefore, if the party become chargeable before the year expires, this is an interruption to the service, and will prevent his gaining a settlement, although no other person is appointed in his stead, until the year expires: and if a person appointed at an annual court leet, serve till the next annual court leet, but when takes place less than twelve months, another person is appointed, such service shall not gain a settlement: and so strictly has this part of the statute been construed, that when a tithingman served two half years at different times, it was held, that they could not be joined so as to make a service for a year, although there was a custom in the parish not to serve the office longer than half a year at a time. For the very custom proved that in this parish the office of tithingman was not an annual office.

This head of settlement is now abolished; see *post*, VII. But settlements gained under it previous to the recent act are not affected.

8 The class of settlements, by hiring and service, is, perhaps, above all others, obscured by an innumerable variety of cases, the determinations in which, unless very minutely attended to, will frequently appear contradictory. The following summary is intended to contain a statement of the

general rules on this head, as concise as possible; without entering into exceptions, caused, for the most part, rather by the particular circumstances of the cases, than by any uncertainty in the law.

If any unmarried person, not having child or children, shall be lawfully hired into any parish or town, for one year, such service shall be adjudged and deemed a good settlement therein. 3 & 4 Wm. & M. c. 11. § 7. But no person, so hired as aforesaid, shall be deemed to have a good settlement in any such parish or township, unless such person shall continue and abide in the same service during the space of one whole year. 8 & 9 Wm. 3. c. 30. § 4.

Under 9 & 10 Wm. 3. c. 11. certificated persons cannot gain a settlement by hiring and service: and by 12 Ann. st. 1. c. 18. § 2. it is expressly provided, that no hired servant to a certificated person shall gain a settlement by such hiring and service.

No child, nurse, or servant, received into, maintained, or employed with the Foundling Hospital, shall gain any settlement in the parish where such hospital is situated, by virtue of being so received, employed, or maintained. 13 Geo. 2. c. 29. § 7.

No person, who shall be admitted into the Magdalen Hospital as a penitent prostitute, or who shall be employed in the said hospital as a hired servant, shall, by reason of such admittance, or service, gain a settlement in the parish in which the said hospital is or shall be situate. 9 Geo. 3. c. 31. § 8.

Who shall gain such settlement.—The clause in the 3 & 4 Wm. & M. c. 11. preventing married persons, having children, from gaining settlements by hiring and service, was made merely for the protection of parishes; and therefore, a widower, although he has children, if such children are emancipated, and have gained settlements for themselves, may gain a settlement by hiring and service; for, in such case, there is no danger of the parish being burdened with the children, by settlement derivatively from their father; and, upon this principle, it has been settled, that a daughter, who is emancipated, may gain a new settlement, by hiring and service with her father. And, indeed, this clause has always been considered as favourably as possible to settlements; and therefore, if a wife, where the husband is abroad, is hired as a servant, and, before a year expires, her husband dies, a continued service for a year, from the time of his death, will gain a settlement, although, at the time of the hiring, she was a married person. So also, if a servant be unmarried at the time when he is hired, he gains a settlement by a year's service, although he marry before the service commences. So also, if a married man hire himself conditionally, and, before the condition performed, his wife dies without issue, he is an unmarried person within the statute, and shall gain a settlement, if the hiring takes place, and he serves a year from the time the condition was performed.

To complete this species of settlement, there must be such a contract, between the master and servant, as will amount to what the law considers as a hiring; for a hiring cannot be intended, where no contract appears: and therefore, where a gentleman, wishing to have his foot-boy instructed in the art of shaving, sent him to a barber to learn to shave, where he staid three years, and afterwards became chargeable to the parish: the court held, that there was not such a contract in this case as would amount to a hiring and service; for there was no implied agreement, much less a positive contract, between the boy and the barber: so also, where a captain brought a female negro slave from America to England, who lived with him here in the capacity of a servant, but there was no hiring; it was held that the service, under this circumstance, would not entitle her to a settlement because there was no contract appeared: so also, where a boy worked for several years with his uncle, who allowed him board, lodging, clothes, and pocket-money; yet, because there was no contract between them for a hiring, it was held, that the boy did

not gain any settlement under this service: so also, where the waiter of an inn being ill, procured another waiter of his acquaintance to assist him, who continued, with the knowledge of the master of the inn, boarding and lodging in the inn for the course of nineteen months, when the waiter went away, and the assistant continued to serve for more than twelve months afterwards, as he had done before, without making any agreement with the master; it was held, that he did not gain any settlement by this service; because there was no contract for such service with the master.

And when a contract of hiring does appear, or can from the circumstances be inferred; yet it must also appear that the hiring was for a year. If, however, there be a hiring in general terms without any designation of time, it is always understood that such general hiring is for a year. Therefore, where a boy went into a service without any express contract being made, and his master told him, that if he staid a year, and behaved himself well, he would give him, the next year, a livery and full wages; the court held, that although there was no express hiring, yet as it was clearly a general hiring, it amounted, by construction of law, to a hiring for a year; for a general hiring shall always be construed into a hiring for a year: of which it would be needless here to multiply examples.

But a hiring at weekly wages, for so long time as the master should want a servant, is not a hiring for a year; for the contract is at the will of the master, and is so far from being for a year, that the servant may be turned away at the end of the week. And the same principle seems to apply to all cases where, by the express contract, the hiring may be determined either by the master or the servant before the year expired: and to make a hiring such as will gain a settlement, there must be, in the original agreement, something by which it appears to be a hiring for a year; as that the party should have so much a week the year round, or so much a week both summer and winter.

A hiring at eight shillings a month, with liberty to let himself out in harvest time, and depart at a month's wages, or a month's warning, is not a hiring for a year: and the distinction in this species of hiring seems to be, that where the liberty either to work for another master, or not to work for the master hiring, forms part of the contract, that such hiring is not a hiring for a year, and, of course, a service under it will not gain a settlement; for, to gain a settlement, the servant must continue and abide in a state of servitude, all the time, during a whole year. But where the exception does not form any part of the original agreement or contract, then an exemption from service, during part of the year, particularly if it arise from usage, will not vitiate the hiring. And even where the hiring is accompanied with an agreement to be absent; yet if it be for the purpose of a duty, which the law would have compelled the master to permit the servant to perform, it will not vitiate the contract; as where a man was hired to serve a year, with an express exception to be absent for a month on the duty of a militia-man. In all cases, if the contract be legal at the time of the hiring, a new agreement, during the service, will not avoid a settlement under it; as where a man hired himself to a turner for a year for board, lodging, pocket-money, and clothes, but in the middle of the year it was agreed, that instead of these, he should work by the piece, and have what he could earn.

As to customary and retrospective Hirings.—A hiring from May-day to Lady-day, and from Lady-day to May-day; or from the 3d of October to the Michaelmas following; or from Michaelmas to Michaelmas, with liberty of absence during sheep-shearing or harvest month, will not gain a settlement; although in all these cases it is the custom of the country to consider such hiring as a hiring for a year; but a hiring from Whitsuntide to Whitsuntide, if it be the custom of the country to consider such hiring as a hiring for a year, will gain a settlement, although it fall short of 365 days: so also, a hiring at a statute fair, held the day after Michaelmas-day, from

that time till the Michaelmas following; or from the second day of one year until the first day of the next year, are hirings for one year; for the days shall be taken inclusively; but where such a number of days intervene, as to prevent the principle of there being no fraction of a day, by analogy to the rule of law in other cases, from applying; or where such terms as will warrant a construction of intent between the parties, are wanting; in such case no custom of the country shall avail to control the law, and give a retrospect; therefore, where there was a hiring at a statute fair held three days after Martinmas to serve till the Martinmas following; the court held, it was not a hiring for a year, although it was so considered by the custom of the country. So also, a hiring three days after Michaelmas till the Michaelmas following, is not a hiring for a year, although, by its happening to be leap-year, the number of days amounted to 365. It seems, therefore, to be most clearly settled, that a retrospective hiring will in no case be considered as a hiring for a year; as where Michaelmas was on Thursday, and upon the Saturday following a man was hired from the said Michaelmas-day to Michaelmas following: but a conditional hiring may be a good hiring for a year; as where a woman agreed to live with a man as a servant for three months, at the rate of 8*l.* a year; and if he and she liked one another, that then she would continue his servant for the remainder of the year, and continued without any other agreement to serve the whole year; the opinion of the court *uno ore* was, that the woman, by this hiring and service, had gained a settlement: so, where a person, in the common case, is hired upon a month's liking, and to go away on a month's wages, or a month's warning, to be at any time paid or given on either side, and the servant continues to serve a year under this hiring, it is held, that he or she thereby gains a settlement.

No settlement can be gained by serving under a contract of hiring for four years, with liberty for the servant to leave for a week every year to see his friends, for that is to be taken distributively, i. e. reserving a week out of each year 10 *East*, 325.

The courts of justice lean so much in favour of settlements, that if, from the circumstances, a contract for a year appears, it is considered as good, although it was not made by one, but by several hirings: therefore, where a person was hired from three weeks after Michaelmas to the Michaelmas following, and on the expiration of this hiring, was hired again for a year, and there was a service for a year under both hirings; it was held, that the party gained a settlement, although the service, under the second hiring, was only for forty days: so also, where a servant was hired from Christmas to Michaelmas, and served accordingly, and at the said Michaelmas was hired again by the same master for a year, but served only till Midsummer following; it was held, that these several hirings might be joined so as to form a hiring for a year. The general principle in these causes is, that though the service must be immediately continued, yet the hiring, under which such service is performed, need not be by one and the same contract; for if there be a continuation of the same service of forty days, after a hiring for a year, such hiring will connect itself with any former hiring, by which the service was continued, so as to make a service for a year. The question, therefore, in this species of settlement, always is, whether the former service was discontinued? therefore, where a person was hired from Ash-Wednesday until Christmas, and, after serving that time, left his master, and went home to his father, where he stayed about a week; this was held a discontinuance, and that it could not be connected with a subsequent hiring for a year, and service under it for eleven months, so as to gain a settlement: but the mere absence of a day between two hirings, or increase of wages on the second hiring, or the former hiring's being from week to week, or absence on account of ill health, or an omission during service to make a new agreement at the expiration of the first hiring, will not make a discontinuance. But the

servant must, at the time of the second hiring, be in a capacity to gain a settlement by hiring and service; and, therefore, if a servant be unmarried at the first hiring, and married at the second hiring, they cannot be so connected as to gain a settlement under him by any length of service.

Of service in different places, at different times, and to different masters.—It is not necessary that the whole year's service, under any hiring for a year, should be performed in the parish where the hiring is made; and therefore if, under a hiring for a year, the servant serves half a year in one parish, and then removes with his master, and serves the other half of the year in another parish, he gains a settlement where he serves the last forty days; even although the master went into the other parish merely on a visit, or for his health, as to a watering-place. It is not necessary that the service should be performed in the place where the servant lives, or where the master dwells; therefore where a house stood in two parishes, the part of the house in which the master lived, and in which the servant constantly worked, stood in one parish; but that part in which the servant lodged stood in another, and the settlement was held to be in that parish where the servant lodged; so also where a groom was hired for a year to a nobleman who resided at Wybridge, to look after his running horses, which stood in the parish of Barrowbrook, it was held, that a residence in this last parish for forty days gained a settlement, although the master had neither house, nor land, nor settlement in the parish.

The forty days' residence need not be forty successive days; for if a servant serves more than forty days in the whole, within any one year of his service, he gains a settlement; and where the last forty days are in a place where no settlement can be gained, the settlement shall be in the place where the last preceding forty days were served. In the case of alternate residence, the settlement shall be in that parish where the servant sleeps the last night of the last forty days. There must, however, be a residence of forty days in some one parish; and therefore, where a person who was hired to a waterman served a year by navigating a boat to and from London, and it did not appear that he had, during the year, slept for forty days in any one parish at different times, either in going to or returning from London, he having in general lived and slept in the boat; it was held, that he did not gain a settlement in either place.

The service may not only be performed in different places, but with different masters, provided there be no dissolution of the original hiring; and the servant be unmarried at the time such original hiring took place; for marriage, during the service, as has already been said, will not vacate the settlement, or entitle the master to turn the servant away. Service with the executor of the master for the remainder of a year, though in a different parish from that in which the hiring for a year was made, is good; for the death of the master does not dissolve the contract; and the servant, by such service, gains a settlement in the second parish.

Of absence from service.—The year's service must be performed; and therefore, if the servant voluntarily and without sufficient cause go away, or absent himself from the service, at any period previous to the expiration of the year, this absence operates as a dissolution of the contract; and this, though done by collusion between the master and servant for the purpose of avoiding a settlement; if a discharge is procured under the order of a justice, and no actual fraud be positively found: so also an absence in the servant, arising from his criminal conduct, or even though involuntary on his part, will, under certain circumstances, prevent a settlement: thus where a maid servant served till within three weeks of the end of the year, when her master, discovering her to be with child, turned her away, and paid her her year's wages, and half a crown over; it was held an insufficient service, and no settlement gained under it; for this was a good cause to discharge her: so where a man-servant is turned away by

his master before the expiration of the year, on the fact of his being the reputed father of a bastard child, he thereby loses his settlement; for the being taken into custody, and detained for this offence, renders him incapable to perform his service, and gives the master a right to discharge him.

The contract, if once dissolved by any species of absence on the part of the servant, cannot be set up again or renewed between the parties by the return of the servant, and subsequent agreement; but an absence created by the default or fraudulent contrivance of the master shall not impede a settlement; as if he turn a servant away or remove him on his falling sick; or he goes away on being disabled by accident, though he be thereby prevented from returning to his service during the remainder of the year. So also an absence procured by the fraud of others will not prevent the party from a settlement; as where the parish officers give a servant money to leave the parish, in order to prevent his becoming chargeable when the year expires; or if the servant, before the year expires, declare to his master that he does not wish to be settled in that parish, and goes away with his master's consent, merely to avoid the gaining of a settlement. An express, or even an implied consent of the master to the absence of the servant, will prevent such absence from dissolving the contract; and the taking the servant again into his service during the year, is evidence of his implied consent to such absence. Thus where a man hired from Martinmas to Martinmas, for a year, about the middle of the year absented himself from his master's service, without his consent, for above three weeks together, but on the demand of his master returned and served out the remainder of the year; it was held, that the absence of the servant was purged by the master's receiving him again. So also where the servant served till within three weeks of the end of the year, when he asked his master's leave to go to the herring fishery, and his master consented he should go, if he would get a man to do the work in the mean time, to his master's liking, which he did, and then received part of his wages, and went away, and returned after the year expired, and received the residue; this was held an absence with the master's consent, and therefore a good service. So also on a hiring from Michaelmas to Michaelmas, if the servant tell his master, at the time of hiring, that he cannot come till the day after Michaelmas, and the master says he will shift till that time; this is a permission of absence till the time, and will gain a settlement, although the servant quit his service the day before the ensuing Michaelmas-day, if he so quit by the leave of his master; and where the dispensation of service at the end of the year is *bona fide*, the absence does not dissolve the contract, though a new service is entered on before the first year actually expires; and, indeed, absence with consent is always good, unless where, as has been before observed, it is an exception in the original contract of hiring.

A clerk in a mercantile house, hired by the year, but serving only during the usual hours of business, thereby gains a settlement, although those hours did not, by the custom of the trade, ever occupy the whole day, and he went where he pleased, without asking his master's leave, when those hours were over. 1 B. & A. 322.

A settlement by hiring and service can no longer be acquired; see *post*, VII.; but the law with respect to settlements gained previous to the late act remains unaltered.

9. If any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement. 3 & 4 W. & M. c. 11. § 8.

Certificate persons, under 9 & 10 Wm. c. 11. cannot gain a settlement by apprenticeship. And by 12 Ann. c. 18. § 2. apprentices to any person, residing in any parish under a certificate, and who shall not have gained a legal settlement, shall not gain any settlement in such parish by reason of such apprenticeship or binding; but an apprentice to a certificate

man may gain a settlement by serving him in another parish, or even in the certified parish, if his master purchase an estate there; or if he serves forty days before the master is certificated; or if the master is certificated to another parish, and the apprentice serves the last forty days in the parish first certified.

No person, bound apprentice by any deed, writing, or contract not indented, being first legally stamped, shall be liable to be removed from any parish, &c. where he shall have been so bound an apprentice, and has resided forty days, on account of such deed, writing, or contract, not being indented. 31 Geo. 2. c. 11.

An apprentice, by being bound and inhabiting in the parish where his master lives, or where his servitude is performed under the indenture, thereby gains a settlement, although it be to a master who has no right to take an apprentice; and although the apprentice, at the time he binds himself, is an infant; and though the binding is for a less term than seven years, if not avoided on this account by the parties themselves during the time. So also, although the apprentice-fee is not inserted in the indentures, pursuant to 8 Ann. c. 9. § 39; or though the indenture, or its counterpart, is not executed by the master or the apprentice; or although the master be an infant. But there must be a binding as an apprentice, either by indenture or by deed properly stamped; and if the indentures are absolutely void, he cannot gain a settlement as a servant by his servitude under them. So also where a contract or agreement was made to serve for so many years; it was held not to amount to a sufficient binding as an apprentice; for a hiring as a servant, and an agreement to bind as an apprentice, are distinct and independent contracts, and never can be converted one into another. Thus where a written agreement was made between the parents of a boy and his intended master, to bind him apprentice for seven years; but no indenture of apprenticeship was executed pursuant to the agreement; the court held, that although an apprenticeship was intended between the parties, yet he could not gain a settlement as a hired servant, by serving under this agreement as an apprentice, nor could he gain a settlement as an apprentice, because no indenture of apprenticeship was executed.

There must also be a residence of forty days under the indenture, to give a settlement to an apprentice; but the forty days may be at different times; and though, in the interval of these times, the apprentice gain a new settlement, yet they will connect so as to form a 40 days' residence under the indenture, and give him a settlement in the parish where he lodges the last night, although the master himself has no settlement in the parish. This species of settlement arises from the binding and inhabiting, and not, as in the case of a servant, from hiring and service; and therefore the apprentice gains his settlement in that place where he inhabits, and not where his service is performed; therefore an apprentice who serves his master in one parish, and boards and lodges with his father in another, although such board and lodging is paid for by the master pursuant to a covenant in the indentures, does not gain a settlement in the master's parish. So also where a boy was bound apprentice to a mariner, and served his master in the day-time for a quarter of a year at his house on shore, but lay every night on board his master's ship at her moorings in the Thames; it was held, that he gained no lodging in the master's parish on shore; although if it had appeared that he slept on board in his master's service, he might thereby have gained a settlement in the parish within which the ship lay; for although the service relates to one place, and the inhabitation is in another, yet that is sufficient; and, therefore, an apprentice to a captain of a ship, who served and lodged the last forty days on board the ship, while lying in her harbour, gained a settlement in the parish within which the harbour lay; the said harbour being considered by the captain and sailors as

the proper home of the ship. So also where an apprentice married during his apprenticeship, and served his master by day in one parish, and slept with his wife and family in a different parish, he gained a settlement in the parish where he slept; for that was the parish of his habitation. So where a boy was bound an apprentice for three years, and after a service of more than forty days with his master, his master died, and he, with the consent of his mistress, and before administration taken out, went from his master's house to his father's, there being no work for him to do, and continued with his father till his time expired; yet it was held, that he gained a settlement in the master's parish. So where an apprentice, after a residence with his master of forty days, fell sick, and on account thereof went home into a different parish with his master's consent, and remained ill until his time expired, he gained a settlement in the master's parish.

An apprentice, while the indentures subsist, is not *suus juris*, and therefore cannot serve another person without his master's consent; but if the original master consent, such service is a service under the indenture, and he gains a settlement in the parish where he lives with such second master, although the hiring out by the first to the second master is by parol, or the agreement be made by the widow of the first master before administration taken out. As to what shall be considered as a consent on the part of a first master, it must always depend on the particular circumstances of each case.

An indenture of a parish apprentice, assented to by two justices separately, is void, and gives no settlement. 3 East, 180.

But if signed by one magistrate alone, who is afterwards present when the other signs, it is sufficient. 8 T. R. 451.

Serving under indentures of apprenticeship not stamped gives no settlement. 3 T. R. 358; 4 T. R. 218, 769.

A defective contract of apprenticeship cannot be converted into a contract of hiring and service, so as to give a settlement as a yearly servant by serving under it. 8 T. R. 379.

A contract of apprenticeship may be formed without using the term "apprentice." *Id. ib.*

An indenture binding an adult female as an apprentice, which was not executed by herself, but only by her father-in-law and the master, though with her consent, does not constitute her an apprentice, and consequently no settlement is gained thereby. 9 East, 295.

For further matter relating to parish apprentices, see tit. *Apprentice*, 1, 2. By 42 Geo. 3. c. 46. overseers are to keep a register of poor children apprenticed by them, under 20 Geo. 3. c. 36. See also 50 Geo. 3. c. 139; 3 & 4 Wm. 4. c. 43.

No settlement can now be gained by apprenticeship to the sea service, but a settlement acquired before the passing of the act, where the party has ceased to be an apprentice, does not seem to be affected. See *post*, VII.

10. By the common law, founded on Magna Charta, no person can be removed from his own landed estate, however inconsiderable its value may be, and this law still continues, provided such estate come to him by operation of law, out by 9 Geo. 1. c. 7. § 5 it is enacted, that "no person shall acquire any settlement, in any parish or place, for or by virtue of any purchase of any estate or interest in such parish or place, where the consideration for such purchase doth not amount to the sum of 30*l.* bona fide paid for any longer or further time than such person shall inhabit such estate."

An estate by operation of law is, that estate which the party gains without any act of his own. Thus, a husband may gain a settlement by residing on an estate vested in trustees for the separate use of his wife, or on an estate to be purchased by her previous to the marriage, though of the value of less than 30*l.* So the husband of an administratrix, who is entitled as a trustee to a lease for years, has the trust estate by operation of law; and, by a residence thereon for forty days, will gain a settlement: but it seems, that the forty days' residence ought to be subsequent to his obtaining letters of administration, for it hath been adjudged, that a

son, or next of kin, who, after his father's death, lives on an estate for years during the remainder of the term, but does not take out administration until the term is expired, does not gain a settlement by his residence on such estate: for even a person solely entitled, but in whom the estate does not vest, for his own use, cannot, by residence thereon, acquire a settlement without obtaining letters of administration: but a residence of forty days upon a reputable estate will gain a settlement; and, therefore, if an estate be decreed to trustees to be sold to pay debts, and to divide the surplus, if any, between A., B., and C.; A. has such an estate, by operation of law, as will gain a settlement. So also, a person entitled as executor to the remainder of a term of ninety-nine years, of a cottage of 4s. a year, gains a settlement by residing on such estate forty days. So also, where a man built a cottage upon the waste lands of a nobleman, and lived on it undisturbed for more than twenty years, and it descended to his daughter; it was held, that the daughter, or, if married, her husband, gained a settlement by a residence of forty days upon this estate; for although her father had not originally any right to the land on which the cottage was built, yet the *disseisin* having been permitted so many years, and a descent cast, the right of entry on the land is taken away, and, having thereby gained the right of possession, it is sufficient to render her irremovable: and it makes no difference, though the possession for more than twenty years was not an adverse possession: and even although the ground and cottage was originally obtained by fraud. An estate in fee being to a married woman, and enjoyed by her husband as tenant by the curtesy, will, after his death, give his son a settlement, although under the value of 10*l.* a year. So, the widow of a man, who dies seised of a house, gains a settlement by residence therein for forty days in right of her dower; but this species of estate will not give a settlement to the widow, where the husband was certificated, nor can she communicate a settlement thereby to any other person, unless her dower be assigned. A conveyance from a father to his daughter, in consideration of natural love and affection, of the residue of a term determinable upon lives, is an estate by operation of law; and a residence thereon of forty days will give such daughter a settlement, although the original consideration paid for such estate, by the father, was only 20*s.* So also, a conveyance after marriage, by the wife's father to the husband only, if it appear to be grounded on natural affection, and intended for the use both of husband and wife, is an estate by operation of law, which will give a settlement though under the value of 30*l.*, and *a fortiori*, an estate of whatever value, conveyed from a father to his son, in consideration of natural affection, although it is also expressed to be in consideration of 10*l.* paid by the son to the father. So also, where a woman, on her marriage with the copyholder of a manor, where the widows are entitled to free-bench, gave a bond, that the son of her husband, by a former wife, should have possession of part of the copyhold estate after the death of her husband, on condition of his repairing the part of the house reserved for her, and after the death of her husband, delivered up the possession to the son, according to the bond; it was held, that the son gained a settlement by residing forty days on this estate. So also, the surrender of an old lease, which had been many years in the family, and the taking a new one, is an estate by operation of law. So also, a married daughter, who resides with her family on the estate of her mother, for forty days after her mother's death, gains a settlement, although the estate was devised to the mother only during her life, and then to be sold for the benefit of her children. But residence on leasehold premises, determined on the death of the mother, and from the profits of which the daughter is entitled to an annuity, will not gain her a settlement; neither can a remainder-man gain a settlement by residing on the estate during the life of the ten-

nant for life; nor a mortgagor, who, after the mortgagee has recovered possession in ejectment, is permitted to reside thereon for a particular purpose; for he is not in possession as mortgagor; nor a man who, having conveyed over his estate in trust for the benefit of his creditors, afterwards gets fraudulently into possession; nor can a wife, in any case, gain a settlement in her own right by residing, either on her own estate, or the estate of her husband, during his life.

An estate by purchase is, in contemplation of law, that estate which a man acquires by his own act and agreement; and it has been held, that a copyhold estate surrendered by a father to his son, and to which the son is admitted, is an estate acquired by purchase, within the meaning of the statute 9 Geo. 1. c. 7. § 5. and therefore will not gain a settlement by a residence thereon of forty days, unless it be of the value of 30*l.* So also is a grant of a copyhold, with a fine, heriot, and rent.

A guardian in socage residing on the ward's estate for forty days gains a settlement in the parish, and cannot be removed from the possession of it at any time. 10 East, 491.

Grandfather, father, and son.—The grandfather gave the father a piece of land, on which he immediately built a house, and continued in possession thirty years, without paying any rent or acknowledgment, sometimes residing in the house with his family, and at other times letting it, and receiving the rent. Held that the son, who ceased to be a part of his father's family fifteen years after the building of the house, was entitled to the settlement which the father gained by residing in the house. 3 M. & S. 22.

As to what purchase shall be considered as amounting to the value of 30*l.* it has been held, that an acre of land purchased for 25*l.* on which the purchaser erects a tenement, and makes other improvements, so as to enable him to sell the whole for more than 30*l.* is an estate of sufficient value. So also, a lease of fifty years of a cottage worth 5*l.* a year, at sixpence a year rent, and which after twenty years sold for 30*l.* is an estate of sufficient value. So also, where a man purchased a house and curtilage for 30*l.* but paid only 9*l.* the remainder being paid for him by a friend, to whom he mortgaged the premises as a security, and who, after the expiration of four years, entered under his mortgage and turned out the purchaser; this was held an estate of sufficient value. So also, the mortgagee of a term for 15*l.* to whom 30*s.* were due, and 18*l.* 10*s.* more by bond and simple contract, who, on the death of the mortgagor, takes out administration as a principal creditor, thereby acquires an estate of sufficient value to gain a settlement. Parol evidence may be given of the value, though the consideration is expressed in the deed.

The residence must be in the parish, but need not be on the estate; nor need the forty days be all at one time, although the estate is held in common between the pauper, his mother, and his sisters.

By the recent act settlements gained by estate are only to be retained so long as the party inhabits within ten miles of the parish where such estate is situate. Should he cease to reside within that distance, but afterwards return to the parish and become chargeable, he may be removed. See post, VII.

V. Any person may go into any parish to work in time of harvest, or at any other time, so that he carry with him a certificate from the minister of the parish, and one of the churchwardens, and one of the overseers, that he hath a dwelling, and hath left his family, and is declared an inhabitant there; and such certificate-person shall not gain a settlement in the parish in which he goes to work. 13 & 14 C. 2. c. 12. §. 3.

If any person whatever shall come into any parish to inhabit, and shall bring and deliver to the churchwardens or overseers a certificate, under the hands and seals of the

churchwardens and overseers of any other parish, or the major part of them, or under the hands and seals of the overseers only of any place where there are no churchwardens, to be attested respectively by two or more credible witnesses, thereby owning and acknowledging the person or persons, mentioned in the said certificate to be inhabitants legally settled in that parish; every such certificate, having been allowed of and subscribed by two or more justices of the peace within the parish or place from whence any such certificate shall come, shall oblige the said parish or place to receive and provide for the person mentioned in the said certificate, together with his or her family, as inhabitants of that parish; whenever he, she, or they shall happen to become chargeable to, or be forced to ask relief of, the parish, to which such certificate was given. And then, and not before, it shall be lawful for any such person, and his or her children, though born in that parish, (see *ante*, IV. 1.) not having otherwise acquired a legal settlement there, to be removed, conveyed, and settled in the parish or place, from whence such certificate was brought. 8 & 9 Wm. 3. c. 30.

No person whatever, who shall come into any parish by such certificate, shall gain any settlement therein, unless he shall take a lease of a tenement of the value of 10*l*.; (see *ante*, IV. 6.) or shall execute some annual office, being legally placed therein, which head of settlement is now abolished. See *ante*, IV. 7.—See also *ante*, IV. 8 & 9.

The witnesses, who attest the execution of such certificates, or one of them, shall make oath before the justices who allow the same, that he saw the parish officers sign and seal the certificate, and that the names of the witnesses, attesting the same, are of their own proper hand-writing; and the said justices shall also certify, that such oath was made before them; and then such certificate shall be taken to be fully proved; and shall be evidence without further proof. 3 Geo. 2. c. 29. § 8. The overseers, or other persons removing back any certificated persons, shall be reimbursed such reasonable charges as they may have been put to, in maintaining and removing such persons, by the parish officers of the parish or place to which they are removed; the said charges being first ascertained by a justice of the peace of the county or place to which such removal shall be made; to be levied by distress, &c. § 9.

The parish officers cannot be compelled to grant a certificate; and, if granted, it is not binding, unless signed by the majority of them; and parol evidence may be given, that those who signed were not officers of the parish; but if signed by the majority, a mistake in its direction is not material. And if a certificate be lost, and the parish officers refuse to grant another, yet the pauper cannot, on that account, be removed, though actually chargeable. The justices may attest a certificate as witnesses, as well as allow it as justices; and if it appear to have been legally allowed, it shall be intended to have been well attested; but unless the allowance, which is discretionary in the justices, be signed, the certificate is invalid: if, however, a certificate be above thirty years old, the allowance thereof, written in the margin and signed, is sufficient, although there is no certificate of one of the witnesses; and one of the witnesses may attest the signing of the other.

A certificate, after its delivery to the parish officers as the statute requires, virtually includes all the legitimate children of the person certified, who are born while the certificate continues in force; and if it promise to provide for the parties as man and wife, the certifying parish cannot afterwards controvert the fact of their marriage. See *ante*, IV. 3. So if it be given to a woman, stating that she is unmarried and with child, and promise to provide for the child she then goes with, they cannot object that such child is not settled in their parish because born a bastard in another. See *ante*, IV.; 1 & 7 T. R. 362.

Persons residing under a certificate cannot be removed until some one or more of them become actually chargeable; and therefore, that one of the family is likely to become chargeable is no cause of removing them; and it is only the individual person who receives relief that shall be removed; but relief afforded by a parishioner is not sufficient, although he is reimbursed by the parish officers.

A certificate is only conclusive upon the parish granting it, with respect to that parish to which it is granted, although it is *prima facie* evidence as to others; and it is only conclusive as between them as to the facts stated in it. But see 1 East, 438.

A certificate is discharged by the removal of the pauper to the parish that gave the certificate; or by the pauper's voluntary return to the certifying parish; or by quitting the parish to which he was certified, if it appear that he meant to abandon the certificate; or by an order of removal from a third parish to the certifying parish; or by a second certificate. The court, however, will not presume a certificate to be discharged; and, therefore, a clear ground of discharge must be shown.

VI. It has already been noticed, (see *ante*, IV. 4.) that by 13 & 14 Car. 2. c. 12. § 1. upon complaint by the churchwardens and overseers to one justice within forty days, of a person coming to reside on a tenement under 10*l*. a year, any two justices of the division might, on his being likely to become chargeable to the parish, remove such person to the place of his last legal settlement. And, by § 3. of the said act, if such person refused to go, or returned back, when sent, he might be committed to the House of Correction as a vagabond; and if the parish officers of his own parish refused to receive him, they might be indicted for their default.

This provision had long been considered as equally cruel and impolitic: see 1 Comm. c. 9. and the notes there: and was at length remedied by the interference of the legislature.

By 35 Geo. 3. c. 101. the first (and consequently the third) section of this stat. 13 & 14 C. 2. were repealed; and the reason assigned in the preamble of the 35 Geo. 3. was, that, "many industrious poor persons chargeable to the parish, &c. where they live, merely from want of work there, would, in any other place where sufficient employment is to be had, maintain themselves and families, without being burdensome to any parish; and that such poor persons are, for the most part, compelled to live in their own parish, and not permitted to inhabit elsewhere, under pretence that they are likely to become chargeable to the parish where they go for employment: although their labour might, in many instances, be very beneficial to such parish."—This preamble also stated, that the remedy intended to be applied by the granting of certificates, under 8 & 9 Wm. 3. c. 30 (see *ante*, V.) had been found very ineffectual:—The statute then enacted, "That no poor person should, in future, be removed, by virtue of any order of removal, from the parish or place where such poor person should be inhabiting, to their last settlement, until such person should have become actually chargeable to the parish or place in which they should inhabit, when they might be removed by two justices, in the same manner, and subject to the same appeal, and with the same powers, as might have been formerly done, with respect to persons likely to become chargeable."

Stat. 35 Geo. 3. c. 101. did not repeal 33 Geo. 3. c. 54 and therefore, where an unemancipated daughter was delivered of a bastard child in the township of I. during her father's residence there, under a certificate acknowledging him to be a member of a friendly society, established under 33 Geo. 3. c. 54. it was held, that such certificate extended, not only to him, but to all the members of his family also, that the daughter therefore was, at the time of her delivery,

residing in the township under the authority of 33 Geo. 3. c. 54. and that by § 25 of that act the settlement of the child followed that of the mother. 2 B. & A. 149.

Persons convicted of larceny or other felony, rogues, vagabonds, idle and disorderly persons, and reputed thieves—as also unmarried women with child—should be considered as actually chargeable. Stat. 35 Geo. 3. c. 101. § 5, 6.

By the same statute, justices were empowered to suspend the removal of sick persons; the charges incurred by such suspension to be borne by the parish to which they are removable. § 2, 3. See ante, IV. 1, 2.

By stat. 19 Geo. 3. c. 124. § 1, 3. where any order of removal or vagrant pass should be suspended, any justice of the place, within which such removal or pass should be made, might direct the execution thereof, and payment of the charges, &c. Order of removal (or vagrant pass), suspended on account of sickness or other infirmity, might be suspended for the same period with respect to every other person named in it actually being of the household or family of such sick person. By § 4. of the same act, one magistrate might examine a pauper as to his settlement, and report the same to petty sessions, who should then adjudge the settlement of such pauper.

By 52 Geo. 3. c. 160. the settlement of paupers, being in gaol on meane process, who may have relief ordered them under that act, shall be ascertained by one justice, who shall make an order of removal to the proper parish, but which order shall be suspended whilst the pauper debtor remains in prison, and the parish where the pauper is settled shall pay the expenses.

By 54 Geo. 3. c. 170. § 10. churchwardens and overseers, or others having the management of the poor, may employ any person to remove paupers, ordered by magistrates to be removed.

By stat. 59 Geo. 3. c. 12. § 3. reciting that poor persons born in Scotland, Ireland, Jersey, Guernsey or Man, frequently become chargeable to parishes in England, and that no provision is made for the removal of such persons, unless they have committed some act of vagrancy, and been adjudged rogues and vagabonds, in which case they could not be removed without having suffered whipping or imprisonment, it is enacted, that two justices may cause any such poor person, not having committed any act of vagrancy, (and his wife and children not having gained a settlement,) to be removed by pass in manner directed by 17 Geo. 2. c. 5. (See Vagrants.) And if such pauper is adjudged a vagabond, he may be either whipped or imprisoned, or removed without suffering such punishment.

A single woman living in service with her master, is not removable, even since the act 35 Geo. 3. c. 101. against the consent of herself and her master, though adjudged by the order of removal to be with child, and therefore chargeable; that act not extending to make persons removable who were not proper objects of removal before, but only to make certain descriptions of persons excepted out of the act, liable to be removed, though not in fact chargeable, if otherwise proper objects of removal. 3 East, 563.

Officers refusing to receive a pauper, removed by warrant of two justices, shall forfeit 5*l.* to the use of the poor, to be levied by distress. Stat. 3 Wm. 3. c. 11. § 10.

Persons, who shall unlawfully return to the parish from whence they are legally removed, shall be deemed idle and disorderly persons, and may be committed to the House of Correction for one month. Stat. 17 Geo. 2. c. 5. See Vagrants.

It seems that nearly all the determinations, as to orders for removal of persons likely to become chargeable, now apply, *mutatis mutandis*, as to the removal of those who are actually so.

One who is resident on an estate granted to him for lives, in consideration of two guineas fine and one shilling rent,

cannot be removed therefrom, though actually chargeable. 5 East, 40.

The first step which the parish officers are to take, in order to procure the removal of a pauper chargeable to their parish, is to make a complaint to a justice of the peace; for the complaint is the foundation of the justice's jurisdiction. The order of removal, therefore, must state not only a complaint, but that it is upon complaint of the parish officers, and show in certain the persons, with their names, who are become chargeable; and the order cannot remove more persons than the officers have complained of.

The next proceeding is the Examination; for this order must state that the removal was made on due examination; it need not, however, state that the examination was on oath, but ought to show that the pauper was summoned and heard; but even this is not, in all cases, absolutely necessary. The examination must be taken before two justices, and it must be by the same two justices who signed the order; and therefore an order stating it, in the alternative, to have been taken "before us or one of us," is bad. The two justices also must sign the order in the presence of each other, and the justices of one county cannot make an order of removal on an examination taken and transmitted to them by justices of another county, although such examination be verified by oath. An order signed by two justices separately, and in different counties, is not void, but only voidable on appeal.

An order of justices removing M. F., wife of P. F., a Scotchman, who never gained a settlement in England, and their children, to her last legal settlement, which order was stated on the face of it to be under the examination of the husband, and with the consent of him and his wife, was held good. 5 East, 113.

An order for removing the wife and daughters of a pauper to the place of their settlement, is supported *prima facie* by showing that the parish to which the removal was made was the place of the wife's settlement before the marriage, and throws the burden of proof on the appellant, that the husband was settled in another parish. 13 East, 311.

The pauper being a settled inhabitant of A., subsequently acquired a settlement in the township of B.; the latter township afterwards ceased to exist as a place capable of maintaining its own poor: held, that the previous settlement in A. having been extinguished, the pauper could not be removed thither from a third township as to the place of his last legal settlement. *Quære*, Whether, in such a case, a removal to the parish of which the township of B. formed a part, would not be good. 2 B. & A. 162.

The mutiny acts enable two justices to take the examination of a soldier respecting his settlement, and direct them to give an attested copy of it, which is to be by him delivered to the commanding officer in order to be produced when required, and the acts make such attested copy evidence; no other attested copy than that given to the soldier is evidence; but the original examination is admissible evidence. 5 T. R. 704; 6 T. R. 534.

The next proceeding is the Adjudication; for an order of removal cannot be good, if it omit to adjudge that the persons complained of actually became chargeable to the parish complaining, and that they are last legally settled in the parish to which they are intended to be removed. An order, removing nurse children to their derivative settlement, is good, without stating the death of the parent, or adjudging the place, to which they are removed, to be the settlement of their parents. The order must state that the justices are justices of the peace for, and not in, the county; but it need not state that they were of the division where the pauper lives; and it is enough to name the county in the margin of the order, for the margin of an order of removal is part of the order itself; if, however, two counties are named, and it state them to be justices of the counties aforesaid, it is bad.

The power given to a justice, on a pauper's returning to

the parish from whence he was removed, cannot be exercised, unless a previous charge be made on oath against the pauper who returns; and it seems that, previous to the repeal of *stat. 13 & 14 Car. 2. c. 12.* this offence must have been proceeded against under *stat. 17 Geo. 2. c. 5.* only; for an order of removal does nothing more than prevent the party thereby removed from returning in a state of vagrancy.

If an order of removal be made, and the parish, to which the pauper is thereby removed, neglect to appeal to the next general or quarter sessions, pursuant to *stats. 13 & 14 Car. 2. c. 12;* *3 & 4 W. & M. c. 11.* § 10, such order becomes conclusive, and no new settlement can be gained but by some act subsequent to such removal; but it is only conclusive between those two parishes and the persons who are mentioned in the order. To render an order thus final, for want of an appeal, it must not only be a legal order, but it must be subsisting; for if it be deserted, or made to an improper place, the neglect to appeal will have no effect. But see *7 T. R. 200.*

And subsequently, the court held that an order of removal executed and unappealed against, was conclusive as to the pauper's settlement at the time of such order, *even as between third parishes* not parties to the former order. *11 East, 388.*

The parish, in whose favour the order is made, may by consent abandon it without appealing; and, after such order being cancelled by consent of both parties before the time of appeal, another order made by them, removing the pauper to a different parish, is good. *12 East, 359.*

If an order of removal be appealed against, and reversed, two justices may remove the pauper back to the parish from whence he was sent; but if the order be confirmed, it is then conclusive that the appellant parish is the place of the pauper's last legal settlement; and of course he cannot be removed to any other parish, on any settlement gained previous to the confirmation of the order. But if an order of removal be reversed on appeal, the respondent parish may remove the pauper to a third parish on a settlement gained previous to the former removal; for an order reversed is only conclusive as to the appellant parish; and a bad order reversed, not on the merits, but merely for want of form, is not conclusive on either parish.

By the late act a notice in writing must be given to the parish to which the order is made, before the pauper is removed. See *post, VII.*

VII. 1. The Provisions of the recent Statute (4 & 5 Wm. 4. c. 76.) relating to the Commissioners and the Assistant Commissioners.—By § 1. his majesty, by warrant under the royal sign manual, may appoint three fit persons to be commissioners to carry the act into execution, and also at pleasure remove any of the commissioners for the time being, and upon any vacancy in the said number of commissioners, either by removal or otherwise, appoint some other fit person to the said office; and, until such appointment, the continuing commissioners may act as if no such vacancy had occurred.

§ 2. The said commissioners shall be styled "The Poor-Law Commissioners for England and Wales;" and the said commissioners, or any two of them, may sit as a board of commissioners for carrying the act into execution; and, acting as such board, are empowered, by summons under their hands and seal, to require the attendance of all persons they may think fit to call before them upon any matter connected with the administration of the laws for the relief of the poor, and also to make any inquiries as to any such matter, and also to administer oaths, and examine all such persons upon oath, and to enforce the production upon oath of books, contracts, agreements, accounts and writings, or copies thereof respectively, in anywise relating to any such matter, or to substitute a declaration for an oath: provided, no person shall be required, in obedience to any summons, to travel more than ten miles from his abode: provided also, that

nothing therein contained shall authorize the said commissioners to act as a court of record, or to require the production of the title, or of any papers or writings relating to the title of any lands, tenements or hereditaments not being the property of any parish or union.

§ 3. The said commissioners shall cause to be made a seal of the said board, and to be sealed therewith all rules, orders, and regulations made by them in pursuance of the act; and all such rules, &c. or copies thereof, purporting to be so sealed, shall be received as evidence of the same respectively, without further proof thereof; and no such rule, &c. or copy thereof, shall be valid unless so sealed as aforesaid.

§ 4. The commissioners shall make a record of their proceedings, in which shall be entered a reference to every letter received, from whence, its date, the date of its reception, and the subject to which it relates, and a minute of every letter written or order given by the said commissioners, whether in answer to such letters received or otherwise, with the date of the same, and a minute of the opinion of each of the board, in case they should finally differ in opinion upon any order to be given or other proceeding, and such record shall be submitted to one of the secretaries of state once in every year, or as often as he shall require the same.

§ 5. The commissioners shall, once in every year, submit to one of the secretaries of state a general report of their proceedings, which shall be laid before both houses of parliament within six weeks after if parliament be then sitting, or if not, within six weeks after the next meeting thereof, and, by § 6. also report their proceedings to the secretary of state when required.

§ 7. The commissioners are empowered to appoint assistant commissioners for carrying the act into execution at such places as they may direct, and to remove such assistant commissioners at discretion, and on every or any vacancy in the said office of assistant commissioner, by removal or otherwise, to appoint, if they see fit, some other person to the said office: provided, that the commissioners shall not appoint more than nine such assistant commissioners to act at one time, unless the Treasury shall consent to the appointment of a greater number.

§ 8. No commissioner or assistant commissioner shall, during his continuance in such appointment, be capable of being elected or sitting as a member of the House of Commons.

§ 9. empowers the commissioners to appoint secretary, assistant secretary or secretaries, clerks, and other officers.

§ 10. No commissioner or assistant commissioner, or other officer appointed by the commissioners, shall hold his respective office for a longer period than five years after the passing of the act, and thenceforth until the end of the then next session of parliament.

By § 11. the commissioners and assistant commissioners are to take the oath therein mentioned.

By § 12. the commissioners may delegate the powers (except the powers to make general rules) to assistant commissioners, and revoke them; and assistant commissioners may summon persons and examine them upon oath, or a declaration may be substituted for an oath.

§ 13. Persons giving false evidence guilty of perjury; and refusing to attend, &c. guilty of misdemeanor.

2. General Rules for the Management of the Poor.—By § 15. after the passing of this act the administration of relief to the poor throughout England and Wales, according to the existing laws, or such laws as shall be in force at the time being, shall be subject to the direction and control of the commissioners, who are authorized and required to make and issue all such rules, orders, and regulations for the management of the poor, for the government of workhouses and the education of the children therein, and for the management of parish poor children under the provisions of an act made and passed in the seventh year of the reign of his late majesty

King George the Third, intituled "An Act for the better Regulation of Parish poor Children of the several Parishes therein mentioned within the Bills of Mortality," and the superintending, inspecting, and regulating of the houses wherein such poor children are kept and maintained, and for the apprenticing the children of poor persons, and for the guidance and control of all guardians, vestries, and parish officers, so far as relates to the management or relief of the poor, and the keeping, examining, auditing, and allowing of accounts, and making and entering into contracts in all matters relating to such management or relief, or to any expenditure for the relief of the poor, and for carrying the act into execution in other respects, as they shall think proper; and the commissioners may suspend, alter, or rescind such rules, orders, and regulations, or any of them: provided, that nothing in the act contained shall enable the commissioners to interfere in any individual case for the purpose of ordering relief.

§ 16. General rules are to be submitted to secretary of state forty days before coming into operation, and if disallowed by king in council during the forty days, not to come into operation. If disallowed afterwards, they shall, on being notified, cease to operate.

§ 17. General rules in force at the commencement of every session of parliament, and which shall not previously have been submitted to parliament, shall, within one week after the commencement of every such session, be laid by one of the secretaries of state before both houses of parliament.

§ 18. Rules, orders, &c. are to be sent to overseers, &c. before they shall come into operation, who are to give publicity to them in the manner directed by commissioners.

§ 19. No rules of the commissioners, or any bye-laws, shall oblige any inmate of any workhouse to attend any religious service celebrated in a mode contrary to the religious principles of such inmate, or authorize the education of any child in such workhouse in any religious creed other than that professed by the parents or surviving parent of such child, and to which such parents or parent shall object, or, in the case of an orphan, to which the godfather or godmother of such orphan shall so object: provided, that any licensed minister of the religious persuasion of any inmate of such workhouse, may at all times in the day, on the request of such inmate, visit such workhouse for the purpose of affording religious assistance to such inmate, and instructing his child or children in the principles of their religion.

§ 20. No order or regulation made by any assistant commissioner shall be in force until adopted by the commissioners, and stamped with their seal; and no rule, order, or regulation of the commissioners, except orders made in answer to the statements and reports hereinafter authorized to be made by overseers or guardians to the said commissioners, shall be in force until the expiration of fourteen days after a copy of the same shall have been sent by the commissioners, sealed and addressed.

§ 49. Contracts entered into by or on behalf of any parish or union relating to the relief of the poor, or for any other purpose connected with the general management of the poor, are not to be valid unless conformable to the rules of commissioners; and § 50 repeals the 45 Geo. 3. c. 54. as to contracts.

§ 28. In case any person shall wilfully neglect or disobey any of the rules of the commissioners or assistant commissioners, or be guilty of any contempt of the commissioners sitting as a board, such person shall, on conviction before any two justices, forfeit for the first offence not exceeding 5*l.*, for the second offence not exceeding 20*l.* not less than 1*l.*, and in the event of such person being convicted a third time, such third and every subsequent offence shall be deemed a misdemeanour, and such offender shall be liable to be indicted for the same offence, and on conviction pay such fine, not being less than 20*l.*, and suffer such imprisonment, with or

without hard labour, as may be awarded against him by the court by or before which he shall be tried and convicted.

§ 105. No rule, order, or regulation of the commissioners or assistant commissioners, shall be removed or removable by writ of *certiorari* into any court of record, except his majesty's Court of King's Bench at Westminster; and every rule, &c. which shall be removed by writ of *certiorari* into the said Court of King's Bench, shall nevertheless, until the same shall be declared illegal by that court, continue in full force, and be obeyed and enforced, as if the same had not been so removed.

By § 106. ten days' notice is to be given to commissioners of application for writ of *certiorari*, &c.; and commissioners may show cause in the first instance.

By § 107. recognizances are to be entered into by parties applying for *certiorari*; and if rule be declared legal, the commissioners are to be entitled to costs.

3. As to Workhouses.

By § 21. the powers of the 22 Geo. 3. c. 83; 59 Geo. 3. c. 12. and of all other acts relating to workhouses and to borrowing money, are to be exercised under the control of the commissioners, and subject to their orders.

By § 22. no additions or alterations are to be made to the rules contained in the schedule to 22 Geo. 3. c. 83. or in any other act, until confirmed by the commissioners.

By § 23. the commissioners are empowered to order workhouses to be built, hired, altered, or enlarged, with consent in writing of a majority of the guardians of any union, or with the consent of a majority of the rate-payers entitled to vote as thereinafter prescribed in any parish.

§ 24. Sums to be raised for purposes of building workhouses to be charged on poor-rates; but are not to exceed one year's amount of poor-rates.

§ 25. gives power to the commissioners to order workhouses to be altered or enlarged without consent as aforesaid.

§ 31. repeals the 22 Geo. 3. c. 83. § 5. and 56 Geo. 3. c. 129; part of § 1 restraining parishes from contributing to workhouse at a greater distance than ten miles; and of 22 Geo. 3. c. 83. § 29. limiting class of persons to be sent to workhouses.

§ 42. The commissioners may make rules, &c. for present or future workhouses, and vary bye-laws already in force or to be made hereafter; and rules, &c. affecting more than one union, to be deemed general rules.

By § 43. justices are empowered to see bye-laws enforced, and to visit workhouses, pursuant to the 30 Geo. 3. c. 49.

By § 44. buildings taken for workhouses are to be deemed within the jurisdiction of the place to which they belong, though situated without.

§ 45. No lunatic, insane person, or dangerous idiot, is to be detained in a workhouse more than fourteen days.

§ 91. repeals so much of 6 Geo. 4. c. 80. as relates to prohibition of spirituous liquors in workhouses; and § 92. inflicts a penalty not exceeding 10*l.* on persons introducing spirituous liquors into workhouses.

By § 93. a penalty is imposed on masters of workhouses allowing use of spirituous liquors, or ill-treating poor persons, or misconducting themselves; and power is given for justices to order salaries, &c. to be stopped, and applied towards payment of penalties.

4. Of Uniting Parishes.

§ 26. The commissioners, by order under their hands and seal, may declare so many parishes as they may think fit to be united for the administration of the laws for the relief of the poor, and such parishes shall thereupon be deemed a union for such purpose, and thereupon the workhouse or workhouses of such parishes shall be for their common use; and the commissioners may issue such rules for the classification of such of the poor of such united parishes in such workhouse or workhouses as may be relieved in any such

workhouse, and such poor may be received, maintained, and employed in any such workhouse or workhouses as if the same belonged exclusively to the parish to which such poor shall be chargeable; but, notwithstanding such union and classification, each of the said parishes shall be separately chargeable with the expense of its own poor, whether relieved in or out of any such workhouse.

§ 28. When a union of parishes shall be proposed, the commissioners are to inquire into the expense of poor belonging to each parish for three years preceding; and the parishes proposed to be included in such union shall, from the time of effecting the same, contribute to a common fund for purchasing, &c. any workhouse for the poor of such parishes, and for any other expense to be incurred for the common use or benefit, or on the common account of such parishes, in the like proportions as on the said annual average of the said three years such relief had cost each such parish separately, until such average shall be varied or altered according to the power thereinafter given.

§ 29. contains the like provision in respect of unions effected under the 22 Geo. 3. c. 83. or local acts of incorporation.

§ 32. The commissioners empowered to dissolve, add to, or take from any union; and thereupon to make such rules as may be adapted to its altered state. But the rights and interests of parishes, and claims on them, to be ascertained and secured. Dissolution or alteration is not to affect the rights of third parties, nor take place without the consent of guardians of parish.

§ 33. In any union already, or thereafter to be formed, the guardians elected by the parishes forming such union, by any writing under the hands of all such guardians, may agree, subject to the approbation of the commissioners, on behalf of the respective parishes forming such union, that for the purposes of settlement such parishes shall be considered as one parish. So, by § 34. a union may be made one parish for the purpose of rating, with the consent of guardians.

§ 38. provides for the constitution and election of board of guardians for unions.

5. As to Overseers.

§ 46. The commissioners may direct overseers and guardians to appoint paid officers for parishes or unions; and fix their duties, and the mode of appointment and dismissal, and the security; and regulate their salaries.

By § 47. every overseer, treasurer, or other person having the collection, receipt, or distribution of the monies assessed for the relief of the poor in any parish or union, or holding or accountable for any balance or sum of money, or any books, deeds, papers, goods, or chattels relating to the relief of the poor, or the collection or distribution of the poor-rate of any parish or union, shall once in every quarter, in addition to the annual account now by law required, and where the rules of the said commissioners shall have come in force, then as often as the said rules shall direct, but not less than once in every quarter, render to the guardians, auditors, or such other persons as by virtue of any statute or custom, or of the said rules, may be appointed to audit such accounts, or in default of any such guardian, &c. being so appointed, then to the justices of the peace at their petty sessions for the division in which such parish or union shall be situate, a full account in writing of all monies, matters, and things committed to their charge, or received, or expended by them on behalf of any such parish or union, and if thereunto required, shall verify on oath the truth of all such accounts and statements, or subscribe a declaration to the truth thereof, in manner and under the penalties in the act provided for parties giving false evidence or refusing to give evidence under the provisions of the act; and all balances due from any guardian, treasurer, overseer or assistant overseer, or other person having the control and distribution of the poor-rate, or accountable for such balances, may be recovered in the same manner as any penalties and forfeitures are recoverable under the act: pro-

vided, that no such proceeding shall discharge the liability of the surety of any such treasurer, overseer, assistant overseer, or other person as aforesaid.

By § 51. the penalty imposed by 55 Geo. 3. c. 137. on persons having the management of the poor being concerned in any contract, is extended to persons appointed under the act.

§ 95. In case any overseer, assistant overseer, master of a workhouse, or other officer of any parish or union, shall wilfully disobey the legal and reasonable orders of such justices and guardians in carrying the rules of the commissioners or assistant commissioners, or the provisions of the act into execution, every such offender shall, upon conviction before any two justices, forfeit not exceeding 5*l*.

§ 96. Provided, that no overseer shall thenceforth be liable to any prosecution or penalty for not carrying into execution any illegal order of such justices or guardians.

§ 97. inflicts a penalty on overseers, &c. purloining, &c. goods, &c. not exceeding 20*l*., and treble the value of goods purloined. And see the next head.

6. As to Relief, and by whom to be administered.

By § 27. in any union formed under the act, two justices of the peace usually acting for the district wherein such union may be situated, may direct, by order under their hands and seals, that relief shall be given to any adult person who shall from old age or infirmity of body be wholly unable to work, without requiring that such person shall reside in any workhouse: provided, that one of such justices shall certify in such order of his own knowledge, that such person is wholly unable to work. and provided further, that such person shall be lawfully entitled to relief in such union, and shall desire to receive the same out of a workhouse.

§ 52. after reciting that "a practice has obtained of giving relief to persons or their families, who, at the time of applying for or receiving such relief, were wholly or partially in the employment of individuals, and the relief of the able-bodied and their families is in many places administered in modes productive of evil in other respects, and difficulty may arise in case any immediate and universal remedy is attempted to be applied in the matters aforesaid," enacts, that after the passing of the act, the commissioners may declare to what extent and for what period the relief to be given to able-bodied persons or to their families, in any particular parish or union, may be administered out of the workhouse of such parish or union, by payments in money, or with food or clothing in kind, or partly in kind and partly in money, and in what proportions, to what persons or class of persons, at what times and places, on what conditions, and in what manner such out-door relief may be afforded; and all relief contrary to the regulations of the commissioners, is to be disallowed; but overseers, &c. may delay the operation of such regulations under special circumstances, and make report thereof to commissioners. If commissioners disapprove of delay, they may fix a day from which all such relief shall be disallowed. provided, that in case overseers, &c. shall depart from the regulations in any particular instance of emergency, and shall, within fifteen days after every such departure, report the same, and the grounds thereof, to the commissioners, and the commissioners shall approve of such departure, or if the relief so given shall have been given in food, temporary lodging, or medicine, and shall have been so reported as aforesaid, then the relief so granted, if otherwise lawful, shall not be subject to be disallowed.

§ 54. After the passing of the act, the giving of relief to the poor of any parish, which, according to the provisions of that act, or of any local acts, shall be under the government of any guardians of the poor, or of any select vestry, and whether forming part of any union or incorporation or not, (but subject in all cases to the powers of the said commissioners appointed under the act,) shall appertain exclusively

to such guardians of the poor or select vestry, according to the respective provisions of the acts under which they shall be appointed; and no overseer of the poor shall give any further or other relief or allowance from the poor-rate than such as shall be ordered by such guardians or select vestry, except in cases of urgent necessity, in which cases he is hereby required to give such temporary relief as each case shall require, in articles of absolute necessity, but not in money, and whether the applicant for relief be settled in the parish where he shall apply for relief or not: provided, that in case such overseer shall refuse to give such necessary relief in any such case of necessity to poor persons not settled nor usually residing in the parish to which such overseer belongs, any justice of the peace may order the said overseer, by writing under his hand and seal, to give such temporary relief in articles of absolute necessity, as the case shall require, but not in money; and in case such overseer shall disobey such order, he shall, on conviction before two justices, forfeit not exceeding 5*l*. provided, that any justice of the peace shall be empowered to give a similar order for medical relief (only) to any parishioner, as well as out-parishioner, where any case of sudden and dangerous illness may require it; and any overseer shall be liable to the same penalties as aforesaid for disobeying such order; but it shall not be lawful for any justice to order relief to any person from the poor-rates of any such parish, except as therein before provided.

§ 58. After the passing of the act any relief, or the cost price thereof, given to or on account of any poor person above the age of twenty-one, or to his wife, or any part of his family under the age of sixteen, and which the commissioners shall by any rule direct to be given, shall be considered to be a loan to such poor person.

§ 59. In all cases where any relief shall have been given by way of loan, or where any relief, or the cost price thereof, shall be treated as a loan, under the rules of the commissioners, or the provisions of the act, any justice, upon the application of the overseers or guardians of the parish or upon providing such relief, and upon proof of the same having been given to or on account of any such person, his wife or family as aforesaid, and of the same, or any part thereof, still remaining due, may issue a summons, requiring such person, as well as the master or employer of such person, or some person on his behalf, to appear before any two justices, at a time and place to be named in such summons, to show cause why any wages due, or which may become due, from such master or employer, should not be paid over, in whole or in part, to such overseers or guardians, and if no sufficient cause be shown to the contrary, or if such person, or some one on his behalf, shall not appear on the return of such summons, then the said justices shall, by order under their hands, direct the master or employer for the time being from whom any wages shall be due or become due to such poor person, to pay, either in one sum or by instalments as the said justices shall think fit, taking into consideration the circumstances of such poor person and his family, out of such wages, to such overseers or guardians, the amount of such relief, or so much thereof as shall be unpaid.

By § 77. no person employed in the administration of the poor laws to furnish, for his own profit, goods or provisions given in parochial relief.

7. As to the Liability of Relations.

By § 56. after the passing of the act all relief given to the wife, or to or on account of any child or children under the age of sixteen, not being blind or deaf and dumb, shall be considered as given to the husband of such wife, or to the father of such child or children, as the case may be, and any relief given to or on account of any child or children under the age of sixteen of any widow, shall be considered as given to such widow: provided, that nothing therein contained shall discharge the father and grandfather, mother and grand-

mother, of any poor child, from their liability to relieve and maintain such poor child in pursuance of the 43 *Eliz. c. 2*.

§ 57. Every man who after the passing of the act shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and such child or children shall, for the purposes of the act, be deemed a part of such husband's family accordingly.

§ 78. All sums of money assessed by any justices of the peace on the father, grandfather, mother, grandmother, child, or children of any poor person, for the relief or maintenance of such poor person, under the provisions of the 43 *Eliz. c. 2*. or of any act to amend the same, or of that act, and all penalties and forfeitures to which any person so assessed by such justices for such relief or maintenance shall be liable for default in paying the same, shall be recoverable against every person so assessed in like manner as penalties and forfeitures are recoverable under the provisions of that act.

8. The Provisions repealing, altering, or affecting Settlements.

§ 64. After the passing of the act no settlement shall be acquired by hiring and service, or by residence under the same, or by serving an office.

§ 65. No person under any contract of hiring and service not completed at the time of the passing of this act shall acquire, or be deemed or adjudged to have acquired, any settlement by reason of such hiring and service, or of any residence under the same.

§ 66. After the passing of the act no settlement shall be acquired or completed by occupying a tenement, unless the person occupying the same shall have been assessed to the poor-rate, and shall have paid the same, in respect of such tenement, for one year.

§ 67. After the passing of the act no settlement shall be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas as a fisherman or otherwise, nor by any person now being such an apprentice in respect of such apprenticeship.

§ 68. No person shall be deemed, adjudged, or taken to retain any settlement, gained by virtue of any possession of any estate or interest in any parish, for any longer or further time than such person shall inhabit within ten miles thereof; and in case such person shall cease to inhabit within such distance, and thereafter become chargeable, such person shall be liable to be removed to the parish wherein previously to such inhabitancy he may have been legally settled, or in case he may have subsequently to such inhabitancy gained a legal settlement in some other parish, then to such other parish.

§ 61. And after the period at which any rule, order, or regulation of the commissioners shall come into operation for the binding of poor children apprentices, in addition to such assent or consent, order or allowance of justices, as are now required by law, such justices or any one justice are and is hereby authorized and required to examine whether the rules, orders, or regulations of the said commissioners then in force for the binding of poor children apprentices, have been complied with, and to certify the same at the foot of every such contract or indenture, and of the counterpart thereof, in such form and manner as the said commissioners by such rules may direct, and until so certified no such contract or indenture of apprenticeship shall be valid: provided, that nothing in the act, or in any rule of the commissioners, shall affect the jurisdiction of any justices of the peace over any master or apprentice during the period of apprenticeship.

9. *As to Illegitimate Children.*

§ 69. After the passing of the act so much of any acts of parliament as enables any single woman to charge any person with having gotten her with any child of which she shall then be pregnant, or as renders any person so charged liable to be apprehended or committed, or required to give security, on any such charge, or as enables the mother of any bastard child or children to charge or affiliate any such child or children on any person as the reputed or putative father thereof, or as enables any overseer or guardian to charge or make complaint against any person as such reputed or putative father, and to require him to be charged with or contribute to the expenses attending the birth, sustentation, or maintenance of any such child or children, or to be imprisoned or otherwise punished for not contributing thereto, or as in any way renders such reputed or putative father liable to punishment or contribution as such, or as enables churchwardens and overseers, by the order of any two justices of the peace, confirmed by the sessions, to take, seize, and dispose of the goods and chattels, or to receive the annual rents or profits of the lands of any putative father of bastard children, and so much of any such act or acts as renders an unmarried woman with child liable as such to be summoned, examined, or removed, or as renders the mother of any bastard liable as such to be imprisoned or otherwise punished, shall, so far as respects any child which shall be likely to be born or shall be born a bastard after the passing of the act, or the mother or putative father of such child, is thereby repealed.

By § 70. securities and recognizances for indemnity of parishes against children likely to be born bastards, are declared null and void; and persons in custody for not giving indemnity are to be discharged.

§ 71. Every child which shall be born a bastard after the passing of the act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own right, and such mother, so long as she shall be unmarried or a widow, shall be bound to maintain such child as a part of her family until such child shall attain the age of sixteen: and all relief granted to such child while under the age of sixteen shall be considered as granted to such mother: provided, that such liability of such mother as aforesaid shall cease on the marriage of such child, if a female.

§ 72. When any child shall thereafter be born a bastard, and shall by reason of the inability of the mother of such child to provide for its maintenance become chargeable to any parish, the overseers or guardians of such parish, or the guardians of any union in which such parish may be situate, may, after diligent inquiry as to the father of such child, apply to the next general quarter sessions of the peace within the jurisdiction of which such parish or union shall be situate, after such shall have become chargeable, for an order upon the person whom they shall charge with being the putative father of such child to reimburse such parish or union for its maintenance and support; and the court to which such application shall be made shall proceed to hear evidence thereon, and if it shall be satisfied, after hearing both parties, that the person so charged is the father of such child, it shall make such order upon such person as to such court shall appear to be reasonable under the circumstances of the case: provided, that no such order shall be made unless the evidence of the mother of such bastard child shall be corroborated in some material particular by other testimony to the satisfaction of such court: provided also, that such order shall in no case exceed the actual expense incurred or to be incurred for the maintenance and support of such bastard child while so chargeable, and shall continue in force only until such child shall attain the age of seven years: provided also, that no part of the monies paid by such putative father in pursuance of such order shall be paid to the mother of such bastard

child, nor in any way be applied to the maintenance and support of such mother.

By § 73. no such application shall be heard at such sessions unless fourteen days' notice shall have been given under the hands of such overseers or guardians to the person intended to be charged with being the father of such child of such intended application; and in case there shall not, previously to such sessions, have been sufficient time to give such notice, the hearing of such application shall be deferred to the next ensuing general quarter sessions: provided always, that whenever such application shall be heard, the costs of the maintenance of such bastard child shall, in case the court shall think fit to make an order thereon, be calculated from the birth of such bastard child, if such birth shall have taken place within six calendar months previous to such application being heard; but if such birth shall have taken place more than six calendar months previously to such application being heard, then from the day of the commencement of six calendar months next preceding the hearing of such application: provided also, that if upon the hearing of such application the court shall not think fit to make any order thereon, it shall order that the full costs and charges incurred by the person so intended to be charged in resisting such application shall be paid by such overseers or guardians.

§ 74. If such person so intended to be charged shall not appear by himself or his attorney at the time when such application shall come on to be heard before such court, according to such notice, such court shall nevertheless proceed to hear the same, unless such overseers or guardians shall produce an agreement under the hand of such person to abide by such order as such court shall make thereon without the hearing of evidence by such court: provided always, that such court may, notwithstanding such agreement, require that evidence shall be given in support of such application, if it thinks fit, before such order is made.

By § 75. the party summoned, if suspected of intending to abscond, may be required to enter into a recognizance for his appearance.

10. *Regulations touching Removals and Appeals.*

§ 79. After the 1st Nov. 1831, no poor person shall be removed or removable, under any order of removal from any parish or workhouse, by reason of his being chargeable to or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and by a copy of the examination upon which such order was made, shall have been sent, by post or otherwise, by the overseers or guardians of the parish obtaining such order, or any three or more of such guardians, to the overseers of the parish to whom such order shall be directed: provided, that if such overseers or guardians as last aforesaid, or any three or more, shall by writing under their hands agree to submit to such order, and to receive such poor person, it shall be lawful to remove such poor person according to the tenor of such order, although the said period of twenty-one days may not have elapsed: provided, that if notice of appeal against such order of removal shall be received by the overseers or guardians of the parish from which such poor person is directed in such order to be removed within the said period of twenty-one days, it shall not be lawful to remove such poor person until after the time for prosecuting such appeal shall have expired, or, in case such appeal shall be duly prosecuted, until after the final determination of such appeal.

§ 80. The overseers or guardians of the parish giving such notice of appeal, or their attorney, or any other person authorized by them, shall, until such appeal shall have been heard and decided, at all proper times have free access to such poor person for the purpose of examining him touching his settlement; and in case it shall be necessary for the more effectual

examination of such person that he should be taken out of the removing parish, such overseers or guardians shall be permitted to remove him therefrom for the time which may be necessary for that purpose: provided, that the expense of such removal, and of his maintenance during the same, shall be defrayed by the appellant parish.

§ 81. After the 1st Nov. 1834, in every case where notice of appeal against such order shall be given, the overseers or guardians of the parish appealing against such order, or any three or more, shall, with such notice, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing under their hands of the grounds of such appeal; and it shall not be lawful for the overseers of such appellant parish to be heard in support of such appeal unless such notice and statement shall have been so given as aforesaid: provided, that it shall not be lawful for the respondent or appellant parish, on the hearing of any appeal, to go into or give evidence of any other grounds of removal, or of appeal against any order of removal, than those set forth in such respective order, examination, or statement as aforesaid.

§ 82. The parish losing the appeal shall pay such costs as the court may direct, which, after refusal to pay, may be recovered from the overseer in the same manner as any penalties or forfeitures are by the act recoverable.

§ 83. If either of the parties shall have included in the order or statement sent as hereinbefore directed any grounds of removal or of appeal which shall in the opinion of the justices determining the appeal be frivolous and vexatious, such party shall be liable, at the discretion of the said justices, to pay the whole or any part of the costs incurred by the other party in disputing any such grounds, such costs to be recovered in the manner hereinbefore directed as to the other costs incurred by reason of such appeal.

§ 84. The costs of relief are to be paid by the parish to which poor persons are decided to belong. But relief under suspended order is not to be recoverable unless notice be sent of such order.

POPE, Papa.] A term anciently applied to some clergymen in the Greek church; but by usage particularly appropriated in the Latin church to the bishop of Rome, and who formerly had great authority in these kingdoms. As to the encroachments of the See of Rome, it is said to be the general opinion, that Christianity was first planted in this island by some of the eastern church; which is very probable, from the ancient Britons observing Easter always on the fourteenth day of the month, according to the custom of the east; but the Saxons, being converted about the year 600, by persons sent from Rome, and wholly devoted to the interest thereof, it could not be expected that such an opportunity, of enlarging the jurisdiction of that see, should be wholly neglected; and yet there are few instances of the papal power in England before the Norman conquest; though four or five persons were made bishops by the pope at the first conversion, and there was an instance or two of appeals to Rome, &c. But Pope Alexander II. having favoured and supported William I. in his invasion of this kingdom, made that a handle for enlarging his encroachments, and, in this king's reign, began to send his legates hither. Ermenfroy, bishop of Sion, was the first who had ever appeared in that character in any of the British islands. And, afterwards, Paschal II. prevailed with Henry I. to give up the donation of bishoprics. In the reign of Stephen, the pontifical authority was permitted to make further encroachments: appeals to the pope, which had been always strictly prohibited, became now common in every ecclesiastical controversy. And in the reign of Henry II. Pope Alexander III. exempted all clerks from the secular power: indeed, this king at first strenuously withstood those innovations; but, on the death of Becket, who, for having vio-

lently opposed the king, was slain by some of his servants, the pope got such an advantage over him, that he was never able to execute the Constitutions of Clarendon. And, not long after this, by a general excommunication of the king and people for several years, because they would not suffer an archbishop to be imposed on them, John was reduced to such straits, that he surrendered his kingdoms to Pope Innocent III. to receive them again, and hold them of him under the rent of a thousand marks. And in the reign of Henry III., partly from the profits of our best church benefices, which were generally given to Italians, and others residing at the court of Rome, and partly from the taxes imposed by the pope, there went yearly out the kingdom 70,000*l.* sterling; a great sum in those days: the nation being thus burdened, and under necessity, was obliged to provide for the prerogative of the prince, and the liberties of the people, by many strict laws. And hence, in the reign of Edward I. it was declared in parliament, that the pope's taking upon him to dispose of English benefices to aliens, was an encroachment not to be endured; and this was followed by the 25 *Edw.* 3. *st.* 6, called the statute of provisors against popish bulls, and disturbing any patron to present to a benefice, &c. See also the 12 *Rich.* 2. *c.* 15; 16 *Rich.* 2. *c.* 5; 2 *Hen.* 4. *c.* 3, 4; 7 *Hen.* 4. *c.* 8; 3 *Hen.* 5. *c.* 4; 25 *Hen.* 8. *c.* 21; 28 *Hen.* 8. *c.* 16. The maintaining by writing, preaching, &c. the pope's power here in England is made a *præmunire* upon the first conviction, and high treason on the second. 5 *Fitz.* *c.* 1. In the construction of which statute it has been held, that he who, knowing the contents of a popish book, written beyond the sea, brings it over, and secretly sells or conveys it to a friend; or having read the book, or heard of its contents, doth after in discourse allow it to be good, &c. is in danger of the statute; but not he who, having heard thereof, buys and reads the same. *Selden's Janus Anglor.*; *Davis*, 90, &c.; *Dyer*, 282; 2 *Inst.* 550. See further, *tit.* *Bull. Præmunire*.

POPULAR ACTION. An action given by statute to any one who will sue for a penalty. See *titles Action, Information, Limitation of Actions*.

PORT, portus.] A harbour or place of shelter, where ships arrive with their freight, and customs for goods are taken. The ports in England are London, Ipswich, Yarmouth, Lynn, Boston, Hull, Newcastle, Berwick, Carlisle, Chester, Milford, Cardiff, Gloucester, Bristol, Bridgwater, Plymouth, Exeter, Poole, Southampton, Chichester, and Sandwich; all which are declared lawful ports, *et infra corpus comitatûs*: to these ports there are certain members belonging, and a number of creeks, where, commonly, officers are placed, by way of prevention of frauds in the customs; but these are not lawful places of exportation or importation, without particular licence from the port or member under which they are placed. *Lex Mercat.* 132. See further, *titles Harbours and Havens*.

PORTER, in the circuit of justices; an officer who carries a white, or silver rod, before the justices in *eyre*, so called *à portando virgum*. 13 *Edw.* 1. *c.* 41. See *Vergers*. There is also a porter bearing a verge before the justices of either bench. *Conell*.

PORTERAGE. A kind of duty formerly paid at the Custom-house to those who attended the water-side, and belonged to the package-office; and these porters had tables set up, ascertaining their dues for landing of strangers' goods, and for shipping out the same. *Merch. Dict.* This duty, along with some others, has been recently abolished. See *Package*.

PORTERS AND PORTERAGE. Porters are persons employed to carry messages or parcels, &c.

In London they are divided into different classes. The 39 *Geo.* 3. *c.* 58. enacts, that the following rates shall be the maximum charge upon all parcels not exceeding 56*lbs.*

weight, in London, Westminster, Southwark, and the suburbs, viz.:

	s.	d.
For any distance not exceeding $\frac{1}{2}$ of a mile	0	3
Not exceeding $\frac{1}{2}$ a mile	0	4
Not exceeding 1 mile	0	6
Not exceeding $1\frac{1}{2}$ mile	0	8
Not exceeding 2 miles	0	10

And so on in like manner the additional sum of 3d. for every further distance, not exceeding $\frac{1}{2}$ a mile.

Tickets to be made out at the inns, and given to the porters, who are to deliver them with the parcels; and any innkeeper not making out such tickets, to forfeit not exceeding 40s., nor less than 5s.; porters not delivering, or defacing the same, to forfeit 40s.; and if they make any overcharge, they are to forfeit 20s. Parcels brought by coaches to be delivered within six hours, under a penalty not exceeding 20s., nor less than 10s. Parcels brought by waggons to be delivered within twenty-four hours, under a like penalty. Parcels directed to be left till called for, to be delivered to those to whom the same may be directed, on payment of the carriage, and 2d. for warehouse room, under like penalty. If parcels be not sent for till the expiration of a week, 1d. more for warehouse rent may be charged. Parcels not directed to be left till called for, to be delivered on demand, under the above penalty. Misbehaviour of porters may be punished by a fine, not exceeding 20s., nor less than 5s. The porters of London have the exclusive privilege of taking up and carrying goods within the city; and the employment of any one else may be punished by fine.

PORTERS, Tackle-house.] Are regulated by the city of London. They have the privilege of performing the labour of unshipping, landing, carrying, and housing the goods of the South Sea Company, the East India Company, and all other goods, except from the east country—the produce of the British plantations, and Ireland, and goods coastwise. They give bond for 500*l.*, to make restitution in case of loss or damage, and are limited to rates, fixed by the corporation.

PORTERS, ticket.] Are persons appointed by the city of London; and have granted them the exclusive privilege of unshipping, loading, and housing pitch, tar, soap, ashes, wainscot, fir poles, masts, deals, oars, chests, tables, flax, and hemp, brought to London from the east country; also iron, cordage and timber, and all goods of the produce of Ireland and the British plantations, and all goods coastwise, except lead. They are freemen of the city, give security in 100*l.* for fidelity, and have their names and numbers engraved on a metal badge. They are under the tackle porters; who may, in performing the business of the port, employ other labourers, if ticket porters be not at hand. Any person may bring goods into London; but he is liable to a fine, if he either take up or carry any within the city.

PORTGREVE, or PORTREVE, portgrevius; Sax. port-gerefe; urbis vel portus præfectus.] A magistrate in certain sea-coast towns; and as Camden, in his Britannia, says, the chief magistrate of London was anciently so called, as appears by a charter of King William the Conqueror.

Instead of the portgreve, Richard I. ordained two bailiffs; but, presently after him, King John granted them a mayor for their yearly magistrature. See *London*.

PORTION. That part of a person's estate which is given or left to a child.

If a term of years settled to raise a daughter's portion is so short, that the ordinary profits of the land are not sufficient, the Court of Chancery may order timber to be felled, &c. to make up the money at the time appointed. *Prec. Ch.* 27.

A sale of lands has been also decreed for payment of portions devised to be paid at a certain time out of the rents and profits, where they were not judged sufficient for raising the money; although the land subject to the portions was given to others in remainder. *Ibid.* 396. See *Treat. of*

Equity, lib. 1. c. 6. § 18; lib. 2. c. 8. § 6, 7; Vin. Abr. tit. Portions; ante, tit. Marriage; and post, tit. Trustees, Uses, Will, &c.

PORTIONER, portionarius.] Where a parsonage is served by different ministers alternately, the ministers are called portioners; because they have but their portion, or proportion, of the tithes or profits of the living; the term portion is also applied to that allowance which a vicar commonly has out of a rectory or impropriation. See 27 *Hen. 8. c. 28*.

PORTMEN. The burgesses of Ipswich are so called. So also are the inhabitants of the cinque ports, according to Camden.

PORTMOTE, from portus, and gemote, conventus.] A court kept in haven-towns, or ports; and is called the portmote court. 43 *Eliz. c. 15*. The portmote, or portmannmote, i. e. portmen's court, is said to be held not only in port towns, as generally rendered, but in inland towns—the word port in Saxon signifying the same with city.

PORTSALE. A public sale of goods to the highest bidder; or of fish presently on its arrival in the port or haven. See *Stat. Antig. 35 Hen. 8. c. 7*.

PORTSOKA, or PORTSOKNE. The suburbs of a city, or any place within its jurisdiction; from the Saxon *port*, civilitas, and *soca*, jurisdictio. *Somner's Gavelkind*, 135. Henry III. granted by charter to the city of London—*Quantum murdri, &c. infra urbem, et in portsokne, viz. within the walls of the city, and the liberties without the walls. Placit. temp. Ed. 1*.

PORTUYS, portuas, portuos, porthose.] A breviary. *Cowell; Blount*. See 3 & 4 *Edw. 6. c. 10*. where portuyses are enumerated with mass books, &c., and prohibited to be imported.

POSSE. An infinitive mood, used substantively, to signify a possibility; such a thing is in *posse*, that is, such a thing may possibly be; but, of a thing in being, we say it is in *esse*.

POSSE COMITATUS. The power of the county, according to Lambard, includes the aid and attendance of all knights, and other men above the age of fifteen, within the county; because all of that age are bound to have harness, and by the statute of Winchester; but ecclesiastical persons, and such as labour under any infirmity, are not compellable to attend. Persons able to travel are required to be assistant in this service. It is used where a riot is committed, a possession is kept on a forcible entry, or any force or rescue made contrary to the commandment of the king's writ, or in opposition to the execution of justice. 2 *Hen. 5. c. 8*.

But with respect to writs that issue, in the first instance, to arrest in civil suits, the sheriff is not bound to take the *posse comitatus*, to assist him in the execution of them. See *Escape*. Though he may, if he pleases, on forcible resistance to the execution of the process. See 2 *Inst.* 193; 3 *Inst.* 161.

Sheriffs are to be assisting to justices of the peace in suppressing riots, &c. and raise the *posse comitatus*, by charging any number of men to attend for that purpose, who may take with them such weapons as shall be necessary; and they may justify the beating, and even killing, such rioters as resist, or refuse to surrender; and persons refusing to assist herein, may be fined and imprisoned. See 17 *Rich. 2. c. 6*, 13 *Hen. 4. c. 7*; 2 *Hen. 5. c. 8*; *Lamb.* 313, 318; *Crompt.* 62; *Dalt. c. 46*; 2 *Inst.* 193.

Justices of peace, having a just cause to fear a violent resistance, may raise the *posse* in order to remove a force in making an entry into or detaining lands; and a sheriff, if need be, may raise the power of the county to assist him in the execution of a precept of restitution; therefore, if he make a return thereto, that he could not make a restitution by reason of resistance, he shall be amerced. See *Forcible Entry, Sheriff*.

Also it is the duty of a sheriff, or other minister of justice, having the execution of the king's writs, and being resisted in

endeavouring to execute the same, to raise such a power as may effectually enable them to quell such resistance; though it is said not to be lawful for them to raise a force for the execution of a civil process, unless they find resistance. *2 Inst.* 193; *3 Inst.* 161.

It is lawful for a peace officer, or a private person, to assemble a competent number of people, and sufficient power to suppress rebels, enemies, rioters; but there must be great caution, lest, under a pretence of keeping the peace, they cause a greater breach of it; and sheriffs, &c. are punishable for using heedless violence, or alarming the country in these cases, without just grounds. See further, *Contempt, Riot, Sheriff*.

POSSESSIO FRATRIS. Formerly where a man had a son and a daughter by one venter, (i. e. wife,) and a son by another venter, and died; if the first son entered and died without issue, the daughter should have the land, as heir to her brother; although the second son, by the second venter, was heir to the father. But if the eldest son died without issue, not having made an actual entry and seisin, the younger brother, by the second wife, as heir to the father, should enjoy the estate, not the sister. *Co. Litt.* 11, 15.

Lands were settled on a man, and the heirs of his body, and he had issue a son and a daughter by one woman, and a son by another, and died, and then the eldest son died, before any entry made on the lands either by his own act, or by the possession of another; the younger brother should inherit, he claiming as heir of the body of the father, and not generally, as heir to his brother; yet, if the eldest brother entered, and, by his own act, gained the possession; or if the lands were leased for years, or in hands of a guardian, there the possession of the lessee or guardian vested the fee in the elder brother, and then, on his death, the sister should inherit, as heir to her brother, for there was *possessio fratris*. *3 Rep.* 42.

There could be no *possessio fratris* of a dignity; in such case the younger brother was *heres natus*. Lord Grey, being created a baron to him and his heirs, had issue a son and a daughter by one venter, and a son by another; and, after his death, the eldest being possessed of the barony, and dying without issue, it was adjudged, that the younger brother, and not the sister, should have it. *Cro. Car.* 437.

Now, by the recent statute altering the law of inheritance, the descent of the heir is to be traced from the person last entitled to the land, whether he has had seisin or not. See *Descent*.

POSSESSION, *possessio, quasi pedis positio*. Is either actual, where a person actually enters into lands or tenements descended or conveyed to him; or, in law, when lands, &c. are descended to a man, and he hath not actually entered into them. So before, or till an office is found of lands escheated to the king by attainder, he hath only a possession in law. *Bract. lib.* 2, c. 17.

Possession, beyond the memory of man, establishes a right; but if by the knowledge of man, or proof of record, &c. the contrary is made out, though it exceeds the memory of man, this shall be construed within memory. *Co. Litt.* 115. A long possession the law favours, as an argument of right, although no deed can be shown, rather than an ancient deed, without possession. *Co. Litt.* 6. Continued possession is a violent presumption of a good title, and where two persons enter into and claim the same land, the possession will always be adjudged in him who has right, &c. *2 Inst.* 256, 323.

He who is out of possession, if he brings his action, must make a good title: and to recover any thing from another, it is not sufficient to destroy the title of him in possession, but you must prove your own better than his. *Vaugh.* 8, 58, 60.

In an action against a person for digging of cony-burrows in a common, &c. it was held that the action, being grounded on the possession of the tenement to which the common belonged, the plaintiff need not show a title; and in

this case the defendant may be a stranger; besides the title is not traversable, but ought to be given in evidence upon the trial of the issue. *3 Salk.* 12.

A defendant in trespass, &c. for taking cattle damage feasant, has been allowed to justify the taking on his possession, without showing his title; the matter of justification being collateral to the title of the land. *2 Mod.* 70; *3 Salk.* 220. See *Trespass*.

In replevin, if defendant had the possession, it is a good bar against the plaintiff if he has no title; but there cannot be a return, unless he shows a property in the goods. See *Replevin*.

Action of the case lies for shooting at and frightening away ducks from a decoy pond, which is in the plaintiff's possession, without showing that he had any property in them. *3 Salk.* 9.

A man on a lease and release of lands, &c. is in possession to all intents, except bringing trespass, which cannot be without actual entry, *pedis positio*. *2 Lil. Abr.* 335. And to make possession good on entry, the former possessor and his servants, &c. are to be removed from the land; and if possession be lost by entry of another, it must be regained by re-entry, &c. *Pasch.* 1650.

A person in possession may bring an action, for loss of his shade, shelter, fruit, when trees are injured; and he in reversion for spoiling the trees. *3 Lev.* 209. One, in defence of his lawful possession, may assemble his friends to resist those who threaten to make an unlawful entry into a house, &c. *5 Rep.* 91. There is an unity of possession, when, by purchase, the seignory and tenancy become in one man's possession. *Kitch.* 134. See *16 Vin. Abr.* 454, 460; *3 Comm.* c. 10; and further, *titae. Ejectment, Entry, Writ of Right*; and other appropriate titles.

Important alterations have been made in the rules of law relating to the possession of lands by the *3 & 4 Wm. 4. c. 27*, which will be found under the title *Limitation of Actions, II*.

POSSIBILITAS. Is taken for an act wilfully done, and *Impossibilitas* for a thing done against our will. *Leg. Alfred. cap.* 38; *Ll. Canuti, c. 60*; *Leg. Sax. Fdm. scior. c. 88*.

POSSIBILITY. Is defined to be an uncertain thing, which may or may not happen. *2 Lil. Abr.* 336. And it is either near or remote; as, for instance, where an estate is limited to one, after the death of another, this is a near possibility; but that one man shall be married to a woman, and then that she shall die, and he be married to another, this is a remote or extraordinary possibility. And the law doth not regard a remote possibility, that is never likely to be. *15 H. 7.* 10; *Hardr.* 417; *2 Rep.* 50.

Where a lease is made for life, the remainder to the right heirs of J. S. this is good; for by common possibility J. S. may die during the life of tenant for life. *2 H. 7.* 13; *3 Shep. Abr.* 36.

A man made a lease to his brother for life, and that if he married, and his wife should survive, then she should have it for her life; the lessee, before he married, made a feoffment of the lands to another, and afterwards the lessor levied a fine to him; then the lessee married, and died, and his wife survived. And it was held, that the remainder to the wife for life was gone by this feoffment, and the possibility of her having it was included in the fine, which was likewise barred. *Moor.* 554.

A testator, possessed of a lease for years, devised the profits thereof to W. R. for life, remainder to another; and afterwards the devisee for life entered with the assent of the executor, and then he in remainder for life assigned all his interest to another, and after the devisee for life died; it was resolved that this assignment was void, because, whilst the devisee for life was living, he in remainder had only a possibility to have the term: for the devisee for life had an interest in it *sub modo*, and might have survived the whole term. *4 Rep.* 64.

The devise of the possibility of a term is void; as where a term is devised to A. for life, remainder to B., and B. devises this remainder to C. and dies, and then A. dies; this devise to C. is void, and the executors of B. shall have it. 3 *Lev.* 427. See *Remainder, Will*.

A possibility founded on a trust differs from a mere possibility; the first may be devised, but the other cannot. *Moor*, 808.

At common law, a possibility could not be granted or assigned; but where such possibilities are real interest, they will be attended to accordingly in equity. Thus, a covenant for a valuable consideration to settle or convey a possibility, when it arises, will be enforced. See *Treat. Eq.* 202; and titles *Assignment, Release*.

A mere possibility could be only bound or extinguished at law by estoppel, by a fine, or recovery; *Pollex*, 54; or in equity by contract. 2 *P. Wms.* 182. 191; see 1 *Madd. Ch.* 437; 3 *Mer.* 671. But where a possibility is coupled with an interest, as where the person is fixed and ascertained, it may not only be bound by estoppel or contract, but may be released, pass under the bargain and sale of commissioners of bankrupt, or be devised, though it cannot be granted or transferred by the ordinary rules of the common law. 10 *Rep.* 46. If an heir apparent levied a fine of lands, and survived his ancestor, he was bound by estoppel, and his right extinguished. *Sir W. Jones*, 456. It was held by the late master of the rolls, that where by deed indented a man represents himself as the owner of an estate, and affects to convey it for valuable consideration, having at the time no possession or interest in the estate, and where nothing therefore can pass, whatever be the nature of the conveyance, if by any means he afterwards acquire an interest in the estate, he is estopped in respect of the solemnity of the instrument from saying, as against the other party to the indenture, contrary to his own averment in it, that he had no such interest at the time of its execution. A conveyance by lease and release will operate as an estoppel; and where the release can have the benefit of the conveyance at law, a court of equity will not interfere in his behalf. 2 *Sim. & Stu.* 519, afterwards affirmed by the lord chancellor; see 2 *B. & Ad.* 282.

Contingent and executory estates, and possibilities accompanied with an interest, are devisable. *Bur.* 1131; 2 *Eden's C. C.* 142; 1 *Bl. Rep.* 605; 1 *Hen. Bl.* 30; 3 *East*, 88; 17 *Ves.* 182. But such an interest is not devisable where the person who is to take is not in any degree ascertainable before the contingency happens; as where there was "a devise to two equally, or to the survivor of them, and to be disposed of by her, the survivor, as she might by will devise," the will of one of such devisees made during their joint lives, although the survivor, was held inoperative. 2 *M. & S.* 164.

As to the alienation of expectancies, see *Tail*.

POST. A swift or speedy messenger to carry letters. See *Post-Office*.

PENNY POST. Letters or parcels are conveyed daily by the establishment, originally called the penny-post, to and from all places within the bills of mortality, and ten miles or more distance from the general post-office, in London. See 9 *Ann. c.* 10; 5 *Geo. 3. c.* 25; 34 *Geo. 3. c.* 17; 41 *Geo. 3. (U. K.) c.* 7. § 3; 45 *Geo. 3. c.* 11. § 4. under which the original rate of 1d. is in all cases advanced to 2d. and in some to 3d.

POST, writ of entry in. A writ given by the statute of *Marlbridge*, (52 *Hen. 3.*) c. 30; which provided, that when the number of alienations or descents exceeded the usual degrees, a new writ should be allowed, without any mention of degrees at all. And accordingly, this writ was framed, which only alleged the injury of the wrong-doer, without deducing all the intermediate titles from him to the tenant: stating it in this manner; that the tenant had no legal entry unless after, or subsequent to, the ouster or injury done by the original disposessor; "*non habuit ingressum nisi post in-*

trusionem quam Gulielmus in illud fecit." 3 *Comm.* 182. This writ is now, as well as the other writs of entry, prospective, abolished. See *Entry*.

POST CONQUESTUM, after the Conquest. Words inserted in the king's title, by King Edward I. and constantly used in the time of Edward III. *Claus. 1 Edw. 3. in dorsi.* m. 39.

POST DIEM. Where a writ is returned after the day assigned, the *custos breviarum* hath a fee of 4d. whereas he hath nothing if it be returned at the day.

POST DISSEISIN. Was a writ that lay for him who, having recovered lands or tenements by a force of *novel disseisin*, was again disseised by the former disseisor; it is now abolished. See *Assise of Novel Disseisin*.

POSTEA. The return of the judge, before whom a cause was tried, after a verdict, of what was done in the cause; and is endorsed on the back of the *ni si prius* record. It began thus in Latin, *postea, die et loco, &c.*, in English, afterwards (i. e. after joining issue and awarding the trial), on the day and at the place of trial named, the plaintiff and defendant appear. See *Pleading, Practice, Record, Trial*.

POSTERIORITY, *posterioritas*.] Signifies the being or coming after, and is a word of comparison and relation in tenures, the correlative whereof is priority. As a man holding lands or tenements of two lords, holds of his ancient lord by priority, and of his latter lord by posteriority. *Staundf. Prærog.* 10, 11; 2 *Inst.* 392. See *Priority, Tenure*.

POST-FINE. A duty that was paid to the king for a fine formerly acknowledged in his court, paid by the cognisee after the fine was fully passed. See *Fine of Lands, I.*

POST-HORSES. The duties upon horses let for hire for travelling post are regulated by the 4 *Geo. 4. c.* 62.

POSTHUMOUS CHILD. A child born after his father's death, &c.

By 10 & 11 *Wm. 3. c.* 16. posthumous children are enabled to take estates by remainder, in settlements, in the same manner as if born in their father's lifetime, though no estate be limited to trustees to preserve them till they come in *esse*. See *Infant, II., Remainder*.

POST-MAN. See *Pre-audience*.

POST-NATUS. The second son, or one born afterwards: often mentioned in Bracton, Glanville, Fleta, and other ancient writers. In another sense it is distinguished from *ante-natus*, in the case of aliens becoming subjects; and as to *post-nati* and *ante-nati*, it was solemnly adjudged, that those who after the descent of the crown of England to King James I. were born in Scotland, were not aliens here in England. But the *ante-nati*, or those born in Scotland, before the descent, were aliens here, in respect of the time of their birth. *Calvin's case*. Children of persons attainted of treason, born after the king's pardon, may inherit lands; though not those born before, &c. *Co. Lit.* 391. See *Alien, Attainder, Descent, &c.*

POST-OFFICE. The office for the conveyance of letters through the kingdom, as well from foreign parts, as from place to place within Great Britain. This was attempted by the parliament in 1643; an office was erected first in 1657, during the usurpation, and after the restoration established by 12 *Car. 2. c.* 35. See 1 *Comm.* 321.

The rates of letters have been from time to time altered, and some further regulations added by 9 *Ann. c.* 10; 6 *Geo. 1. c.* 21; 28 *Geo. 2. c.* 13; 5 *Geo. 3. c.* 25; 7 *Geo. 3. c.* 50; 28 *Geo. 3. c.* 9; 39 *Geo. 3. c.* 76; 41 *Geo. 3. (U. K.) c.* 7; 42 *Geo. 3. c.* 81. 101; 45 *Geo. 3. c.* 11; 46 *Geo. 3. c.* 73. 92; 48 *Geo. 3. c.* 116; 55 *Geo. 3. c.* 87; and penalties are imposed in order to confine the carriage of letters to the public office only, except in some few cases. See *Carrier*.

By 46 *Geo. 3. c.* 92. letters may be conveyed to and from places, not being post-towns, and charged with extra prices.

Many attempts were made by post-masters in country towns, to charge 4d. and 1d. a letter on delivery, at the houses in

the town, above the parliamentary rates, under the pretence, that they were not obliged to carry the letters out of the office gratis. But it was repeatedly decided, that such a demand is illegal, and that they are bound to deliver the letters to the inhabitants, within the usual and established limits of the town, without any addition to the rate of postage. 3 Wils. 443; 2 Black. Rep. 906; 5 Burr. 2709; 2 Roll. Rep. 906; Comp. 182.

By 7 Geo. 3. c. 50. enforced by 42 Geo. 3. c. 81. persons employed in the post-office, secreting any letters containing securities for money, &c. are punished as felons guilty of a capital offence: as are also persons procuring such offence.

It seems that it is not a felony within 7 Geo. 3. c. 50. § 1. for a person employed in the post-office, to steal out of a letter entrusted to his care, a draft on a London banker, purporting to be drawn in London, but actually drawn about ten miles from London, on an unstamped paper.

It seems also that § 2. of the same act does not apply to persons employed in the post-office; and that such a person therefore who steals a letter out of the post-office, is not guilty of felony under that act. 3 Bosc. & Pull. 311.

By the 4 & 5 Hm. 1. c. 11. the conveyance of newspapers between the united kingdom and the colonies, and also between the former and foreign parts, has been regulated.

By § 3. newspapers liable to the stamp duty and duly stamped may be sent through any general post office in Great Britain or Ireland to any of the colonies free of postage; and newspapers published in such colonies and sent to the united kingdom are to be delivered also free of postage.

By § 4. newspapers of the united kingdom may be sent to any foreign post free of postage, and newspapers printed in any foreign kingdom and brought by packet boats (if printed in the language of the state from which they are forwarded but not otherwise) may be delivered by the general post within the united kingdom free of postage. There is a proviso attached to the clause, that before newspapers are permitted to go free to and from any foreign state, satisfactory proof must be given to the postmaster general, that newspapers from or to persons in Great Britain and Ireland are allowed to pass by the post within such foreign state free of postage; and until such proof be furnished the postmaster general may charge 2d. for the conveyance of a newspaper to any foreign port to be paid when the same shall be put into the post office, and likewise 2d. on the delivery of any foreign newspaper within the united kingdom in addition to the postage charged by the foreign post office.

§ 5. empowers the postmaster general, with the consent of the treasury, whenever it shall be deemed expedient, again to impose the respective rates of 2d. for the conveyance of any newspaper from or to the united kingdom.

By § 6. newspapers are to be sent in covers open at the sides, and by § 7. must be posted within seven days after publication.

§ 9. authorises the postmaster general, with the consent of the treasury, to contract with the editors of unstamped publications for forwarding the same by post, on payment of a yearly sum for each publication.

By 6 Geo. 4. c. 20. § 10. any deputy, clerk, letter-carrier, letter-sorter, post-boy, or rider, or any other officer or person employed in receiving, stamping, sorting, &c. or delivering letters or packets, or in any business relating to the post office, wilfully embezzling, purloining, secreting, or destroying, or permitting, &c. any other person so to do, printed notes or proceedings in parliament, printed newspaper, or any other printed paper, sent by the post without cover, or in covers open at the sides, is declared guilty of a misdemeanor and punishable by fine and imprisonment.

By the 52 Geo. 3. c. 143. § 2. if any officer, or person employed by or under the post office of Great Britain, shall secret, embezzle, or destroy, any letter or packet with which he shall have been entrusted in consequence of such employ-

ment, or which shall have come to his hands or possession whilst so employed, containing the whole or any part of any bank note, &c. or warrant, draft, bill, or promissory note whatsoever for the payment of money; or shall steal and take out of any letter or packet with which he shall have been entrusted, or which shall have come to his hands or possession, the whole or any part of such bank note, &c. he is guilty of a capital felony.

By § 4. aiders, abettors, and accessories before the fact, are also guilty of felony punishable with death, and they may be tried and convicted either before or after the conviction of the principals.

By § 3. of the above statute, stealing letters from the possession of any person employed to convey letters sent by the post, or from any post office bag, or mail, is declared to be a capital offence.

By the 42 Geo. 3. c. 81. § 4. any person secreting or detaining, or after request refusing to deliver up any mail or bag of letters or any letter sent by the post, or put into any post office, and which shall have been found or picked up or by accident or mistake left with or at his house, is guilty of a misdemeanor punishable with fine and imprisonment.

It was determined so long ago as 13 Will. 3. in the case of *Lane v. Cotton*, by three judges of the Court of K. B. though contrary to Lord C. J. Holt's opinion, that no action could be maintained against the post-master general, for the loss of bills or articles sent in letters by the post. 1 Ld. Raym. 646; 1 Com. Rep. 100. A similar action was brought against Lord Le Despenser and Mr. Carteret, postmaster-general in 1778, to recover a bank note of 100l. which had been sent by the post, and was lost. Lord Mansfield delivered the opinion of the court, that there was no resemblance, or analogy, between the post-masters and a common carrier; and that no action for any loss in the post-office could be brought against any person, except him by whose actual negligence the loss accrued. Comp. 754. 765. For this reason, it is recommended by the secretary of the post-office, to cut bank notes, and to send one half at a time. This is the only safe method of sending bank notes; as the bank would never pay the holder of that half which had been fraudulently obtained.

As to rates of postage, &c. in Ireland, see 54 Geo. 3. c. 119; 55 Geo. 3. c. 103. and for the establishment and regulations 43 Geo. 3. c. 28. and Irish act 23 & 24 Geo. 3. c. 17.

The privilege of letters coming free of postage to and from members of parliament was claimed by the House of Commons in 1660, but dropped, on a private assurance that it should be allowed. And accordingly a warrant used to be issued to the postmaster-general to allow the same, till at length it was expressly confirmed by 4 Geo. 3. c. 24. which, and 24 Geo. 3. st. 2. c. 37; 35 Geo. 3. c. 53. add many new regulations; rendered necessary by the great abuses crept into the practice of franking. This privilege of franking is still further regulated by 42 Geo. 3. c. 63. and 46 Geo. 3. c. 61. and is by several acts extended to public offices and boards in particular departments of government.

The preamble of the ordinance made in 1657, states that the establishing one general post-office, besides the benefit to commerce, and the convenience of conveying public despatches, "will be the best means to discover and prevent many dangerous and wicked designs against the commonwealth." The policy of having the correspondence of the kingdom under the inspection of government is still continued; for by a warrant from one of the principal secretaries of state, letters may be detained and opened. 1 Comm. 322. edit. 1793, n. 28. But by 9 Ann. c. 10. § 40, if any person shall, without such authority, wilfully detain or open any letter or packet delivered to the post-office, he shall forfeit 20l. and be incapable of future employment in the post-office. It has been decided, that no person is subject to this penalty but those who are employed in the post-office, 5 T. R. 101. And see 24 Geo. 3. st. 2. c. 37. § 4, 5. as to opening foreign

letters suspected to contain prohibited goods; and 35 Geo. 3. c. 62; 17 Geo. 3. st. 2. c. 53. enabling the postmaster-general to open and return letters to foreign parts in consequence of certain political emergencies.

POST TERMINUM. The return of a writ, not only after the return thereof, but after the term; on which the *custos breviarum* takes a fee. It is also used for the fee so taken.

POSTULATION, *postulatio*. A petition. Formerly when a bishop was translated from one bishopric to another, he was not elected to the new see; for the canon law is *electus non potest elegi*; and the pretence was, that he was married to the first church, which marriage could not be dissolved but by the pope; thereupon, he was petitioned, and consenting to the petition, the bishop was translated, and this was said to be by postulation: but this was restrained by 16 R. 2. c. 5. See *Bishops, Pope*.

Postulations were made on the unanimous voting any person to a dignity or office, of which he was not capable by the ordinary canons or statutes, without special dispensation; and by the ancient customs, an election could be made by a majority of votes; but a postulation must have been *nemine contradicente*.

POUND, *parcus*. Generally any place inclosed, to keep in beasts; but especially a place of strength to keep cattle which are distrained, or put in for any trespass done by them, until they are replevied or redeemed. In this signification, it is called pound overt and pound covert; a pound overt is an open pound, usually built on the lord's waste, and which he provides for the use of himself and tenants, and is also called the lord's or the common pound; and a backside, yard, &c. whereto the owner of beasts impounded may come to give them meat, without offence, is a pound overt: a pound covert is a close place, which the owner of the cattle cannot come to, without giving offence; such as a house, &c. *Kitch. 144; Terms de Ley; Co. Lit. 96.*

There is a difference between a common pound, an open pound, and a close pound, as to cattle impounded: for where cattle are kept in a common pound, no notice is necessary to the owner to feed them; but if they are put into any other open place, notice is to be given; and he is then also bound to feed them; and if beasts are impounded in a pound close, as in part of the distrainer's house, stable, &c. he is to feed them at his peril. *Co. Lit. 47.* A distress of household goods, or dead chattels, which are liable to be stolen, or damaged by the weather, ought to be impounded in a pound covert; else the distrainer must answer for the consequences; and for this purpose, under 11 Geo. 2. c. 19. any person distraining for rent may turn any part of the premises upon which a distress is taken into a pound, *pro hac vice* for securing such distress. See *Distress, II.*

A common pound belongs to a township, lordship, or village, and ought to be in every parish kept in repair by them who have used to do it time out of mind; the oversight whereof is to be by the steward in the leet, where any default herein is punishable. *Dyer, 288; Noy, 52.*

The 2 Wm. & M. st. 1. c. 5. gives treble damages and costs against persons guilty of pound-breach, (or rescous of goods distrained for rent,) and also against the owners of the goods, if afterwards found to have come to their possession. It is no answer to an action on this statute for a pound-breach that the rent and demand were tendered after the distress and impounding. 5 T. R. 482.

A pound keeper is bound to receive every thing offered to his custody, and is not answerable whether the thing were legally pounded or not. 1 T. R. 62.

POUNDAGE. A subsidy of twelve-pence in the pound, anciently granted to the king, on the value of all merchandise exported or imported. See *Customs on Merchandise; Taxes.*

POUND-BREACH. If a distress be taken and impounded, though without just cause, the owner cannot break the

pound, and take away the distress; if he doth, the party distrained may have his action, and retake the distress wherever he finds it: and for pound-breaches, &c. action of the case lies, whereon treble damages may be recovered. *Co. Lit. 261; 2 Wm. & M. st. 1. c. 5; 7 Wm. 3. c. 22.* Also pound-breaches may be inquired of in the sheriff's tourn; as they are common grievances, in contempt of the authority of the law. 2 Hawk. P. C. c. 10. § 56.

It has been doubted whether this is an indictable offence when unaccompanied by a breach of the peace. 4 Leon. 12; 3 Burr. 1701. 1781. But as pound-breach is considered a greater offence, at common law, than even a rescue of the goods distrained, and is no doubt an injury and insult to public justice, it seems to be equally indictable as such at common law. *Mirror, c. 2. § 26; 2 Chit. C. L. 204. n. (b).*

POUND IN MONEY, [from the Sax. *pund*, i. e. *pondus*.] twenty shillings: in the time of the Saxons it consisted of 240 pence, as it doth now: and 240 of those (silver) pence weighed a pound, but 720 scarce weigh so much at this day. *Lambard, 219.*

POUR FAIR PROCLAIMER, [*que null inject Fines ou Ordures en Fosses, ou Rivers, pres Cities, &c.*] An ancient writ directed to the mayor or bailiff of a city or town, requiring them to make proclamation, That none cast filth into places near such city or town to the nuisance thereof and if any be cast there already, to remove the same; founded on the 12 R. 2. c. 13; F. N. B. 176. Indictments for nuisances now supply the place of this writ. See *Nuisance*.

POURPARTY, *pro pars, proprietia, propartia*, Fr. *pour-part; pro parte*. That part or share of an estate first held in common by parceners, which is by partition allotted to them. Thus it is contrary to *pro indiviso*: for to make pourparty is, to divide the lands that fall to parceners, which before partition they hold jointly, and *pro indiviso*. *Old Nat. Brev. 11.* See *Parceners*.

POURPRESTURE, *pourprestura*, from the Fr. *pourpris, conseptum*, an inclosure. Any thing done to the nuisance or hurt of the king's demesnes or the highways, &c. by inclosure or buildings: endeavouring to make that private which ought to be public. *Glanv. l. 9. c. 11; 1 Inst. 38. 272.* See *Nuisance*.

Crompton in his *Jurisd.* 152, defines it thus: pourpresture is properly when a man taketh unto himself, or incroacheth any thing he ought not, whether it be in any jurisdiction, land, or franchise; and generally when any thing is done to the nuisance of the king's tenants. See *Kitch. 10; Manwood's Forest Laws, c. 10; Glanv. l. 9. c. 11.*

Skene de verbor. signif. verbo pourpresture, makes three sorts of this offence; one against the king, a second against the lord of the fee, the third against a neighbour by a neighbourhood. See 2 Inst. 38 & 272. *Et Lib. Niger in Scac. 37 & 38.* That against the king happens by the negligence of the sheriff or deputy, or by the long continuance of wars, inasmuch as those who have lands near the crown lands take or inclose a part of them, and add it to their own.

Pourpresture against the lord is, when the tenant neglects to perform what he is bound to do for the chief lord, or in any wise deprives him of his right. *Cowell.*

Pourpresture against a neighbour is of the same nature: it is mentioned in the *Monast. l. tom. 848*; and in *Thorn. 2628.*

POUR SEISIR TERRES, *le fème que tient en doner, &c.* An ancient writ whereby the king seized the land which the wife of his tenant, who held in capite, deceased, had for her dowry, if she married without his leave. It was grounded on the statute of the king's prerogative, c. 3. See F. N. B. 174. This writ does not now lie. See 12 Car. 2. c. 24. abolishing these and other feudal effects of tenures.

POURSUIVANT, from the Fr. *poursuivre*, i. e. *persequi*. The king's messenger attending him, to be sent on any occasion or message; as for the apprehending a person accused

or suspected of any offence: those employed in martial causes are called pursuivants at arms. See *Herald*.

The rest are used upon other messages in time of peace, and especially in matters touching jurisdiction. *Nicholas Upton De Militari Officio*, l. 1. c. 11. mentions the ancient form of making these pursuivants, and tells us that they were called *milites linguarum*; because their chief honour was in *custodiâ linguarum*, and he divides them into *cursores equitantes* and *prosecutores*. *Cowell*.

POURVEYANCE, or PURVEYANCE. The providing necessities for the king's house.

The profitable prerogative of purveyance and pre-emption, was a right enjoyed by the crown, of buying up provisions and other necessities, by the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without consent of the owner; and also, of forcibly impressing the carriages and horses of the subject, to do the king's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price.

This prerogative prevailed pretty generally throughout Europe, during the scarcity of gold and silver, and the high nominal valuation of money consequential thereupon. In those early times, the king's household (as well as those of inferior lords) was supported by specific renders of corn and other victuals from the tenants of the respective domains; and there was also a continual market kept at the palace gate to furnish viands for the royal use. *4 Inst.* 273. And this answered all purposes, in those ages of simplicity, so long as the king's court continued in any certain place. But when it removed from one part of the kingdom to another, (as was formerly very frequently done,) it was found necessary to send purveyors beforehand, to get together a sufficient quantity of provisions and other necessities for the household: and lest the unusual demand should raise them to an exorbitant price, the powers beforementioned were vested in these purveyors, who, in process of time, greatly abused their authority, and became a great oppression to the subject, though of little advantage to the crown, ready money, in the open market, (when the royal residence was more permanent, and specie began to be plenty,) being found upon experience to be the best provender of any. Wherefore, by degrees, the powers of purveyance have declined in foreign countries as well as our own; and having fallen into disuse here during the suspension of monarchy, King Charles II. at his restoration consented, by 12 Car. 2. c. 24. to resign entirely these branches of his revenue and power: and the parliament, in part of recompence, settled on him, his heirs and successors, for ever, the hereditary excise of fifteen pence per barrel on all beer and ale sold in the kingdom, and a proportionable sum for certain other liquors. *1 Comm.* 287.

By this stat. 12 Car. 2. c. 24. it is provided, "That no person, by colour of buying or making provision or purveyance, shall take any thing of any subject, without the full and free consent of the owner, obtained without menace of force," &c.

Temporary acts were subsequently passed suspending this statute in favour of the king's royal progresses, viz. 13 Car. 2. c. 1. c. 8; 1 Jac. 2. c. 10; and in favour of the navy and ordnance, 13 & 14 Car. 2. c. 20.

POURVEYOR, or PURVEYOR, provisor, derived from the Fr. *pourvoir*, i. e. *providere*. The officer of the king or queen, or other great personage, who provided corn and other victual for their house. See *Magna Charta*, c. 22. *3 Ed.* c. 7 & 8; *13 & 14 Car. 2. c. 20*. *Articuli super chartas*, 28 E. 1. c. 2. c. 2. and other statutes. The name of purveyor was so odious in times past, that by 36 Edw. 3. c. 2. the heinous name of purveyor was changed into buyer: but the office is restrained by 12 Car. 2. c. 24. See *ante*, *Purveyance*.

POW-DIKE. To perversely and maliciously cut down or destroy the pow-dike in the fens of Norfolk and Ely is felony, by 22 Hen. 8. c. 11.

POWER.

An authority which one man gives another to act for him; a term commonly applied to a reservation made in a conveyance for persons to do some certain acts; as to make leases, raise portions, or the like. *2 Lill. Abr.* 339.

Powers are either common law authorities, declarations, or directions operating only on the conscience of the persons in whom the legal interest is vested; or declarations or directions deriving their effect from the statutes of uses. A power given by a will to A. to sell an estate, and a power given by an act of parliament to sell estates, as in the instance of the land-tax redemption acts, are both common law authorities. The estate passes by force of the will or act of parliament, and the person who executes the power merely nominates the party to take the estate. A power of attorney is also a common law authority; but the estate is not in this, as in the other cases, actually transferred by the instrument creating the power. It is a mere authority to execute a conveyance in the place of the principal; and the estate, therefore, must be conveyed by the attorney, with the same solemnities as would have been requisite upon a transfer executed by the principal himself. A power to dispose of an estate or sum of money, if the legal interest is vested in another, is a power of the second sort. The legal interest is not divested by the execution of the power, but equity will compel the person seised of it to clothe the estate created with the legal right. *Syngden on Powers*, 1.

I. Of the creation and different kinds of powers, and by what words they may be raised.

II. Of the construction and execution of powers.

I. Powers deriving their effect from the statute of uses are either given to a person who has an estate limited to him by the deed creating the power, or who had an estate in the land at the time of the execution of the deed, or to a stranger to whom no estate is given, but the power is to be exercised for his own benefit, or to a mere stranger to whom no estate is given, and the power is for the benefit of others. The two first may be distinguished into two kinds, 1st, Appendant or appurtenant; 2d, Collateral or in gross. The third, it should seem, is a power in gross. The latter are termed powers simply collateral.

1. Powers appendant or appurtenant are so termed because they strictly depend upon the estate limited to the person to whom they are given. Thus, when an estate for life is limited to a man, with a power to grant leases in possession, a lease granted under the power may operate wholly out of the life estate of the party executing it, and must in every case have its operation out of his estate during his life. And this, as well as every other power which enables the party to create an estate which will attach on an interest actually vested in himself, is a power appendant or appurtenant.

2. Powers collateral, or in gross, are powers given to a person who had an interest in the estate at the execution of the deed creating the power, or to whom an estate is given by the deed, but which enable him to create such estates only as will not attach on the interest limited to him. Of necessity, therefore, where a man seised in fee settles his estate on others, reserving to himself only a particular power, the power is collateral, or in gross. A power to a tenant for life to appoint the estate after his death amongst his children, a power to jointure a wife after his death, a power to raise a term of years to commence from his death, for securing younger children's portions, are all powers collateral, or in gross, the estates to be created by them cannot in any event affect the life-estate of donee, and are, therefore, correctly termed collateral, or in gross, nevertheless, they are consi-

dered as emoluments annexed in privity to his estate, or as a part of his old dominion, and it even seems that a power to a perfect stranger who has no estate limited to him, to charge the estate for his own benefit, would be deemed a power in gross.

A power may, with reference to the different estates in the land over which it rides, have different aspects; it may, in regard to one, be a power appendant, in respect to the other, a power in gross. Thus, where an estate is settled to A. for life, remainder to B., in tail, remainder to A. in fee, and A. has a power to jointure his wife after his death, this power is collateral, or in gross, as to the estate for life, but appendant or appurtenant as to the remainder in fee. It may affect the latter, but can never attach on the former.

2. A power simply collateral, is defined by Sir Matthew Hale to be a power given to a party who has not, nor never had, any estate in the land. As where such power is given to a stranger. *Hard. 415.* This definition, however, is not correct. It is certainly clear, that if a man seised in fee reserve a power of revocation to himself, such power is a power in gross, and part of his old dominion; but although he might formerly have been owner of the estate, the power will be simply collateral, unless his interest existed at the time of the execution of the deed, so that by the revocation he would acquire an estate. Again, it should seem that a power to a perfect stranger to charge the estate for his own benefit would not be deemed a power simply collateral. A power of this nature may be thus defined: a power to a person not having any interest in the land, and to whom no estate is given, to dispose of, or charge the estate in favour of some other person. *Sugden on Powers, 46.*

Powers which are given to mere strangers, that is, to persons who have neither a present nor future estate or interest in the land, are said to be collateral to the land; those which are reserved to a person, who has either a present or future estate or interest in the land, are said to be relating to the land; and these again are subdivided into two classes, powers annexed to the estate in the land; and powers in gross. Powers annexed are, where a person has an estate in the land, and the estate to be created by the power is to take effect in possession during the continuance of the estate to which the power is annexed; such is the power usually given in settlements to tenants for life, when respectively in possession, to make leases. Powers in gross are, where the person to whom they are given has an estate in the land; but the estate to be created under or by virtue of the power, is not to take its effect till after the determination of the estate to which it relates; such are the powers usually inserted in settlements, to jointure an after-taken wife. *1 Inst. 342. b. in n.*

In conveyances to an use, a man may direct or model the use as he pleases, and the *27 Hen. 8. c. 10.* executes the possession to the use: therefore he may annex powers to estates, which cannot be annexed to them by a conveyance at the common law. *Co. Litt. 237. a; Mo. 610.* And, therefore, to the limitation of an use for life, he may annex a power to make leases for years, or lives, or to make a jointure to a wife. *Mo. 381; 2 Lev. 58.* Or to grant annuities, raise portions, &c. *Mo. 381.* Or to make a jointure, and also a lease to commence after his death, for portions, &c. *Hard. 413.* So, he may annex a power of revocation of all uses limited, and to make a limitation of new uses, and this will not be repugnant. *Co. Litt. 237. a.*

So, a power may be annexed to an estate by another deed, executed at the same time, though it be not in the same conveyance by which the estate is conveyed. *1 Vent. 279.* So, a man may give a power or authority by will, which is a naked authority, not annexed to an estate: as, if he devises to A. for life, and afterwards that it shall be at his disposal to any of his children then living; he hath but an estate for life, with a naked power to dispose, in the manner directed by the will. *1 Salk. 24; 3 Salk. 276.* So, he may give a

power to a stranger, which is a naked collateral power, and annexed to an estate; or a power in gross, which takes effect after his estate is determined. *Hard. 415.*

If a power be to A. or his assigns, to make leases, &c. the power runs with the estate to the assignee in deed, or in law. *1 Vent. 340; 2 Jon. 110.* So, in all cases a power coupled with an interest may be assigned: as, a power to a lessor, and his assigns, to cut down trees. *2 Mod. 317.*

If a man, seised in fee, covenant to stand seised to the use of himself for life, with power to make leases, remainder to another in fee, the power is not well raised, *Ch. Ca. 161:* if the consideration of the covenant does not extend to the power to make leases, *Mo. 145; 1 Co. 175; Raym. 218.* So, upon such covenant, he cannot reserve a power to make leases, jointures, or for preferment of younger children, &c. *Mo. 381. 383.*

No precise form of words is necessary for the valid creation of powers which are mere declarations of trust, and therefore any words, however informal, clearly indicating an intention to give or reserve a power, are sufficient for the purpose. *Anon. Mo. 608; 2 Ro. Abr. 262. (B.) pl. 3; 2 Vern. 377.* The same rule prevails as to common law authorities, created either by will, *2 Ves. 175; 3 Ves. jun. 513;* or by deed.

Thus if a power be to demise or lease, though the intent is, that he declare the uses of the first settlement for life or years; for the lease does not take effect by demise, but by declaration of the uses. *Mo. 611.* So, if a man expresses the power only by implication, it is well; as, provided that he shall not have power to alien, &c. otherwise than to make a jointure and leases for twenty-one years, it is a good power to make a jointure and leases. *1 Leo. 148.* So, if a devise be to A. for life, to set, let, and make estates out of it as I might, and afterwards to his daughter in tail; A. has power to make leases, it being the custom of the country where the land lies to let for lives or years, *2 Rol. 261. l. 35.*

A power, being executory, may be restrained or enlarged by a subsequent deed: as, if a power be general, to revoke; by a covenant afterwards, that he will not revoke without the consent of B. the power is restrained. *Jon. 411.* So, if the consideration, upon which the power was founded, does not extend to the person to whom the lease is made, the lease shall be void: as, if a man covenant, in consideration of natural affection, to stand seised to the use of himself for life, &c. with power to make leases, &c. a lease to a stranger is void: for he is not within the consideration. *2 Rol. 260. l. 30.* So, if a power at its creation be, to make leases to a person to whom the consideration does not extend, it will be void, though the lease be executed to a person within the consideration. *2 Rol. 260. l. 35.* But a man cannot annex a power of revocation to a feoffment or grant, for that will be void. *1 Inst. 237. a; Mo. 610.*

Powers of revocation of uses of lands are very frequent, and merely voluntary conveyances, but have of late been disallowed in marriage settlements, doubts having arisen whether such settlements are not fraudulent within the *27 Eliz. c. 4; T. Jones, 94, 95.* Powers of revocation in their creation are to be construed favourably; and, therefore, no express or technical words are necessary to the creating of such powers, but any expression which denotes an intent to reserve such power will be sufficient. *2 Vern. 376; 3 Krb. 26.* But if such power be once executed, that is, the old uses over the whole estate revoked, and new uses limited, such new uses cannot be revoked, without an express reservation of a power for such purpose. *Pre. Ch. 474; 2 Burr. 1136; 2 Ves. 211.* A power of revocation may extend to all the limitations, or be restricted to a particular estate, limited by the conveyance; as where the use is to A. for life, remainder over, with power to revoke the estate for life only, this seems to be a good power. *2 Rol. 262. pl. 1.* See further, *Fonblanque Treat. Eq. lib. 2. c. 6. § 6, 7.* and the notes there.

A power of appointment or revocation may be reserved

either in the body of the deed or by indorsement before the execution of it; *Cro. Jac.* 156; 2 *Keb.* 809; or by a deed of even date with the settlement. 1 *Keb.* 134.

No particular solemnities are by law required to the execution of powers. A power may be reserved to be executed by a simple note in writing, or by will unattested, or attested by only one or two witnesses; and this although the subject over which it rides is real estate. But a man cannot reserve such a power to himself by his own will, for that would be simply an evasion of the statute of frauds. 2 *Ves. jun.* 204.

II. A Power shall be expounded strictly; therefore if a man has power to make leases generally, this extends to make leases in possession only, and not in reversion. 2 *Roll.* 261. c. 5; *Cro. Jac.* 318; *Yelv.* 222; *Ray.* 248; 1 *Ld. Raym.* 267; 2 *Salk.* 357; 1 *Lev.* 168; 6 *Co.* 33 a; *Mo.* 199; 1 *Leo.* 35; 3 *Leo.* 131. Nor a lease to commence in futuro. *Raym.* 248; 1 *Leo.* 35; *Yelv.* 222; *Cro. Jac.* 318; *Mo.* 494. So if the power be to make leases for two or three lives, he cannot make a lease to one not in esse; as to the son of B. not born, &c. *Raym.* 163. So, if the power be to make leases in possession, he cannot make a lease of land in reversion, though it be to commence in presenti. 1 *Sid.* 101, *Ch. Ca.* 18.

So, if part of a lease be in reversion, the whole lease shall be void. 3 *Salk.* 276; 2 *East.* 376. So if the power be to make leases in possession, or in reversion, he cannot make a lease in possession, and another lease of the same land in reversion; but his power to lease in reversion extends only to make leases of the land which was not then in possession. 1 *Ld. Raym.* 269; 2 *Salk.* 357. So a power to make a lease of three lives, or three years in possession, or for two lives or thirty years in reversion, warrants only a concurrent lease for two lives; for a lease for lives cannot commence at a future day. 1 *Ld. Raym.* 269; 2 *Salk.* 537.

Devise to the use of H. J. for life, without impeachment of waste, &c., remainder to the use of plaintiff for life, with power to make leases for two or three lives, &c. or for the term of twenty-one years, so as there be reserved the best rent without taking any sum or sums of money or other thing, for or in lieu of a fine; and H. J. by indenture, 15th of October, leased for fourteen years, to be computed, as to the meadow land, from the 13th of February last; the pasture from the 25th of March last; and the messuage from the 12th of May last; under a yearly rent, payable to lessor and such other person as should be entitled to the freehold and inheritance, half-yearly, on the 11th of November and the 25th of March: first payment to be made on the 11th November next ensuing; and lessee covenanted with lessor, his heirs and assigns, for payment to lessor and such other person, &c. of the rent at the days and times, &c.: Held, that the lease for fourteen years was warranted by the power to lease for twenty-one. And that the reservation of the first half-year's rent, payable at the end of twenty-seven days, was not taking a sum of money for a fine, being in consideration of a preceding occupation. 3 *M. & S.* 382.

But if a power be annexed to the estate of land in reversion, to make leases generally, he may make a lease in presenti of the reversion, 1 *Ler.* 168; though the power be to make leases in possession, *Ch. Ca.* 18; 1 *Lev.* 108; 1 *Sid.* 260, 261. So, if a fine be to the donee for fifteen years, afterwards to B. for life, &c. with power to lease for three lives, or twenty-one years in possession, he may make a lease during the fifteen years of land in lease at the time of the fine when such lease expires. 2 *Roll.* 260. l. 50; *Cro. Jac.* 347; 1 *Roll.* 12; 2 *Roll.* 216. So, if husband and wife lease pursuant to the 32 *Hen.* 8. c. 28. and then, by act of parliament, the estate is settled to the husband for life, with power to lease for three lives, or twenty-one years; he may make leases of the reversion during the first lease by the husband and wife. 2 *Roll.* 261. l. 15; 1 *Lev.* 36; *cont. Dyer.* 357 a. So, if a power be to make leases in reversion for three lives, &c. he may lease for three lives, when there is

another life in esse, though the power does not say, to make leases of the reversion, for there is no prejudice. 2 *Roll.* 261. l. 30. So he may make a lease for years determinable upon three lives, to commence after the end of the former lease in esse. 8 *Co.* 70. See *Lease*, I. 2.

If tenant for life, with power to lease, make leases not in conformity with the power, and die bequeathing his personality to the next remainder-man, the executors may refuse to pay it to him, unless he either confirms the leases or indemnifies the executors. *Vernon v. Egmont*, 1 *Bligh*, 554.

Where the intention is clear, a power may enable the disposition of a fee, although no words of inheritance are used; as where a testator gives a power to sell lands, the donee may sell the inheritance, because the testator gives the same power he himself had. 1 *Mod.* 189. So a general power to dispose of an estate in favour of a particular object will authorize the limitation of a fee, although no words of inheritance are contained in the power. 1 *Mod.* 189; 1 *Freem.* 149, 163, 176; 2 *Lev.* 104; *Carth.* 232. And see 7 *East*, 521.

At law a particular power of charging lands will not authorize a limitation of the fee as a security for the sum to be raised. 1 *Lev.* 150; *Hard.* 395; 1 *Ch. Ca.* 103. But it should seem that at this day, if a clear intention appeared to execute the power, equity would consider such an execution as that in the above case a substantial, although defective execution, and would relieve against the defect in favour of the mortgagee; and it has been ruled, that in equity an unlimited power to charge an estate will authorize a disposition of the estate itself in trust to sell and divide the money among the objects. 5 *Ves.* 445.

Whatever is an equitable ought to be deemed a legal execution of a power; and the reason is obvious, for powers were originally in their nature equitable, but are, by the Statute of Uses, transferred to common law. See 2 *Burr.* 1147; 1 *Comp.* 266.

There is a distinction between the non-execution of a power, and a defective execution of a power; for though a court of equity will, under certain circumstances, help the latter, it will never aid the former, because so to do would be repugnant to the nature of a power, which always leaves it to the free will and election of the party, to whom the power is given to execute it or not; for which reason equity will not compel the execution of a power, or construe the act as done, when there is no evidence of the intention of the party to do it. 2 *P. Wms.* 490; and see *Sugden on Powers*. The declaration of such intent is, however, a sufficient ground for the interference of a court of equity. 2 *Vern.* 69. A covenant in a marriage settlement, referring to a power, or to the estate on which the power attaches, is, in respect of the consideration, a sufficient indication of an intent to execute such power. 2 *Freem.* 256; 2 *Vern.* 379. See 2 *P. Wms.* 222; *Gillb. Rep.* 166; *Ambl.* 3.

The interference of courts of equity, in cases of a defective execution of a power, proceeds upon the same principles as those on which those courts will supply any defect in the surrender of a copyhold estate, and is therefore bound by the same considerations. *Treat. Eq.* l. 314 n. See *Copyhold*.

In *Bath and Montague's case* (3 *Ch. Ca.* 69, 93.) it is said by the two chief justices, that if the party appear to have intended to execute his power, and is prevented by death, equity shall interpose to effectuate his intent, for it is an impediment by the act of God; and the case of *Smith v. Ashton* (1 *Ch. Ca.* 264; *Finch. Rep.* 273.) is relied on as an authority to such an effect; but this not being an original opinion of the learned chief justices, and founded only on the case cited, can be carried no farther than that case warrants; upon reference to the circumstances, it will be found to afford an authority rather against than in support of the notion, that where a man is only preparing to execute a power, and dies before he does execute it, the preparatory steps amount to such an execution as equity will make effectual; for it is ob-

servable that the court, in *Smith v. Ashton*, directed an issue to try whether the notes or instructions for the will, from which the intent of the donee of the power was inferred, were part of his will; which issue would have been unnecessary, if the court could have relieved on the ground of preparatory measures only; the relief afforded in that case must therefore be referred to the result of the issue, which was, that the notes or instructions were part of the will. *Treat. Eq.* i. 315, *in n.*

It is said that equity will relieve the defective execution of a power to make leases; but this must be understood of such leases as are not derived under powers limited in their nature to a particular mode of execution; for in the construction of powers, originally in their nature legal, courts of equity must follow the law, be the consideration ever so meritorious; for instance, in the case of powers by tenant in tail, to make leases under the statute, if not executed in the requisite form, no consideration, however meritorious, will avail. So with respect to defective executions of powers under the Civil List Act, or powers under particular family entails, equity can no more relieve from them than it can from defects in a common recovery. The principle upon which the rule of construction is founded in these cases is, that there is nothing to affect the conscience of the remainderman. *Comp.* 257.

In the case of defective execution of powers, it is not necessary, in order to induce the interference of a court of equity, that the consideration should be strictly valuable; but it is sufficient that it be meritorious; i. e. founded on some moral obligation. *Treat. Eq.* i. 316, *in n.*

As to the 54 *Geo. 3. c. 168.* by which deeds made before the passing of the act for executing powers by deeds to be signed and sealed by the party, are declared valid, though the attestation does not mention the signature. See *Deeds*, II. 6.

Though equity will not, even in favour of creditors, execute a power which the party himself has omitted to execute; yet, if a power be executed in favour of a volunteer, though a child, it seems agreed by all the cases, that the money shall be assets for the benefit of creditors. 2 *Vern.* 319; 1 *Atk.* 495; 2 *Ves.* 1. Nor can a power be so framed as to protect an appointment under it from payment of the debts of the person appointing. 2 *Ves.* 640. See *Executor*, V. 6.

By the 1 *Wm. 4. c. 46. § 1.* no appointment made in future in exercise of any power to appoint property among several persons, shall be invalid in equity, on the ground that a nominal share only is appointed to any object of the power. But this shall not affect any provision by which the amount of the share is declared by the deed. § 2. Nor alter the force of the appointment. § 3. The object of this act is to restore the law to its original state, and to put the equitable rule on the same footing as the rule at law, with respect to appointments; so that the doctrine of *illusory appointments* should no longer exist in a court of equity. The authority assumed in that respect was always looked on as dangerous, inasmuch as it depended almost entirely on the arbitrary distinctions taken by each individual judge; and it proved to be inconvenient, because it was extremely difficult to draw the line between *illusory* and *substantial* appointments, the judges having found it impossible to fix a rule on account of the varying circumstances which might make it applicable to the very next case that might be brought before them. This act therefore takes away the jurisdiction of the Court of Chancery (in that respect), and restores the doctrine of appointment to its original state at common law. By this provision a fruitful source of litigation is removed, and a parent or trustee is enabled to act so as best to meet the exigencies of a family, and to give to children aid and provision in proportion to their actual wants:—but the power must be exercised in order to exclude any object in favour of them. In

future creations of powers it is probable that the parties will be careful to declare what shall be the *smallest sum* or share of the fund which any one object shall take under an exercise of the power. See *Jemmett's Introduction to the Acts relating to the Administration of Law in Courts of Equity*, passed in the session of 1830.

It is agreed in the books that a wife may, without her husband, execute a naked authority, whether given before or after coverture, and though no special words are used to dispense with the disability of coverture; and the rule is the same where both an interest and an authority pass to the wife, if the authority is collateral to, and doth not flow from the interest; because then the two are as unconnected as if they were vested in different persons. *Finch. Rep.* 348. As too a feme covert may, without her husband, convey lands in execution of a mere power or authority, so may she, with equal effect, in performance of a condition where land is vested in her on condition to convey to others. *W. Jones*, 137, 138. The reason why in these instances the wife may convey without her husband, seems to be, that he can receive no prejudice from her acts; but a great one might arise to others, if his concurrence should be essential. 1 *Inst.* 112, *a. n. n.* And it has long been finally settled, that a married woman may execute a power, whether appendant in gross or simply collateral. 1 *Roll. Abr.* 329, *pl. 12*; *P. Wms.* 149; 3 *Atk.* 711; 2 *Ves.* 191: and as well over a copyhold as a freehold estate. 4 *Taunt.* 294; 5 *B. & C.* 578. See further, *Baron and Feme*.

As to the *Suspension and Extinction of Powers*, see 1 *Inst.* 342 *b in n.*; and as to the rules by which the creation and execution of powers in general are governed, see *Sugden on Powers*; and further, with respect to subjects connected therewith, *tit. Authority, Estate, Limitation of Estate, Lease, Remainder, Trust, Use, &c.*

POWER OF THE COUNTY; see *Posse Comitatus*.

POWER OF THE CROWN; see *King*.

POWER OF THE PARENT; see *Parent*.

POYNDING. See *Poynding*.

POYNING'S LAW. An act of parliament made in Ireland in the reign of Henry VII., 10 *Hen. 7. c. 22*; so called because Sir Edward Poyning was lieutenant there when it was made, whereby all general statutes before then made in England were declared of force in Ireland, which before that time they were not. 12 *Rep.* 109. See *Ireland*.

PRACTICE. This term is sometimes applied, in an unfavourable sense, to signify fraud or bad practice. Thus clandestine proceedings are said to be by practice.

PRACTICE OF THE COURTS.

By this is understood the form and manner of conducting and carrying on suits or prosecutions at law or in equity, civil or criminal, through their various stages, from the commencement of the process to final judgment and execution, according to the principles of law and the rules laid down by the several courts.

Though the knowledge of this practice is to be acquired chiefly by experience, it is founded on the original structure and progressive improvements of our laws. Several modern treatises have been written on the practice of the several courts of King's Bench, Common Pleas, Chancery, and Exchequer; some of which are by no means liable to the censure passed on former productions of that nature by the learned and ingenious writer from whom the following abridgement is extracted. The nature of this dictionary precludes the possibility of entering into any thing like a general account on so complicated a subject, the various points of which are incidentally noticed under the several heads to which they apply.

Some idea of the visible practice of the courts is given under *Motion in Court*, and which the following summary may serve further to illustrate. It is taken from a work

which would probably have secured to its author a fame more adequate to his deserts, had not the splendour of the Commentaries obscured all inferior exertions of ingenuity and elegance. See *Eunomus*, *Dial.* 2. § 23, 40.

It must be owned, (says that writer,) that the knowledge of practice can be acquired only by practice; though, as its rules depend on principles, it is as much a science as any other part of the law. It is impossible even to recollect those rules, and often difficult to investigate them. The very few books of any credit that have been written on this subject are written on a loose and unconnected plan, and after all, speak only to the learned. This branch of law was, until of late years, more than any other, destitute of any elementary treatise.

The following idea of practice, given by the author of *Eunomus*, is new, and, it is believed, accurate as far as it goes: it may afford a pleasing view of the rationale of practice even to adepts; but it is chiefly adapted to the instruction of those who are first setting out in the profession; who, either from lectures in the university, or their now private studies, have a tolerable notion of the general principles of law; though they may have barely set foot in Westminster Hall, and consequently have but little idea of the practice of a court. It arises on the following case:—

A person who has a cause of complaint, either for a right detained, or an injury done, is determined to bring his *Action*; and, by his attorney, takes out *Process* against the party complained of; in consequence of which, the latter (who is called the defendant) puts in *Bail*: either common or special, as the case requires. The defendant being thus secured, the plaintiff declares in proper form the nature of his cause; the defendant answers this declaration; and the charge and defence, by due course of *Pleading*, (in the course of which may be introduced a *Demurrer* on either side,) are brought to one or more plain simple facts: these facts arising out of the pleadings, and thence called *Issues*, come next to a *Trial by Jury*, who, having heard the *Evidence* on an issue before them, find (let it be supposed) a *Verdict* for the plaintiff, on which verdict *Judgment* is afterwards entered. The plaintiff's costs of suits are then taxed by the officer of the court; and the judgment is put in *Execution*, by laying on the defendant's effects the *Damages* given by the jury, and the *Costs* allowed by the court; which being done, there is an end of the suit, and both parties are once more out of court. [By referring to the titles in this dictionary, distinguished by italic words in the above sentence, further information on each head will be obtained.]

But the practice of a court in civil suits arises, in a great measure, from the interruption in the above regular stages and course of a cause. Those regular stages (as to the time and manner of carrying them on) are themselves the legitimate offspring of the established practice of the court where the cause is brought: when they are pursued, the course of the proceeding runs on smooth and silent, transacted by the attorneys in the cause and the officers of the court, without ever being heard of in open court; and the method of transacting this business is that practice, the knowledge of which more immediately concerns the attorneys and officers. The irregularities and informalities, that push a cause out of its course, must be redressed by the interposition of the court; and it is this kind of business that furnishes and makes up a great part of the visible practice of the courts of law in term time.

It was above stated, that the attorney first takes out process against the defendant, in order to make him appear. But this process may be irregular, and then it will produce motions to set it aside; as, for instance, where the defendant is a privileged person it may not only be irregular, but highly oppressive; and then it grounds a motion for an attachment against the parties executing the process, as for a contempt of the court. This is a general motion, and may, as

the oppression which produces it, arise in any stage of the cause. The suit itself, as well as the process, may be irregular, and then it will occasion a motion to stay proceedings in a cause: as where the parties have agreed to compromise the matters in difference, and a release is not executed; for the release, when executed, may be pleaded in bar of the action. The first process may be regular, and the bail may not, and thence arise various motions, either to discharge the defendant on common bail, where it appears from the affidavit that he is not liable to give special bail, or, where the affidavit to hold to bail is defective, to set aside a judge's order, made at his chambers, relating to the bail; which kind of motion may be made on other grounds. If the bail is regular in the manner of putting it in, but suspicious as to the competency of the bail, the plaintiff gives notice, and the defendant moves to justify bail in open court.

The declaration may furnish several motions; as to the delivery of it; its frame and structure; or the neglect of it by the defendant. Perhaps it cannot be delivered in the common form, the party absconding to avoid it; and then the plaintiff moves that some other service of the declaration may be sufficient. The declaration being delivered, the defendant may apprehend it to be immoderately prolix and impertinent; in which case he will move to strike out some counts in the declaration. The court usually, upon this, order it to be referred to the master of the plea office, and the master's report is the ground of the rule afterwards made. A motion for the master's report is another motion, that may arise in various parts of a cause. In an action that is in its nature transitory, if the declaration lays the cause of action in one county, and it did in reality arise in another, the defendant may avail himself of that circumstance, and upon affidavit apply to the court for the plaintiff to change the venue, (that is, the place where the cause of action is declared to have happened,) from the first county to the latter. The venue may likewise be changed from any county in England, wherever the cause of action arose, to that of Middlesex, where the court sits, if the defendant is privileged as attendant on that court. Where the jury, and not the venue, is to be changed, as where the material evidence arises in the place laid, but no jury, competent special cause is laid, disinterested, (as in case of a county cause about a bridge, or the like,) it is usual to move for a trial in the adjoining county, upon entering a suggestion on the roll. See *Venus*, *Trial*. A suggestion on the roll is sometimes entered for other purposes; as where the sheriff who regularly returns the process is partial. See *Coroner*, *Jury*, *Sheriff*.

If a declaration is substantially defective, the defendant, instead of answering, demurs to it. See *Demurrer*. If, on the other hand, the declaration is delivered, and is unexceptionable, and the defendant neglects to answer it in due time, the plaintiff may have judgment by default; but if the plaintiff is over hasty in signing this judgment, the court will interpose on a motion to set it aside; in consequence of which the defendant will be at liberty to plead. The motion to set aside a judgment obtains in other instances; and the motion for judgment as in case of a nonsuit arises on another ground, as will be shown hereafter; and see *Nonsuit*.

When the defendant comes to plead to the declaration, instead of making, in due time, a plain denial of the charge, called the general issue, (but see now *Issue*), he may find it necessary to vary the common course, either by enlarging the time or the manner of pleading: he may therefore move for time to plead, which being a matter of indulgence, the court, on the equity of the case, may refuse or grant; and grant without or upon terms. At common law a defendant could only plead a single matter, but this was remedied by statute; (see *Pleading*); and, if necessary, the defendant accordingly moves the court for leave to plead several matters, which he mentions. Sometimes this expedient is an afterthought, and then, as it tends to delay the plaintiff, the defendant moves

for leave to withdraw the general issue, and to be at liberty to plead specially; sometimes he moves the contrary.

The plea, replication, rejoinder, &c. are at length settled on record, and come to an issue, which remains to be settled by a jury; in order to which all the record down to the issue, which it includes, is transcribed from what is called the plea-roll, and which is only part of a large bundle, comprehending the cases of many other persons, and never stirs out of the custody of the court. That manuscript is called the *nisi prius* roll; as the *nisi prius* roll, after it is returned from the trial, assumes the name of the *postea*. See *Pleading, Nisi Prius, Postea, Record*.

Between the issue and the trial, several motions may happen which may either put off the trial or not; of the latter kind, and at this stage, is a motion by the defendant for leave to pay money into court. See *Money into Court*.

Many circumstances may make it necessary to postpone a trial, or vary the common forms of examination. The necessary witnesses in the cause may reside altogether abroad, or being there for a time, may not be likely to return at the regular time of the trial. In the first case the court is moved for a commission to examine witnesses on interrogatories, which are settled here, sent over, and, with their answers properly attested, are sent back, and read in evidence at the trial. See *Depositions*. In the latter case the trial is delayed on motion, to put it off for the absence of a material witness. But if, by this delay, the other party is likely to lose evidence that is ready at the time; either in case a witness is so old and infirm, as not to be likely to survive the arrival of the evidence on the other side; or in case his necessary business obliges him to leave England before the trial can come on; in this case, a motion is made by the party affected, to examine such witness *de bene esse*; that is, to admit the depositions so taken as evidence, if the person cannot afterwards be examined at the trial. If a witness, under none of these capacities, being duly summoned, neglect to attend, he is liable to an action on the statute (5 Eliz. c. 9) for damages; or the court will punish him criminally for the contempt on a motion for an attachment. See *Evidence*, II. 2. Motions may also arise respecting written evidence, as for leave to inspect and take copies of corporation books; or for an order to produce them at the trial.

Not only the witnesses in a cause, but the jury, may occasion particular applications to the court: so may the nature of the cause in question; and so may the course of judicature itself. The nature of the cause sometimes requires the jury to see the very spot where the matter in dispute arises; in which case, after issue joined, the court is moved for a view. See *Jury*, I; *View*. In cases also where the cause is either of a nature to exceed the apprehension, or to inflame the passions of a common jury, a special jury will be moved for. See *Jury*, I. Sometimes the cause is apparently likely to be very long, intricate, and important, either in its value or its consequences; from whence arises a motion for a trial at bar. See *Trial*.

When the cause is brought to the assizes, the jury sworn, and the witnesses examined, the trial goes on, or it does not; if it goes on, either a verdict is given, or it is not; if a verdict is given, it is either for the plaintiff or the defendant. The jury may be sworn, and the witnesses may be in part examined; and yet the trial may stop; because the parties may then, or at any time, compromise the matter in difference, or agree to refer it to arbitrators; in either case, a rule is made at the assizes (called an order of *nisi prius*), and motion is afterwards made, to make the order of *nisi prius* a rule of court. See *Award*, VI.

But the cause may go on, and yet not get to a verdict; for if the plaintiff does not prove his case, the defendant calls no evidence; and, instead of a verdict on either side, there is a nonsuit. Wherever a verdict is given, the plaintiff at least must give evidence to maintain his declaration. Where evi-

dence is produced on both sides, the verdict is given for the plaintiff or defendant, according to the superior weight of evidence. See *Jury*, III.

Here closes the trial; and from this period it is that the record assumes the name of the *postea*; and if the trial is decisive, neither the law nor the fact being afterwards controverted, the *postea* is delivered by the proper officer to the attorney of the victorious party to sign his judgment; but in many cases, after a verdict given, there is room to question its validity; in which case the *postea* remains in the custody of the court. The verdict may be exceptionable, either from misdirection of a judge in point of law, or the misbehaviour of the jury; in which case, a motion may be made to set it aside: as it may on other grounds; as from its being clearly contrary to evidence, or in the damages given greatly exceeding the injury sustained; on both which accounts a new trial may be moved for. See *Trial*. If the verdict itself stands unimpeached, yet some original defect may appear on the face of the record, which shows that no verdict ought to have been given; or though given, no judgment can be had on it; and when this happens, the motion is in arrest of judgment. See *Judgment*, III.

Supposing the verdict and record to stand clear of all objections, the judgment follows of course; and after judgment, execution; the purpose of which execution is, to levy the damages assessed by the jury, and the costs allowed by the court. The execution, however, may, for a short time, be interrupted, in case any objection arises to the taxation of costs, and then a motion may be made, for the master to review his taxation: this, and every act of the master, being liable to be reviewed on appeal to the court; though a judgment of ordinary stages of practice, he is invested with original and competent jurisdiction. If the sheriff, or his officers, misbehave in respect to the execution, (as in any other service of a writ,) this may produce a motion for an attachment against them.

When execution is over, the cause is over; but a cause may, on many occasions, come much sooner to an end, and in a direction very different from what has been mentioned; it may come sooner to a trial, or it may come to execution without a trial.

In the case put at setting out, and, in the general exposition of the case, it has been supposed that the defendant pleaded to the declaration: but it was intimated, that if he neglected to plead, judgment would be had against him by default; in consequence of this default of a plea, the truth of the fact is confessed, and cannot be afterwards litigated, as on a trial; but this judgment, though it operates so as to preclude the defendant from controverting the fact, which is the cause of action, does not go to a confession of the damages laid in the declaration, which must be ascertained on a writ of inquiry. See *Judgment*, I. In this course of proceeding, motions may arise to set aside the judgment and writ of inquiry issued thereon, as irregular; to execute a writ of inquiry before a judge, instead of a sheriff, where it is a matter of importance; and sometimes for a new writ of inquiry, for excessive damages, in the same manner as for a new trial on those grounds. See *Trial*.

There are two cases, however, where the admission of the defendant silences all future enquiry, either as to the truth of the fact, or the quantity of the damages; that of a direct confession of the action; and a warrant of attorney to confess a judgment: this latter occasions a motion very often; for where it is above a year standing, motion must be made for leave to file the warrant of attorney, on affidavit of the defendant being still alive, and the debt unpaid. And motions may be made to set aside the warrant of attorney, if not regularly executed. See *Judgments acknowledged for Debts*.

A matter may come sooner to a trial, by means of an issue directed by the court; which obtains, in a court of law, principally where a question of civil right is involved, in a

criminal prosecution for a misdemeanor: in which case it is the usual lenity of the court to suspend the latter till the former has been tried: or where a court of equity directs facts to be inquired of at law, and does not rest the case on depositions. See *Feigned Issue*.

What has been said relates merely to the practice of the courts in civil suits; and, in general, concerns the trial of a cause. To give a full or general idea of practice, it may be necessary to establish a distinction between such motions, as are in their nature previous to the trial itself, or subsequent to it. Of the former sort, are motions to stay proceedings in a cause; motions relating to bail; to declarations; to the time and manner of pleading: for changing venues; special juries; and many others above particularized. Of the latter sort necessarily are motions to set aside verdicts; for new trials; in arrest of judgment; on writs of inquiry; and others, that are easily classed according to this division. There are some motions that in the abstract are of an ambiguous nature, and may arise in any part of the cause, either before or after a trial; as motions for an attachment, for a master's report, and others.

Every motion hitherto has been supposed to have some relation to the trial of a cause: there are some few entirely independent of it; as a motion for a prohibition; applications for summary relief, under various statutes, relating to articles of clerks; to attornies; insolvent debtors; and others of that stamp. See *Motion in Court*.

Part of the visible practice of the court also arises from causes directed out of chancery; special verdicts and writs of error; all of which are argued at the bar, and determined by the judges.

Until recently, the practice of the courts of common law, at Westminster, differed in many respects, each court adhering to the course that had been pursued, and to the decisions which had been made by its own judges; but, with a view to render the practice of all the courts uniform, the common law judges have, by various statutes, been invested with the power of making and promulgating general rules, applicable to all the courts alike. Several series of rules have accordingly been issued, and, so far as they extend, the practice of the courts is assimilated; but there are still many proceedings untouched by these rules, in which each court follows its former mode of procedure.

The practice of courts of equity may be deduced in a manner similar to the above, by attending to the several stages, from the filing of the bill to the execution of the decree. See *Chancery*.

The crown business, or criminal practice, of which the court of King's Bench has exclusive jurisdiction, does not admit of the application of the same idea: much the greatest part of it is independent of any solemn trial; and the trials themselves are too simple to endure much interruption, or to be broken out into many points of practice. This crown practice may be divided into such matters as originally commence in that court, and such as are removed into it from other inferior jurisdictions. Of both which kinds, taken together, are motions for an habeas corpus; mandamus (though this, and the motion for a quo warranto, in cases relating to corporations, partake of a civil as well as a criminal nature); to exhibit articles of the peace; motions relating to the discharge of recognizances; to remove indictments, orders of attachment, convictions, made by justices, &c. from their common ordinary course of proceeding, by writ of certiorari, into this court, on some foundation of complaint against the justice. The visible practice, that occasions this removal, and very simple in their kind, though infinitely diversified as to their objects, viz. the general motion to remove the indictment, or conviction by certiorari; motion to quash the indictment, &c. when it is removed. In the case of an indictment removed hither on a demurrer, it is set down to be

argued; or motion is made to quash it before trial; or motion in arrest of judgment; or motion for judgment after the trial.

But the most extensive jurisdiction is involved in matters of original cognizance, whether it regards indictments or informations; or such matters as are entirely independent of either, or any solemn trial; such as begin and end on motions.

There is little or no difference between an indictment commenced in this court, or removed from another jurisdiction, as to motions concerning them. As to informations, though altogether the creature of this court, they admit but of three motions; the application to the court to grant it: when granted, and tried, a casual motion in arrest of judgment, on grounds arising from the record itself: or, where the charge in the information and the verdict are both incontestible, the motion for judgment.

To recapitulate all in a few words:—Practice in general, it appears, is either in civil or crown causes. In civil causes, it is either independent of a trial, or relative to it: if relative to it, it arises from something applied for either before or after a trial. In crown causes, the only distinction made was, either as it concerned the original jurisdiction of the court, or such as is exercised, as it were, on appeal. "And unless (concludes the writer, from whom the foregoing sketch has been extracted and abridged,) I was to read over to you a hundred (he might have added or more) rules of court, and the several cases and books on this subject, (which, by the bye, I would not wish any enemy I have to do,) I cannot undertake to be more explicit on this subject."

PRÆCEPTORIES, præceptoria. A kind of benefices, having their name from being possessed by the more eminent Templars, whom the chief master by his authority created and called *Præceptores Templi*. And of these præceptories there are recorded sixteen, as belonging to the Templars in England, viz. Cressing Temple, Balshal, Shingay, Newland, Yevely, Witham, Templebruere, Willington, Rotheley, Ovenington, Temple Combe, Trebigh, Ribstane, Mount St. John, Temple Norton, and Temple Harst. *Mss. Angl. ii. 543*. But some authors say, these places were cells only, subordinate to their principal mansion in the Temple in London. See *Stat. Antiq. 32 Hen. 8. c. 24*.

PRÆCIPE, command. See *Original*.

PRÆCIPE IN CAPITE. The writ of right for the king's immediate tenants *in capite*, when they were deforced of lands or tenements. 3 *Comm. c. 10*. See *Writ of Right*.

PRÆCIPE, QUOD REDDAT, Command that he render. See *Fine of Lands, Recovery*.

PRÆCIPITUM. A punishment inflicted on criminals, by casting them from some high place. *Malm. lib. 5. p. 155*.

PRÆFECTUS VILLÆ. Is the same as *præpositus villæ*, i. e. the mayor of a town. *Leg. Ed. Confess. c. 28*.

PRÆFINE. That fine which, on suing out the writ of covenant on levying fines, was paid before the fine was passed. See *Fine of Lands*.

PRÆMUNIRE,

CORRUPTED from, or apparently synonymous with, *præmoneri*, "to be forewarned;" and therefore, according to the proverb, fore-armed. See *Du Cange in v.* The writ so called, or the offence whereon the writ is granted; the one may be understood by the other. The offence is of a nature highly criminal, though not capital, and more immediately affecting the king or his government. It is named, from the words of the writ, preparatory to the prosecution thereof, "*Præmunire facias A. B.—Cause A. B. to be forewarned—that he appear before us to answer the contempt wherewith he stands charged;*" which contempt is particularly recited in the preamble to the writ. It took its original from the exorbitant power claimed and exercised in England by the

pope; and was originally ranked as an offence immediately against the king; because it consisted in introducing a foreign power into this land, and creating *imperium in imperio*, by paying that obedience to papal process, which constitutionally belonged to the king alone, long before the Reformation in the reign of Henry VIII. See 4 *Comm.* c. 8.

The church of Rome, under pretence of her supremacy, and the dignity of St. Peter's chair, took on her to bestow most of the ecclesiastical livings, of any worth in England, by mandates, before they were void; pretending therein great care to see the church provided of a successor before it needed. Whence these mandates or bulls were called *gratiæ expectativæ* or *provisiones*, whereof see a learned discourse in *Duarenus de Beneficiis*, lib. 3. c. 1. These provisions were so common, that at last it was necessary to restrain them by the laws of the land.

In the 35th year of Edward I. was made the first statute against papal provisions, 35 *Edw.* 1. st. 1; being, according to Coke, the foundation of all the subsequent statutes of *præmunire*. It recites, that the abbots, priors, and governors had, at their own pleasure, set divers impositions upon the monasteries and houses in their subjection; to remedy which, it was enacted, that in future religious persons should send nothing to their superiors beyond the sea; and that no imposition whatever should be taxed by priors aliens. By 25 *Edw.* 3. st. 5. c. 22. it was enacted, that if any one purchased a provision of an abbey or priory, he should be out of the king's protection. And by 25 *Edw.* 3. st. 6. (c. 2.); 27 *Edw.* 3. st. 1. c. 1; 38 *Edw.* 3. st. 1. c. 4; and 2. c. 1, 2, 3, 4, it was enacted, that the court of Rome should not present or collate to any bishopric or living in England; and that whoever disturbed any patron in the presentation to a living, by virtue of a papal provision, such person should pay fine and ransom to the king, at his will; and be imprisoned till he renounced such provision. The same punishment was inflicted on such as should cite the king, or any of his subjects, to answer in the court of Rome. By 3 *Rich.* 2. c. 3; 7 *Rich.* 2. c. 12, it was enacted, that no alien should be capable of letting his benefice to farm, in order to compel such as had crept in, at least to reside on their preferments; and that no alien should be capable of being presented to any ecclesiastical preferment, under the penalty of the statutes of provisors. By 12 *Rich.* 2. c. 15. all liegemen of the king, accepting of a living by any foreign provision, were put out of the king's protection, and the benefice made void; to which 13 *Rich.* 2. st. 2. c. 2. adds banishment and forfeiture of lands and goods; and by c. 3. of the same statute, it was enacted, that any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of provisors, should be imprisoned, forfeit his lands and goods, and moreover suffer pain of life and member.

In the writ for the execution of these statutes, the words *præmunire facias* being used to command a citation from the party, have denominated in common speech, not only the writ but the offence itself of maintaining the papal power, by the name of *præmunire*. The 16 *Rich.* 2. c. 5. which is the statute generally referred to by all subsequent statutes, is accordingly usually called the statute of *præmunire*. It enacts, that whoever procures at Rome or elsewhere, any translations, processes, excommunications, bulls, instruments, or other things, which touch the king, against him, his crown and realm, and all persons aiding and assisting therein, shall be put out of the king's protection; their lands and goods forfeited to the king's use; and they shall be attached by their bodies to answer to the king and his council; or process of *præmunire facias* shall be made out against them as in other cases of provisors. By 2 *Hen.* 4. c. 3. all persons who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, were also subjected to the penalties of *præmunire*. This is said to be

the last ancient statute concerning this offence till the Reformation.

But by 2 *Hen.* 4. c. 4. whoever shall put in execution bulls purchased by those of the order of Cisteraux, to be discharged of tithes, shall incur the like penalty; they were also further restrained by 6 *Hen.* 4. c. 1; 7 *Hen.* 4. c. 8; 9 *Hen.* 4. c. 8; and 3 *Hen.* 5. c. 4; by which the statutes above mentioned are enforced and explained; and by 23 *Hen.* 8. c. 2. § 22. whoever shall sue for or execute any licence, dispensation, or faculty from the see of Rome; and by 28 *Hen.* 8. c. 16. (by which all bulls, briefs, &c. obtained from Rome, are made void,) whoever shall use, allege, or plead the same in any court, unless they were confirmed by this statute, or afterwards by the king, shall incur the like penalty. *Vide Reg.* 54; 3 *Inst.* 127.

The penalties of *præmunire* have been since applied to other offences, some of which bear more, some less, and some no relation to this original offence, as shall be hereafter noticed.

Whenever it is said, that a person, by any act, incurs a *præmunire*, it is meant to express, that he thereby incurs the penalties which, by the different statutes above mentioned are inflicted for the offences therein described. See 4 *Comm.* c. 8; 1 *Inst.* 391. in n. 2.

Having said thus much generally, we may proceed further to consider the subject under the following heads:

I. What Offences, besides those already specified, come under the Notion of a *Præmunire*.

II. Of the Punishment in a *Præmunire*.

I. At the time of the Reformation, the penalties of *præmunire* were extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the see of Rome, though not all the doctrines of the Roman church. And therefore, by the statutes 24 *Hen.* 8. c. 12; 25 *Hen.* 8. c. 19, 21. to appeal to Rome from any of the king's courts, which (though illegal before) had at times been connived at; to sue to Rome for any licence or dispensation, or to obey any process from thence, are made liable to the pains of *præmunire*. And, in order to restore to the king, in effect, the nomination of vacant bishoprics, and yet keep up the established forms, it is enacted by 25 *Hen.* 8. c. 20. that if the dean and chapter refuse to elect the person named by the king, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of *præmunire*.

Exercising the jurisdiction of a suffragan, without the appointment of the bishop of the diocese, is also made a *præmunire*, by 26 *Hen.* 8. c. 14; which sets forth at large how suffragans are to be nominated, &c. See *Bishops*.

Also by 5 *Eliz.* c. 1. to refuse the oath of supremacy will incur the pains of *præmunire*; and to defend the pope's jurisdiction in this realm, is a *præmunire* for the first offence, and high treason for the second. Lastly, to contribute to the maintenance of a Jesuit's college, or any popish seminary, or whatever, beyond sea, or any person in the same; or to contribute to the maintenance of any Jesuit or popish priest in England, is by 27 *Eliz.* c. 2. made liable to the penalties of *præmunire*.

Thus far the penalties of *præmunire* seem to have kept within the proper bounds of their original institution,—the depressing the power of the pope; but they being pious of no inconsiderable consequence, it has been thought fit to apply the same, as already hinted, to other heinous offences.

Detraging from the king's common law courts, is said to have been an high offence at common law, and is made a *præmunire* by many ancient statutes; for, by 27 *Ed.* 3. c. 1. of provisors, If any subject draw any out of the realm in plea, whereof the cognizance pertains to the king's court, or of things whereof judgments be given in the king's courts, or sue in any other court to defeat or impeach the judgments given in the king's courts, he shall be warned to appear, &c.

in proper person, at a day, containing the space of two months; at which if he appear not, he and his proctors, &c. shall be put out of the king's protection, his lands and chattels forfeited, his body imprisoned, and ransomed at the king's will, &c. See also 16 *Rich. 2. c. 5.*

In the construction of these statutes it hath been held, that certain commissioners of sewers, for summoning one before them who had got a judgment at law, and imprisoning him till he would release it, were guilty of a *præmunire*. 2 *Bulst.* 295; 8 *Inst.* 125; *Cro. Jac.* 336.

Also suits in the admiralty or ecclesiastical courts within the realm for matters which, upon the face of the libel itself, appear to belong only to the cognizance of the temporal courts, are said to be within 16 *Rich. 2.* by force of the words, "or elsewhere." 1 *Hawk. P. C. c. 19. § 14, 19.*

And it hath been formerly holden, that even suits in a court of equity, to relieve against a judgment at law, were within the danger of these statutes; especially if they tended to controvert the very point determined at law, or to relieve in a matter relievable at law. 4 *New. Abr.* 140.

By 1 & 2 *P. & M. c. 8. § 40.* to molest the possessors of abbey lands, granted by parliament to Henry VIII. and Edward VI. is a *præmunire*. So likewise is the offence of acting as a broker or agent in any usurious contract, where above 10 per cent. interest is taken, by 13 *Eliz. c. 8.* To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *præmunire* by 21 *Jac. 1. c. 9. § 4.* To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a *præmunire* by the 1st *Car. 1. c. 21.* On the abolition, by 12 *Car. 2. c. 24.* of purveyance, and the prerogative of pre-emption, or taking any victual, beasts, or goods for the king's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *præmunire*. See *Purveyance*. To assert, maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a *præmunire* by 13 *Car. 2. st. 1. c. 1.* So, to conspire to avoid the seizure or forfeiture, upon the importation of cattle, as mentioned in 20 *Car. 2. c. 7.* By the Habeas Corpus Act also, 31 *Car. 2. c. 2.* it is a *præmunire*, and incapable of the king's pardon, besides other heavy penalties, to send any subject of this realm a prisoner into parts beyond the seas. See *Habeas Corpus*. By 1 *W. & M. st. 1. c. 8.* persons of eighteen years of age, refusing to take the new oaths of allegiance, (and formerly of supremacy, see *Nonjurors, Oaths*.) upon tender by the proper magistrate are subject to the penalties of a *præmunire*; and, by 7 & 8 *Wm. 3. c. 4.* serjeants, counsellors, proctors, attorneys, and all officers of courts, practising without having taken the oaths of allegiance, (and formerly of supremacy, and subscribed the declaration against popery,) are guilty of a *præmunire*, whether the oaths be tendered or not. See *Oaths*. By 6 *Ann. c. 7.* to assert maliciously and directly, by preaching, teaching, or advised speaking, that the then pretended Prince of Wales, or any person other than according to the acts of settlement and union, hath a right to the throne of these kingdoms; or that the king and parliament cannot make laws to limit the descent of the crown; such preaching, teaching, or advised speaking, is a *præmunire*; as writing, printing, or publishing the same doctrines amount to high treason. By 6 *Ann. c. 23.* if the assembly of peers of Scotland, convened to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter, save only the declaration, they incur the penalties of a *præmunire*. The 12 *Geo 3. c. 11.* subjects to the penalties of the statute of *præmunire* all such as knowingly and willingly solemnize, assist, or are present at, any forbidden marriage of such of the descendants of the

body of King George II. as are by that act prohibited to contract matrimony without the consent of the crown. See *King, Marriage*.

II. THE punishment of this offence may be learned from the foregoing statutes, which are thus shortly summed up by Coke: "That from the conviction, the defendant shall be out of the king's protection, and his lands and tenements, goods and chattels, forfeited to the king; and that his body shall remain in prison at the king's pleasure; 1 *Inst.* 129; or (as other authorities have it, during life;" 1 *Bulst.* 199. both which amount to the same thing; as the king, by his prerogative, may any time remit the whole, or any part of the punishment; 2 *Bulst.* 299; except in the case of transgressing the statute of Habeas Corpus. These forfeitures, here inflicted, do not (by the way) bring this offence within the general definition of felony; being inflicted by particular statutes, and not by the common law. But so odious, Sir Edw. Coke adds, was this offence of *præmunire*, that a man who was attainted of the same, might have been slain by any other man, without danger of law: because it was provided by 25 *Edw. 3. st. 6. c. 22.* that any man might do to him as to the king's enemy, and any man may lawfully kill an enemy. However, the position itself, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful by the law of nature and nations, to kill him in the heat of battle, or for necessary self-defence. And to obviate such savage and mistaken notions, the 5 *Eliz. c. 1.* provides, that it shall not be lawful to kill any person attainted in a *præmunire*; any law, statute, opinion, nor exposition of law to the contrary notwithstanding. But still such delinquent, though protected, as a part of the public, from public wrongs, can bring no action for any private injury, how atrocious soever; being so far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he, as an individual, may suffer. 1 *Inst.* 130. And no man, knowing him to be guilty, can with safety give him comfort, aid, or relief. 1 *Hawk. P. C. c. 19.* See 4 *Comm. c. 8.*

If the defendant be condemned on his default of not appearing, whether at the suit of the king or party, the same judgment shall be given as to the being out of the king's protection and the forfeiture; but instead of the clause, that the body shall remain in prison, there shall be awarded a *capiatur*. *Co. Litt.* 129 b; 3 *Inst.* 125, 218.

A statute, by appointing that an offender shall incur the penalty and danger mentioned in 16 *Ric. 2. c. 5.* does not confine the prosecution for the offence to the particular process thereby given. 1 *Vent.* 173.

It is holden, that the statute of *præmunire*, which gives a general forfeiture of all the lands and tenements of the offender, extends not to lands in tail. *Co. Litt.* 130.

It is said, the statute of *præmunire* doth not extend to the forfeiture of rents, annuities, farms, &c. or any other hereditaments that are not within the word *terræ*. 3 *Inst.* 126.

This suit need not be by original in B. R.; for if defendant be in *custodiâ Marescalli*, the suit may be against him by bill; and defendants cannot be sued in any other court when they are in *custodiâ Marescalli*. And if a defendant come not at the day, &c. or if he appears and pleads, and the issue be found against him, or he demurs in law, &c. judgment shall be given, that he shall be out of protection, &c. 3 *Inst.* 124.

If tenant in tail is attainted in a *præmunire*, he shall forfeit his lands only during life; and afterwards the issue in tail shall inherit. 11 *Rip.* 56.

A person, being seized in fee of lands, was indicted for a *præmunire* upon 13 *Eliz. c. 2*; but before conviction he made an entail of his lands, and it was adjudged, that the attainder should relate to the time of the offence, and that was before he entailed the lands, and not the time of the judgment, which

was afterwards; and the freehold being in him at the time of the attainder, shall not be divested without an inquisition under the great seal. *Cro. Car.* 123. 172.

It hath been adjudged, that a pardon of all misprisions, trespasses, offences, and contempts, will pardon a *præmunire*. *Cro. Jac.* 336; 2 *Bulst.* 299.

The defendant in a *præmunire* must regularly appear in person, whether he be a peer or commoner, unless he is dispensed with by some writ or grant for that purpose; but in the case of Sir Anthony Mildmay, he was allowed to plead a pardon to a *præmunire* by attorney; but it has been thought, that there was some clause to this effect in the pardon. 3 *Inst.* 125; 1 *Roll. Rep.* 190; 2 *Bulst.* 290.

On an indictment of a *præmunire*, a peer of the realm shall not be tried by his peers. 12 *Co.* 92.

On an information on the 6 *Geo.* 1. c. 18. (now repealed) for setting up a bubble called the South Sea, it was determined that the court was not obliged by that act to give the whole judgment, as in case of a *præmunire*, against a defendant, but only such parts of it as in their discretions they should think fit; and accordingly a fine of 5*l.* was set on the party convicted, and judgment that he should remain in prison during the king's pleasure. 2 *Ld. Raym.* 361.

Numerous as the statutes are which denounce the penalties of a *præmunire*, prosecutions for this offence have been for some time unheard of in our courts. In the State Trials there is only one instance of such a prosecution, in which case the penalties of a *præmunire* were inflicted upon some persons, for refusing to take the oath of allegiance in the reign of Charles the Second. 2 *Harg. St. Tr.* 463; 2 *Deacon's Crim. Dig.* 1053.

PRÆPOSITUS ECCLESIAE. A church reeve, or churchwarden; see that title.

PRÆPOSITUS VILLÆ. Sometimes is used for the constable of a town, or petit constable. *Crompt. Jurisd.* 205. Yet the same author, 194, seems to apply it otherwise; for there *quatuor homines præpositi* are those four men, who must appear for every town, before the justices of the forest in their circuit. It is sometimes used for an head or chief officer of the king, in a town, manor, or village, or a reeve. See *Receus. Animalia et res inventæ coram ipso (præposito) et sacerdote ducenda erant.* LL. *Edw. Confessor.* cap. 28. This *præpositus villæ*, in our old records, does not answer to our present constable, or head-borough of a town; but was no more than the reeve, or bailiff of the lord of the manor, sometimes called *serviens villæ*.

By the laws of Henry I. the lord answered for the town where he was resident; where he was not, his dapifer, or senechal, if he were a baron: but if neither of them could be present, then *præpositus et quatuor de unaquodque villa*, i. e. the reeve and four of the most substantial inhabitants were summoned. See *Brady's Glossary to Introduction to English History*, page 57. in voc. *Præpositus*.

PRAYERS OF THE CHURCH. See *Common Prayer*.

PREACHING. Every beneficed preacher, residing on his benefice, and having no lawful impediment, shall in his own cure, or some neighbouring church, preach one sermon every Sunday of the year: and if any beneficed person be not allowed to be a preacher, he shall procure sermons to be preached in his cure by licensed preachers; and every Sunday, whereon there shall not be a sermon, he or his curate is to read one of the homilies: no person, not examined and approved by the bishop, or not licensed to preach, shall expound the scripture, &c.; nor shall any be permitted to preach in any church, but such as appear to be authorised thereto, by showing their licence; and churchwardens are to note in a book the names of all strange clergymen who preach in their parish; to which book every preacher is to subscribe his name, the day he preached, and the name of the bishop of whom he had licence to preach. *Can.* 44, 45. 49.

If any person licensed to preach, refuses to conform to the ecclesiastical laws, after admonition, the licence of every such preacher shall be void: and if any parson preach doctrine contrary to the word of God, or the Articles of Religion, notice is to be given of it to the bishop by the churchwardens, &c. So likewise of matters of contention and impugning the doctrine of other preachers in the same church; in which case, the preacher is not to be suffered to preach, except he faithfully promise to forbear all such matter of contention in the church, until the bishop hath taken further order thereon. *Can.* 53, 54.

No minister shall preach or administer the sacrament in any private house, unless in times of necessity, as in case of sickness, &c. on pain of suspension for the first offence, and excommunication for the second; which last punishment is also inflicted on such ministers as meet in private houses, to consult on any matter tending to impeach the doctrine of the church of England. *Can.* 71, &c.

PREAMBLE, [*præmiun*, from the preposition *præ*, before, and *ambulo*, to walk.] The beginning of a statute is called the preamble; which is a key to the intent of the makers of the act, and the mischiefs which they would remedy by the same. See *Statute*.

The preamble to an act reciting the existence of certain outrages, and making provision against them, is admissible evidence to prove an introductory averment in an information for a libel. 4 *M. & S.* 532.

PRE-AUDIENCE. In the courts, is of considerable consequence; the following short table of precedence, which usually obtains among counsel, is taken from 3 *Comm. c. 3.* p. 97. in n.

1. The king's premier serjeant (so constituted by special patent.)
2. The king's ancient serjeant, or the eldest among the king's serjeants.
3. The king's advocate-general.
4. The king's attorney-general.
5. The king's solicitor-general. } But see below.
6. The king's serjeants.
7. The king's counsel, with the queen's attorney and solicitor, and those who have patents of precedence. See *Barrister*.
8. Serjeants at law.
9. The recorder of London.
10. Advocates of the civil law.
11. Barristers.

By special order of the prince regent, 14th December, 1814, Nos. 4 and 5, now take precedence before Nos. 1 and 2. 6 *Taunton*, 424.

In the Court of Exchequer, two barristers appointed by the lord chief baron, called the post-man and the rub-rum. (from the places in which they sit,) have also a precedence in motions. See *Motion in Court*.

PREBEND, [*præbenda*.] The portion which every prebendary of a cathedral church receives, in right of his place, as one of the chapter of the dean, for his maintenance; as *canonica portio* is properly used for that share, which every canon receiveth yearly out of the common stock of the church. And *præbenda* is a several benefice arising from some temporal land, or some church appropriated towards the maintenance of a clerk, or member of a collegiate church; and is commonly named of the place where the profit arises.

Præbenda, strictly taken, is that maintenance which doth *præbetur* to another; but now it signifies the profits belonging to the church, divided into those portions called *præbenda*, and is a right of receiving the profits for the duty performed in the church sufficient for the support of the parson in that divine office where he resides. *Decret.* 11 *De Præbend.*

The spirituality and temporality make a prebend, but the

spirituality is the highest and most worthy; and a person is not a complete prebendary, to make any grant, &c. before installation and induction. *Dyer*, 221.

Prebends are simple and dignitary.

A simple prebend hath no more than the revenue for its support; but a prebend with dignity hath always a jurisdiction annexed; and for this reason the prebendary is styled a dignitary, and his jurisdiction is gained by prescription.

Prebends are some of them donative; and some are in the gift of laymen; but in such case they must present the prebendary to the bishop, and the dean and chapter inducts him, and places him in a stall in the cathedral church, and then he is said to have *locum in choro*. At Westminster, the king collates by patent, and, by virtue thereof, the prebendary takes possession without institution or induction. 2 *Rot. Abr.* 356.

As a prebend is a benefice without cure, &c. a prebend and a parochial benefice are not incompatible promotions; for one man may have both without any avoidance of the first: for though prebendaries are such as have no cure of souls, yet there is a sacred charge incumbent on them in those cathedrals where they are resident, and they are obliged to preach by the canons of the church; and it is not lawful for a prebendary to possess two prebends in one and the same collegiate church. *Rot. Abr.* 361.

Prebendaries are said to have an estate in fee-simple in right of their churches, as well as bishops of their bishoprics, deans of their deaneries, &c.

Corpus Præbendæ, is that which is received by a prebendary above the profits which are always for his daily maintenance. See further, *tits. Chapter, Clergy, Dean*.

PREBENDA and PROBANDA were also in old deeds used for provisions, provand or provender. *Pro equo suo unum bushel avenarum pro præbenda capiendâ. Coucher Book in Dutchy Office*, i. 65. *Cowell*.

PREBENDARY, *præbendarius*.] He who hath a prebend; so called, not a *præbenda audiendum et consilium episcopo*, &c. but from receiving the prebend: and if a manor be the body of a prebend, and is evicted by title paramount, yet the prebend is not destroyed. 3 *Rep.* 75.

There is a golden prebendary of Hereford, otherwise called *præbendarius episcopi*, who is one of the twenty eight minor prebendaries there, and has, *ex officio*, the first canon's place that falls. he was anciently *confessarius* of the cathedral church, and to the bishop, and had the offerings at the altar; whereby, in respect of the gold commonly given there, he had the name of golden prebendary. *Blount*.

PRECARIAL. Days-works, which tenants of some manors were bound, by reason of their tenure, to do for their lord in harvest; and, in divers places, are still vulgarly called bond days for bond-days, which, in the Saxon, *die præcarie sunt*. For *ladden* is to pray or intercede. This custom is plainly set forth in the great book of the *Customs of the Monastery of Battle*, *tit. Appellerham*, fol. 60. *Cowell*.

PRECEDENCE. The commonalty of the realm, like the nobility, are divided into several degrees; and as the Lords, though different in rank, yet all of them are peers in respect of their nobility; so the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility. 2 *Inst.* 29. See 1 *Comm.* c. 12.

The rules of precedence, in England, are reduced by Blackstone to the following table:—in which those marked * are entitled to the rank here allotted them, by 1 *H. 8. c. 10*,—those marked †, by 1 *H. 8. c. 10*,—those marked ‡, by letters-patent 2, 10, and 11 *H. 1. c. 1*, which see in *Sidd. Tr. of Hon. 11. c. 4*, and 11. *c. 11*,—those marked §, by ancient usage and established custom, for which see (among others) *Canden's Britannia*, *tit. Ordines*, *Mills's Catalogue of H. 11. edit. 1610*, and *Chamberlayne's Present State of England*, b. 3. c. 3.

TABLE OF PRECEDENCE.

- * The King's children and grandchildren.
- * brethren.
- * uncles.
- * nephews.
- * Archbishop of Canterbury.
- * Lord Chancellor or Keeper, if a Baron.
- * Archbishop of York.
- * Lord Treasurer.
- * Lord President of the Council. } if Barons.
- * Lord Privy Seal.
- * Lord Great Chamberlain. But see private } above all Peers of
- stat. 1 *Geo. 1. c. 3*.
- * Lord High Constable.
- * Lord Marshal.
- * Lord Admiral.
- * Lord Steward of the Household.
- * Lord Chamberlain of the Household.
- * Dukes.
- * Marquises.
- † Duke's eldest sons.
- * Earls.
- † Marquises' eldest sons.
- † Dukes' younger sons.
- * Viscounts.
- † Earls' eldest sons.
- † Marquises' younger sons.
- * Secretary of State, if a Bishop.
- * Bishop of London.
- * Durham.
- * Winchester.
- * Bishops.
- * Secretary of State, if a Baron.
- * Barons.
- † Speaker of the House of Commons.
- † Lords Commissioners of the Great Seal.
- † Viscounts' eldest sons.
- † Earls' younger sons.
- † Barons' eldest sons.
- † Knights of the Garter.
- † Privy Councillors.
- † Chancellor of the Exchequer.
- † Chancellor of the Duchy.
- † Chief Justice of the King's Bench.
- † Master of the Rolls.
- † Chief Justice of the Common Pleas.
- † Chief Baron of the Exchequer.
- † Judges, and Barons of the Coif.
- † Knights Bannerets, Royal.
- † Viscounts' younger sons.
- † Barons' younger sons.
- † Baronets.
- † Knights Bannerets.
- † Knights of the Bath.—[Enlarged in 1815, and distinguished as Knights Grand Crosses, and Knights Commanders.]
- † Knights Bachelor.
- † Baronets' eldest sons.
- † Knights' eldest sons.
- † Baronets' younger sons.
- † Knights' younger sons.
- † Colonels.
- † Serjeants at Law.
- † Doctors:—With whom, it is said, rank Barristers at Law; as to whose Precedence among each other, see *Pre-audience*.
- † Esquires.—[Of whom Companions of the Bath rank first.]
- † Gentlemen.
- † Yeomen.
- † Tradesmen.

† Artificers.
† Labourers.

Married women and widows are entitled to the same rank among each other, as their husbands would respectively have borne between themselves; except such rank is merely professional or official;—and unmarried women to the same rank as their eldest brothers would bear among men, during the lives of their fathers. 3 *Comm. c. 21. p. 405. in n.*

PRECEDENT CONDITIONS. See *Condition, IV.*

PRECEDENTS. Authorities to follow in determinations in courts of justice.

Precedents have always been greatly regarded by the sages of the law. The precedents of the courts are said to be the laws of the courts; and the court will not reverse a judgment, contrary to many precedents. 4 *Rep. 93; Cro. Eliz. 65; 2 Inst. Abr. 314.* But new precedents are not considerable; precedents without judicial decision on argument are of no moment; and an extrajudicial opinion given in or out of court, is no good precedent. *Vaugh. 169, 382, 399, 429.*

It has been held that there can be no precedent in matters of equity, as equity is universal truth; but, according to Lord Keeper Bridgman, precedents are necessary in equity to find out the reasons thereof for a guide; and, besides the authority of those who made them, it is to be supposed they did it on great consideration, and it would be strange to set aside what has been the course for a long series of time. 1 *Mod. 307.* If a man doubt whether a case be equitable, or no, in prudence he will determine as the precedents have been; especially if made by men of good authority and learning. *Ibid.* See *Chancery, Equity.*

Lord C. Talbot said, he thought it much better to stick to the known general rules, than to follow any one particular precedent, which may be founded on reasons unknown to us. Such a proceeding would confound all property. *Cases in Chan. in Talbot's Time, 26, 27, 196.*

PRECE PARTIUM. When a suit is continued by the prayer, assent, or agreement of both parties. See 13 *Ed. 1. st. 1. c. 27.*

PRECEPT, *præceptum.*] Is diversely taken in law; as sometimes for a command in writing by a justice of peace, or other officer, for bringing a person or records before him; of which there are many examples in the table of the *Register Judicial.* And in this sense it seems to be borrowed from the customs of Lombardy, where *præceptum* significeth *scriptura vel instrumentum.* *Notom. in verb. Feudal. & lib. 3. Commenta. in Libros Feudor' in Præfatione.* Sometimes it is taken for the provocation, whereby one man incites another to commit a felony, as theft, murder, &c. *Stamdf. Pl. Cor. 105; Bracton, lib. 3. tract. 2. cap. 9,* calls it *præceptum* or *mandatum.* Whence we may observe three divisions of offending in murder, *præceptum, fortia, consilium;* *præceptum* being the instigation used beforehand; *fortia* the assistance in the fact, as to help to bind the party murdered or robbed; *consilium*, advice either before or in the fact. The civilians use *mandatum* in this case. *Concil.*

PRE-CONTRACT, mentioned in 2 & 3 *Edw. 6. c. 23.*] A contract made before another contract; the term hath relation especially to marriage. See *Marriage.*

PREDIAL TITHES, *decimæ prædiales.*] Are those which are paid of things arising and growing from the ground only, as corn, hay, fruit of trees, and such like. See 2 & 3 *Edw. 6. c. 13; 2 Inst. 649; 2 Comm. c. 3; and tit. Tithes.*

PRE-EMPTION, *præ-emptio.*] The first buying of a thing; it was a privilege heretofore allowed the king's purveyor, but abolished by 12 *Car. 2. c. 24.* See *Purveyance.*

PREGNANCY, plea of.] Where a woman is capitally convicted, and pleads her pregnancy, though this is no cause to stay the judgment, yet it is to respite the execution till she is delivered. See *Execution of Criminals.*

PREMISES, or PREMISSES. That part in the beginning of a deed, the office of which is to express the grantor and grantee, and the land, or thing granted or conveyed. 5 *Rep. 55.* See *Conveyance; Deed, II.*

No person, not named in the premises, can take any thing by the deed, though he be afterwards named in the *habendum*, because the premises of the deed make the gift; therefore, when the lands are given to one in the premises, the *habendum* cannot give any share of them to another, because that would be to retract the gift made and consequently, to make a deed repugnant in itself. Thus, for instance, if a charter of feoffment be made between A. of the one part, and B. and D. of the other part, and A. gives land to B. *habendum* to B. and D. and their heirs; D. takes nothing by the *habendum*, because all the lands were given to B., consequently D. cannot hold those lands which are given before to another; but in this case, if the *habendum* had been to B. and D. and their heirs, to the use of B. and D.; this had been a good limitation of a use; consequently, the statute of uses would carry the possession to the use, and B. and D. thereby become joint-tenants. *Co. Lit. 6 a; 9 Co. 47 b; Hob. 275, 313; 2 Rol. Abr. 65; Cro. Jac. 564; Cro. Eliz. 58; 13 Co. 54; Poph. 126.*

If lands be given to a husband, *habendum* to him and his wife, and to the heirs of their two bodies, the wife takes nothing, because she was not mentioned in the premises; therefore shall take nothing of that which was before given entirely to her husband. 2 *Rol. Abr. 67.*

But there are four exceptions to this rule: 1. If the lands be given in frank-marriage, the woman, who is the cause of the gift, may take by the *habendum*, though she be not named in the premises; as if lands be given to J. S., *habendum maritagium und cum* the woman who is daughter of the donor, this is a good estate in frank-marriage to them both; because the gift being totally on her account, it is necessary to the creation of the estate in the husband that the wife should take. *Co. Litt. 21; Plowd. 158; Cro. Jac. 456; Poph. 126; 2 Rol. Abr. 67.*

2. In grants of copy of court-roll; as if a copy-holder surrenders to his lord, without limiting any use, and then the lord grants it in this manner; J. S. *cepit de Domino, habendum* to the said J. S. and his wife, and the heirs of their bodies begotten, this is a good estate-tail in the wife; for these customary grants that are made in pursuance of a former surrender, are construed according to the intention of the parties, as wills are; besides, the custom of the manor is the rule for the exposition of such sorts of grants, and, in many manors, such form is usual. *Poph. 126, 126; Cro. Jac. 434; 2 Rol. Abr. 67; Cro. Eliz. 323.*

3. A man not named in the premises may take an estate in remainder by limitation in the *habendum.* 2 *Rol. Abr. 68; Hob. 319; Cro. Jac. 564.*

4. In wills; for if a man devises lands to J. S. *habendum* to him and his wife, this is a good devise to the wife; because, in construction of wills, the intention of the deviser is chiefly regarded; and wherever that discovers itself it shall take place, though it be not expressed in those legal forms that are required in conveyances executed in a man's life. *Plowd. 158, 414; 2 Rol. Abr. 68.*

PREMIUM, *præmium.*] A reward. Among merchants it is used for the money the insured gives the insurer for insuring the safe return of any ship or merchandise. See *Insurance.*

PRENDER. The power or right of taking a thing before it is offered; from the French *prendre*, i. e. *accipere*; hence the phrase of law, it lies in render, but not in prender. *Rep. 1.*

PRENDER DE BARON, to take a husband.] It was used for an exception to disable a woman from pursuing an appeal of murder, against one who had killed her former husband. *St. P. C. lib. 3. c. 59.*

PREPENSED, præpensus.] Forethought; as prepensed malice is *malitia præcogitata*, which makes killing murder; and when a man is slain on a sudden quarrel, if there were malice prepensed formerly between the parties, it is murder, or as it is called by the statute, prepensed murder. See *Homicide*, III. 3.

PREROGATIVE, from præ and rogo, to ask or demand, before or above others.] A word of large extent, including all the rights which, by law, the king hath as chief of the kingdom, and as intrusted with the execution of the laws. The king, by virtue of his prerogative, is exempted from the payment of taxes collected *personally* from the subject, and not mingled with the price of the commodity, before it is known by whom it is to be made use of; therefore an express assent upon government service is not liable to pay the post-borne duty. 3 *East's Rep.* K. B. 519.

A palace being kept in a constant state of preparation to receive the king, with his officers and guards residing and doing duty there at all times, and some of the royal family having apartments there, is privileged as a royal palace against the intrusion of the sheriff for the purpose of executing process against the goods of a person having the use of certain apartments there. 10 *East's Rep.* 578. See further, *ut King*, V.

PREROGATIVE COURT, Curia Prærogativa Archiepiscopi Cantuariensis.] The court wherein all wills are proved, and all administrations taken which belong to the archbishop by his prerogative; that is, in case where the deceased had goods of any considerable value out of the diocese wherein he died; and that value is ordinarily 5*l.* except it be otherwise by composition between the archbishop and some other bishop, as in the diocese of London it is 10*l.*; and if any contention grow between two or more, touching such will or administration, the cause is properly decided in this court, the judge whereof is termed *Judex Curie Prærogativæ Cantuariensis*, the Judge of the Prerogative Court of Canterbury. See *Courts Ecclesiastical; Will*.

The archbishop of York hath also the like court, which is termed his exchequer, but inferior to this in power and profit. 4 *Inst.* 335. As to the prerogative of the archbishop of Canterbury or York, see the book intitled *De Antiquitate Britannicæ Ecclesiæ Cantuariensis Historia*, especially the eighth chapter, p. 25. *Cowell*.

PRESBYTER. A priest, elder, or honourable person. *Indori. lib. 7.*

PRESBYTERIUM. A presbytery, that part of the church where divine offices are performed, applied to the choir or chancel, because it was the place appropriated to the bishop, priest, and other clergy; while the laity were confined to the body of the church. *Mon. Ang. i. 243.*

PRESBYTERIAN. A member of the Church of Scotland. See *Dissenters, Nonconformists*.

PREScription,

PRESCRIPTION.] A title acquired by use and time, and allowed by law; as when a man claims any thing because he, his ancestors, or they whose estate he hath, have had or used it all the time whereof no memory is to the contrary; or it is where for continuance of time, *ultra memoriam hominum*, a particular person hath a particular right against another. *Kitch. 104; Co. Litt. 114; 4 Rep. 32.*

According to Lord Coke, *prescriptio est titulus ex usu et tempore substantiam capiens ab auctoritate legis*. 1 *Inst.* 113 b. And a prescription must have a lawful commencement, and peaceable possession and time are inseparably incident to it. *Co. Litt. 113.*

Blackstone classes title by prescription among the methods of acquiring real property by purchase; as when a man claims no other title to what he claims than that he, and those under whom he claims, have immemorially used to enjoy it.

Every species of prescription by which property is acquired or lost, is founded on this presumption, that he who has a quiet and uninterrupted possession of any thing for a certain number of years, is supposed to have a just right, without which he would not have been suffered to continue in the enjoyment of it; for a long possession may be considered as a better title than can commonly be produced, as it supposes an acquiescence in all other claimants, and that acquiescence also supposes some reason for which the claim is forborne. 1 *Domat.* 461.

As to customs or immemorial usages in general, with the several requisites and rules to be observed, in order to prove their existence and validity, see *Custom*.

I. *Of the Distinction between a Prescription and a Custom or Usage, and who may prescribe.*

II. *What sort of things may be prescribed for.*

III. *For what length of time a Prescription must be claimed.*

IV. *How Prescriptive Rights may be lost.*

I. **CUSTOM** is properly a local usage, and not annexed to any person; such as a custom in the manor of Dale, that lands shall descend to the youngest son. Prescription is merely a personal usage; as, that such an one and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege. 1 *Inst.* 113. As for example: If there be an usage in the parish of Dale that all the inhabitants of that parish may dance on a certain close at all times for their recreation (which is held to be a lawful usage, 1 *Lev.* 176; see *post*, II.), this is strictly a custom, for it is applied to the place in general, and not to any particular persons; but if the tenant, who is seised of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a prescription; for this is an usage annexed to the person of the owner of his estate. 2 *Comm. c. 17.*

The difference between prescription, custom, and usage, is also thus stated: Prescription hath respect to a certain person, who by intendment may have continuance for ever; as, for instance, he and all they whose estate he hath in such a thing, this is a prescription.

Custom is local, and always applied to a certain place; as, time out of mind there has been such a custom in such a place, &c. And prescription belongeth to one or a few only; but custom is common to all. Usage differs from both, for it may be either to persons or places; as to inhabitants of a town, to have a way, &c. 2 *Nels. Abr.* 1277.

A custom and prescription are in the right; usage is in possession; and a prescription that is good for the matter and substance, may be bad by the manner of setting it forth; but where that which is claimed as a custom, in or for many, will be good, that regularly will be so when claimed by prescription for one. *Godb.* 54.

All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath; which last is called prescribing in a *quo estate*. 4 *Rep.* 32.

Prescriptions properly are personal, therefore are always alleged in the person of him who prescribes; viz. that he, his ancestors, or all those whose estate he hath, &c.; or of a body politic or corporation, they and their predecessors, &c. Also a person may prescribe, *quod ipse et predecessores sui*, and all they whose estate, &c.; for there is a perpetual estate, and a perpetual succession, and the successor hath the very same estate which his predecessor had, which continues, though the person alters, like the case of ancestor and heir. 3 *Salk.* 279.

Previous to the recent act of the 2 & 3 *Wm.* 4. c. 71. a prescription must always have been laid in him that was tenant of the fee. A tenant for life, for years, at will, or a copyholder, could not prescribe, by reason of the imbecility of

their estates. 4 Rep. 31, 32. For as prescription was deemed usage beyond time of memory, it was absurd that they should pretend to prescribe for any thing whose estates commenced within the remembrance of man. And therefore the copyholder must have prescribed under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. As, if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must have prescribed under cover of the tenant in fee-simple, and have pleaded that John Stiles and his ancestors had immemorially used to have this right of commons appurtenant to the said manor, and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life. 2 Comm. c. 17.

Now by the fifth section of the above act it is no longer necessary to claim in the name of the owner of the fee. See post.

Where a person would have a thing that lies in grant by prescription, he must prescribe in himself and his ancestors, whose heir he is by descent; not in himself and those whose estate, &c. (unless the *que estate* is but a conveyance to the thing claimed by prescription); for he cannot have their estate that lies in grant without deed, which ought to be shown to the court. Co. Litt. 113.

Parishioners cannot generally prescribe, but they may allege a custom; and inhabitants may prescribe in a matter of easement, way to a church, burying-place, &c. 2 Saund. 325; 1 Lev. 253; Cro. Eliz. 441; Cro. Car. 419; 2 Rol. 290.

A custom for all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes, in a certain close, at all seasonable times of the year, at their free will and pleasure, is good. But a similar custom for all persons, for the time being in the said parish, is bad. 2 H. Black. Rep. 393. See post, II.

A prescription may be laid in several persons, where it tends only to matters of easement or discharge; though not where it goes to matter of interest or profit in *alieno solo*, for that is a title, and the title of one doth not concern the other; therefore several men, having several estates, cannot join in making a prescription. 1 Mod. 74; 3 Mod. 250.

Where a man prescribes for a way to such a close, he must show what interest he hath in the close. *Aliter*, if he prescribes for a way to such a field; because that may be a common field by intendment. Latch. 160.

Plaintiff declared that the occupiers of the adjoining field have, time out of mind, repaired the fences, which being out of repair, his beasts escaped out of his own ground and fell into a pit; it is good, without showing any estate in the occupiers; but it had not been so if the defendant had prescribed. 1 Ventr. 264.

It should seem that a prescription by the owner of land, adjoining to a wood, to take underwood there growing to repair the fence belonging to the wood, is not good; for of common right the making of the hedge doth appertain to the owner of the wood; and the prescription is no more than to take wood in the lands of another, to make the hedges of the same land in which the wood groweth, which cannot be a good prescription, for it sounds only in charge, and not to the profit of him who prescribes. 1 Leon. 313.

Estates gained by prescription are not of course descendible to the heirs general, like other purchased estates, but are an exception to the rule. For, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo*; and therefore if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes; the prescription in this case being indeed a species of descent. But if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner,

whether that were acquired by descent or purchase; for every accessory followeth the nature of its principal. 2 Comm. c. 17. p. 266.

II. NOTHING but incorporeal hereditaments can be claimed by prescription; as a right of way, a common, &c.; but no prescription can give a title to lands and other corporeal substances, of which more certain evidence may be had. Dr. & St. Dial. 1. c. 8; Finch. 152. For a man shall not be said to prescribe that he and his ancestors have immemorially used to hold the castle of Arundel; for this is clearly another sort of a title; a title by corporal seisin and inheritance, which is more permanent, and therefore more capable of proof than that of prescription. But as to a right of way, a common, or the like, a man may be allowed to prescribe, for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage. See Common Pew, &c.

A prescription cannot be for a thing which cannot be raised by grant; for the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus the lord of a manor cannot prescribe to raise a tax or toll upon strangers; for as such claim could never have been good by any grant, it shall not be good by prescription. 1 Ventr. 387.

A grant may enure as a confirmation of a prescription; and the prescription continue unaltered by a new charter, &c. where the charter is not contrary to the prescription. Moor. 818, 830. But in some cases it is intended that a prescription shall begin by grant; and as to prescriptions in general, the law supposes a grant or purchase originally. Cro. Eliz. 709; Co. Litt. 113.

What is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deadlands, felons goods, and the like. These not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by prescription; for they arise by private contingencies, and not from any matter of record. Co. Litt. 114. See Franchises.

Among things incorporeal which may be claimed by prescription a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For if a man prescribe in a *que estate* (that is, in himself and those whose estate he holds), nothing is claimable by this prescription but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim any thing as the consequence or appendix of an estate with which the thing claimed has no connexion; but if he prescribe in himself and his ancestors, he may prescribe for any thing whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross. Litt. § 153; Finch. L. 134. Therefore a man may prescribe, that he, and those whose estate he hath in the manor of Dale, have used to hold the advowson of Dale as appendant to that manor; but if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also a man may prescribe in a *que estate* for a common appurtenant to a manor; but if he would prescribe for a common in gross, he must prescribe in himself and his ancestors. 2 Comm. c. 17.

A person may make title by prescription to an office, a fair, market, toll, way, water, rent, common, park, warren, franchise, court-leet, waifs, estrays, &c. But no person can prescribe against an act of parliament, or against the public good, religion, &c. Nor can one prescription be pleaded against another, unless the first is answered or traversed;

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or where one may stand with the other. *Lutw.* 381; *Raym.* 232; 2 *Rol. Abr.* 264; 2 *Inst.* 167; 7 *Rep.* 28; *Cro. Car.* 432; 1 *Bulst.* 115; 2 *Lil.* 346.

The word easement is a genus to several species of liberties which one may have in the soil of another, without claiming any interest in the land itself; but where the thing set forth is a prescription was to catch fish in the water of another, &c. and no instance could be given of a prescription for such a liberty by the word easement, a rule was made to set the prescription right, and to try the merits. 1 *Med.* 302. See further, tit. *Easement*.

In trespass for breaking the plaintiff's close, the defendant prescribed that the inhabitants of such a place, time out of mind, had used to dance there at all times of the year for their recreation, and so justified; issue being taken on this prescription, defendant had a verdict: it was objected against it, that a prescription to dance in the freehold of another, and spoil his grass, was ill, especially as laid in the defendant's plea, viz. at all times of the year, and not at seasonable times, and for all the inhabitants, who, though they may prescribe in easements which are necessary, as a way to a church, &c. they cannot in easements for pleasure only; but adjudged that the prescription is good, issue being taken on it, and found for the defendant, although it might have been in demurrer. 1 *Lev.* 175. See *ante*, I.

A custom that the farmers of such a farm have always found ale, &c. to such a value, at perambulations, was held bought, because it is no more than a prescription in occupiers, which is not good in matter to charge the land. 2 *Lev.* 161.

Prescription by the inhabitants of a parish to dig gravel in such a pit, the soil of W. R., it was doubted whether this was good or not, though it was to repair the highway; but the inhabitants may prescribe for a way, and, by consequence, for necessary materials to repair it. 2 *Lutw.* 1346. *Sed quid?* And see *Gatewood's case*, 6 *Co.* 60. where prescription for common for every inhabitant of an ancient messuage in a parish is held not to be good.

Defendant pleaded that within such a parish all occupiers of a certain close *habent, et habere consueverunt*, a way leading over the plaintiff's close to the defendant's house; this was held ill, for it is not like a prescription to a way to the church or market, which are necessary, *et pro bono publico*. 2 *Ventr.* 186.

A man may claim a fold-course, and exclude the owner of the soil by prescription. 1 *Saund.* 153. But a diversity of opinion is taken where a prescription takes away the whole benefit of the close of the land; and where a particular profit is reserved; in one case it is good, in the other void. 1 *Leon.* 11.

If a person prescribes for common appurtenant, it is ill, unless it be for cattle *levant et couchant*, &c. And the reason is, because by such a prescription the party claims only some part of the pasture, and the quantum is ascertained by the *levant et couchant*, the rest being left to the owner of the soil; therefore, if he who thus prescribes should put more cattle than are *levant et couchant* on his tenement, it is a trespasser. *Noy*, 145; 2 *Saund.* 324.

A prescription to have common, the jury found it to be, paying every year a penny. Here the prescription is entire, and the payment of one penny is parcel; which ought to be entirely alleged in the prescription in the plea, or it will be ill. *Cro. Eliz.* 563, 564. But where the payment is a toll, it is good from the prescription, a prescription may be good without alleging it. *Cro. Eliz.* 405.

Common for cattle *levant et couchant*, or a right of common without stint, cannot be claimed by prescription, as appurtenant to a house without any curtilage or land. 5 *T. R.* 390.

It was a question, whether a toll, independent of markets and fairs, might be claimed by prescription, without showing that the subject hath some benefit; and some arguments

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were brought for it, from an authority in *Dyer*, 352. Though by *Holt*, this prescription cannot be good, because there was no recompense for it; and every prescription to charge the subject with a duty, must import some benefit to him who pays it; or else some reason must be shown why the duty is claimed. 4 *Mod.* 319.

A prescription for toll, in respect of goods sold in a market by sample, and afterwards brought into the city to be delivered, cannot be supported. 4 *Taunt.* 410.

A court-leet is derived out of the hundred; and if a man claims a title to the leet, he may prescribe that he and his ancestors, and all those whose estate he hath in the hundred, time out of mind, had a leet. *Co. Litt.* 125.

There may be a prescription for a court to hold pleas of all actions, and for any sum or damage; and it will be good. *Jenk. Cent.* 327. If a court held by prescription is granted and confirmed by letters-patent, this doth not destroy the prescription; but it is said the court may be held by prescription as before. 2 *Rol. Abr.* 271.

He had a manor in *Lucy*, in order to establish an exclusive right of cutting sea-weed on rocks below low watermark, must prove either a grant from the king, or the exclusive possession of such privilege for so long a time as to confer on him a title by prescription. The possession required to establish a prescription must be long, continued, and peaceable, by the laws of England, the civil law, and those of Norway, France, and Jersey. *Knapp.* 50.

Every prescription is taken strictly; and a man ought not to prescribe to that which the law, of common right, gives. 3 *Leon.* 13; *Noy*, 20.

III. Previous to the act of the 2 & 3 *Wm.* 4. c. 71. to constitute a prescription, the enjoyment must have existed time out of mind, or in other words, must have commenced antecedent to the reign of Richard I. *Bract.* l. 2. c. 22; 3 *Lev.* 160; 1 *Comm.* 75; 2 *Id.* 263. But in order to prevent disputes as to rights which had been long and peaceably enjoyed, the courts interpreted an enjoyment of an incorporeal right for even twenty years as presumptive evidence that the right had existed time out of mind, and consequently that period was held a sufficient foundation for establishing a prescriptive right, unless its origin could be proved. 10 *East*, 476; 2 *Brod. & Bing.* 403; *Comp.* 215; 2 *Wils.* 23.

By the above statute, intituled "An Act for shortening the Time of Prescription in certain Cases," the first section, after reciting that "the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard I. whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice, enacts, "that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the king, his heirs or successors, or any land being parcel of the duchy of Lancaster or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are therein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute."

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lute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

By § 2. "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the king, his heirs or successors, or being parcel of the duchy of Lancaster or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

For the third section of the act, relating to the use of light, see *Lights*.

§ 4. Each of the respective periods of years therein-before mentioned shall be deemed to be the period next before some suit or action wherein the claim or matter to which such period may relate shall be brought into question, and that no act shall be an interruption, within the meaning of the statute, unless the same shall have been submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof, and of the person making or authorizing the same.

§ 5. In all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be sufficient, and if the same shall be denied, all the matters in the act mentioned and provided, applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and in all pleadings to actions of trespass, and in all other pleadings wherein before the act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for such of the periods mentioned in the act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter therein-before mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

§ 6. In the several cases mentioned in and provided for by the act, no presumption shall be allowed or made in support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in the act as may be applicable to the case and to the nature of the claim.

§ 7. provided, that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in

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the computation of the periods herein-before mentioned, except only in cases where the right or claim is thereby declared to be absolute and indefeasible.

§ 8. provided, that when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been enjoyed or derived hath been or shall be held under any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as therein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

The act does not extend to Scotland or Ireland. As to prescriptions of *modus decimandi*, see *Tithes*.

IV. Formerly a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. *Co. Litt.* 113. But by the statute of limitations, 32 Hen. 8. c. 2, it is enacted that no persons shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within threescore years next before such prescription made.

And the remedy for such rights, so far as it depends upon real actions, is further abridged by the abolition of real actions by the 3 & 4 Wm. 4. c. 27. § 36. See *Limitation of Actions*, II. 1.

Where a profit of any kind, to be taken out of lands, has not been taken for a vast number of years, and the lands have been enjoyed without yielding it to a third person, the consequence is, that the title to such profit, whatever its nature shall be presumed to be, is discharged. 3 Blgh. 215. But a title gained by prescription or custom, is not lost by mere interruption of possession for ten or twenty years, unless there be an interruption of the right, as by unity of possession of right of common, and the land charged therewith of an estate equally high and perdurable in both. *Co. Litt.* 114 b. An unity of possession merely suspends, there must be an unity of ownership to destroy a prescriptive right. *Canham v. Fisk*, 2 Cr. & Jerv. 186. Thus if a person, having a right of common by prescription, takes a lease of the land for twenty years, whereby the common is suspended, he may, after the determination of the lease, claim the common again by prescription, for the suspension was only of the enjoyment, not of the right. *Co. Litt.* 113 b. A prescriptive right may be lost by the destruction of the subject-matter; 4 Rep. 88; but not by an alteration of the quality of the thing to which a prescription is annexed. *Hob. 394* Rep. 86 a, 87 a. An ancient grant, without date, does not necessarily destroy a prescriptive right; for it might be either before time of memory, or in confirmation of such prescriptive right, which is matter to be left to a jury. 2 Bl Rep. 989. It seems that a release of a right of way, or a right of common, will not be presumed by mere non-user for a less period than twenty years, although it is otherwise as to lights. *Moore v. Rawson*, 3 B. & Cr. 339. See *Lights*.

The right to hold courts for the determination of civil suits, granted by the king's charter to the stewards and suitors of a court of ancient demesne, was held not to be lost by a non-user of fifty years. 5 B. & A. 691; *Id.* 692 n.

Formerly a prescription could not run against the king, *fr nullum tempus occurrit regi*. 2 Roll. 264. 1. 40; *Comm Dig Prescription*, F. 1. And liberties and franchises were excepted in the 9 Geo. 3. c. 16. limiting the claims of the crown for sixty years; but see the 32 Geo. 3. c. 58. The recent statute of the 2 & 3 Wm. 4. c. 71. it will be seen, applies equally to the crown as to the subject.

PRESCRIPTIONS against Actions and Statutes, see *Limitation of Actions*, II. 2.

PRESCRIPTIONS by the ecclesiastical law, as to the tithes, &c., see *Modus Decimandi, Tithes*.

PRESENCE. Sometimes the presence of a superior magistrate takes away the power of an inferior. 9 Rep. 118. And the presence of one may serve for all the feoffees or grantees, &c. 3 Rep. 26. When the presence of a man in the place where an offence is done, may make him guilty, see *Accessary*.

PRESENTATION, presentatio] The act of a patron, offering his clerk to the bishop of the diocese, to be instituted in a church or benefice of his gift, which has become void. See *Advocatus, Patron*.

PRESENTEE. The clerk presented to a church by the patron. In 13 Rich. 2. st. 1. c. 1. the king's presenter is he whom the king presents to a benefice.

PRESENTMENT. The old term for presentation to a church. See that title.

In its more modern and now usual sense it signifies a denunciation of jurors, or some officers, &c. (without any information, of an offence, inquirable in the court where it is presented. *Lamb. Eiren. lib. 4. c. 5.* Or it may be defined to be an information made by the jury in a court, before a judge who hath authority to punish an offence. 2 Inst. 79.

The presentment is drawn up in English by the jury, and differs from an indictment in that an indictment is drawn up at large, and brought engrossed to the grand jury to find. 1 Litt. Abr. 353.

A presentment, generally taken, is a very comprehensive term; including not only presentments, properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, properly speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill or indictment laid before them, at the suit of the king. *Lamb. Eiren. lib. 4. c. 5.* As to the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment before the party presented can be put to answer it. 2 Inst. 739. An inquisition of office is the act of a jury, summoned by the proper officer to inquire of matters relating to the crown, upon evidence laid before them. See *Inquest*. Some of these are in themselves convictions, and cannot afterwards be traversed or denied; and therefore the inquest or jury ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se*; and formerly of *felo in persons* accused of felony; of deodands, and the like; and presentments of petty officers in the sheriff's tourn or court-leet, whereupon the presiding officer may set a fine. Other inquisitions may be afterwards traversed or examined; as particularly the coroner's inquisition of the death of a man, when he finds any one guilty of homicide; for in such cases the offender so presented must be arraigned upon this inquest, and may dispute the truth of it, which brings it to a kind of indictment.

There are also presentments of justices of peace in their sessions of offences against statutes, in order to their punishment in superior courts; and presentments taken before commissioners of sewers, &c. Presentments are made in courts-leet and courts-baron, before stewards; and in the latter of surcintors, grants, &c. Also by constables, churchwardens, surveyors of the highways, &c. of things belonging to their offices. See *Cophold, Surrender*.

By the 7 & 8 Geo. 4. c. 38. after the passing of that act no petty constable shall be required at any petty sessions or elsewhere to make, nor shall any high constable be required at any general gaol delivery, great sessions, or general or quarter sessions of the peace in England, to deliver any presentment respecting —

Popish recusants,

Absence from church or place of worship,

Rogues and vagabonds,

Inmates,

Retailers of brandy,

Ingrossers, forestallers, and regraters,

Profane swearers and cursers,

Servants out of service,

Felonies and robberies,

Unlicensed or disorderly alehouses,

False weights and measures,

Highways and bridges,

Riots,

Riots and unlawful assemblies where the poor are well provided for.

Constables legally chosen and sworn.

See further, *Highways, Indictment*.

PRESIDENT, præsides.] The king's lieutenant in any province; as President of Wales, &c.

PRESIDENT OF THE COUNCIL. Is the fourth great officer of state. See *Precedence*. He is as ancient as the reign of King John; and hath sometimes been called *Principalis Consiliarius*, and other times *Capitalis Consiliarius*. During the reign of Queen Elizabeth the office remained dormant. It appears to have been exercised in the reign of James I. and was revived by Charles II. See *Privy Council*.

The office of president of the council has been always granted by letters-patent under the great seal *durante bene placito*, and this officer is to attend on the king, to propose business at the council-table; and report to his majesty the transactions there; also he may associate the lord chancellor, treasurer, and privy seal, at naming of sheriffs; and all other acts limited by any statute, to be done by them. 21 Hen. 8. c. 20. See 1 *Comm.* 230.

PRESSING for the sea-service. See *Impressing Seamen*.

PRESSING TO DEATH. See *Mute*.

PRIEST. A duty in money that was to be paid by the sheriff on his account, in the exchequer, or for money left or remaining in his hands. See 2 & 3 Edw. 6. c. 4.

PRESTATION-MONEY, præstatia, a paying or performing.] Is a sum of money paid by archdeacons yearly to their bishop *pro exteriore jurisdictione*—*Et sunt quatuor à præstatione muragii*. *Chart. Hen. 7. Burgens. Mount-Gomer*. *Præstatia* was also anciently used for purveyance. See *Philip's* book on that subject, p. 222.

PREST-MONEY, from the French *prest, promptus, expeditus*; for that it binds those who receive to be ready at all times appointed, being meant commonly of soldiers. See 18 Hen. 6. c. 19; 7 Hen. 7. c. 1; 2 & 3 Edw. 6. c. 2.

PRESUMPTIO. Was anciently taken for intrusion, or the unlawful seizing of any thing. *Leg. Hen. 1. c. 11*.

PRESUMPTION, presumptio.] A supposition, opinion, or belief previously formed. *Co. Litt. 6, 375; Wood's Inst.* 599.

Though presumption is what may be doubted of, yet it shall be accounted truth, if the contrary be not proved. 2 Litt. Abr. 354. But no presumptions ought to be admitted against the presumption of law, and wrong shall never be presumed. *Co. Litt.* 232, 273.

Where the law intrusts persons with the execution of a power, the court will presume in favour of their execution of that power; though if they make a false return, whereby the party and justice are abused, they may be punished. 12 Mod. 382.

Presumptions are said to be either *juris et de jure*, or *juris, or hominis vel judicii*. The presumption *juris et de jure* is that where law or custom establishes the truth of any point, on a presumption that cannot be traversed on contrary evidence; thus a minor, or infant under age with guardians, is deprived of the power of acting without their consent, on a presumption of incapacity which cannot be traversed. The *presumptio juris* is a presumption established in law till the contrary be proved, as the property of goods is presumed to

be in the possessor: every presumption of this kind must necessarily yield to contrary proof. The *presumptio hominis vel judicis* is the conviction arising from the circumstances of any particular case.

PRESUMPTIVE EVIDENCE. See *Evidence, Felony, Homicide, &c.*

PRESUMPTIVE HEIRS. Such persons who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born. See *Descent, I.*

PRETENDED TITLES, buying or selling. See *Champerly, Maintenance.*

PRETENSED RIGHT, *jus prætensum.* Where one is in possession of land, and another who is out of possession claims and sues for it; here the pretended right or title is said to be in him who so claims and sues for the same. See *Mod. Cas. 302.*

PRETIUM AFFECTIONIS. An imaginary value put on a thing by the fancy of the owner in his affection for it. See *Bell's Scotch Dict.*

PRETIUM SEPULCHRI. See *Mortuary.*

PRICE. See *Agreement, Consideration, &c.*

PRIDE GAVEL, from *prid*, the last syllable of *lamprid*, and *gavel*, a rent or tribute.] In the manor of Rodeley, in the county of Gloucester, is a rent paid to the lord by certain tenants in duty and acknowledgment to him for the privilege of fishing for lampreys or lamprids in the river Severn. See *Tayl. Hist. Gavelk. 112.*

PRIESTS. In general signification, are any ministers of a church; but in our law this word is particularly used for ministers of the Church of Rome. See *Papists.*

PRIMAGE. A duty at the waterside, due to the master and mariners of a ship; to the master for the use of his cables and ropes, to discharge the goods of the merchant; and to the mariners for lading and unlading in any port or haven: it is usually about 12d. per ton, or 6d. per pack or bale, according to custom. See *Merch. Dict.*

PRIMATE. An archbishop who has a distinguishing rank from all other archbishops and bishops. See *Bishops.*

PRIMER-FINE. On suing out the writ or *præcipe*, called a writ of covenant, there was due to the king, by ancient prerogative, a primer-fine, or a noble for every five marks of land sued for: that was, one-tenth of the annual value. See *Fine of Lands, I. 1.*

PRIMICERIUS. The first of any degree of men; sometimes it signifies the nobility. *Primicerius totius Angliæ*, the nobility of England. See *Mon. Angl. i. 838.*

PRIMIER SEISIN, *prima seisin.* The first possession, or seisin; heretofore used as a branch of the king's prerogative, whereby he had the first possession, that is, the entire profits for a year of all the lands and tenements, whereof his tenant (who held of him *in capite*) died seised in his demise as of a fee, his heir being then at full age, until he did homage, or, if under, until he were of age. See *Staundf. Prærog. cap. 9, and Bracton, l. 4. tr. 3. c. 1.* All the charges arising by primer seisins were taken away by the 12 Car. 2. c. 24. See *Tenures.*

PRIMIER SERGEANT. The king's first serjeant at law. See *Precedence.*

PRIMO BENEFICIO. The first benefice in the king's gift, &c. See *Beneficio prius, &c.*

PRIMOGENITURE, *promogenitura.* The title of an elder son or brother in right of his birth: the reason of which Coke says, is, *Qui prior est tempore, potior est jure*; affirming moreover, that, in King Alfred's time, knights' fees descended to the eldest son; because, by the division of such fees between males, the defence of the realm might be weakened. And Dodderidge, in his Treatise of Nobility, saith, (p. 119,) it was anciently ordained, That all knights' fees should come unto the eldest son by succession of

heritage; whereby he, succeeding his ancestors in the whole inheritance, might be the better enabled to maintain the wars against the king's enemies, or his lords; and that the soccage should be partible among the male children, to enable them to increase into many families for the better furtherance in, and increase of husbandry. See *Cowell, and Leg. Alfred. Dodd. Treat. Nobil. 119.* See *Descent.*

PRINCE, *princeps.* Sometimes taken at large for the king himself; but more properly for the king's eldest son, who is called Prince of Wales. See *King, II.*

It is said by some writers, that the king's eldest son is Prince of Wales by nativity; but others say, that he is born Duke of Cornwall, and afterwards created Prince of Wales, though from the day of his birth he is styled Prince of Wales, a title originally given by Edward I. to his son. His titles are, Prince of Wales, Duke of Cornwall, and Earl of Chester.

Before Edward II., who was the first Prince of Wales, and born at Caernarvon, in that principality, (his mother being sent there big with child by Edward I., to appease the tumultuous spirit of the Welch,) the eldest son of the king was called lord prince; but prince was a name of dignity long before that time in England. See *Staundf. Prærog. c. 22, 75.* See 27 Hen. 8. c. 26; 28 Hen. 8. c. 3. And *Stow's Annals, p. 303.*

In a charter of King Offa, after the bishops had subscribed their names, we read *Brordanus patricius, Bimmanus princeps*, and afterwards the dukes subscribed their names. And in a charter of King Edgar, in *Mon. Angl. tom. 3. p. 302.* *Ego Edgarus Rex rogatus ab episcopo meo Deorivolve, et princepe meo Alfredo, &c.* And in *Matt. Paris, p. 155:* *Ego Habbenus princeps Regis pro viribus assensum præbeo, et ego Turketinus dux concedo.*

As Duke of Cornwall, and likewise Earl of Chester, the Prince of Wales is to appoint the sheriffs, and other officers, in those counties. The Prince of Wales, besides the revenues of the principality of Wales, duchy of Cornwall, &c. has also an income settled on him, from time to time, by parliament. See 33 Geo. 3. c. 78; 50 Geo. 3. c. 6, enabling the prince to make leases of land, parcel of the duchy of Cornwall; and 35 Geo. 3. c. 125, for preventing the accumulation of debts by any future heir-apparent of the crown, and for regulating his mode of expediture from the time of his having a separate establishment.

PRINCIPAL, *principulum.* Is variously used in our law; as an heir loom, &c.

The word principal was also sometimes anciently used for a mortuary, or corse-present. See *Mortuary.*

In Urchenfield, in the county of Hereford, certain principals, as the best beast, the best bed, the best table, &c. pass to the eldest child, and are not liable to partition.

The chief person in some of the inns of Chancery is called principal of the house. See *Cowell.*

PRINCIPAL AND ACCESSARY. See *Accessory, Agent, Indictment.*

PRINCIPAL CHALLENGE. A species of challenge to jurors for suspicion of partiality. This takes place where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favour. See *Jury, I.*

PRINTING. By the 39 Geo. 3. c. 79. § 23—33, certain restrictions are imposed on printers and others, for the preventing of treasonable and seditious publications. Printers, letter-founders, and printing-press makers, are to register their names with the clerk of the peace. The name and abode of the printer is to be printed at the beginning and end of every book, and on the front of every paper printed; and one copy thereof is to be kept by the printer, with the name of his employer written thereon, and to be produced on demand any time within six months after the time of printing. One justice of peace may empower a peace officer to search for presses and types suspected to be illegally used; which may be seized, together with any printed papers

found on the premises. The king's printer, the public presses in the universities, and papers printed by authority of parliament, or other public boards, are excepted from the operation of this act. See 39 & 40 Geo. 3. c. 95; 41 Geo. 3. c. 80; 51 Geo. 3. c. 65. See also *Books, Libel, Literary Property, Newspapers*.

PRINTS AND ENGRAVINGS. See *Literary Property*.

PRIOR. Was in dignity next to the abbot, or the chief of a convent, &c. See *Abbat*.

PRIORS ALIENS, priores alieni.] Were certain religious men, born in France and Normandy, governors of religious houses erected for foreigners here in England; but were suppressed by Henry V., and afterwards their livings were given to other monasteries and houses of learning, and especially towards the erecting of the king's colleges at Cambridge and Eton. 2 Inst. 584. See *Stow's Annals*, 582; 1 Hen. 5. c. 7.

PRIORITY, prioritas.] An antiquity of tenure, in comparison of another less ancient. *Old Nat. Br.* 91.

Crompt., in his *Jurisd.* fol. 117, useth this word in the same signification. The lord of the priority shall have the custody of the body, &c. and fol. 120, if the tenant hold by priority of one, and by posteriority of another, &c. To which effect, see also *F. N. B.* 142. and tit. *Posteriority*.

PRIORITY OF DEBTS AND SUITS. See *Abatement, Action, Pleading, &c.*—As to payment of debts by an executor in order of priority; see *Forster*, V. 6. As to priority of mortgages, see *Mortgage*, III.

There is no priority of time, in judgments; for the judgment first executed shall be first paid; but it is otherwise, if the goods be merely seized, and not sold. 1 T. R. 729. See *Execution, Judgment*.

Wherever any suit on a penal statute may be said to be actually depending, it may be pleaded in abatement of a subsequent prosecution, being expressly averred to be for the same offence. Neither will it be any exception to such a plea, that the offence in a subsequent prosecution is laid on a day different from that in the former. Neither doth a mistake in such a plea of the very day, whereon the suit pleaded as prior was commenced, seem to be material on the issue of *nil tibi record*, if it appear in truth to have been commenced before the other, and for the same matter.

And if two informations be exhibited on the very same day, it seems that they may mutually abate one another; because there is no priority to attach the right of the suit in one informer more than in the other. Also it seems, that an information or bill the same day that they are filed, may be so far said to be depending before any process sued on there, that they may be pleaded in abatement of any other suit on the same statute. And from the same reason it seems also, that a writ of debt may be so pleaded in abatement of any other suit on the same statute; and from the same reason it seems also that a writ of debt may be so pleaded after it is returned; because then it seems to be agreed, that it may be properly said to be depending; and whether it may not also be so pleaded before it be returned, seems questionable; because, according to some opinions, a writ may be said to be depending as soon as purchased. 2 Hawk. P. C. c. 26. § 63. See *Idem*.

These points of law, where Hawkins seems to doubt, are now, in general, pretty clearly settled, according to what appeared to be his opinion.

PRISAGE, prisagium.] That share which belongs to the king or admiral, out of such merchandises as are taken at sea, by way of lawful prize, which is usually a tenth part. See 51 Eliz. c. 5.

PRISAGE OF WINES was an ancient duty or custom on wines, payable at certain ports, except London, Southampton, &c. It was where the king claimed out of every ship or vessel laden with wine, containing twenty tons, or more, two tons of wine, the one before, the other behind the mast,

at his price, which was twenty shillings for each ton; but this varied according to the custom of places; and at Boston every bark laden with ten tons of wine or above paid prisage. This word has long been out of use, the duty being afterwards called butlerage, because the king's chief butler received it. See *Customs on Merchandise*.

By 43 Geo. 3. c. 156. the treasury were empowered to purchase the duties of prisage and the butlerage in Great Britain, and a contract for that purpose with the Duke of Grafton was confirmed by 46 Geo. 3. c. 79. By 46 Geo. 3. c. 94. the treasury of Ireland were empowered to contract for the purchase of the duties of prisage and butlerage in that country from the Earl of Ormond. By 50 Geo. 3. c. 101. the contract was confirmed; and by 51 Geo. 3. c. 15. the duties were abolished.

PRISE. See *Prize*.

PRISO. A prisoner taken in war. *Hoveden*, p. 541.

PRISON, prisona.] A place of confinement for the safe custody of persons, in order to their answering any action, civil or criminal. See *Gaol*.

PRISON BREAKING. See *Gaol*, III.

PRISONER, prisonarius, Fr. prisonnier.] A man may be a prisoner on matter of record, or of fact: prisoner on matter of record, is he who, being present in court, is by the court committed to prison; and the other is on arrest, by the sheriff, &c. *Staudf. P. C.* 34, 35. See *Debtors, Gaol*, II.; *Execution*, III. 4.

PRIVATEERS. A kind of private men of war, the persons concerned wherein administer, at their own costs, a part of a war, by fitting out these ships of force, and providing them with all military stores; and they have instead of pay, leave to keep what they take from the enemy, allowing the admiral his share, &c.

Privateers may not attempt any thing against the laws of nations; as to assault an enemy in a port or haven, under the protection of any prince or republic, whether he be friend, ally, or neuter; for the peace of such places must be inviolably kept. Therefore by a treaty made between King William and the states of Holland, before a commission shall be granted to any privateer, the commander is to give security, if the ship be not above 150 tons, in 1500*l.*, and if the ship exceed that burden, in 3000*l.*, that they will make satisfaction for all damages which they shall commit in their courses at sea, contrary to the treaties with those states, on pain of forfeiting their commissions; and the ship is made liable. *Lex Mercat.* 177, 178.

Besides these private commissions, there are special commissions for privateers, granted to commanders of ships, &c. who take pay, and are under a marine discipline; and if they do not obey their orders, may be punished with death. And the wars in latter ages have given occasion to princes to issue these commissions, to annoy the enemies in their commerce, and hinder such supplies as might strengthen them, or lengthen out the war; and likewise to prevent the separation of ships of greater force from their fleets or squadrons. See *Admiralty, Letters of Marque*.

PRIVATION, privatio.] A taking away or withdrawing; most commonly applied to a bishop or rector, when, by death, or other act, they are deprived of their preferments; it seems to be an abbreviation of the word deprivation. *Co. Litt.* 239.

PRIVEMENT ENSIENT, or ensient. The term to signify a woman being with child, but not quick with child. *Wood's Inst.* 662.

PRIVIES, from the Fr. *prich*, i. e. *familiaris*.] Those who are partakers, or have an interest in any action or thing, or any relation to another; as every heir in tail is privy to recover the land entailed, &c. *Old Nat. Br.* 117.

There are five several kinds of privies, viz. privies of blood, such as the heir to the ancestor; privies in representation, as executors or administrators to the deceased; pri-

vies in estate, between donor and donee, lessor and lessee, &c.; privies in respect of contract; and privies on account of estate and contract together. 3 Rep. 23, 123; 4 Rep. 123; *Latch*, 260.

It is also said that there are three sorts of privies and privities; in estate, in blood, and in law.

Privies in blood are intended of privies in blood inheritable, and in this in three manners, viz. inheritable as general heir, or as special heir, or as general and special heir.

Privies in estate, as joint tenants, baron and feme, donor and donee, lessor and lessee, &c.

Privies in law are, when the law, without blood or privity of estate, casts the lands on one, or makes his entry lawful; as lord by escheat, lord who enters for mortmain, lord of villein, &c. 8 Rep. 42 b; *Jo*. 92.

The author of the *New Terms of the Law* maketh many sorts of privies, viz. privies in estate, privies in deed, privies in law, privies in right, and privies in blood. See *Perkins*, 831, 832, 833. *Coke*, lib. 3. f. 23, and lib. 4, 123, 124, mentions four kinds of privies, viz. privies in blood, as the heir to his father; privies in representation, as executors or administrators to the deceased; privies in estate, as he in reversion, and he in the remainder, when land is given to one for life, to another in fee, for that their estates are created both at one time: the fourth is privy in tenure, as the lord by escheat, that is, when the land escheateth to the lord for want of heirs. *Cowell*.

If a fine were levied, the heirs of him who levied it were termed privies. See *Fine of Lands*, l. If a lessor grants his reversion, the grantee and lessee are privies in estate: privies in contract extend only to the persons of the lessor and lessee; and where the lessee assigns all his interest, here the lessor and lessee remain privy in contract, but not in estate, which is removed by the assignment. 3 Rep. 23.

Privies, in respect of estate and contract, appear where the lessee assigns his interest; but the contract between the lessor and lessee, as to action of debt, continues, the lessor not having accepted of the assignee. 3 Lev. 295.

If the lessor grants over his reversion, or if the reversion escheat, now between the grantee, or the lord by escheat, and the lessee, there is privity in estate only.

Privity of contract only is personal privity, and extends only to the person of the lessor, and to the person of the lessee; as when the lessee assigned over his interest, notwithstanding his assignment, the privity of the contract remained between them, though privity of the estate be removed by the act of the lessee himself; and the reason of this is,

1st, Because the lessee himself shall not prevent by his own act such remedy, which the lessor had against him by his own contract; but when the lessor granted over his reversion, there, against his own grant, he cannot have remedy, because he has granted the reversion to the other, to which the rent is incident.

2dly, The lessee may grant the term to a poor man who shall not be able to manure the land, and who will by indigence, or for malice, permit it to lie fresh, and then the lessor shall be without remedy, either by distress, or by action of debt, which shall be inconvenient, and will concern in effect every man, (because, for the most part, every man is a lessor, or a lessee); and for those two reasons all the cases of entry by tort, eviction, suspension, and apportionment of the rent are answered, for in such cases it is either the act of the lessor himself, or the act of a stranger; and in none of the cases, the sole act of the lessee himself shall prevent the lessor of his remedy, for that it will introduce such inconvenience as has been said. See *Lease*, l. 3.

Privity of contract and estate together, is between the lessor and lessee himself. 3 Rep. 23.

Where there are privies in contract, and the privity is altered by assignment of an executor, &c. before any rent

due, and after the privity of estate, by the assignment of the executor's assignee, nothing remains whereby to maintain any action. *Latch*. 260.

There are likewise privies in deed, or in law; where the deed makes the relation, or the law implies it, in case of escheats to the lord, &c. And only parties and privies shall take advantage of conditions of entry on lands, &c. *Co. Litt*. 516.

If I deliver goods to a man, to be carried to such a place, and he, after he hath brought them thither, steal them, it is felony; because the privity of delivery is determined as soon as they are brought thither. *Staudf. Pl. Cor. lib. 1. cap.* 15, 25.

Privies inheritable, as heir general, shall take benefit of the infancy; as if infant tenant in fee-simple makes feoffment, and dies, his heir shall enter. The same law of h.m. who is heir general and special, and also of him that is heir special, and not general. But privies in estate (unless in some special cases) shall not take advantage of the infancy of the other. 8 Rep. 42, b. 43.

Merchants privy are opposed to merchant strangers in 2 *Edw. 3. c. 9, 15.*

PRIVILEGE,

PRIVILEGIUM.] Is defined by Cicero, in his oration *pro domo sua*, to be *lex privata homini irrogata*. It is, says another, *jus singulare*, whereby a private man, or a particular corporation, is exempted from the rigour of the common law. It is sometimes used in law for a place which hath some special immunity. *Kitchin*. 118.

Privilege is either personal or real: a personal privilege is that which is granted to any person, either against or beyond the course of the common law in other cases; as, for example, privilege of parliament.

A privilege real is that which is granted to a place, as to the universities, that none of either may be called to Westminster Hall, on any contract made within their own precincts, or prosecuted in other courts: and one belonging to the Court of Chancery cannot be sued in any other court, certain cases excepted, and if he be, he may remove it by writ of privilege, grounded on the statute 18 *Edw. 3. Cowell*. Officers of that court are to be sued in the Petty Bag Office.

Privilege is an exemption from some duty, burden, or attendance, to which certain persons are entitled, from a supposition of law, that the stations they fill, or the offices they are engaged in, are such as require all their care; that therefore, without this indulgence, it would be impracticable to execute such offices, to that advantage which the public good requires. *Bac. Ab. Privilege*.

I. Of Privilege in Suits, allowed Officers and Attendants in the Courts of Justice; and see titles *Attendants*, l. 3. (a); *Attorney*.

II. Of the Privilege of Peers and Members of Parliament; in addition to what is said under titles *Parliament*, *Peer*.

III. Of the Proceedings in Courts, by and against Persons entitled to Privilege of Parliament.

I. THE officers, ministers, and clerks of the courts in Westminster Hall are allowed particular privileges in respect of their necessary attendance on those courts; they are regularly to sue and be sued in the courts they respectively belong to, and cannot (except in certain cases, be impleaded elsewhere; which privilege arises from a supposition of law, that the business of the court, or their clients' causes, would suffer by their being drawn into another than that in which their personal attendance is required. 2 *Inst.* 551; 4 *Inst.* 71; *Vaugh.* 154; *Dyer*, 337, a. pl. 30.

An attorney was formerly entitled to sue in his own court, by attachment of privilege in the King's Bench and Common

Pleas, or by *capias* of privilege in the Exchequer, and to be sued by bill in all the courts; but these privileges have been taken away by the uniformity of process act (2 Wm. 4. c. 39. But he still retains his privilege of freedom from arrest, it being declared by the 19th section of the act, that nothing therein contained shall subject any person to arrest, who, by reason of any privilege, usage, or otherwise, may now, by law, be exempt therefrom. An attorney, therefore, can now only be sued by serviceable process, viz. by writ of summons. It is supposed, however, that he still retains the privilege he possessed, of being sued in the court of which he is an attorney; and that there is nothing in the act to take away his privilege of laying the venue in Middlesex, when he is plaintiff. But see 7 B. & B. 683, and *Tidd's New Pr.* 65; *Dax's Exch. Pr.* 15.

It is also said, that an attorney is entitled to have his cause tried at bar. These privileges are allowed not so much for the benefit of attorneys, as of their clients; and are therefore confined to attorneys who practise, or at least have practised within a year; and they are never allowed against the king; but actions *qui tam* are not considered as the king's actions. Neither are they allowed to attorneys, as against each other; it being a general rule, that there can be no privilege against privilege. But this rule only applies to attorneys of the same court; for where they are of different courts, the plaintiff is entitled to his privilege. It is also settled, that an attorney shall not be allowed his privilege, where he sues, or is sued in *autre droit*, as executor or administrator; or jointly with his wife, or other person who is not privileged; or where there would otherwise be a failure or defect of justice; as where an appeal, which only lies in the Court of King's Bench, is brought against an attorney of the Common Pleas, or such an attorney is in the actual custody of the marshal: but where an attorney of the Common Pleas puts in bail to an action depending in the Court of King's Bench, he does not thereby lose his privilege; but may plead it in that action, or in any other brought against him, by the bye: for it would be absurd, that he who founds an action on that of another, should be in a better condition than the original plaintiff. Yet where an attorney, having put in bail, waives his privilege, by pleading in chief, in one action, it is construed to be a waiver of privilege, in all other actions brought against him by the bye, during the same term.

The attachment of privilege, at the suit of an attorney, was in nature of a *latitat*, and the time allowed for declaring was the same as upon a *latitat*, or other process in trespass.

The bill against an attorney was a complaint in writing, describing the defendant as being present in court; and generally concluded with a prayer of relief, though the declaration upon the bill was not demurrable for want of it. Formerly, the bill against an attorney could only have been filed in term time, *sedente curia*, and not in vacation. But afterwards it might be filed in vacation, as well as in term time, though if it be filed in vacation, otherwise than to avoid the statute of limitations, the plaintiff was not allowed his costs, if the action were settled before the ensuing term.

In practice, it was usual to file the bill on stamped parchment, with the clerk of the declarations, in the King's Bench office; and to deliver a copy of it, on stamped paper, to the defendant, with notice thereon to plead in four days. And if the bill were filed, and a copy thereof delivered, four days exclusive before the end of the term, including Sunday, the defendant must have pleaded as of that term, the plaintiff having entered a rule to plead, and demanded a plea; but if the bill were not filed, and a copy delivered within that time, the defendant was entitled to an imparlance. See *Pleading*.

The rest of the proceedings, by and against attorneys, were, and continue the same, as in other cases; only that they are not bound to pay for copies of the pleadings.

Where J. S. was arrested in B. R., and after the arrest he procured himself to be made an attorney of C. B., and prayed his privilege, it was disallowed, because it accrued *pendente lite*. 2 Rol. Rep. 115.

If an attorney lays his action in London, the court will change the venue on the usual affidavit; for, by not laying it in Middlesex, he seems regardless of his privilege, and is to be considered in the same light as an unprivileged person. 2 Vent. 47; *Salk.* 668.

An attorney sued by bill jointly with a person having privilege of parliament does not lose his privilege. 8 T. R. 585.

As to other persons than attorneys claiming privilege, the following cases are deserving notice:—

Anderson, Ch. J., of C. B., brought trespass by bill for breaking his house in the city of Worcester, against a citizen of that city; the mayor and commonalty came and showed a charter granted by Edward VI., and demanded consuance of pleas; but it was refused, because the privilege of that court, of which the plaintiff was a chief member, is more ancient than the patent; for the justices, clerks, and attorneys, ought to be there attending their business, and shall not be impeached or compelled to implead others elsewhere; and this privilege was given the court on the original erection of it. 3 Leon. 149.

In debt against the warden of the Fleet, by bill of privilege, he refused to appear; the court doubted how they could compel him, as they could not forejudge him the court, he having an inheritance in his office; but it being surmised that he made a lease of his office, it was held that he should not have his privilege, for that the lessee, and not he, was the officer during the lease. 2 Leon. 173.

So, if the marshal of B. R. grants his place for life, the grantor has no privilege during that time. 1 Vent. 65.

A clerk of B. R. was sued in an inferior court for a debt under 5*l.*, and had a writ of privilege allowed; for the 21 Jac. 1. c. 23. never intended to take away the privilege of attorneys. *Palm.* 403.

Until the passing of the 2 Wm. 4. c. 39. many persons in the Court of Exchequer, such as the officers in the several sides of the courts, accountants to the king, &c. could only be sued in that court by bill, and might sue by *capias* of privilege. 1 Y. & J. 199; 1 Price, 96. But, by that act, such distinctions (so far at least as regards the commencement of proceedings) have been abolished.

A *latitat* being sued out against the commissioners of the Treasury, the puisne baron of the Exchequer came into the Court of B. R., and brought the Red Book of the Exchequer, which is deemed a record in that court; and thereby it appeared, that the treasurer had privilege of being sued only in that court; and the patent being produced in court which constituted the defendants, &c. and granted them the office of treasurer of England, their privilege was allowed without putting them to bring a writ of privilege: the court grounding themselves on the record before them. 2 Show. 299.

In debt in B. R. against J. S. he pleaded to the jurisdiction, That none of the privy chamber ought to be sued in any other court, without the special licence of the lord chamberlain of the household, and that he was one of the privy chamber; on demurrer to this plea, the court overruled it with great resentment, and awarded a *respondeus oster*. *Raym.* 34; 1 Keb. 137.

It was agreed, that the privilege of the Court of C. B., which sergeants claimed, extended only to inferior courts, not to the courts in Westminster Hall; and that a serjeant may be sued in any of these, because he is not confined to that court alone, but may practise in any other court; but it is otherwise as to attorneys or flacers, who cannot practise in their own name in any other court but such as they respectively belong to: and that a serjeant at law is to be sued by original, not by bill of privilege. 2 Lev. 129; 3 Keb. 42; *Moor.* 296, S. C.

So, in an action by bill brought in C. B., against a serjeant at law, he pleaded that he ought to have been sued by original, and not by bill; and on demurrer the court held, that the cases of a serjeant and prothonotary's clerk were on the same footing, neither of them being bound to personal attendance, as prothonotaries and attornies were; that therefore he ought to have been sued by original; and accordingly gave judgment for the defendant. *Trin. 7 Geo. 2. Serjeant Girdler's case.*

J. S. being arrested by a writ out of C. B. brought his writ of privilege as clerk of the Crown Office; but, it appearing that he was only clerk to a clerk of that office, and not an immediate clerk of the office, a *supersedeas* to the writ of privilege was granted on motion; the court having agreed, that he had no more privilege than an attorney's clerk. *2 Show. 287.*

A serjeant at law, or barrister, as well as an attorney, or other privileged person, whose attendance is necessary in Westminster Hall, may lay his action in Middlesex, though the cause of action accrued in another county; and the court on the usual affidavit will not change the venue. *Stil. 460; Moor. 64; 2 Show. 242.*

On a motion to discharge a rule which had been obtained for changing the venue, it appeared, that the plaintiff was a barrister and master in chancery; and the court held that he had privilege, by reason of his attendance, to lay his action in Middlesex, therefore discharged the rule. *2 Raym. 1556.*

As to the obstruction of public justice, by means of pretended privileged places, see *Arrest*. The following is a fuller statement of the statute there referred to.

By the 8 & 9 Wm 3. c. 27. § 15. for preventing the many ill practices used in privileged places to defraud persons of their debts; the pretended privilege of White Friars, the Savoy, Salisbury Court, Ram Alley, Mitre Court, Fuller's Rents, Baldwin's Gardens, Montague Close, the Minories, Mint, Clink, or Deadman's Place, are taken away. And the sheriffs of London or their officers are enabled to take the *posse comitatus*, and such other power as shall be requisite, and enter such privileged places to make any arrest on legal process, and in case of refusal to break open doors.

The 9 Geo. 1. c. 28. enacts, That if any person within Suffolk Place, or the Mint, or the pretended limits thereof, wilfully obstruct persons executing any writ, &c. or abuse any person executing the same, whereby he receive damage or bodily hurt, the person offending shall be transported. And on complaint to three justices, &c. by any person who shall have a debt owing from any one who resides in the Mint, having a legal process taken out for recovery thereof, if the debt be above 50*l.* on oath thereof, the justices are empowered to issue their warrant to the sheriff of Surry, to raise the posse, and to enter the pretended privileged place, and arrest the party. See also 11 Geo. 1. c. 22. enforcing the above penalties.

II. In an indictment for treason or felony, trespass *vi et armis*, assault or riot, process of outlawry shall issue against a peer; for the suit is for the king, and the offence is a contempt against him; but in civil actions between party and party regularly a *capias* or exigent lies not against a lord of parliament. *2 Hal. Hist. P. C. 109; 2 Hawk. P. C. c. 44. § 16.* See post, III. and *Outlawry*.

But if a peer of parliament was convicted of a disseisin with force, a *capias pro fine* and *exigent* issued, for the fine was given by statute, in which no person is exempted. *Cro. Eliz. 170; see Dyer, 314.*

So, in debt on an obligation against the Earl of Lincoln, who pleaded *non est factum*, which being found against him, the judgment was *ideo capiatur*; on a writ of error brought by him, it was objected that a *capias* does not lie against a peer. *sed non allocatur*; for by this plea found against him

a fine is due to the king, against whom none shall have any privilege. *Cro. Eliz. 503.*

An information was exhibited in B. R. against the Earl of Devonshire, for striking in the king's palace; which being in time of parliament, he insisted on his privilege, and refused to plead in chief, but sent in his plea of privilege, to which there was a demurrer, and the plea over-ruled, and he was fined 30,000*l.* *Comb. 49.*

A member of the House of Commons may be convicted, upon an indictment in B. R., for a libel, in publishing in a newspaper the report of a speech delivered by him in that house, if it contain libellous matter, although it be a correct report of such speech. *1 M. & S. Rep. 273.*

Peers are punishable by attachment for contempts in many instances; as for rescuing a person arrested by due course of law; for proceeding in a cause against the king's writ of prohibition; for discharging other writs, wherein the king's prerogative, or the liberty of the subject, are nearly concerned; and for other contempts which are of an enormous nature. *2 Hawk. P. C. c. 22. § 33.*

If a peer be returned on a jury, on his bringing a writ of privilege he may be discharged; also it seems the better opinion, that without such writ he may either challenge himself, or be challenged by the party. *Dyer, 314; Moor. 767; 9 Co. 49; Co. Lit. 177, 1 Jon. 153. See Jury.*

So if a peer be made steward of a base court, or ranger of a forest, he may, from the dignity of his person, and the presumption that he is engaged in the more weighty affairs of the commonwealth, exercise these offices by deputy; though there are no words for this purpose in his creation. *2 Co. 49 a.*

So if a licence be granted to a peer to hunt in a chase or forest, he may take such a number of attendants with him as are suitable to his dignity. *2 Co. 49 b.*

Formerly, if a peer brought an appeal, the defendant should not be admitted to wage battle, by reason of the dignity of his person. *2 Hawk. P. C. c. 45. § 5.*

III. There were, formerly, two ways of proceeding against peers of the realm, and members of the House of Commons: first, by original writ; and, secondly, by bill, under the provisions of the 12 & 13 Wm. 3. c. 39.

But now, by the uniformity of process act, 2 Wm. 4. c. 39. the proceedings by original are, in effect, abolished in personal actions; and the only process now against peers (since they cannot be taken on *capias*) is by writ of summons under the act. In personal actions, wherein it is intended to proceed against a member of parliament according to the provisions of the 6 Geo. 4. c. 16. § 10. the process is to be by writ of summons, in the form in the schedule of the 2 Wm. 4. c. 39. (marked No. 6); and which process and a copy thereof shall be in lieu of the summons, or original bill and summons, and copy thereof, mentioned in the statute of 6 Geo. 4. c. 16. The process is directed to the defendant, commanding him, that within one calendar month next after personal service on him, he cause an appearance to be entered in the court in which he is sued, in an action on promises, (or debt, or as the case may be,) at the suit of the plaintiff, and the defendant is thereby informed that an affidavit of debt for the sum of £ hath been filed, pursuant to 6 Geo. 4. c. 16; and that unless he pay some, or compound for the debt sought to be recovered, or enter into such bond as by the act is provided, and cause an appearance to be entered for him within one month after service thereof, he will be deemed to have committed an act of bankruptcy from the time of service thereof.

If a peer, having privilege of parliament, be in the king's Bench prison, a declaration may be filed against him, as being in custody of the marshal, and no summons need be issued. *5 T. R. 361.*

Where a peer was sued jointly with others, by bill of

Middlesex, the court set aside the proceedings as against the peer. *Briscoe v. Egremont, (E.) & al. Term Rep. K. B. Trin. 54 Geo. 3. 88.*

All further proceedings against peers of the realm, and members of the House of Commons, are the same as against other persons; only it should be remembered, that as no *capias* lies against them in civil actions, they cannot be taken in execution, unless where the judgment is obtained upon a statute-staple, or statute-merchant, or upon the statute of Acton Burnel; in which case a *capias* lies, even against peers of the realm; and see *ante*, II.

The Court of C. B. refused to grant an attachment against a peer for not paying money awarded, though the defendant consented it should issue on condition it should lie in the office for a certain time. *7 T. R. 171.* And so against a member of parliament. *Id. 448.*

Lord Stourton brought a bill against Sir Thomas Meers, to compel him to a specific performance of articles for purchasing Lord Stourton's estate. Sir Thomas, in his defence, insisted that there were defects in Lord Stourton's title to the estate; and it being ordered that Lord Stourton should be examined on interrogatories touching his title; it was objected, that Lord Stourton, being a peer, ought to answer on honour only; but it was ruled by Lord Harcourt, that though privilege did allow a peer to put in his answer on honour only, yet this was restrained to an answer; and as to all affidavits, or where a peer is examined as a witness, he must be on oath; and that this examination on interrogatories, being in a cause wherein his lordship was plaintiff, to force the execution of an agreement, as his lordship would have equity, so he should do equity; and allow the other side the benefit of a discovery, and that in a legal manner; and accordingly ordered Lord Stourton to put in his examination on oath. *1 P. Wms. 145.*

Peers, in suits of equity, are entitled to a letter missive, which method was introduced on a presumption that peers would pay obedience to the chancellor's letter; and is founded on that respect which is due to the peerage. *Jenk. 107.* If the lord doth not appear on the letter, a subpoena, on motion, is awarded against him; because no subsequent process can be awarded but on a contempt to the great seal; and the chancellor's letter is only *ex gratia*. If, on the service of the subpoena, the peer doth not appear, or if he appears and does not put in his answer, no attachment can be awarded against him, because his person cannot be imprisoned; but the proceedings must be by sequestration, unless cause, &c.; and this is regularly made out, on affidavit made of the service of the latter and subpoena, though sometimes it is moved for without, since the peer may show want of service at the day assigned to show cause why the sequestration should not issue; and this order for a sequestration is never made absolute without an affidavit of the service of the order to show cause, and a certificate of no cause shown. *2 Fant. 342. See Chancery.*

A sequestration was granted, unless cause, against Lord Clifford, for want of an answer; he afterwards put in an answer, which being reported insufficient, it was moved for a sequestration absolutely, an insufficient answer being as no answer; but the court thought it a hardship, in the case of a peer or member of the House of Commons, that a sequestration, which in some respects is in nature of an execution, should be the first process against them; therefore allowed, that in case of an answer which is reported insufficient, the plaintiff is to move again *de novo* for a sequestration nisi. *2 P. Wms. 385. See 3 Atk. 740.*

It was moved for a sequestration nisi, for want of an answer, against a menial servant of a peer, as the first process for contempt, in the same manner as in the case of the peer himself; and though the motion was granted by the master of the rolls, yet the registrar refused to draw it up, as thinking it against the course of the court; which being moved

again before the chancellor, his lordship, on reading the 12 & 13 Wm. 3. c. 3. likewise granted the motion, it appearing to be both within the meaning and words of the statute; and if it were not so, as it was plain no attachment would lie against their persons, consequently there would be no remedy against them, and they would have a greater privilege than their lord, if the process against such menial servant were to be a subpoena. *1 P. Wms 535.*

PRIVILEGED DEBTS. This term is applied to such debts as an executor may pay in preference to all others, such as sick-bed and funeral expenses, mournings, servants' wages, &c. See *Executor, Funeral Expenses.*

PRIVILEGIUM CLERICALE; or, in common speech, the benefit of clergy. See *Clergy, Benefit of.*

PRIVILEGIUM Property, propter.] A man may have a qualified property in animals *scilicet natura, propter privilegium;* that is, he may have the privilege of hunting, taking and killing them, in exclusion of other persons. *2 Comm. c. 25. p. 394. See Game.*

PRIVITY, privitas.] Private familiarity, friendship, inward relation. If there be lord and tenant, and the tenant holds of the lord by certain services, there is a privity between them in respect of the tenure. *Cowell. See Privies.*

PRIVY, from the French privé, familiaris.] Signifies him who is partaker, or hath an interest in any action or thing. *Old Nat. Brev. 117. See Privies.*

PRIVY COUNCIL.

CONSILIIUM REGIS, PRIVATUM CONSILIUM.] A most honourable assembly of the king himself and his privy councillors, in the king's court or palace, for matters of state. *4 Inst. 53.*

This is the principal council belonging to the king, and is generally called, by way of eminence, The Council. According to *Coke's* description of it at length, it is a noble, honourable, and reverend assembly of the king and such as he wills to be of his privy council, in the king's court or palace. The king's will is the sole constituent of a privy councillor; and this also regulates their number, which, of ancient time, was twelve or thereabouts. Afterwards it increased to so large a number that it was found inconvenient for secrecy and despatch; and therefore King Charles II. in 1679 limited it to thirty, whereof fifteen were to be the principal officers of state, and those to be councillors *virtute officii;* and the other fifteen were composed of ten lords and five commoners of the king's choosing. But since that time the number has been much augmented, and now continues indefinite. At the same time also the ancient office of lord president of the council was revived in the person of Anthony Earl of Shaftesbury. See *President of the Council.*

Next to the lord president of the council the lord privy seal sits in council, the secretaries of state, and many other lords and gentlemen; and in all debates of the council the lowest delivers his opinion first, and the king declares his judgment last; and thereby the matter of debate is determined. *4 Inst. 55.*

Privy councillors are made by the king's nomination without either patent or grant; and, on taking the necessary oaths, they become immediately privy councillors, during the life of the king that chooses them, but subject to removal at his discretion.

As to the qualifications of members to sit at this board,—any natural-born subject of England is capable of being a member of the privy council, taking the proper oaths for the security of the government, and the test for security of the church. But, in order to prevent any persons under foreign connections from insinuating themselves into this important trust, it is enacted by the Act of Settlement, 12 & 13 Wm. 3. c. 2. that no person born out of the dominions of the crown of England, unless born of English parents, even though

naturalized by parliament, shall be capable of being of the privy council.

A previous article was also introduced into the same Act of Settlement, "That all matters relating to the government, properly cognizable in the *Privy Council*, should be transacted there; and all the resolutions taken thereupon should be signed by such of the privy council as should advise and consent to the same."

The insertion of this article was caused by a very remarkable alteration which had been silently wrought in the practice of the executive government. According to the original constitution of our monarchy, the king's privy council consisted of the great officers of state, and of such others as he should summon to it, bound by an oath of fidelity and secrecy, by whom all affairs of weight, whether as to domestic or exterior policy, were debated, for the most part, in the royal presence, and determined (subordinately of course to his pleasure) by the vote of the major part. It could not but happen that some councillors, more eminent than the rest, should form juntos or cabals for more close and private management, or be selected as more confident advisers of their sovereign; and the very name of a *CABINET COUNCIL*, as distinguished from the larger body, may be found as far back as the reign of Charles I. But the resolutions of the crown, whether as to foreign alliances, or the issuing orders and proclamations at home, or any other overt act of government, were not finally taken without the deliberation and assent of that body whom the law recognized as the sworn and notorious advisers of the monarch. This was first broken in upon after the Restoration, and especially after the fall of Clarendon, a strenuous assertor of the rights and dignities of the privy council. "The king (as Clarendon complains in his life) had in his nature so little reverence and esteem for antiquity, and did in truth so much condemn *old orders, forms, and institutions*, that the objection of novelty rather advanced than obstructed any proposition." He wanted to be absolute on the French plan, for which both he and his brother, as the same historian tells us, had a great predilection, rather than obtain a power a little less arbitrary, so far at least as private rights were concerned, on the system of his three predecessors. The delays and the decencies of a regular council, the continual hesitation of lawyers (whose cowardice renders them as unfit for crime as for virtue), were not suited to the temper, talents, or designs of the king; and it must indeed be admitted that the privy council, even as it was then constituted, was too numerous for the practical administration of supreme power. Thus, by degrees, it became usual for the ministry (or *cabinet*) to obtain the king's final approbation of their measures before they were laid for formal ratification before the council. It was one object of Sir William Temple's short-lived scheme in 1679 to bring back the ancient course, the king pledging himself, on the formation of his new privy council, to act in all things by its advice.

During the reign of William III. this distinction of the *CABINET* from the *PRIVY COUNCIL*, and the exclusion of the latter from all business of state, became more fully established. This, however, produced a serious consequence as to the *responsibility* of the advisers of the crown; and at the very time when the controlling and the chastising power of parliament was most effectually recognized, it was silently eluded by the concealment in which the objects of its inquiry could wrap themselves. Thus, in the instance of a treaty, which the House of Commons might deem mischievous and dishonourable, the chancellor setting the great seal to it would of course be responsible; but it is not so evident that the first lord of the treasury, or others more immediately advising the crown on the course of foreign policy, could be liable to impeachment, with any prospect of success, for an act in which the participation could not be legally proved. By this it is not meant that evidence might not possibly be obtained which might affect the leaders of the cabinet (as in

the instance of Oxford and Bolingbroke); but that the cabinet itself, having no *legal* existence, and its members being surely not amenable to punishment in their simple capacity of privy councillors, which they generally share in modern times with a great number even of their adversaries, there is no tangible character to which responsibility is attached,—nothing *except a signature or the setting of a seal* from which a bad minister could entertain any further apprehension than that of losing his post and reputation.

This very delicate question as to the *responsibility* of the *CABINET* (or *MINISTRY*, as they are usually termed), was canvassed in parliament on the introduction of the then chief justice of the King's Bench (Ellenborough) into that select body in 1806. It is difficult to comprehend how an article of impeachment for acting as a *Cabinet Minister* could be framed; and as a privy councillor has not (it is conceived) a right to resign his place, it would apparently be unjust and illegal to presume a participation in culpable measures from the mere circumstance of his continuing to hold it.

It may be that no absolute corrective is practicable for this apparent deficiency in our constitutional security; but it is expedient to keep it well in mind, because all ministers speak loudly of their responsibility, and are apt, on the faith of this guarantee, to obtain a previous confidence from parliament, which they may in fact abuse with impunity; for should the bad success or detected guilt of their measures raise a popular cry against them, and censure or penalty be demanded by their opponents, they will infallibly shroud their persons in the dark recesses of the *Cabinet*, and employ every art to shift off the burden of individual liability.

William III., from his reserved disposition, as well as from the great superiority of his capacity for business, was far less guided by any responsible councillors than the spirit of our constitution requires. In the business of the treaties for the partition of the Spanish monarchy, in 1698 and 1700 (which, whether rightly or otherwise, the House of Commons reckoned highly injurious to the public interest), he had not even consulted his *Cabinet*; nor could any of the ministers, except the Earl of Portland and Lord Somers, be found to have had any concern in the transaction; for though the house made the treaties one article of those impeachments against Lord Oxford and Lord Halifax, they were not in fact any further parties to it than by being in the secret; and the former had shown his usual intractability by objecting to the whole measure. This whole proceeding was undoubtedly such a departure from sound constitutional usage as left parliament no control over the executive administration. It was endeavoured to restore the ancient principle (by the article in the Act of Settlement on which this discussion has arisen); but whether it were that real objections were found to stand in the way of this article, or that ministers shrunk back from so definite a responsibility, it was repealed a very few years afterwards by *stat. 4 Ann. c. 8.*, *6 Ann. c. 7.* in fact, before it came into operation, as its commencement was to have taken place on the access of the House of Hanover.

The plans of government are therefore discussed and determined in a *CABINET COUNCIL*; forming, indeed, part of the larger body, but *unknown to the law* by any distinct character or special appointment. It has been suggested (though not on clear foundations) that this change has greatly augmented the direct authority of the *Secretaries of State*, especially as to the interior departments, who communicate the king's pleasure, in the first instance, to subordinate officers and magistrates, in cases which (at least down to the time of Charles I.) would have been determined in council. Proclamations and orders still emanate, as the law requires, from the privy council; and on some rare occasions, even of late years, matters of domestic policy have been referred to their advice. It is in general understood, however, that no councillor is to attend *except when summoned*; so that, unneces-

sarily numerous as the council has become (sometimes to gratify vanity by a titular honour, all members once called to the privy council being always afterwards addressed as *Right Honourable*), the special meetings consist only of a few persons besides the actual ministers of the cabinet, and give the latter no apprehension of a formidable resistance. Yet there can be no reasonable doubt that every councillor is as much answerable for measures adopted by his consent, and especially when ratified by his signature, as those who bear the name of ministers, and who have generally determined upon them before he is summoned.—See *Hallam's History of England from Henry VII. to George II.* chap. xvi.

The duty of a privy councillor appears from the oath of office, which consists of seven articles:—1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honour and good of the public, without partiality, through love, affection, need, doubt, or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be there resolved. 6. To withstand all persons who would attempt the contrary. And, lastly, in general, 7. To observe, keep, and do all that a good and true councillor ought to do for his sovereign lord. 4 *Inst.* 54.

The power of the privy council is to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. But their jurisdiction herein is only to inquire, and not to punish; and the persons committed by them are entitled to their *habeas corpus* by 16 *Car.* 1. c. 10. as much as if committed by an ordinary justice of the peace. By the same statute the Court of Star-chamber, and the Court of Requests, both of which consisted of privy councillors, were dissolved; and it was declared illegal for them to take cognizance of any matter of property belonging to the subjects of this kingdom. But, in Plea-tation or Admiralty causes, which arise out of the jurisdiction of this kingdom; and in matters of lunacy or idiocy, being a special power of the prerogative; with regard to these, although they may eventually involve questions of extensive property, the privy council continue to have cognizance, being the court of appeal in such cases; or, rather, the appeal lies to the king's majesty himself in council; which is, in fact, a court of justice, which must at least consist of three privy councillors. See 3 *P. Wms.* 108; 1 *Comm.* c. 5. Never also a question arises between two provinces in America, or elsewhere, as concerning the extent of their charters and the like, the king in his council exercises original jurisdiction therein, upon the principles of feudal sovereignty. And so likewise when any person claims an island or a province, in the nature of a feudal principality, by grant from the king or his ancestors, the determination of that right belongs to his majesty in council; as was the case of the Earl of Derby, with regard to the Isle of Man, in the reign of Queen Elizabeth; and the Earl of Cardigan and others, as representatives of the Duke of Montague, with regard to the Island of St. Vincent, in 1764. But from all the commons of the crown, excepting Great Britain and Ireland, an appellate jurisdiction (in the last resort) is vested in the same tribunal; which usually exercises its judicial authority in a committee of the whole privy council, who hear the allegations and proofs, and make their report to his majesty in council, by whom the judgment is finally given. See 3 *Inst.* 182; 4 *Inst.* 53. And see the powers recently given to a judicial committee of the privy council, *post*.

Formerly the court of privy council could not decree in *perpetuum* in England, unless in certain criminal matters. See *Hardwicke's argument in Peck v. Baltimore*, where the jurisdiction of the council and Chancery upon questions arising on subject-matters abroad, was very fully discussed. 1 *Peck* 141. But now see § 18 of the 38 & 39 *Geo.* 4. c. 11, *post*.

The privileges of privy councillors, as such (abstracted

from their honorary precedence, see *tit. Precedence*), consisted formerly principally in the security which the law gave them against attempts and conspiracies to destroy their lives. For by 3 *Hen.* 7. c. 14. if any of the king's servants of his household conspired or imagined to take away the life of a privy councillor, it was felony, though nothing were done upon it. The reason of making this statute, *Coke* says, was because such a conspiracy was, just before this parliament, made by some of King Henry VII.'s household servants, and great mischief was like to have ensued thereupon. 3 *Inst.* 38. This extended only to the king's menial servants. But the 9 *Ann.* c. 16, went further, and enacted, that any person who unlawfully attempted to kill, or unlawfully assaulted, and struck or wounded any privy councillor in the execution of his office, should be a felon without benefit of clergy. This statute was made upon the daring attempt of the *Sieur Guiscard*, who stabbed Mr. Harley, afterwards Earl of Oxford, with a penknife, when under examination for high crimes in a committee of the privy council. Both of these statutes, however, were repealed by the 9 *Geo.* 4. c. 31; and any attempt or assault of the above description upon a privy councillor now stands on the same footing as attempts and assaults upon other individuals.

Anciently, if one did strike another in the house of a privy councillor, or in his presence, the party offending was to be fined. 4 *Inst.* 53.

The dissolution of the privy council depends upon the king's pleasure; and he may, whenever he thinks proper, discharge any particular member, or the whole of it, and appoint another. By the common law also it was dissolved *ipso facto* by the king's demise, as deriving all its authority from him. But now, to prevent the inconveniences of having no council in being at the accession of a new prince, it is enacted by the 6 *Ann.* c. 7. § 8. that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor. See 1 *Comm.* c. 5.

It is consistent with safety for a privy councillor to give the king counsel when demanded; and the best counsel is ever given to a prince when the question is evenly poised, so as the councillor cannot discern which way the king himself inclines; resolution should never precede deliberation, nor execution go before resolution: and when, on debate and deliberation, any matter is well resolved by the council, a change of it on some private information is neither safe nor honourable. 4 *Inst.*

The court of privy council is of great antiquity: the government in England was originally by the king and privy council, though at present the king and privy council only intermeddle in matters of complaint on sudden emergencies, their constant business being to consult for the public good in affairs of state. 4 *Inst.* 53.

The lords and commons assembled in parliament have often transmitted matters of high concern to the king and privy council; and acts of the privy council, whether orders or proclamations, were of great authority. Henry VIII. procured an act of parliament to be made, that, with the advice of his privy council, he might set forth proclamations, which should have the force of acts of parliament; but that statute was repealed in the reign of Edward VI.

Acts of the privy council continued of great authority until the reigns of King Charles I. & II.; and by these were controversies sometimes determined touching lands and rights, as well as the suspension of penal laws, &c. But this seemed to be contrary to the 25 *Edw.* 3. st. 5. c. 4. And by the 16 *Car.* 1. c. 10. § 3. it is declared, that neither the king nor the privy council have authority by petition, &c. to determine or dispose of lands, &c. of any subject.

By 6 *Ann.* c. 6. the privy council of Scotland was absorbed in the British privy council; it being in that act provided, that the queen and her successors should have but one privy council in or for the kingdom of Great Britain; and that

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such privy council should have the same powers and authorities as the privy council of England lawfully had used and exercised at the time of the union with Scotland, and none other. See *Liberty*.

The king, with advice of his council, publishes proclamations binding to the subject; but they are to be consonant to, and in execution of, the laws of the land.

It is in the power of the privy council to inquire into crimes against government; they may commit persons for treason, and other offences against the state, in order for their trial in other courts; and any of the privy council may lawfully do it. See *Commitment*, I.

By 33 Hen. 8. c. 23. persons examined by the privy council, on treasons, &c. done within or without the realm, might be tried before the commissioners of oyer and terminer, appointed by the king in any county of England. This statute, so far as it related to treason committed within the kingdom, was repealed by the 1 & 2 P. & M. c. 10; and was wholly repealed by the 9 Geo. 4. c. 31.

By the 2 & 3 Wm. 4. c. 92. the powers of the High Court of Delegates, both in ecclesiastical and maritime causes, by virtue of the 25 Hen. 8. c. 19, and the 8 Eliz. c. 5. were transferred to his majesty in council.

By the 3 & 4 Wm. 4. c. 41. for the better administration of justice in his majesty's privy council, it is enacted that the president for the time being of his majesty's privy council, the lord chancellor, and such of the privy council as shall hold the office of the lord keeper or first lord commissioner of the great seal of Great Britain, lord chief justice of the King's Bench, master of the rolls, vice-chancellor of England, lord chief justice of the Common Pleas, lord chief baron of the Exchequer, judge of the prerogative court of Canterbury, judge of the high court of admiralty, and chief judge of the court in bankruptcy, and also all persons members of his majesty's privy council who shall have been president thereof or held the office of lord chancellor of Great Britain, or shall have held any of the other offices herein-before mentioned, shall form a committee of his majesty's said privy council, and shall be styled "the judicial committee of the privy council;" provided that his majesty, by his sign manual, may appoint any two other persons, being privy councillors, to be members of the said committee.

§ 2. All appeals or applications in prize suits, and in all other suits or proceedings in the courts of admiralty, or vice-admiralty courts, or any other court in the plantations in America and other his majesty's dominions abroad, which may, by any law, statute, commission, or usage, be made to the high court of admiralty in England, or to the lords commissioners in prize cases, shall be made to his majesty in council; and such appeals shall be made in the same manner and form and within such time wherein such appeals might, if the act had not been passed, have been made to the said high court of admiralty, or to the lords commissioners in prize cases respectively; and all laws or statutes in force with respect to any such appeals or applications shall apply to any appeals to be made in pursuance of this act to his majesty in council.

§ 3. All appeals or complaints in the nature of appeals whatever which, either by virtue of this act, or of any law, statute, or custom, may be brought before his majesty, or his majesty in council, from or in respect of the determination, sentence, rule, or order of any court, judge, or judicial officer, and all such appeals as are pending and unheard, shall from the passing of this act be referred by his majesty to the said judicial committee of his privy council, and that such appeals, causes, and matters shall be heard by the said judicial committee, and a report or recommendation thereon shall be made to his majesty in council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by his majesty to the whole of his privy council or a committee

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thereof, (the nature of such report or recommendation being always stated in open court.)

§ 4. His majesty may refer to the said judicial committee for hearing or consideration any such other matters whatsoever as he shall think fit, and such committee shall thereupon hear or consider the same, and shall advise his majesty thereon in manner aforesaid.

§ 5. No matter shall be heard, nor any order, report, or recommendation be made, by the said judicial committee, in pursuance of the act, unless in the presence of at least four members of the said committee; and no report or recommendation shall be made to his majesty unless a majority of the members of such judicial committee present at the hearing shall concur in such report, &c.: provided that nothing therein contained shall prevent his majesty, if he shall think fit, from summoning any other of the members of his said privy council to attend the meetings of the said committee.

By § 6. in case the king directs the attendance of any judge, a member of the committee, the other judges of the court to which he belongs to make arrangements with regard to the business of the court.

§ 7. It shall be lawful for the said judicial committee, in any matter which shall be referred to such committee, to examine witnesses by word of mouth, (and either before or after examination by deposition,) or to direct that the depositions of any witness shall be taken in writing by the registrar of the said privy council, to be appointed by his majesty as herein-after mentioned, or by such other person or persons, and in such manner, order and course as his majesty in council or the said judicial committee shall appoint and direct; and the said registrar and such other person or persons so to be appointed shall have the same powers as are now possessed by an examiner of the high court of chancery or of any court ecclesiastical.

§ 8. The judicial committee may order any particular witnesses to be examined, and as to any particular facts; and his majesty, on the recommendation of the committee, may remit causes for rehearing; and further, on any such remitting or otherwise, direct that one or more feigned issue or issues shall be tried in any court in any of his majesty's dominions abroad, for any purpose for which such issue or issues shall to his majesty seem proper.

§ 9. Every witness who shall be examined in pursuance of this act shall give his or her evidence upon oath, or if a Quaker or Moravian upon solemn affirmation, which oath and affirmation respectively shall be administered by the said judicial committee and registrar, and by such other person or persons as his majesty in council or the said judicial committee shall appoint; and every such witness who shall wilfully swear or affirm falsely shall be deemed guilty of perjury, and shall be punished accordingly.

§ 10. The judicial committee may direct one or more feigned issue or issues to be tried in any court of common law, and either at bar, before a judge of assize or at the sittings for the trial of issues in London or Middlesex, and either by a special or common jury, in like manner and for the same purpose as is now done by the High Court of Chancery. And § 11. may direct depositions to be read at the trial of such issue; and deeds to be produced, and facts to be admitted. And § 12. may make such orders as to the admission of evidence as are made by the Court of Chancery. And § 13. may direct new trials of issues; and paid evidence of any witness's testimony may be received who is dead, or become incapable.

By § 14. the powers, &c. of 13 Geo. 3. c. 63. and 1 Wm. 4. c. 22, with regard to examination of witnesses upon interrogatories, may be exercised by the judicial committee.

By § 15. costs of any appeals, &c. to be in the discretion of the committee.

§ 16. The orders or decrees of his majesty in council

made in pursuance of any recommendation of the said judicial committee, in any matter of appeal from the judgment or order of any court or judge, shall be enrolled, for safe custody, in such manner, and the same may be inspected and copies thereof taken under such regulations, as his majesty in council shall direct.

§ 17. The committee may refer matters to the registrar in same manner as matters are by the Court of Chancery referred to a master.

§ 18. The king may appoint a registrar, and direct his duties.

§ 19. It shall be lawful for the president for the time being of the said privy council to require the attendance of any witnesses, and the production of any deeds, evidence, or writings, by writ to be issued by such president in such and the same form, or as nearly as may be, as that in which a writ of subpoena *ad testificandum*, or of subpoena *duces tecum*, is now issued by his majesty's court of King's Bench at Westminster; and every person disobeying any such writ so to be issued by the said president shall be considered as in contempt of the said judicial committee, and shall also be liable to such and the same penalties and consequences as if such writ had issued out of the said court of King's Bench, and may be sued for such penalties in the said court.

§ 20. All appeals to his majesty in council shall be made within such times respectively within which the same may now be made, where such time shall be fixed by any law or usage, and where no such law or usage shall exist, then within such time as shall be ordered by his majesty in council; and subject to any right subsisting under any charter or constitution of any colony or plantation, his majesty in council may alter any usage as to the time of making appeals, and make any order respecting the time of appealing to his majesty in council.

§ 21. Decrees for courts abroad to be carried into effect as the king in council shall direct. Act not to abridge powers of privy council.

§ 22. His majesty may direct the East India Company to bring on appeals from the Sudder Dewanny Adawlut courts to a hearing; and § 23. orders made on such last-mentioned appeals are to have effect notwithstanding death of parties, &c.; and by § 24. his majesty is empowered to make orders for regulating the mode, &c. of such appeals.

By § 25. his majesty is empowered to appoint one of the barons of the Court of Exchequer to sit in equity in the absence of the chief baron; and § 26. two judges of the court of bankruptcy are to act for the chief judge of the court of review during his attendance at the said judicial committee.

§ 28. The said judicial committee shall have the same power of punishing contempts and of compelling appearances, and his majesty in council shall have the same powers of enforcing judgments, decrees, and orders, as are now exercised by the High Court of Chancery, or the Court of King's Bench, (and both *in personam* and *in rem*.) or as are given to any court ecclesiastical by the 2 & 3 Wm. 4. c. 93; and all such powers as are given to courts ecclesiastical, if of punishing contempts or of compelling appearances, shall be exercised by the said judicial committee, and if of enforcing decrees and orders shall be exercised by his majesty in council, in such and the same manner as the powers in such act given, and shall be of as much force as if the same had been thereby expressly given to the said committee or to his majesty in council.

§ 29. Subject to such orders as his majesty in council shall make, the present registrar of the high court of admiralty, if he shall so think fit, either in person or by deputy, may attend the hearing by the said judicial committee of all causes and appeals which, but for this act or the said last-mentioned act, would have been heard by any court or commission which such registrar was entitled to attend, in person or by deputy,

by virtue of his offices of registrar of the high courts of admiralty, delegates, and appeals for prizes; and likewise, subject to any order of his majesty in council, transact and do all acts and things that are necessary, or heretofore done by the said registrar or his deputies in respect of such causes and appeals.

§ 31. Provided, that nothing therein contained shall impeach or render void any treaty or engagement already entered into by his majesty, or restrain him from acceding to any treaty, with any foreign prince, potentate, or power, in which treaty it shall be stipulated that any persons other than the said judicial committee shall hear and adjudicate appeals from his majesty's courts of admiralty in causes of prize.

PRIVY SEAL, *privatum sigillum*.] A seal which the king useth to such grants or things as pass the great seal 2 Inst. 554. See *Keeper of the Privy Seal*.

No protection can be granted under the privy seal, but under the great seal: but a warrant of the king under the privy seal to issue money out of his coffers, is sufficient; though not under the privy signet. 2 Inst. 555; 2 Rep. 17; 2 Rol. Abr. 183. The privy seal is sometimes used in things of less consequence, that never pass the great seal; as to discharge a recognizance, debt, &c. But no writ shall pass under the privy seal, which toucheth the common law. 2 Inst. 555. Matters of the privy seal are not issuable, or returnable in any court, &c. 3 Nels. Abr. 211. See *Grant of the King, Treason*, 7, &c.

By the 2 Wm. 4. c. 49. the offices of the clerks of the signet and privy seal are to be abolished as soon as vacancies occur in them.

PRIVY VERDICT. See *Jury*.

PRIZE MONEY. By the 2 & 3 Wm. 4. c. 53. all former acts relating to army prize money have been repealed, and the law consolidated and amended. This statute enacts, that all captures hereafter made by the army shall be divided according to such general rule of distribution as his majesty shall direct. Deserters are not to be entitled to prize money; and shares not claimed within six years after being paid as directed by the act to the treasurer of Chelsea Hospital, are declared forfeited, unless upon good cause shown and allowed.

PRIZES, *captio; præda*; from the Fr. *prendre*.] A booty taken from an enemy in time of war; generally applied to the cases of capture at sea.

The prize courts in the admiralty, and the courts of lords commissioners of appeals, have the sole and exclusive jurisdiction over the question of prize or no prize, and who are the captors, notwithstanding any of the prize acts; and if they pronounce a sentence of condemnation, adjudging also who are the captors, the courts of common law cannot examine the justice or propriety of it, even though, perhaps, they would have put a different construction on the prize acts. And the same courts have power to enforce their decrees. 4 T. R. 382.

Now, by the 2 & 3 Wm. 4. c. 92. the powers of the lords commissioners, commonly called "the high court of delegates," have been transferred to his majesty in council. See *Privy Council*. And see further as to naval prizes, *Admiralty, Navy*, II.

Where an admiral appointed to the command of an expedition from this country, was instructed to put himself and his fleet under the command of the admiral commanding the station, if his co-operation should be necessary, and did accordingly put himself and his fleet under such command, and was directed by the admiral of the station, whilst he remained with him, to consider himself under his command, and to attend to all his orders and signals whilst the fleets were on the same station, and the admiral of the station did several acts forwarding the objects of the expedition, and issued orders relating thereto; but in consequence of ill health, left the station with the ships under his command, and sailed for

England, and at the time the enemy's fleet agreed to surrender was out of sight, and not in a situation to have afforded the least assistance, and the enemy's fleet surrendered the day after he sailed: Held that the admiral of the station was not entitled to his share of distribution of prize as commander-in-chief of the expedition at the time of capture, but the admiral appointed to the command of it was. *4 M. & S. 105.*

No action lies against the commander of a British ship of war for seizing and detaining a vessel on suspicion of her being hostile prize, although he afterwards dismiss the vessel without libelling in the Court of Admiralty: and though he detained the vessel partly on suspicion of matters which were cases only of forfeiture, if she were British. *6 Taunton, 439.*

PRO. A preposition, signifying for, or in respect of a thing; as *pro consilio*, &c. And in law, *pro* in the grant of an annuity *pro consilio*, showing the cause of the grant, amounts to a condition: but in a feoffment, or lease for life, &c. it is the consideration, and doth not amount to a condition; and the reason of the difference is, because the state of the land by the feoffment is executed, and the grant of the annuity is executory. *Plowd. 412. See Condition, Grant.*

PROBATE. To claim a thing as a man's own. *Leg. Canut. c. 44.*

PROBATE OF TESTAMENTS, *probatio testamentorum.*] The exhibiting and proving wills and testaments before the ecclesiastical judge, delegated by the bishop, who is ordinary of the place where the party dies. If all the deceased's goods, chattels, and debts owing to him, were in the same diocese, then the bishop of the diocese, &c. hath the probate of the testament; but if the goods and chattels were dispersed in divers dioceses, so that there were any thing out of the diocese where the party lived, to make what is called *bona notabilia*, then the archbishop of Canterbury or York is the ordinary to make probate by his prerogative. *Blount. See Executor, V. 3.*

The probate of a will is usually made in the spiritual court, and is done by granting letters testamentary to the executor under seal of the court, by which the executor is enabled to bring any action, &c. And if such letters testamentary are granted to the party who exhibits the will, merely on his oath, by swearing that he believeth it to be the last will of the deceased, this is called proving it in common form; and such a probate may be controverted at any time; but if the executor, besides his own oath, produces witnesses to prove it to be the last will of the deceased, and this in the presence of the parties who claim any interest, or in their absence, if they are summoned, and do not appear; this is termed a *probate per testes*, which cannot be questioned after thirty years. *2 Nels. Abr. 1301.*

On an issue, whether the deceased made an executor or no, the probate of the will was adjudged good proof. *2 Lill. Abr. 375.* And where the probate of a will is produced in evidence at a trial, the defendant cannot say that the will was forged, or that the testator was *non compos mentis*; because it is directly against the seal of the ordinary in a matter where he had a proper jurisdiction: but the defendant may give in evidence that the seal itself was forged, or that the testator had *bona notabilia*, or he may be relieved on appeal. *1 Lev. 235; Raym. 405; 1 Strange, 481.* The probate is evidence only in questions relating to the personal estates; as a will relating to real estate only need not be proved. *See Executor, Will.*

As the judge of the spiritual court only can determine the validity of wills for things personal; therefore the probate of such a will is undeniable evidence to a jury, and may not be controverted at common law. *1 Ld. Raym. 262. See further, Evidence, I.*

When probate is to be granted of a will, wherein a legacy is interlined in a different hand, and supposed to be forged, the executor has no remedy but in the spiritual court, where

the will ought to be proved, with a special reservation as to that clause. *1 P. Wms. 388.*

By *21 Hen. 8. c. 5.* which first settled the fees to be taken by a registrar and judge in the probate of wills, it is enacted, that if the officer takes more than his due fees, he shall forfeit *10l.* to be divided between the king and party grieved.

The power of granting probates and administration of the goods of dying persons, for wages or work done in the king's docks and yards, shall be in the ordinary of the diocese where the person dieth; or in him to whom power is given by such ordinary, to the exclusion of the prerogative court, &c. *4 & 5 Ann. c. 16.*

By several acts of parliament, stamps are imposed on the probates of wills and letters of administration, according to the value of the property of the deceased. By these acts the expense of probates for the wills of soldiers and sailors is made very small. *See Navy, II. and further, Will.*

PROBATOR. An accuser, or approver, or one who undertakes to prove a crime charged upon another.

The word was strictly meant of an accomplice in felony, who, to save himself, confessed the fact, and accused any other principal or accessory, against whom he was bound to make good the charge by duel, or trial by the country, and then was pardoned life and members, but yet to suffer transportation. *Bracton; Fleta, lib. 2. c. 52. § 42, 44. See Accessary, Approver.*

PROCEDENDO, or *procedendo in loquell.*] A writ which lieth where an action is removed from an inferior to a superior jurisdiction, as the Chancery, King's Bench, or Common Pleas, by *habeas corpus, certiorari*, or writ of privilege, to send down the cause to the court from whence removed, to proceed on the complaint; it not appearing to the higher court that the suggestion is sufficiently proved, *F. N. B. 153; 5 Rep. 68. See 21 Jac. 1. c. 23.* So, where a cause has been removed from an inferior court, the court of K. B. will grant a *procedendo* if the debt or damages appear to be under *40s.* *Tidd's Pract.*

If the party who sues out the *habeas corpus* or *certiorari* doth not put in good bail in time (where good bail is required), then there goes this writ to the inferior court to proceed notwithstanding the *habeas corpus*, &c. *Rule, Mich. 1654. § 8.*

If a *certiorari* or *habeas corpus*, to remove a cause, be returned before a judge, the judge will give a rule thereon to put in good bail by such a day, which if the defendant, on serving his attorney with a copy of the rule, doth not do, then the judge will sign a note or warrant for a *procedendo*, to remove the cause where the action was first laid, unless to remove the cause where the action was first laid, unless bail is perfected in four days after service of the rule: also if bail be put in at the time, and do not prove good, the judge will grant a rule for better bail to be put in by a certain day, or else to justify the bail already put in: which if defendant doth not do, the judge will then likewise grant a warrant for a *procedendo.* *Tidd's Pract. See Certiorari, Habeas Corpus.*

Where bail, put in on removal of a cause in B. R. is disallowed by the court, if the defendant on a rule for it, at purpose, and notice given, refuse to put in better bail such as the court shall approve of, a *procedendo* may be granted for disallowing the bail makes the defendant in the same condition as if he had put in no bail, and until the bail is put in and filed, the court is not possessed of the cause so as to proceed in it. *Mich. 24 Car. B. R.*

After a record returned, and the defendant hath filed bail in B. R. on a cause to be removed, a *procedendo* ought not to be granted; because by giving and filing bail in this court, the bail below is discharged. *Sid. 313.*

The *procedendo* removes the suspicion created by the *habeas corpus*, and a cause once remanded thereby cannot afterwards be removed or stayed before judgment. *21 Jac. 1. c. 23. § 3.*

This writ may also be awarded when it appears upon the return of the *habeas corpus*, that the court above cannot administer the same justice to the parties as the court below. As where an action is brought in London on a custom or bye-law, which is only suable there. See *Habeas Corpus*, IV. *ad fin.*

Where an *habeas corpus* is brought, after interlocutory, and before final judgment, in an inferior court, and the defendant dies before the return of it, a *procedendo* shall be awarded; because, by 8 & 9 Wm. 3. c. 11. the plaintiff may have a *scire facias* against the executors, and proceed to judgment, which he cannot have in another court: and by this means he would be deprived of the effect of his judgment, which would be unreasonable. *Salk.* 352. So where an action was brought in the sheriff's court of London against two partners, and one of them brought a *habeas corpus*, and put in bail for himself only, a *procedendo* was granted; for otherwise the plaintiff would have been disabled from going on in either court. 1 *Stra.* 527.

If an indictment for felony is removed into K. B. from an inferior court in order to issue process of outlawry upon it, and the party accused comes in, the Court of K. B. will award a *procedendo* to carry the record back. 5 *T. R.* 478.

PROCEDENDO ON AID PRAYER. If a man pray in aid of the king, in a real action, and aid be granted; it shall be awarded that he sue to the king in Chancery, and the justices in the Common Pleas shall stay until the writ of *procedendo de loquell* come to them; and if it appear to the judges by pleading, or showing of the party, that the king hath interest in the land, or shall lose rent, &c. there the court ought to say until they have from the king a *procedendo in loquell*: and then they may proceed in the plea, until they come to give judgment: when the justices ought not to proceed to judgment, without a writ for that purpose. So in a personal action, if defendant pray in aid of the king, the judges are not to proceed till they receive a *procedendo in loquell*. And though they may then proceed and try the issue joined, they shall not give judgment until a writ comes to proceed to judgment. *New Nat. Brev.* 342.

PROCEDENDO AD JUDICIUM. A remedial writ in case of refusal or neglect of justice, which issues out of the Court of Chancery, where judges of any subordinate court do delay the parties; for that they will not give judgment, either on the one side or the other, when they ought so to do. In this case a writ of *procedendo* shall be awarded, commanding them, in the king's name, to proceed to judgment; but without specifying any particular judgment: for that if errors may be set aside in the course of appeal, or by writ of error, or false judgment: and upon further neglect or refusal, the judges of the inferior court may be punished for their contempt by writ of attachment, returnable in the Court of King's Bench or Common Pleas. 3 *Comm.* c. 7; *F. N. B.* 153, 154, 240.

If a verdict passed for the plaintiff in an assize of novel disseisin before the justices of assize, and before they gave judgment by a new commission, new justices were made, the plaintiff in assize might sue forth a *certiorari*, directed to the other justices, to remove the record before the new justices; and another writ to the new justices to receive and inspect the record, and then proceed to judgment, &c. *New Nat. Brev.* 342, 343.

Where the authority of commissioners of *oyer and terminer*, &c. or of justices of the peace, is suspended by writ of *super-readers*, their power may be restored by a writ of *procedendo*. *Regul.* 124; 12 *Ass.* 21; *H. P. C.* 162.

PROCESS,

Processus, à procedendo ab initio usque ad finem.] Is so called, because it proceeds or goes out, upon former matter, either original or judicial; and hath two significations:

First, It is largely taken for all the proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end. Secondly, That is termed the process by which a man is called into any temporal court, because it is the beginning or principal part thereof, by which the rest is directed; or, taken strictly, it is the proceeding, after the original, before judgment. *Britton*, 138; *Lamb. lib.* 4; *Crompt.* 133; 8 *Rep.* 157.

I. Of Process in Civil Cases.

II. In Criminal Cases.

I. BLACKSTONE considers process in civil cases as the means of compelling the defendant to appear in court. This is sometimes called *original Process*, being founded upon the original writ (now abolished in *personal* actions, *see post*); and also to distinguish it from *mesne* or intermediate process, which issues, pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses, and the like. *Finch.* L. 436. *Meane* process is sometimes put in contradistinction to final process, or process of execution; and then it signifies all such process as intervenes between the beginning and end of a suit. 3 *Comm.* c. 19.

Before the 2 Wm. 4. c. 39. the means of commencing personal actions in the Court of King's Bench, conformable to its jurisdiction, were, first, by original writ, which was three-fold: 1. Against common persons: 2. Against peers of the realm, and members of the House of Commons: 3. Against corporations and hundredors:—Secondly, by bill of Middlesex, or *latitat*: Thirdly, by attachment of privilege, at the suit of attorneys and officers of the court: and, Fourthly, by bill, which was of three kinds:—1. Against members of the House of Commons: 2. Against attorneys and officers of the court: 3. Against prisoners in custody of the sheriff, or marshal of the King's Bench prison.

In the Common Pleas the means of commencing personal actions were, first, by original writ, issuing out of Chancery; which was either a special original, adapted to the nature of the action, or a common original, in *trespass quare clausum fregit*. The former, though it might have been had in any case, was only necessary, in the first instance, against peers, corporations, and hundredors; the latter, not requiring personal service, was sometimes used, when the defendant kept out of the way, so that he could not be arrested, or personally served with process: Secondly, by *capias quare clausum fregit*, founded on a supposed original, which was the common mode of commencing actions in that court, and answered to the bill of Middlesex, or *latitat* in the King's Bench: Thirdly, by attachment of privilege, at the suit of attorneys and officers of the court: Fourthly, by bill, which was two-fold: 1. Against attorneys and officers: and, 2. Against members of the House of Commons. If a man were in the Fleet, it seems that a plaintiff might have formerly had a *bill of debt* against him, in the same manner as in the King's Bench against a man in the custody of the marshal. In practice, actions against prisoners in custody of the warden of the Fleet, were commenced in the same manner as those against other persons by original writ.

In the Exchequer of Pleas, the means of commencing personal actions were, first, by *subpoena ad respondendum*, which was a process directed to the defendant, analogous to the subpoena in Chancery, or on the equity side of the Exchequer: Secondly, by *venire facias ad respondendum*, which was in the nature of an original writ, and was the process used at common law against persons having privilege of parliament: Thirdly, by *quo minus capias*, which answered to the bill of Middlesex or *latitat* in the King's Bench, and *capias quare clausum fregit* in the Common Pleas: Fourthly, by *venire facias* or *capias* of privilege, at the suit of attorneys and officers of the court: and, Lastly, by bill, which was three-fold: 1. Against attorneys and officers: 2. Against members of the House of Commons, on the *stat.* 12 & 13 Wm. 3. c. 3. § 2: and

3. Against prisoners in custody of the sheriff, &c. or warden of the Fleet.

The process formerly used for the commencement of personal actions in his majesty's superior courts of law at Westminster having been found, by reason of its great variety and multiplicity, very inconvenient in practice, was abolished, and other writs substituted in lieu thereof, by the 2 Wm. 4. c. 39. intitled "An Act for Uniformity of Process in Personal Actions in his Majesty's Courts of Law at Westminster." The writs authorized by that statute, and which are now used for the commencement of personal actions in any of the said courts, in cases to which such writs are applicable, are—

1. A writ of *summons*, which is of two kinds: First, In ordinary cases, where the action is not of a bailable nature, or it is not intended to hold the defendant to special bail: Secondly, Against members of parliament, to enforce the provisions of the 6 Geo. 4. c. 16. § 10.

2. A writ of *capias*, when the defendant is at large, or in custody of the sheriff, &c., and it is intended to hold him to special bail.

3. A writ of *detainer*, when the defendant is in custody of the marshal of the King's Bench, or warden of the Fleet prison, and it is intended to detain him in such custody.

The foregoing being declared by the statute to be the only writs for the commencement of personal actions in any of the courts aforesaid, in the cases to which such writs are applicable, original writs are consequently abolished in personal actions against peers, corporations, and hundredors, as well as against common persons; as is also the mode of commencing such actions by bill against members of the House of Commons, attorneys and officers of the courts, and prisoners in the custody of the marshal or sheriff, &c.; and by attachment, or *capias* of privilege, at the suits of attorneys and officers of the courts, in cases to which the writs authorized by the statute are applicable; and there is of course an end, in such cases, to the distinction between the proceedings by original writ and by bill. It should be observed, however, that this statute, being confined to personal actions, did not apply to such as were purely real, as the writ of right, *formedon*, &c.; or to mixed actions, as *dower unde nihil habet*, *quare impedit*, *ejectment*, *waste*, &c. But by the 3 & 4 Wm. 4. c. 2. § 36. all real and mixed actions are abolished, except the writ of right of *dower*, writ of *dower unde nihil habet*, *quare impedit*, and *ejectment*. These excepted actions, however, may still be commenced by original writ, and the action of *ejectment* may be brought, as before the statute, either by original writ in the King's Bench or Common Pleas, or by bill in the King's Bench or Exchequer of Pleas. The action of *replevin* also, which is a personal action, and other personal actions, commenced in inferior courts, and removed from thence into superior ones, do not seem to be within the statute; for besides that these actions are not commenced in any of the superior courts of law at Westminster, there is a clause in the act (§ 19.) that "nothing therein contained shall extend to any cause removed into either of the said courts, by writ of *pone*, *certiorari*, *recordare facias loquelam*, *habeas corpus*, or otherwise." The king, not being named in this statute, is not bound thereby, and consequently may proceed by *scire facias*, which is a judicial writ, issuing out of and under the seal of the Court of Exchequer, for the recovery of a debt due to him on bond, recognizance, or judgment, &c.; or found by inquisition on an outlawry, or extent; or by an original writ of *scire facias*, to repeal letters-patent. And a subject is not prohibited by the statute from the suing out a *scire facias*, which is, for some purposes, considered as a personal action to obtain execution on a judgment or recognizance; or a writ of error, which is an original writ for reversing a judgment.

The writs of *summons* and *capias*, it will be observed, are only *primary*, or writs taken out, in the first instance, to compel the defendant to appear, or put in and perfect special

bail to the action. But besides these, and consequent upon them, other auxiliary writs are authorized by the statute to be issued for the same purposes.

These writs are, 1. The writ of *distringas*, which issues where the defendant has not been personally served with the writ of *summons*, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do without some more efficacious process. 2. The writ of *alias* or *pluries summons*, or *capias*, for continuing the cause, if the defendant has not been served therewith, or arrested thereon. 3. The writs of *exigi facias*, and proclamation, &c. for outlawing or waiving the defendant, upon the return of *non est inventus* to a writ of *capias*, or of *non est inventus* and *nulla bona* to a writ of *distringas*.

When the writ is to be served, it is said to be serviceable; and when the defendant is to be arrested thereon, it is of a bailable nature. See further, *Tidd's New Practice*.

In real actions a *summons*, which is a warning to appear in court at the return of the original writ, is given to the defendant by two of the sheriff's messengers, called *summoners*, either in person, or left at his house or land. *Finch. L. 436*. This warning on the land is given, in real actions, by erecting a white stick or wand on the defendant's grounds. *Dalt. Sher. c. 31*. And by the 31 Eliz. c. 3. the notice must also be proclaimed on some Sunday before the door of the parish church.

From the foregoing it appears that process is only meant to bring the defendant into court, in order to contest the suit, and abide the determination of the law. When he appears, then follow the pleadings, &c. between the parties. See that title.

As to the language of the process and records of law, see *Pleading, III.*; and for further matter, explanatory of the several sorts of writs and processes, various apposite titles throughout the whole of this work.

Original process to call persons into court, &c. must be in the name of the king; and if it issue from the court of King's Bench, it ought to be under the *teste* of the chief justice, or of the senior judge of the court, if there be no chief justice; and if it issueth from any other court, it is to be under the *teste* of the first in commission, &c. *Dalt. Ch. 132*; *Finch. 436*; *Cro. Car. 393*.

If process is awarded out of a court which hath not jurisdiction of the principal cause, it is *coram non judice* and void; and the sheriff executing it will be a trespasser. 2 Leon. 89.

II. THERE is no need of process on an indictment, &c. where the defendant is present in court; but if he hath fled, or secretes himself, in capital cases, or hath not, in smaller misdemeanors, been bound over to appear at the assizes or sessions, still an indictment may be preferred against him in his absence; since, were he present, he could not be heard before the grand jury against it. And, if it be found, then process must issue to bring him into court; for the indictment cannot be tried unless he personally appears; according to the rule of equity in all cases, and the express provision of the 28 Edw. 3. c. 3. in capital ones, that no man shall be put to death without being brought to answer by due process of law.

No process shall regularly issue in the king's name, and by his writ to apprehend a felon or other malefactor, unless there be an indictment or matter of record in the court, upon which the writ issues. 1 Hale's Hist. P. C. 575.

The proper process on an indictment for any petty misdemeanor, or on a penal statute, is a writ of *conne facias*, which is in the nature of a *summons* to cause the party to appear. And if by the return to such writ it appears that the party hath lands in the county whereby he may be distrained, then a distress infinite shall be issued from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick, then (upon his non-appearance) a

writ of *capias* shall issue, which commands the sheriff to take his body, and have him at the next assizes; and if he cannot be taken upon the first *capias*, a second and a third shall issue, called an *alias* and a *pluries capias*. But on indictments for treason or felony, a *capias* is the first process; and for treason or homicide, only one shall be allowed to issue, or two in the case of other felonies, by 25 Edw. 3. c. 14, though the usage is to issue only one in any felony, the provisions of this statute being in most cases found impracticable. 2 Hale's P. C. 195. And so in the case of misdemeanors, it is now the usual practice for any judge of the Court of King's Bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant. But if he absconds, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary. For in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the *exigent* in order to his outlawry, that is, he shall be exacted, proclaimed, or required to surrender at five county courts; and if he be returned *quinto cructis*, and does not appear at the fifth exaction or requisition, then he is adjudged to be outlawed, or put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise. See 8 Hen. 6. c. 10; and tit. Outlawry, III.

The punishment for outlawries upon indictments for misdemeanors, is the same as for outlawries upon civil actions (as to which, and the previous process by writs of *capias*, *exigi facias*, and proclamation, see title Outlawry), viz. forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country. 2 Hale's P. C. 205; 4 T. R. 521. His life is, however, still under the protection of the law, so that though anciently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf, by any one that should meet him; because having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him; yet now, to avoid such inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully; but in so doing is guilty of murder, unless it happens in the endeavour to apprehend him. 1 Hale's P. C. 497; Bracton, fol. 125. For any person may arrest an outlaw on a criminal prosecution, either of his own head, or by writ of warrant of *capias ulagatum*, in order to bring him to execution. But such outlawry may be frequently reversed by writ of error; the proceedings therein being (as it is fit they should be) exceedingly nice and circumstantial; and if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed upon which reversal the party accused is admitted to plead to, and defend himself against, the indictment. See further, Outlawry, V.

The above is the process to bring in the offender after indictment found; during which stage of the prosecution it is that writs of *certiorari facias* are usually had; though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the Court of King's Bench, which is the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of these four purposes, either, 1, to consider and determine the validity of criminal appeals or indictments, and the proceedings thereon, and to quash or confirm them as there is cause; or, 2, where it is surmised that a partial or insufficient trial will move, in order to have the prisoner or defendant tried at the bar of the Court of King's Bench, or before the justices of Nisi Prius; or 3, it is so removed, in order to plead the king's pardon there; or 4, to issue process of outlawry

against the offender in those counties or places where the process of the inferior judges will not reach him. 2 Hale's P. C. 210. Such writ of *certiorari*, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal, unless the Court of King's Bench remands the record to the court below, to be there tried and determined. A *certiorari* may be granted at the instance of either the prosecutor or the defendant; the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the justices of gaol delivery, or after issue joined, or confession of the fact, in any of the courts below. 4 Comm. c. 24. See *Certiorari*.

At this stage of prosecution also it is that indictments found by the grand jury against a peer must in consequence of a writ of *certiorari* be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain; and that in places of exclusive jurisdiction, as the two universities, indictments must be delivered (upon challenge and claim of cognizance) to the courts therein established by charter, and confirmed by act of parliament, to be there respectively tried and determined. 4 Comm. c. 24.

Prior to the 48 Geo. 3. c. 58, it was the practice for any judge of the Court of King's Bench, upon a certificate of any indictment found, to award a writ of *capias* immediately, in order to bring in the defendant; 4 Comm. 319; but by that statute it is enacted, that when any person is charged with any offence (not being treason or felony) for which he might be prosecuted by indictment or information in the Court of King's Bench upon affidavit thereof made, or on certificate of indictment or information being filed, any judge of the court may issue his warrant to apprehend the party, who shall be thereupon held to bail to answer the charge, or on failure of bail shall be committed; and if any person in custody on any such charge for want of bail, shall not plead within eight days after copy of the indictment or information, and notice to plead, are delivered at the gaol, the prosecutor may enter the plea of not guilty, and proceed to trial; and the party may be convicted or acquitted as if he had actually appeared. By the same act the powers given by the act 13 Geo. 3. c. 31. and 45 Geo. 3. c. 92. for executing in Scotland the warrants of justices of peace in England, is extended to warrants issued by any judge of the Court of King's Bench, as also the Courts of Great Sessions in Wales, and any judge ofoyer and terminer, or other person having authority to issue such warrant. See also the acts 44 Geo. 3. c. 92., 45 Geo. 3. c. 92. and 54 Geo. 3. c. 186. as to persons committing an offence in one part of the United Kingdom, and who shall go into, reside, or be in any other part of the United Kingdom; and see titles *Arrest*, *Justices*, &c.

Obstructing the execution of lawful process, is an offence against public justice, of a very high and presumptuous nature, but more particularly so when it is an obstruction of an arrest upon criminal process. And it hath been holden, that the party opposing such arrest becomes thereby *particeps criminis*, that is, an accessory in felony, and a principal in treason. 4 Comm. c. 10. p. 129. See *Accessory*, *Arrest*, *Misdemeanor*, *Privilege*, &c.

PROCESSION. In cathedral and conventual churches, the members had their stated processions, wherein they walked in their most ornamental habits, with music, singing hymns, and other suitable solemnity; and in every parish there was a customary annual procession of the parish priest, the patron of the church, with the chief flag or holy banner, and the other parishioners, to take a circuit round the limits of the parish or manor, and pray for a blessing on the fruits of the earth; to which we owe our present custom of perambulation, which in most places is still called *processioning* and *going in procession*, though we have lost the order and

devotion, as well as pomp and superstition of it. See *Perambulation*.

PROCESSUM CONTINUANDO. A writ for the continuance of process after the death of the chief justice or other justices in the commission of oyer and terminer. *Reg. Orig.* 128.

PROCHEIN AMY, *proximus amicus*.] The next friend or next of kin to a child in his nonage, who in that respect is allowed to deal for the infant in the management of his affairs; as to be his guardian if he holds lands in soccage, and in the redress of any wrong done him. See *West. 1. 3 Edw. 1. c. 47*; *West. 2. 13 Edw. 2. st. 1. c. 15*; *2 Inst.* 261; and see *Infant, V.*

Prochein amy is commonly taken for guardian in soccage; but otherwise it is he who appears in court for an infant who sues any action, and aids the infant in pursuit of his action; for to sue, an infant may not make an attorney, but the court will admit the next friend of the infant plaintiff; and a guardian for an infant defendant.

If no guardian is appointed by the father, &c. of an infant, the course of B. R. hath been used to allow one of the officers of the court to be *prochein amy* to the infant to sue. *Terms de Ley*; *2 Ld. Abr.* 52.

Prochein amy was never before the statute *West. 1.* and was appointed in case of necessity, where an infant was to sue his guardian, or the guardian would not sue for him. *2 Nels. Abr.* 997.

The plaintiff infant may sue by guardian, or by *prochein amy*; and if the admission is to sue by guardian when it should be by *prochein amy*, it will be well enough, there being many precedents both ways; but if he is sued, it must be by guardian. *Cro. Car.* 86, 115; *Hut.* 92.

If an infant were enloigned or disturbed by his guardian or any other, so that he could not bring assize, his *prochein amy* should be admitted. *3 Edw. 1. c. 47*. So generally, by *13 Edw. 1. c. 15*. Since these statutes, the common rule seems to have been that the infant shall sue by *prochein amy*, and defendant by guardian.

To constitute a *prochein amy* (or guardian), the person intended, who is usually some near relation, goes with the infant before a judge, at his chambers; or else a petition is presented to the judge on behalf of the infant, stating the nature of the action; or if he is defendant, that he is advised and believes he has a good defence thereto; and praying in respect of his infancy, that the person intended may be assigned him as his *prochein amy* or guardian, to prosecute or defend the action. This petition should be accompanied with an agreement, signifying the assent of the intended *prochein amy* or guardian; and an affidavit made by some third person, that the petition and agreement were duly signed. On one or other of these grounds, the judge will grant his fiat, upon which a rule or order is drawn up, with the clerk of the rules, for the admission of the *prochein amy* or guardian; which admission is either special, to prosecute or defend a particular action, or general, to prosecute or defend all actions whatsoever; though it is said, that by the practice of the Court of King's Bench, a special admission of a guardian to appear in one cause will serve for others. *1 Stra.* 304, 305.

But this is now altered by a rule of H. T. *2 Wm. 4.* which declares that a special admission of *prochein amy* or guardian to prosecute or defend for an infant shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified. See further, *Tidd's Prac.*

PROCHEIN AVOIDANCE. A power to present a minister to a church when it shall become void; as where one hath presented a clerk to a church, and then grants the next avoidance to another, &c. See *Admowson, Avoidance*.

PROCLAMATION, *proclamatio*.] A notice publicly given of any thing, whereof the king thinks fit to advertise his subjects; and so it is used in *7 Rich. 2. c. 6*. See *King, V. 3.*

The king's proclamation, reciting that it had been represented that certain outrages had been committed in different parts of certain counties, and offering a reward for the discovery and apprehension of offenders, is admissible evidence to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed in those parts. *4 M. & S.* 532.

PROCLAMATION OF COURTS, is used particularly in the beginning or calling of a court, and at the discharge or adjourning thereof, for the attendance of persons and despatch of business.

Before a parliament was dissolved, it was anciently held, that public proclamation was to be made, that if any person had any petition, he should come in and be heard. *Lee Constitut.* 156. See *Parliament*.

Proclamation is made in courts baron for persons to come in and claim vacant copyholds, of which the tenants died seized since the last courts; and the lord may seize a copyhold, if the heir come not in to be admitted on three proclamations, &c. *1 Lev.* 63. See *Copyhold*.

PROCLAMATION OF EXIGENTS. On awarding an exigent, in order to outlawry, a writ of proclamation issues to the sheriff of the county where the party dwells, to make three proclamations for the defendant to yield himself, or be outlawed. See *Outlawry, III.*

PROCLAMATION OF A FINE. Where any fine of land was passed, proclamation was solemnly made thereof in the Court of Common Pleas where levied, after engrossing it, and transcripts were also sent to the justice of assize and justices of the peace of the county in which the lands lay, to be openly proclaimed there. *1 Rich. 3. c. 7*. See *Fine of Lands, V.*

PROCLAMATION OF NUISANCES. Proclamation is to be made against nuisances, and for the removal of them, &c. *12 Rich. 2. c. 13*. See *Nuisance*.

PROCLAMATION OF REBELLION, is a writ whereby a man not appearing upon a subpoena, or an attachment in the Chancery, is reputed and declared a rebel, if he render not himself by a day assigned. See *Chancery, Commission of Rebellion*.

PROCLAMATION OF RECUSANTS. A proclamation whereby recusants were formerly convicted, on non-appearance at the assizes. See *29 Eliz. c. 6*; *3 Jac. 1. c. 4, 5*.

PRO CONFESSO. Where a bill is exhibited in Chancery, to which the defendant appears, and is afterwards in contempt for not answering, the matter contained in the bill shall be taken as if it were confessed by defendant. *Terms de Ley*.

For the former practice with respect to bills taken *pro confesso*, and the amendments introduced in it by the *1 Wm. 4. c. 36*, see *Equity*.

PROCTOR, *procurator*.] He who undertakes to manage another man's cause in any court of civil or ecclesiastical law for his fee: *Qui aliena negotia gerenda suscipit*.

Proctors are officers established to represent in judgment the parties who empower them (by warrant under their hands called a *proxy*) to appear for them to explain their rights, to manage and instruct their cause, and to demand judgment. *2 Dom.* 583.

A proctor is not to act as a justice of peace. *5 Geo. 2. c. 18*. See *Justices of the Peace, III.*

For the regulations as to the admission and acting of proctors in ecclesiastical courts in England, see *53 Geo. 3. c. 127. § 8—11*; in Ireland, *54 Geo. 3. c. 68. § 9—13*.

The ecclesiastical court cannot entertain a suit for proctors' fees, since they are a temporal duty, for which an action may be maintained in the temporal courts. *1 Ld. Raym.* 709. *S. C.* *1 Salk.* 333; *4 Mod.* 255.

PROCTORS OF THE CLERGY, *procuratores cleri*.] They who are chosen and appointed to appear for cathedral or other collegiate churches; as also for the common clergy of every

doese to sit in the convocation-house in the time of parliament.

On every new parliament the king directeth his writ to the archbishop of each province for the summoning of all bishops, deans, archdeacons, &c. to the convocation, and generally of all the clergy of his province, assigning them the time and place in the writ; then the archbishop of Canterbury, on his writ received, according to custom directs his letters to the bishop of London, as his provincial dean, first citing him personally, and then willing him to cite in like manner all the bishops, &c. and generally all the clergy of his province, to the place, and against the day prefixed in the writ; but directeth withal that one proctor be sent for every cathedral or collegiate church, and two proctors for the body of the inferior clergy of each diocese; and by virtue of these letters authentically sealed, the bishop of London directs his like letters severally to the bishop of every diocese of the province, citing them in like sort, and willing them not only to appear, but also to admonish the deans and archdeacons personally to appear; and the cathedral and collegiate churches, and the common clergy of the diocese, to send their proctors to the place at the day appointed; and also willeth them to certify to the archbishop the names of every person so warned by them, in a schedule annexed to their letter certificatory; then the bishops proceed accordingly, and the cathedral and collegiate churches, and the body of the clergy, make choice of their proctor; which being done and certified to the bishop, he returneth all at the day. *Cowell. See Convocation.*

PROCONSULS. A name applied to justices in eyre, or *justitarii errantes*, in England. *Cowell.*

PROCURATIONS, procuraciones. Certain sums of money which parish priests pay yearly to the bishop or archdeacon, *ratione visitationis*: formerly the visitor demanded a proportion of meat and drink for his refreshment, when he came abroad to do his duty and examine the state of the church; afterwards these were turned into annual payments of a certain sum, which is called a procuration, being so much given to the visitor, *ad procurandum cibum et potum*. And complaints were often made of the excessive charges of the procurations, which were prohibited by several councils and bulls; and that of Clement IV. is very particular, wherein mention is made that the archdeacon of Richmond, visiting the diocese, travelled with one hundred and three horses, twenty one dogs, and three larks, to the great oppression of religious houses, &c.

Procurations are due to the person having of common right; and although originally due by reason of visitation only, yet the same may be due without actual visitation. *Co. l. 97.*

A libel was brought in the spiritual court for procurations by the archdeacon of York, setting forth, that for ten or twenty years, &c. there had been due and paid to him, so much yearly by a parson, and his predecessors, who suggested for a prohibition that a duty had been payable, but denied the prescription; and that the ecclesiastical court cannot try prescriptions; but it was adjudged that procurations are payable of common right, as tithes are, and no action will lie for the same at common law; if he had denied the quantum, then a prohibition might go. *Rayn. 360. See 34 & 35 Hec. 8. c. 19.*

These are also called *procuras*, and it is said there are three sorts of procurations or proxies, *ratione visitationis, ratione tithis et parochie*, and that the first is of ecclesiastical cognizance, but the two last are triable at law. *Hardr. 180.*

PROCURATOR. One who hath a charge committed to him by any person; in which general signification it hath been applied to a visitor or lieutenant, who acts instead of another; and we read of *procurator regis*, and *procurator republice*, which is a public magistrate; also proxies of lords in parliament are in our law books called *procuratores*; the bishops are sometimes termed *procuratores ecclesiarum*;

and the advocates of religious houses, who were to solicit the interests and plead the causes of the societies, were denominated *procuratores monasterii*; and from this word comes the common word *proctor*. It is likewise used for him who gathers the fruits of a benefice for another man; and procuracy is used in 3 Rich. 2. c. 3. for the writing or instrument whereby he is authorized.

PROCURATORES ECCLESIE PAROCHIALIS. The churchwardens, so called because they were to act as proxies and representatives of the church, for the true honour and interest of it. *Paroch. Antiq. 562.*

PROCURATORIUM. The procuratory or instrument by which any person or community did constitute or delegate their proctor or proctors to represent them in any judicial court or cause.

PROCURATORY OF RESIGNATION. A term in the law of Scotland, by which the vassal authorizes the fee to be returned to his superior, either to remain the property of the superior, in which case it is said to be a resignation *ad remanentiam*, or for the purpose of the superior's giving out the fee to a new vassal, or to the former vassal, and a new series of heirs; this is termed a resignation in favour. These are analogous to the surrenders of copyholds in England. See that title, and tit. *Tenures*.

PRODES HOMINES. A title often given in our old books to the barons of the realm, or other military tenants, who were summoned to the king's council; *discreti et fideles (probi) homines*, who, according to their prudence and knowledge, were to give their counsel and advice.

PRODITORIE, treasonably. The technical word in indictments for treason when indictments were in Latin.

PROFANENESS, quasi procul à fano. A disrespect to the name of God, and to things and persons consecrated to him. *Wood's Inst. 396.*

Profaneness is punishable by statute; as for reviling the sacrament of the Lord's Supper, profanely using the name of God in plays, &c.; profaning the Lord's Day; cursing and swearing, &c. See 1 Edw. 6. c. 1; 1 Eliz. c. 1; 3 Jac. 1. c. 21; 1 Car. 1. c. 1; and tits. *Blasphemy, Swearing, Sunday*.

PROFER, profum, vel proferum, from the French *proferer*, i. e. *producere*. The time appointed for the accounts of officers in the exchequer, which was twice in the year. 51 Hen. 3. stat. 5.

As to the profers of sheriffs, though the certain debt of the sheriff could not be known before the finishing of his accounts; yet it seems there was anciently an estimate made of what his constant charge of the annual revenue amounted to, according to a medium, which was paid into the exchequer at the return of the writ of summons of the pipe; and the sums so paid were called *profer vicecomitis*; but although these profers were paid, if on the conclusion of the sheriff's accounts, and after allowances and discharges had by him, it appeared that there was a surplussage, or that he was charged with more than he could receive, he had his profers paid or allowed him again. *Hale's Sher. Account, 32.*

Now by the 3 & 4 Wm. 4. c. 99. § 2. it is no longer necessary for sheriffs to make or pay profers; and by § 48. their accounts are hereafter to be audited by the commissioners for auditing the public accounts. See further, tit. *Sheriff*.

There is a writ *de attornato vicecomitis pro profro faciendo*. *Reg. Orig. 139.* And we read of profers in the 32 Hen. 8. c. 21, in which place *profer* signifies the offer and endeavour to proceed in an action. See *Brit. c. 28; Fleta, lib. 1. c. 38.*

PROFER THE HALF-MARK. To offer or tender the half-mark. See *Half-Mark*.

PROFERT IN CURIA. [See *Produces in Court*.] Where the plaintiff in an action declares on a deed, or the defendant pleads a deed, he must do it with a *profert in curia*, to the end that the other party may at his own charges have a copy of it; and until then he is not obliged to answer it. 2 *Lil. Abr.*

382. And if a man pleads by virtue of an indenture, which is lost, on affidavit made thereof the court will compel the plaintiff to show the counterpart, that the defendant may plead thereto. *Cro. Jac.* 429.

The Court of King's Bench held, that a deed may be pleaded as lost by time and accident without profert; *3 T. R.* 151; or destroyed. *3 T. R.* 153, n. But if it appear by the record that defendant had oyer of a copy only, it is error. *3 T. R.* 153, n.

Where, in setting forth a conveyance, it was stated that a release was cancelled "by the seal of the releasor being taken off and destroyed, or lost," with a profert of the residue of the deed, the Court of Common Pleas held this to be good pleading. *2 K. B.* 259.

When he who is party or privy in estate or interest, or who justifies in the right of him who is party or privy, pleads a deed, notwithstanding the party privy claims but part of the original estate, yet he must show the original deed. But where a man is a stranger to a deed, and claims nothing in it, &c. there he may plead the patent or deed, without a *profert in curia*. *10 Rep.* 92, 93.

A man may claim under a deed of uses, without showing it; because the deed doth not belong to him (though he claims by it), but to the covenantees, and he hath no means to obtain it; and for that it is an estate executed by the statute of uses, so as the party is in by law, like to tenant in dower, or by statute, &c. who may have a rent-charge extended, and need not show the deed. *Cro. Car.* 442. And in things executed, or estates determined, there need not be any *profert in curia*. *3 Lev.* 204.

If profert be made, nothing but the production of the deed will suffice. *4 East*, 585. But no profert need be made of a deed which is only inducement to the action. *8 T. R.* 571.

No advantage or exceptions shall be taken for want of a *profert in curia*; but the court shall give judgment according to the very right of the cause, without regarding any such omission and defect, except the same be specially and particularly set down, and shown for cause of demurrer. *4 & 5 Ann.* c. 16. See *Amendment*; and also *Deed*, IV.; *Monstrans de Fait*; *Oyer*, &c.

PROFESSION, *professio*.] Was used particularly for the entering into any religious order, &c. This entering into religion, whereby a man was shut up from all the common offices of life, was termed a civil death. See *1 Comm.* 132.

PROFITS. A devise of the profits of lands is a devise of the land itself. *Dyer*, 210.

A husband deviseth the profits of his lands to his wife until his son came of age; this was held to be a devise of the lands until that time; though if the lands were devised to the son, and that his mother should take the profits of it until he came of age, &c., this would give the mother only an authority, not an interest. *2 Leon.* 221.

By devise of profits the lands usually pass, unless there are other words to show the intention of the testator to be otherwise. *Moor*, 753, 758; *2 Nels. Abr.* 1051. See *Wills*.

PROFITS OF COURTS. The profits arising from the king's ordinary courts of justice make a branch of his revenue. And these consist not only in fines imposed upon offenders, forfeitures of recognizances and amercements levied on defaulters; but also in certain fees due to the crown in a variety of legal matters; as for setting the great seal to charters, original writs, and other forensic proceedings, and for permitting fines to be levied of lands, in order to bar entails, or otherwise to insure titles. As none of these can be done without the immediate intervention of the king, by himself or his officers, the law allows him certain perquisites and profits as a recompense for the trouble he undertakes for the public. These in process of time have been almost all granted out to private persons, or else appropriated to certain particular uses. So that, though our law proceedings are still loaded with their payment, very little of them is now returned

into the king's exchequer, for part of whose royal maintenance they were originally intended. All future grants of them, however, by the *1 Ann. st.* 2. c. 7. are to endure for no longer time than the life of the prince who grants them. *4 Comm.* c. 8. p. 289.

PROHIBITION,

PROHIBITIO.] A writ to forbid any court to proceed in any cause there depending, on suggestion that the cognizance thereof belongeth not to the court. *F. N. B.* 39. But it is now most usually taken for that writ which lieth for one who is impleaded in the court-christian, for a cause belonging to the temporal jurisdiction, or the consueance of the king's court; whereby as well the party and his counsel, as the judge himself, and the registrar, are forbidden to proceed any further in that cause. *Cowell*.

The writ of prohibition is the remedy provided by the common law, against the encroachment of jurisdiction; where one is called *coram non judice*, to answer in a court that has no legal cognizance of a cause; which is enumerated by Blackstone among the grievances cognizable by the courts of common law. See *3 Comm.* cap. 7.

As all external jurisdiction, whether ecclesiastical or civil, is derived from the crown, and the administration of justice is committed to a variety of courts; hence it hath been the care of the crown, that these courts keep within the limits and bounds of the several jurisdictions prescribed them; for this purpose the writ of prohibition was framed; which issues out of the superior court of common law to restrain inferior courts, whether such courts be temporal, ecclesiastical, maritime, military, &c. on a suggestion that the cognizance of the matter belongs not to such courts, and in case they exceed their jurisdiction, the officer who executes the sentence, and in some case the judge who gives it, are punishable in such superior courts, sometimes at the suit of the king, sometimes at the suit of the party, sometimes at the suit of both, according to the variety of the case. *2 Inst.* 601; *F. N. B.* 40; *12 Co.* 6; *1 And.* 279; *2 Jon.* 218; *Skin.* 628.

The reason of prohibitions in general is, that they preserve the right of the king's crown and courts, and the quiet of the subject; that it is the wisdom and policy of the law to suppose both best preserved when every thing runs in its right channel, according to the original jurisdiction of every court; as by the same reason that one might be allowed to encroach, another might; which would produce nothing but confusion in the administration of justice. *Show. Par. Ca.* t. 3.

So that prohibitions do not import that the ecclesiastical or the inferior temporal courts are *alia* than the king's courts, but signify that the cause is drawn *ad aliud examen* than it ought to be; therefore it is always said in all prohibitions, (be the court ecclesiastical or temporal to which it is awarded,) that the cause is drawn *ad aliud examen contra coronam et dignitatem regiam*. *2 Inst.* 602; *1 Roll. Rep.* 252; *3 Bulst.* 120; *Palm.* 297.

A prohibition is a writ issuing properly out of the Court of King's Bench, being the king's prerogative writ; but, for the furtherance of justice, it may now also be had, in some cases, out of the courts of Chancery, Common Pleas, or Exchequer; see *post*, I. It is directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. This writ may issue either to inferior courts of common law; as to the courts of the counties palatine or principality of Wales, (but which latter courts are now abolished,) if they hold plea of land or other matters not lying within their respective franchises; to the county courts, or courts baron, where they attempt to hold plea of any matter of the value of 40s.; or it may be directed

to the courts christian, the university courts, the court of chivalry, or the Court of Admiralty, where they concern themselves with any matter not within their jurisdiction; as if the first should attempt to try the validity of a custom pleaded, or the latter a contract made, or to be executed, within this kingdom. Or if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they require two witnesses to prove the payment of a legacy, a release of tithes, or the like; in such cases also a prohibition will be awarded. For as the fact of signing a release or of actual payment is not properly a spiritual question, but only allowed to be decided in those courts, because incident or necessary to some original question clearly within their jurisdiction, it ought, therefore, where the two laws differ, to be decided, not according to the spiritual, but the temporal law; else the same question might be determined different ways, according to the court in which the suit is depending; an impropriety, which no wise government can or ought to endure, and which is therefore a ground of prohibition. And if either the judge or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it; and an action will lie against them, to repair the party injured in damages. 3 Comm. c. 7. p. 112, 113.

So long as the idea continued among the clergy, that the ecclesiastical state was wholly independent of the civil, great struggles were constantly maintained between the temporal courts and the spiritual, concerning the writs of prohibition, and the proper objects of it; even from the time of the constitutions of Clarendon, made in opposition to the claims of Archbishop Becket, in 10 Hen. 2. to the time of exhibiting certain articles of complaint to the king by Archbishop Bancroft in 3 Jac. 1. on behalf of the ecclesiastical courts, from which, and from the answers to them signed by all the judges of Westminster Hall, much may be collected concerning the reasons of granting and methods of proceeding upon prohibitions. See 2 Inst. 601-618.

- I. What Courts may grant a Prohibition; and whether the granting it be discretionary, or ex debito justitiæ.
- II. Who have a right to, and may demand, and join in a Prohibition.
- III. Of the Manner of obtaining a Prohibition; and the Decision of the Court thereon.
- IV. In what Cases it may be granted to inferior Temporal Courts or Jurisdictions; and at what Time.
- V. In what Cases to the Spiritual Courts; and at what Time.

I. The superior courts of Westminster, having a superintendency over all inferior courts, may in all cases of innovation, &c. award a prohibition; in this the power of the Court of B. R. has never been doubted, being the superior common law court in the kingdom. F. N. B. 53; 1 Inst. 71. Also the Court of Chancery may award a prohibition; which may issue as well in vacation as in term time, but such writ is returnable into B. R. or C. B. Bro. Prohibition, pl. 6; 4 Inst. 81; 1 P. Wms. 43, 476.

If one be sued in an inferior court for a matter out of the jurisdiction, the defendant may either have a prohibition from one of the common law courts of Westminster Hall; or in regard this may happen in vacation, when only the Chancery is open, he may move that court for a prohibition; but then it must appear by oath, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused; and if a prohibition has been granted out of Chancery *improvidè*, and without these circumstances attending it, the court will grant a *supersedeas* thereto. 1 P. Wms. 776.

As the jurisdiction of the Court of C. B. is founded on

original writs issuing out of Chancery, it hath been doubted, whether this court could, without writ or plea depending, award a prohibition; but this point has been determined, viz. that this court may on a suggestion grant prohibitions, to keep as well temporal as ecclesiastical courts within their jurisdiction, and that without any original writ or plea depending; the common law being, in these cases, a prohibition of itself, and standing instead of an original. Bro. Prohibition, pl. 6; Noy, 153; 12 Co. 58, 108; Bro. Consultation, pl. 3; 4 Inst. 99; 2 Brownl. 17.

Accordingly it hath been adjudged, that a prohibition ought to be granted by C. B. to the court of delegates, for suing there to avoid the institution of a clerk to a church in Lancashire, after induction; though the *quare impedit* for the church could not be brought in C. B., but only in the county of Lancaster; because the title of the advowson was not questioned by this prohibition, but the intrusion on the common law, of which this court has special care. Moor, 861; 2 Roll. Abr. 317; Hob. 15.

Formerly as to the courts of B. R. and C. B. this difference was made, That in the first of those courts a prohibition might be awarded on a bare surmise, without any suggestion on record; and such writ was only in nature of a commission prohibitory, which was discontinued by demise of the king; but that as to a prohibition issuing out of C. B. the suggestion must have been on record, therefore was considered as the suit of the party, and in which he might have been nonsuited, and was not discontinued by demise of the king. Noy, 77; Palm. 422; Latch. 114. Yet, if insisted on, a prohibition could not be moved for in B. R., till the suggestion were entered on the roll. And indeed it was the constant practice to enter the suggestion on the roll, and to leave a copy thereof with the clerk of the papers previous to the motion. 1 Salk. 130. But now see the recent statute, 1 Wm. 4. c. 21, post.

The Court of C. B. has no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possessions of his see: at least at the suit of an uninterested person. Query, if any court of common law has that power; and if the Court of Chancery has not? 1 Bos. & Pul. 105.

If the king's farmer, or copyholder of the king's manor, be sued in the ecclesiastical court for tithes, on a suggestion in the Court of Exchequer that he prescribes to pay a certain *modus* in lieu of tithes, he shall have a prohibition, and such *modus* shall be tried there. Palm. 523-5; Lane, 39; 1 Roll. Abr. 539.

It is laid down, that though a surmise be a matter of fact, and triable by a jury, yet it is in the discretion of the court to deny a prohibition, when it appears to them that the surmise is not true. Hob. 67.

But it hath been held, that awarding a prohibition is a matter discretionary; that is, from the circumstances of the case, the superior courts are at liberty to exercise a legal discretion therein; but not an arbitrary one in refusing prohibition, where in such like cases they have been granted, or where by law they ought to be granted. Winch. 78.

It hath been determined in the House of Lords, that no writ of error will lie on the refusal of a prohibition; but when a consultation is awarded, it is within an *ideo consideratum est*, and then a writ of error will lie. 1 Ld. Raym. 515.

If the master of a ship sues in the Admiralty for his wages, and a prohibition is moved for, on a suggestion that the contract was made on land, and the court is of opinion that a prohibition ought to be granted; in this case they will not compel the party to find special bail to the action in the court above. Salk. 33; Carth. 518; Cum. 74; 1 Ld. Raym. 576.

If there is judgment against a simonist, who by the assent of parties is to continue for a certain time on the benefice,

PROHIBITION, II.

and who at the expiration of the time refuses to remove, but commits waste, a prohibition to stay waste may be had by the patron, incumbent, or any other person, because that is the king's writ; and any one may pray prohibition for the king, and it is grantable *ex debito justitiæ*, and not in the discretion of the court. 1 *Sid.* 65; *Hob.* 247.

II. The king may sue for a prohibition, though the plea in the spiritual court be between two common persons; because the suit is in derogation of his crown and dignity. *F. N. B.* 40.

If the ecclesiastical court hold plea of any matter which belongs not to their jurisdiction, it has been already stated, that, on information thereof to the king's courts, a prohibition will issue. 2 *Inst.* 607. And if a man libels in the spiritual court for a matter which does not appertain to that court, but to the common law, as a matter of frank tenement; yet he himself, against his own suit, may pray a prohibition, and have it. 2 *Roll. Abr.* 312; 1 *Leon.* 130; *Goulds.* 149; 12 *Co.* 56.

So, where the plaintiff in the spiritual court brought a prohibition to stay his own suit there, for that he suing for tithes by virtue of a lease made by the vicar of A. for three years, the defendant claimed to be discharged of tithes by a former lease and composition by deed; and in this case it was held, that the plaintiff himself may have a prohibition to stay the suit; for the ecclesiastical judges are not to meddle with the trial of leases or real contracts, though they have jurisdiction of the original cause, (viz. the tithes); for the lease is in the realty, and is not merely accidental; and it makes no difference, that the plaintiff brings prohibition to stay his own suit; for if the temporal court has knowledge by any means, that the spiritual court meddles with temporal trials, a prohibition ought to be awarded. *Cro. Jac.* 351; 2 *Bulst.* 285; *Litt. Rep.* 20.

If a vicar sues a parishioner for tithes in the spiritual court, and the parson appropriate appears there *pro interesse suo*, and prays a prohibition, it shall be granted. 2 *Roll. Abr.* 312; *Cro. Eliz.* 251; *Keilw.* 110.

If lessee for years is sued in the spiritual court for tithes, he in reversion may have a prohibition. *Moor.* 915; *Cro. Eliz.* 55.

But no man is entitled to a prohibition, unless he is in danger of being injured by some suit actually depending; therefore, on a petition to the archbishop, or other ecclesiastical judge, no prohibition lies. *March.* 22, 45. A prohibition *quia timet* does not lie. *Allen.* 56.

And a defendant, cited in the ecclesiastical court, must appear before he can apply for a prohibition. 2 *D. P. C.* 528.

If several libels are exhibited against A. and B. in a matter in which the court hath not consueance, A. and B. cannot join in a prohibition; so if the griefs be several, as some books say. *Noy.* 131; 1 *Leon.* 286; *Cro. Car.* 129.

But where the vicar of A. libelled several persons severally for tithes, who joined in a prohibition, suggesting a *modus*; though the court held in this case that the prohibition was not regularly brought, being in all their names, when there were several libels; yet inasmuch as this was on a custom, and matter triable at common law, in which the ecclesiastical court was properly prohibited, though not in exact form, they refused to award a consultation; but directed that the parties should put in several declarations, as if there had been several prohibitions. *Yelv.* 128, 129; *Owen.* 13.

So if A. libels against B. and C. for defamation, and they sue a prohibition, they shall join in attachment on it; and it is no objection to say, that the defamation was several. 1 *Ld. Raym.* 127; and see 1 *Vent.* 266; *Raym.* 125; *Comb.* 448.

Where two or more are allowed to join in a prohibition, and one dies, the writ shall not abate; because nothing is to be recovered; they are only to be discharged. *Owen.* 13.

PROHIBITION, III.

III. The party aggrieved in the court below applies to the superior court, setting forth the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom; upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute, the plea.

But sometimes the point may be too nice and doubtful to be decided merely upon a motion: and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to declare in prohibition; that is, to prosecute an action, by filing a declaration against the other, upon a supposition or fiction (which is not traversable) that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if, upon demurrer and argument, the court shall finally be of opinion, that the matter suggested is a good and sufficient ground of prohibition on a point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior court, shall be prohibited from proceeding any farther. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the court above, and a writ of consultation shall be awarded; so called, because, upon deliberation and consultation had, the judges find the prohibition to be ill-founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined, in the inferior court. 3 *Comm. c.* 7; 2 *H. Black. Rep.* 533.

Formerly it was necessary to file a suggestion on record, setting forth the ground for prohibition, and to allege contempt in a declaration in prohibition filed before writ issued; but now by the 1 *Wm. 4. c.* 21. it is not necessary to file any such suggestion, but the application may be made on affidavits only; and in case the party applying shall be directed to declare in prohibition, before writ issued, such declaration shall be expressed to be on behalf of the party only, and not as heretofore on behalf of the party and of his majesty; and shall contain and set forth in a concise manner so much only of the proceeding in the court below as may be necessary to show the ground of the application, without alleging the delivery of a writ or any contempt; and shall conclude by praying, that a writ of prohibition may issue; to which declaration the party defendant may demur or plead such matters, by way of traverse or otherwise, as may be proper to show that the writ ought not to issue, and conclude by praying that such writ may not issue; and judgment shall be given that the writ of prohibition do or do not issue, as justice may require: and the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same; and in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess damages, for which judgment shall also be given; but such assessment shall not be necessary to entitle the plaintiff to costs. § 1.

It has been held, that the above act does not enable the King's Bench, where a party has declared in prohibition and succeeded, to grant him his costs incurred in the ecclesiastical court. 5 *B. & Ad.* 458.

Leave to declare in prohibition will be granted only when the court inclines to prohibit, not when it inclines to the contrary. 1 *Black. Rep.* 81; *Doug.* 620. (528). The party applying for a prohibition has no right to insist on declaring when the court is satisfied that his application is groundless; but the defendant in prohibition may, when the opinion of the court is against him. 1 *Burr.* 198.

Even in ordinary cases, the writ of prohibition is not absolutely final and conclusive. For, though the ground be a

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proper one in point of law for granting the prohibition, yet, if the fact that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction. If, for instance, a custom be pleaded in the spiritual court, a prohibition ought to go, because that court has no authority to try it; but if the fact of such a custom be brought to a competent trial, and be there found false, a writ of consultation will be granted. For this purpose the party prohibited may appear to the prohibition, and take a declaration, (which must always pursue the suggestion,) and so plead to issue upon it; denying the contempt, and traversing the custom upon which the prohibition was grounded: and, if that issue be found for the defendant, he shall then have a writ of consultation.

The writ of consultation may also be, and is frequently, granted by the court without any action brought; when, after a prohibition issued, upon more mature consideration the court are of opinion that the matter suggested is not a good and sufficient ground to stop the proceedings below. 3 *Comm. c. 7.*

Where the matter suggested for a prohibition appears on the face of the libel to be out of the jurisdiction of the inferior court, an affidavit of the truth of the suggestion is never insisted on; but if it does not appear on the face of the libel, or if a prohibition is moved for, for more than appears on the face of the libel to be out of their jurisdiction, there ought to be an affidavit. 2 *Salk. 549*; 1 *P. Wms. 65. 477*; *Andr. 304.*

On a rule to show cause why a prohibition should not be granted to stay a suit in the court of the Archdeacon of Lincoln, against one for not going to church, nor receiving the sacrament thrice a year, on suggestion of the statute of Elizabeth, and Toleration Act, and then qualifying himself within that act, and alleging, that he pleaded it below, and they refused to receive his plea; cause was shown that this fact was false, and that the plaintiff was not a dissenter, nor had qualified himself *ut supra*, and that there was no affidavit of the fact by the plaintiff; by which means any person might come and suggest a false fact, and oust the spiritual court of their jurisdiction; which the court admitted, and, for want of such affidavit, the rule was discharged. 1 *Ld. Raym. 1211.*

If a plea to an inferior jurisdiction be properly tendered, which they refuse, though this be a good cause for a prohibition, yet an affidavit must be made of the refusal. *Skin. 20*; *Hurd. 406*; 3 *Keb. 217.*

An action was made for a prohibition to the ecclesiastical court of London, for calling a woman whore, on a suggestion that the words were actionable there by the custom of the place; but the court would not grant a prohibition without oath made, that if any such words were spoken, it was in London, and not elsewhere. 4 *Mod. 367.*

On a libel for calling the plaintiff old thief and old whore, the defendant suggested for a prohibition, that if any such words were spoken, they were spoken at the same time; but this suggestion was held ill, because the words ought to have been fully confessed. 1 *Vent. 10.*

The 2 & 3 *Edw. 6. c. 13.* enacted, That, in cases of suits in the ecclesiastical court for tithes, any party suing for any prohibition, before any prohibition should be granted, shall bring and deliver to the hands of some of the judges of the same court, where such party demanded prohibition, the very true copy of the libel depending in the ecclesiastical court, concerning the matter where the party demandeth prohibition, subscribed with the hand of the same party; and under the copy of the libel should be written the suggestion wherefore the party demanded the prohibition.

But this statute, so far as is related to prohibition, was repealed by the 1 *Wm. 4. c. 21. § 2.*

A prohibition is not to be granted the last day of term; but on motion a rule may be obtained to stay proceedings till the ensuing term. *Latch. 7*; 3 *Roll. Rep. 456.*

PROHIBITION, IV.

By 50 *E. 3. c. 4.* no prohibition shall go after a consultation, unless the libel be enlarged or otherwise changed. And therefore, regularly, where a consultation is awarded upon the merits, the party shall not have another prohibition on the same suggestion. But if a consultation is awarded for want of form in the suggestion or proceeding thereon, another prohibition may be allowed; or if a consultation goes for a collateral matter, as if the plaintiff is nonsuited. So if a consultation goes, and the party against whom it is granted, appeals, the appellee may have a prohibition, though the appellants cannot. So, if after consultation the plaintiff pleads the same matter (which was suggested and found against him at common law) in the spiritual court, which is accepted, and proceeds there for trial, the former defendant may have a new prohibition. See *Com. Dig. tit. Prohibition, (K. 3.)*

The common form of a prohibition runs thus:

GEORGE, &c. To A. B. &c. Greeting. We prohibit you, that you hold not plea in the Court, &c. of, &c. whereof C. D. complains that T. P. draws him into plea before you, &c. And to the party himself; We prohibit or forbid you E. F. that you follow not the plea in the Court of, &c. whereof C. D. complains that you draw him into the Court, &c.

IV. A PROHIBITION doth lie as well to a temporal court as to the spiritual court, of admiralty, or other court, whose proceedings are different from those in the superior courts of common law, if such temporal court exceed the bounds of its jurisdiction, or take cognizance of matters not arising within its jurisdiction. *F. N. B. 45*; 2 *Inst. 229, 243, 601*; 2 *Roll. Rep. 379*; 1 *Roll. Rep. 252*; 2 *H. Blackst. 100, 107, 533*; 6 *Parl. Cases, (8vo.) 203.*

A prohibition lies to a court of appeal, where it appears they have no jurisdiction over the subject, even after they have remitted the suit to the court below, and awarded costs against the appellant, and though the party applying for the prohibition be the appellant. 1 *Term Rep. 552.* See *post, V.* and *Com. Dig. tit. Prohibition, D.* as to the time when a prohibition shall be granted.

If trespass *vi et armis* be brought into the county court, a prohibition lies for the plaintiff. *F. N. B. 47.*

So if one sueth another in a court-baron or other court, which is not a court of record, for charters concerning inheritance or freehold, he shall have a prohibition. *F. N. B. 47.*

A person having obtained judgment in *B. R.* for his debt and damages, brought action for recovery of them against the bail in the court of the Tower of London, in which action the party was taken on a *capias*, and was rescued, after which the plaintiff brought his action on the case in that court for the rescue; and all this appearing to the court of *B. R.* they granted a prohibition. 1 *Roll. Rep. 54.*

So where an action of debt was brought in the Marshalsea on a judgment in *B. R.* a prohibition was granted. 2 *Salk. 439.*

A suit was surmised to be before the lord president of the marches, for an office, between the grantee of the lord president and a stranger, wherein the only question would be, whether the grant of that office belonged to the lord president; and because in this case he would be as it were both judge and party, a prohibition was granted. 1 *Keb. 648.*

If there be one entire contract above 40s. and a man sues for it in a court-baron, severing it into small sums under 40s. a prohibition shall be granted, because this is done to defraud the court of the king. 19 *Hen. 6. 54*; 2 *Roll. Abr. 280*; *F. N. B. 46.*

An action was brought in the hundred court for 40s. in which the plaintiff confessed that he was satisfied one shilling, which being done with an intent to give that court jurisdiction, and to defraud the superior courts, a prohibition was granted. *Palm. 564.*

If there be several contracts between A. and B. at several times for divers sums, each under 40s., but amounting in the whole to a sum sufficient to entitle the superior court to a jurisdiction, they shall be sued for in such superior, and not in an inferior court, which is not of record. 1 *Vent.* 65.

So in a prohibition to the court of the Honour of Eye, where the case was, one contracted with another for divers parcels of malt, the money to be paid for each parcel being under 40s. he levied divers plaints thereupon in the said court, wherefore the court of K. B. granted a prohibition: because though there be several contracts, yet as the plaintiff might have joined them all in one action, he ought to have so done, and sued in B. R., and not put the defendant to unnecessary vexation, any more than he can split an entire debt into divers, to give the inferior court jurisdiction in *fraudem legis*. 1 *Vent.* 73; 2 *Keb.* 617; 1 *Show.* 11.

It is laid down by *Coke*, and admitted in a variety of cases, that no inferior court can hold plea of any transitory action, if not made within the jurisdiction, and that the cause of action must be alleged to arise within such jurisdiction. 2 *Inst.* 231; 1 *Saund.* 74; 2 *Jon.* 230; 1 *Show.* 10; and see *County Court, Courts*.

Therefore, in an action on a promise in an inferior court, not only the promise, but the consideration must be alleged to arise within the inferior jurisdiction, and must be so proved on the trial. 1 *Roll. Abr.* 545.

But if the plaintiff had shown that the money had been lent within the jurisdiction of the court, or if it had been for goods there sold, the plaintiff would have had no need to say that the defendant assumed to pay within the jurisdiction; because the law creates the promise on the creation of the debt, which debt being within the jurisdiction, the promise shall be intended there also. *Ld. Raym.* 211.

In all cases where inferior courts assume a jurisdiction, or hold plea of a matter not arising within their limits, the party hath his remedy, and may stay their proceedings by prohibition; but such prohibition can only regularly be obtained by its appearing, on oath made, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused. 6 *Mod.* 146; *Carth.* 402; 1 *Salk.* 201; 1 *P. Wms.* 476.

In the case of *Mendyke v. Stint* it was greatly insisted upon, that though the party neglected to plead to the jurisdiction, yet the matter arising out of the inferior jurisdiction, the superior courts ought to grant a prohibition; for otherwise the parties, their counsel and attorneys, would give a jurisdiction to inferior courts which they were not entitled to by law; but it was otherwise adjudged, and it seems to be now agreed, that after admitting the jurisdiction, or after imparlance, the party cannot apply for a prohibition. 2 *Mod.* 271.

But these things were agreed by the court.

If any matter appears in the declaration, which sheweth that the cause of action did not arise within the jurisdiction, there a prohibition may be granted at any time. If the subject matter in the declaration be not proper for the judgment and determination of such court, there also a prohibition may be granted at any time. If the defendant, who intended to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, or by the attorney's refusing to plead it, &c. or if his plea be not accepted, or is overruled; in all these cases a prohibition likewise will lie at any time. 2 *Mod.* 273.

A motion was made for a prohibition, to be directed to the sheriff's court in Bristol, on suggestion that causes of action arising out of the jurisdiction of the sheriff's court ought not to be sued there; and this motion was made in behalf of a defendant in an action, before he had appeared, to stay the proceedings in the court, who proceeded to attach his goods in the hands of a garnishee; and the motion was opposed, because the defendant could not pray a prohibition

on suggestion of a matter which he could not plead; and as here he could not plead this before appearance, so he ought not to make such a motion before appearance. And *per Holt*, a man shall not plead to the jurisdiction until he appear; but if the original cause of action arose out of the jurisdiction of the court, the garnishee may plead it; and of that opinion was *Hale*, Ch. J.; but if it was debt on a simple contract, it is attachable where the person of the debtor is. 1 *Ld. Raym.* 346.

So, where a prohibition was moved for to the court of the sheriffs of London to stay proceeding, where they attached the debt of the garnishees, because it arose out of the jurisdiction, it was denied, because the debt was on simple contract, which follows the person of the debtor. *Ld. Raym.* 347.

Quære, whether the Court of King's Bench can direct a prohibition to the lord chancellor sitting in bankruptcy. 3 *B. & A.* 123.

Where the lord chancellor has jurisdiction generally, the King's Bench has no authority to revise his order. *Ibid.*

When the spiritual court incidentally determines any matter of common law cognizance, such as the construction of an act of parliament otherwise than as the common law requires, prohibition lies after sentence; although the objection do not appear on the face of the libel, but is collected from the whole of the proceedings in the spiritual court. 3 *East*, 472; 5 *East*, 345.

V. The general grounds for a prohibition to the ecclesiastical courts, are either a defect of jurisdiction, or a defect in the mode of trial. If any fact be pleaded in the court below, and the parties are at issue, the court has no jurisdiction to try it, because it cannot proceed according to the rules of the common law; and in such case a prohibition lies. Or where the spiritual court has no original jurisdiction, a prohibition may be granted, even after sentence. But where it has jurisdiction, and gives a wrong judgment, this is the subject of appeal, and not of prohibition. 2 *Term Rep.* 4. But when a prohibition is granted after sentence, the want of jurisdiction must appear upon the face of the proceedings of the spiritual court. *Ibid.* *Comp.* 422; 4 *Term Rep.* 382.

In all cases where it appears on the face of the libel that the spiritual court, &c. have not a jurisdiction, a prohibition may be awarded, and is grantable as well after as before sentence; for the king's superior courts have a superintendency over all inferior jurisdictions, and are to take care that they keep within their due bounds. 2 *Inst.* 602; 2 *Roll. Abr.* 319; *Noy*, 137; 1 *Sid.* 65; *Cro. Eliz.* 571; *Mor.* 462, 907; *Skin.* 299; *Carth.* 463; *March*, 153; 2 *Roll. Rep.* 24; *Comb.* 356.

But where the court has a natural jurisdiction of the thing, but is restrained by some statute, as by 23 *H. 8. c. 9.* for not citing out of the diocese, there the party must come before sentence; for after pleading and admitting the jurisdiction of the court below, it would be hard and inconvenient to grant a prohibition. See the authorities *supra*, and *Cro. Car.* 97; 2 *Show.* 145; *Vent.* 61; 6 *Mod.* 252; 7 *Mod.* 137; *Godb.* 163, 243; 5 *Mod.* 341; *Hell.* 19; 12 *Co.* 76; *Salk.* 543.

On a motion for prohibition the case was, the defendant libelled in the spiritual court for tithes of faggots made of loppings of trees, and the suggestion for a prohibition was, that these loppings were cut from the stumps of timber trees above the growth of twenty years; and it was alleged, that sentence was given in the spiritual court, therefore the plaintiff comes here too late to have a prohibition; but *per Holt*, the sentence will not hinder the having a prohibition in any case, but in the case of prohibitions grounded on 23 *Hen. 8. c. 9.* for citing out of the diocese; but because the plaintiff had not pleaded this matter in the spiritual court, they denied

the prohibition, because the spiritual court has a general jurisdiction of tithes; and if any special matter deprives them of their jurisdiction, it must be pleaded there; and if it had been pleaded there, and issue joined on it, and on the trial it had been found not to be *silva cædua*, it had been well; but if they had refused to admit the plea, a prohibition should have been granted. 2 *Ld. Raym.* 885.

If a remedy be given in any case by statute in a temporal court, a prohibition lies to the spiritual court, if a suit be there, though the matter be of a spiritual nature; except where the jurisdiction of the spiritual court is saved by the same statute. 1 *Inst.* 96 b.

If one sues another in the spiritual court for a chattel or debt, the defendant shall have a prohibition. So if he sues for a trespass. *F. N. B.* 40.

If the spiritual courts take on them to try the boundaries of a parish, a prohibition lies. 2 *Roll. Abr.* 291; 7 *Co.* 44; 1 *Roll. Rep.* 331. *Cro. Eliz.* 298; 2 *Leon.* 829; 3 *Keb.* 286. *S. P.* because the prescription is the ground thereof.

But if the bounds of two villis lying in the same parish come in question in the spiritual court, no prohibition lies, for such bounds are triable in the ecclesiastical court, though those of parishes are not. 1 *Lev.* 78.

If a suit be by a parson for tithes, and the defendant plead that the place where, is in another parish, a prohibition lies; because they meddle with that which is out of their jurisdiction, though the original thing be of their cognizance, and this comes in obliquely. 2 *Roll. Abr.* 282; 1 *Show.* 10; *Noy.* 147.

If there be a suit for tithes in the ecclesiastical court, and the tenant pleads that the party who sues is not incumbent, but that J. S. is; and this plea, because it goes to the right of the incumbency, is rejected, a prohibition lies; for by denying the tenant this liberty he might be twice charged for tithes. *Cro. Eliz.* 228; 3 *Leon.* 265.

So if the vicar of a parish libels against another to avoid his institution to the church of D., which he supposes to be a chapel of ease appertaining to his vicarage, and the defendant suggests that D. is a parish of itself, and not a chapel of ease; a prohibition will be granted, for they shall not try the bounds of the parish. 2 *Roll. Abr.* 261.

So if the question be in the court-christian, whether a church be a parochial church or chapel of ease, a prohibition lies. *Ibid.*

The ecclesiastical courts have cognizance of a way to a church; and for not repairing such way the parties may be proceeded against in the spiritual court. *March.* 45.

So, if a parson is prevented from carrying away his tithe by the stopping up the usual way, he may have his remedy in the ecclesiastical court, grounded on the statute 2 & 3 *Ed.* 6. c. 13. *Bulst.* 67; 1 *Jon.* 230.

But if the question be, whether he is to have one way or another, or whether such a way be a highway or not; this cannot be tried in the spiritual court. *March.* 15; 1 *Bulst.* 67; 1 *Roll. Abr.* 287.

So if the churchwardens of a church sue for a way to the church, which they claim to appertain to all the parishioners by prescription, a prohibition shall be granted; for this right being grounded on the prescription, is to be tried in the temporal courts. 2 *Roll. Rep.* 41, 287.

If a man be admitted, instituted, and inducted, and a suit is commenced in the ecclesiastical court to avoid the institution, supposing it not valid; though the thing be of their cognizance, yet, because the induction, which is temporal, gives a lay right, may depend on it, a prohibition lies. *Hob.* 15; 1 *Lat. h.* 205; 1 *Bulst.* 179; *Litt. Rep.* 165; *Poph.* 138; 1 *Roll. Abr.* 282; 1 *Show. Rep.* 10.

There are frequent instances of prohibitions being granted to the ecclesiastical courts, to stay suits for fees by chancellors, registrars, and proctors in those courts, on this foundation, that demands for work and labour are properly determinable at common law, and fees cannot be settled by the canon law; and that the spiritual court can only give costs and expenses of suit, but that no action of debt will lie for such costs at common law; and that the profits of an office being temporal, the remedy for them ought to be by *quantum meruit*, or, in case it be an office of freehold, by assize, the denial of just fees being a disseisin; therefore it seems to be now settled, that neither a proctor nor registrar can sue for fees in the spiritual court, but that the proper remedy is, in case of a fee certain, by an *indebitatus assumpsit*, or in case of an uncertain fee, by *quantum meruit*; and in such suits it is not necessary to prove a retainer, that being implied by law. 2 *Roll. Rep.* 59; 3 *Leon.* 268; 1 *Mod.* 176; 2 *Keb.* 615; 3 *Keb.* 303, 441, 516; 1 *Salk.* 333; 4 *Mod.* 254.

If a legatee takes a bond from the executor for payment of the legacy, and afterwards sues him in the spiritual court for the legacy, a prohibition will be granted; for by taking the obligation the nature of the demand is changed, and becomes a debt or duty recoverable in the temporal court. *Yelv.* 38; 2 *Vern.* 31; but 2 *Roll. Rep.* 160, *S. P. contra.* And see *Legacy*, 4.

Matters of freehold and the rights of inheritances are only determinable in the temporal courts; so that if the ecclesiastical courts intermeddle with those, a prohibition lies. *F. N. B.* 40; 2 *Roll. Abr.* 286; *Litt. Rep.* 164.

As in a feoffment of tithes and lands, where there is no livery, if they adjudge the tithes to pass, notwithstanding there is no livery, a prohibition will lie. *Cro. Jac.* 270; 1 *Vent.* 41.

Trespass on a glebe, being freehold, cannot be determined in the ecclesiastical court. *Bro. Jur.* pl. 41.

A parson libelled against the defendant in the spiritual court of York, for having cut elms in the church-yard, and a prohibition was granted, on suggestion that they grew on his freehold. 1 *Ld. Raym.* 212.

So if a man devises that his lands shall be sold for the payment of his debts, and that the overplus shall be paid to such persons in certain shares, the legatees in this case cannot sue in the ecclesiastical court; for the provisions intended them arise originally out of lands, and their proper remedy in this case is in a court of equity. *Dyer*, 151, 264; *Hob.* 265; 2 *Roll. Abr.* 284, 285; 2 *Show.* 50; *Cro. Car.* 16.

But if a rent be devised out of a farm for years, the ecclesiastical courts may hold plea thereof, for the term for years, being only a chattel, is testamentary, consequently the rent devised thereout. 1 *Sid.* 279; 2 *Keb.* 5; 1 *Lev.* 179.

The rights to offices for life in the ecclesiastical courts or courts of admiralty, are determinable at common law; as in the question concerning the validity of two patents, by which the office of registrar to a bishop was granted; it was held, that this should not be tried in the spiritual court, though the subject matter be spiritual; because the office itself, being matter of freehold, is for that reason of temporal cognizance. 2 *Roll. Abr.* 285, 286; *Noy.* 91; *Latch.* 228; *Palm.* 450; *Godb.* 390; *Cro. Car.* 65; 2 *Roll. Rep.* 306; *Raym.* 88; 1 *Lev.* 125; 4 *Mod.* 27; *Comb.* 306.

When the right of election to the office of canon-residentary, a freehold office, is in the dean and chapter, a prohibition shall go to the bishop, claiming a right to present by lapse, under pretence of visitatorial authority. 1 *T. R.* 650.

Preaching without licence is within the act of uniformity, and therefore prohibition lies to a suit in the spiritual court for it. *Fort.* 345.

A prohibition lay to a suit for marrying without banns or licence, after the passing of the 26 *Geo.* 2. c. 33, by which it was made felony. 2 *Wils.* 79.

But prohibition does not lie to a suit in the ecclesiastical court against a Quaker, for repairs of the church, on 7 & 8

Wm. 3. c. 34, though the act gives a remedy before justices of the peace; for the old remedy is not taken away, nor in the case of small tithes, under 7 & 8 *Wm. 3. c. 6. Fort. 347*.

For more learning on this subject, see *Bac. Abr.*, and 17 & 18 *Vin. Abr.*, and *Com. Dig. tit. Prohibition*.

PROHIBITIO DE VASTO, DIRECTA PARTI. A judicial writ directed to the tenant, prohibiting him from making waste on the land in controversy, during the suit. *Reg. Judic. 21*.

A prohibition shall be granted to any one who commits waste, either in the house or buildings of the incumbent of a spiritual living, or who cuts down trees on the glebe, or doth any other waste. *Moor. 917*.

PRO INDIVISO, as undivided. The possession or occupation of lands or tenements belonging to two or more persons, whereof none knows his several portion; as coparceners before partition. *Bract. lib. 5. See Parceners*.

PROLES, Lat.] Progeny; such issue as proceeds from a lawful marriage; though if the word be used at large, it may denote others.

PROLOCUTOR OF THE CONVOCATION-HOUSE, prolocutor domus convocationis.] An officer chosen by ecclesiastical persons, publicly assembled in convocation by virtue of the king's writ at every parliament; there are two prolocutors, one of the higher house of convocation, the other of the lower house; the latter of whom is chosen by the lower house, and presented to the bishops of the higher house as their prolocutor, that is, the person by whom the lower house of convocation intend to deliver their resolutions to the upper house, and have their own house especially ordered and governed; his office is to cause the clerk to call the names of such as are of that house, when he sees cause, to read all things propounded, gather suffrages, &c. See further, *Convocation*.

PROMISE. See *Assumpsit*.

PROMISSORY NOTES. See *Bill of Exchange, Larceny*.

PROMOTERS, promotores.] Persons who in popular and penal actions prosecuted offenders, in their name and the king's, as informers, having part of the fines or penalties for their reward; they belonged chiefly to the Exchequer and King's Bench; and Sir Edward Coke calls them *turbidum hominum genus*. 3 *Inst. 181*.

TO PROMULGE A LAW, promulgare legem.] To declare, publish, and proclaim a law to the people; and so promulgatus, signifies published or proclaimed. See 6 *Hen. 6. c. 4*; 1 *Com. 45*; and tit. *Statute*.

PRONOTARY. See *Prothonotary*.

PROOF. The showing the truth of any matter alleged, or the trial, or making out, of any thing, by a jury, witnesses, &c.

Bracton says, there is *probatio duplex, viz. viâ vocis*, by witnesses; and *probatio mortua*, by deeds, writings, &c.

Proof, according to *Lilly*, is either in giving evidence to a jury on a trial, or else on interrogatories, or by copies of records, or exemplifications of them. 2 *Lil. Abr. 993*. Though where a man speaks generally of proof, it shall be intended of proof by a jury, which in the strict signification is legal proof. 3 *Bulst. 56*.

Condition of a bond was to pay such money as an apprentice should mispend, on proof made by the confession of the apprentice or otherwise; and it was held, that although generally proof shall be intended to be made on a trial by jury, in this case it being referred to the confession of the party, it is sufficient if he confess it under his hand. *Cro. Jac. 381*.

It hath been insisted, that the law knows no other proof but before a jury in a judicial way, and that which is on record; but if the proof is modified by the agreement of the parties, that it shall be in such a manner, or before such a person, that modification which allows another manner of

proof shall be observed and prevail against the legal construction of the word proof. *Sid. 313*; 2 *Lutw. 436*.

In articles the parties bound themselves in the penalty of 100*l.*, &c., to be paid on due proof of a breach; proof at a trial will maintain the action. *Lutw. 441*. See further, *Evidence*.

PRO PARTIBUS LIBERANDIS. An ancient writ for partition of lands between coheirs. *Reg. Orig. 316*. See *Parceners*.

PROPER FEUDS. See *Tenures, I*.

PROPERTY, proprietas.] The highest right a man can have to any thing; being used for that right which one hath to lands or tenements, goods or chattels, which no way depend on another man's curtesy.

Before men entered into society there was not any property, but an universal right instead of it; every man might then take to his use what he pleased, and retain it, if he had sufficient power; but when men entered into society, and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof proper laws were ordained.

It seems that the abstract right of property originates in occupancy, or when any thing is separated for private use from the common stores of nature; and this appears agreeable to the reason and sentiments of mankind, prior to all civil establishments. See 2 *Comm. c. 1*, and note; and this Dictionary, titles *Occupant, Liberty, Title*.

According to our law, property in lands and tenements is acquired either by entry, descent by law, or conveyance; and in goods or chattels it may be gained many ways, though usually by deed of gift, or bargain and sale. 2 *Lil. Abr. 400*.

For preserving property the law hath these rules:

1st, No man is to deprive another of his property, or disturb him in enjoying it.

2dly, Every person is bound to take due care of his own property, so as the neglect thereof may not injure his neighbour.

3dly, All persons must so use their right, that they do not, in the manner of doing it, damage their neighbour's property.

There are also three sorts of properties, viz. property absolute, property qualified, and property possessory. an absolute proprietor hath an absolute power to dispose of his estate as he pleases, subject to the laws of the land: the husband hath a qualified property in his wife's land, real chattels and debts; but in her chattels personal, he hath an absolute property. *Plowd. 5*.

The right of possession of real property, though it carries with it a strong presumption, is not always conclusive evidence of the right of property, which may still subsist in another man; for one man may have the possession, and another the right of possession, which is recovered by possessory actions. So one man might, previous to the abolition of real actions, have had the right of possession, and so not be liable to eviction by any possessory action, and another might have had the right of property which could not be otherwise asserted than by a writ of right. 3 *Comm. c. 10*. See *Limitation of Actions, I. II. and Writ of Right*.

If the sea or a river, by violent incursion, carries away the soil or ground in so great a quantity, that he who had the property in the soil can know where his land is, he shall have his land - but if his soil or land be insensibly wasted by the sea or river, he must lose his property, because he cannot prove which is his land. *Pasch. 1650*. See *Occupant*.

Property in chattels personal may be either in possession, which is where a man hath not only the right to enjoy, but hath the actual enjoyment of the thing, or else it is a action, where a man hath only a bare right, without any occupation or enjoyment; and of these the former, or property in possession, is divided into two sorts, an absolute and a qualified property. Property in possession absolute may be

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in all inanimate things, and in all such animals as are naturally tame; a qualified property is had, under certain circumstances, in *wild animals*, being tamed, or being unable to escape *propter impotentiam*, as birds in the nest; or may be obtained *propter privilegium*, by the privilege of hunting, &c. in exclusion of others. So a qualified property exists in the elements of light, air, and water. See 2 Comm. c. 25.

Every owner of goods, &c. hath a general property in them; though a legatee of goods hath no property in the goods given him by will until actually delivered him by the executor, who hath the lawful possession. See *Legacy*.

And though by a bare agreement a bargain and sale of goods may be so far perfected, without delivery or payment of money, that the parties may have an action of the case for non-performance, yet no property vests until delivery; therefore it is said, if a second buyer gets delivery, he has the better title. 3 Salk. 61, 62.

But if one covenant with me, that if I pay him so much money such a day, I shall have his goods in such a place, and I pay him the money, this is a good sale, and by it I have the property of the goods. 27 Hen. 8. 16. See *Agreement, Fraud*.

As to property of things in possession or action: In possession, it is, generally, when no other can have them from the owner, or with him, without his act or default, or especially when some other hath an interest with him, or where there is a property also in another as well as in the owner, as by bailment, delivery of things to a carrier or inn-keeper, where goods are pawned or pledged, distrained or leased, &c.; and property in action is when one hath an interest to sue at law for the things themselves, or for damages for them; as for debts, wrongs, &c. and all these things, in possession or action, one may have in his own right, or in the right of another, as executor. *Wood's Inst.* 314.

A person hath such a special property in goods delivered him to keep, that he may maintain action against strangers who take them out of his possession; so of things delivered to a carrier, and when goods are pawned, &c. *Lil. Abr.* 400, 401.

A tenant hath only a special property in the trees on the lands demised, so long as they remain part of the freehold, for when they are severed his property is gone. 11 Rep. 82.

An executor or administrator hath the property of the goods of the deceased. But a servant hath neither a general or special property in his master's goods; therefore to take them from his master may be trespass or felony, according to the value and other circumstances. *Goldsb.* 72. See *Apprentice, Larceny, Servant*.

If a man hires a horse, he hath a special property in the horse during the time, against all men, even against the right owner, against whom he may have an action if he disturbs him in the possession. *Cro. Eliz.* 236. But it hath been adjudged, that if a man deliver goods, &c. to another, to keep for a certain time, and then to re-deliver them, if he to whom they were delivered sell them in open market before the day appointed for the re-delivery, the owner may seize them wherever he finds them, because the general property was always in him, and not altered by the sale. *Godb.* 160; 3 Nels. Abr. 18. And if one delivers a horse or other cattle, or goods, to another to keep, and he kills the horse or spoils the goods, trespass lies against him, for by the killing or spoiling, the property is destroyed. 5 Rep. 13. See *Bailment*.

If a swarm of bees light upon a tree, they are not the owner's of the tree till covered with his hive, no more than hawks that have made their nests there, &c. But their young ones will be his property, and for them he may have trespass. *Dort. & Stud. c. 5; Co. Litt.* 145.

A man's geese, &c. fly away out of sight; wherever they

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go he hath still a property in them. *Stamf. lib.* 1. c. 16; 3 Shep. Abr. 111.

Wild beasts, deer, hares, conies, &c. though they belong to a man on account of his game and pleasure, none can have an absolute real property in; but if they are inclosed and made tame, there may be a qualified and possessory property in them. See *Game*.

One may have absolute property in things of a base nature, as mastiff dogs, hounds, spaniels, &c.; but not in things *feræ naturæ*, unless when dead. *Dalt.* 371; *Finch.* 176; 11 Rep. 50; *Raym.* 16.

Property in lands, goods, and chattels, may be forfeited or lost by treason, felony, outlawry; also of goods by their becoming deadand, waif, estray, &c. *Buck. Elem.* 77, 78.

PROPERTY IN HIGHWAYS, TURNPIKES, &c. He who hath the land which lies on both sides the highway, hath the property of the soil of the highway in him, notwithstanding the king hath the privilege for his people to pass through it at their pleasure; for the law presumes that the way was at first taken out of the lands of the party who owns the lands lying on both sides the way, and divers lords of manors claim the soil as part of their waste. 2 Lil. Abr. 400. See *Highway*.

By the 7 Geo. 4. c. 64. § 16. in larceny of materials, tools, implements for making, altering, or repairing highways, they may be described as belonging to the surveyors of the highways for the time being, without specifying their names; and by § 17 such materials, &c. provided for turnpike roads, may be described as belonging to the trustees or commissioners.

PROPERTY BELONGING TO COUNTIES, &c. In larceny of goods provided for or at the expense of a county, riding, or division, it is by the 7 Geo. 4. c. 64. § 15. sufficient to charge them to belong to the inhabitants of such county.

PROPERTY OF PARTNERS. In larceny of the property of partners, it may be stated to belong to one named, and another or others, as the case may be. 7 Geo. 4. c. 64. § 14.

PROPERTY OF THE POOR. So § 16. in larceny of goods provided for the poor, they may be laid to belong to the overseers.

PROPERTY IN SEWERS. In larceny of property under commissioners of sewers, it may be laid as belonging to them. 7 Geo. 4. c. 64. § 18.

PROPERTY ALTERED. A man borrows or finds my goods, or takes them from me; neither of these acts will alter the property. *Bro. Propert.* 27.

If one, having taken away corn, make it into malt, turn plate into money, or timber into a house, &c. the property of them is altered. *Doddridge, Law,* 132, 133.

And where goods are generally sold in a market overt, for a valuable consideration, and without fraud, it alters the property thereof. 5 Rep. 83. Except in some particular cases. See *Market*.

To alter or transfer property is lawful; but to violate property is never lawful, property being a sacred thing which ought not to be violated. And every man (if he hath not forfeited it) hath a property and a right allowed him to defend his life, liberty, and estate; and if either be violated the law gives an action to redress the injury and punish the wrong. 2 Lil. Abr. 400. See *Liberty*.

By the 7 & 8 Geo. 4. c. 29. § 57. the owner of property stolen, taken, obtained, converted or received by means of a felony or misdemeanor, or his executors or administrators, shall, on prosecuting the offender, have the property restored; and the court is authorized to award a writ of restitution for that purpose, or to order restitution in a summary manner, except in the case of a valuable security bond *fide* paid, &c. or taken or received by transfer or delivery, for consideration, and without notice or reasonable cause of suspicion. See further, *Restitution*.

PROPHECIES, *prophetiæ*.] The foretelling of things to come in hidden mysterious speeches, whereby commotions

have been often caused in the kingdom, and attempts made by those to whom such speeches promised good success, though the words were mystically framed, and pointed only to the cognizance, arms, or some other quality of the parties. But these, for distinction sake, are called *false or phantastical prophecies*.

False prophecies (where persons pretend extraordinary commissions from God), to raise jealousies in the people, to terrify them from impending judgments, &c. are punishable at common law as impostures; they are reckoned by Blackstone among offences against the public peace, and were punished capitally by the 1 Edw. 6. c. 12. which was repealed in the reign of Queen Mary. And by the 5 Eliz. c. 15. none shall publish or set forth any false prophecy, with an intent to make any rebellion or disturbance, on pain of 10*l.* for the first offence, and a year's imprisonment; and for the second offence, to forfeit all his goods and chattels, and suffer imprisonment during life: the prosecution to be within six months. See 3 Inst. 128, 129. and tit. *Conjuratio*.

PROPORTION, *proportio*.] See *De Onerando pro Rata Portionis*.

PROPORTUM, *purport*.] Intent or meaning. *Cowell*.

PROPOUNDEES. The 85th chapter of *Coke's 3d Institute* is entitled, against Monopolists, Propounders, and Projectors, where it seems to signify the same as Monopolists. *Cowell*:—rather as Projectors.

PROPRIETARY, *proprietaryus*.] He who hath a property in any thing, *quæ nullius arbitrio est obnoxia*; but was heretofore chiefly used for him who had the fruits of a benefice to himself, his heirs and successors, as abbots and priors had to them and their successors. See *Appropriations*.

PROPRIETATE PROBANDA, *proving the property*.] A writ to the sheriff to inquire of the property of goods distrained, when the defendant claimeth property on a replevin sued; for the sheriff cannot proceed till that matter is decided by writ; and if it is found for the plaintiff, then the sheriff is to make replevin; but if for the defendant, he can proceed no further. *F. N. B.* 77; *Finch* 316, 450; *Co. Litt.* 145 b. See *Replevin*.

PRO RATA, *pro proportione*, in proportion.] As joint-tenants, &c. are to pay *pro rata*, i. e. in proportion to their estates. The term is also applied to an obligation, where two or more have become bound jointly to pay a sum of money. In such a case each of the obligors is said to be liable *pro rata parte*, or proportionally; in contradistinction to these obligations by which the obligors are bound jointly and severally, by which each is liable for the whole debt. See *Joint-tenants*, *Parceners*.

PROROGUE. To prolong or put off to another day. See *Parliament*.

PROTECTION, *protectio*.] Is generally taken for that benefit and safety which every subject hath by the king's laws. Every man who is a loyal subject is in the king's protection; and, in this sense, to be out of the king's protection is to be excluded the benefit of the law. See *Præmunire*.

In a special signification, a protection of the king is an act of grace, by writ issued out of Chancery, which lies where a man passes over the sea in the king's service; and by this writ (when allowed in court) he shall be quit from all personal and real suits between him and any other person, except assizes of *novel disseisin*, assize of *darrein presentment*, attaints, &c. until his return. 2 *Lil. Abr.* 398.

This term is thus further explained,—viz. Protection is an immunity granted by the king to a certain person, to be free from suits at law for a certain time, and for some reasonable cause; and it is a branch of the king's prerogative so to do. There are two sorts of these protections, one is *cum clausula*, *Volumus*; and of that protection there are three particulars; one is called *quia profecturus*, and is for him who is going beyond sea in the king's service: another is *quia moraturus*, which is for him who is already abroad in the king's service,

as an ambassador, &c.; and another is for the king's debtor, that he be not sued till the king's debt is satisfied. The other sort of protection is *cum clausula*, *Nolumus*, &c. which is granted to a spiritual corporation, that their goods or chattels be not taken by the officer of the king for the king's service; it may likewise be granted to a spiritual person single, or to a temporal person. *Reg. Orig.* 23.

By the common law the king might take his debtor into his protection, so that no one might sue or arrest him till the king's debt were paid. *F. N. B.* 28; *Co. Litt.* 131; but by the 25 Edw. 3. st. 5. c. 19. notwithstanding such protection, another creditor may proceed to judgment against him with a stay of execution, till the king's debt be paid; unless such creditor will undertake for the king's debt, and then he shall have execution for both. 3 *Comm.* c. 19.

On a person's going over sea in the service of the king, writ of protection shall issue to be quit of suits till he return, and then a re-summmons may be had against him; but one may proceed against a defendant having such protection, until he comes and shows the protection in court, and hath it allowed, when his plea or suit shall go *sine die*, though if after it appears that the party who hath the protection goes not about the business for which the protection was granted, the plaintiff may have a repeal, &c. *Terms de Ley*; 2 *Lil. Abr.* 398. And by the 33 Edw. 1. st. 1. the plaintiff may challenge the protection, and aver that the defendant was within the four seas, or not in the king's service, &c.

A protection is to be made for one year, and may be renewed from year to year; but if it be made for two or three years, the justices will not allow it; and if the king grant a protection to his debtor, that he be not sued till his debt is paid; on these protections none shall be delayed; the party is to answer and go to judgment, and execution shall be staid. *Co. Litt.* 130. See *ante*, and st. 25 Edw. 3. c. 10.

The king granted a protection to one of his debtors; and on demurrer it was alleged that by the 25 Edw. 3. st. 5. c. 19. protections of this kind are expressly that none shall be delayed on them; and the court ordered, that when it came to execution they would advise; so a *respondeas ouster* was awarded. *Cro. Jac.* 477.

In all protections there ought to be a cause shown for granting them; if obtained pending the suit, they are *baui*; and a person giving bail to an action on arrest, it is said, may not plead his protection; one may not be discharged out of prison, to which he is committed in execution, by protection to serve the king, &c. Nor will a protection be allowed where a person is taken on a *capias utlagatum*, after judgment; for though the *capias utlagatum* is at the king's suit in the first place, it is in the second degree for the subject. *Latch.* 197; 1 *Licon.* 185; *Dyer*, 162; *Hob.* 115.

But in action on *assumpsit* a protection under the great seal was brought into court, for that defendant was in the wars in Flanders, &c.; and it was allowed, though after an *arrest*. 3 *Lev.* 332.

A plaintiff in an action cannot cast a protection; for the protection is for the defendant, and shall be always for him, if it be not in special cases where the plaintiff becomes defendant. *New Nat. Br.* 62. And no protection shall be allowed against the king. *Co. Litt.* 131.

A protection to save a default is not good for any place within the kingdom of England; and regularly it lies only where the defendant or tenant is demandable; for the protection is to excuse his default, which cannot be made when he is not demanded. *Jenk. Cent.* 66, 94.

These protections are now very rarely used: the last instance of one was in 1692, when King William III. granted one to Lord Cutts, to protect him from being outlawed by his tailor. 3 *Lev.* 332. See *Privilege*.

FORM OF THE WRIT OF PROTECTION.

GEORGE the Third, &c. To all and singular sheriffs, &c.

and others, who shall see and hear our present letters, Greeting. Know you, that we have taken into our special protection A. B. and all his servants, lands, and tenements, goods and chattels, in, &c. in the county of S. and in, &c. and also all his writings whatsoever: Therefore we command you, that you protect and defend the said A. B. and his servants, &c. aforesaid, not doing to him or them, or any of them, or permitting to be done to them, any injury, damage, or violence, on pain of grievous forfeiture, &c. In testimony of which, &c. for one year to endure. In Witness, &c.

PROTECTION OF AMBASSADORS. See *Ambassadors*.

PROTECTION OF CHILDREN. See *Bastard*, *Homicide*, *Parent*, *Poor*.

PROTECTION OF PARLIAMENT. See *Parliament*, *Privilege*.

PROTECTION OF THE COURTS AT WESTMINSTER. The protection of the Court of B. R. is allowed for any person who attends his own business in that court, or by virtue of any subpoena. See *Arrest*, *Privilege*.

DE PROTECTIONIBUS. The statute allowing a challenge to be entered against a protection, &c. 23 Edw. 1. st. 1. *vel temp. incert.* See *Protection*.

PROTEST, *protestatio*. Hath two applications, one, by way of caution, to call witnesses (as it were), or openly affirm that he doth either not at all, or but conditionally, yield his consent to any act, or unto the proceeding of a Judge in a court, wherein his jurisdiction is doubtful, or to answer on his oath further than by law he is bound. See *Plowden*, 676; and *Reg. Orig.* 306.

The other is by way of complaint, as to protest a man's bill. See *Bills of Exchange*.

Each peer has a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons of such dissent, which is usually styled his protest. See further, tit. *Parliament*, V. 1.

PROTESTANT CHILDREN OF JEWS. See *Jews*.

PROTESTANT DISSENTERS. See further, *Dissenters*, *Non-conformists*.

PROTESTANT SUCCESSION. See *King*, I.

PROTESTATION, *protestatio*. A defence or safeguard to the party who made it from being concluded by the action he was about to do, that issue could not be joined by it. *Plowd.* 276. See *Pleading*.

It was a form of pleading when one did not directly affirm or deny any thing alleged by another, or which he himself alleged. *Conell.* As, *protestando* that he made no testament *pro placito*, that he made not the plaintiff his executor; because if he made no testament, he could make no executor. *Heath's Max.* 26. cites *Pl. C.* 276.

Coke defined a protestation to be an exclusion of a conclusion. 1 *Inst.* 124. For the use of it was to save the party from being concluded with respect to some fact or circumstance which could not be directly affirmed or denied without falling into duplicity of pleading, and which yet, if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted. Thus, where tenure in villenage subsisted, if a villen had brought an action against his lord, and the lord was inclined to try the merits of the demand, and at the same time to prevent any conclusion against himself that he had waived his lordship; he could not in this case both plead affirmatively that the plaintiff was his villen, and also take issue upon the demand; for then his plea would have been double, as the former alone would have been a good bar to the action; but he might have alleged the villenage of the plaintiff, by way of protestation, and then have denied the demand. By this means the future advantage of the plaintiff was saved to the defendant, in case the issue was found in his (the defendant's) favour; for the protestation prevented the conclusion, which would otherwise have resulted from the rest of his defence, that he had enfranchised the plaintiff;

since no villen could maintain a civil action against his lord. *Co. Litt.* 126. So also, if a defendant, by way of inducement to the point of his defence, alleged (among other matters) a particular mode of seisin or tenure, which the plaintiff was unwilling to admit, and yet desired to take issue on the principal point of the defence, he must have denied the seisin or tenure by way of protestation, and then traverse the defensive matter. So lastly, if an award were set forth by the plaintiff, and he could assign a breach in one part of it (*viz.* the non-payment of a sum of money), and yet was afraid to admit the performance of the rest of the award, or to aver in general a non-performance of any part of it, lest something should appear to have been performed; he might have saved to himself any advantage he might hereafter make of the general non-performance, by alleging that by protestation, and pleaded only the non-payment of the money. 3 *Comm.* c. 20. p. 312.

Protestation is said to have been of two kinds, 1st, When a man pleaded any thing which he dared not directly affirm, or could not plead, for fear of making his plea double; as if in conveying to himself by his plea a title, he ought to plead divers descents by divers persons, and he dared not affirm that they were all seized at the time of their death, or although he could do it, yet it would be double to plead two descents, of both which each one by itself must be a good bar, then the defendant ought to have pleaded and alleged the matter, introducing the word *protestando*; as to say (by protestation) that such a one died seized, &c. and that the adverse party cannot traverse. 2dly, When one was to answer two matters, and yet by law he ought to plead but to one, then in the beginning of his plea he might have said *protestando et non cognoscendo* such part of the matter to be true, (and then making his plea further,) *sed pro placito in hâc parte*, &c. and so he might take issue on the other part of the matter; and then he was not concluded by any of the rest of the matter which he hath by protestation so denied. *Reg. Plac.* 70, 71. See 18 *Vin. Abr.* tit. *Protestation*.

In other terms, the use of a protestation in pleading seemed to be this, *viz.* When one party alleged or pleaded several matters, and the other party could only offer, or take issue on one of them, he protested against the others: in such case should the issue, on trial, be found against the latter party, the record would not be evidence against him in another suit, as to those matters or points, against which he protested; which it otherwise might be, had he admitted, or not protested against them. *Dict.*

Protestations are now abolished, for by one of the general rules of H. T. 4 *Wm.* 4. 1831, no protestation shall hereafter be made in any pleading, but either party shall be entitled to the same advantage in that or other actions as if a protestation had been made.

PROTHONOTARY, *protonotarius, vel primus notarius*. A chief officer or clerk of the Common Pleas and King's Bench; for the first court there are three prothonotaries, and the other hath but one: he of the King's Bench records all civil actions; as the clerk of the Crown Office doth all criminal causes in that court: those of the Common Pleas, since the order 14 *Jac.* 1. on agreement entered into between the prothonotaries and filicers of that court, enter and enrol all manner of declarations, pleadings, assizes, judgments, and actions: they make out all judicial writs, except writs of *habeas corpus* and *distringas jurator*; (for which there is a particular office erected, called the *Habeas Corpora Office*;) also writs of execution, and of seisin, of privilege for removing causes from inferior courts, writs of *procedendo*, *scire facias*, in all cases, and writs to inquire of damages; and all process upon prohibitions, on writs of *audita querela*, false judgments, &c. They likewise enter recognizances acknowledged in that court, and all common recoveries; and make exemplifications of records, &c. See 5 *Hen.* 4. c. 14. See further *Tidd's Pr.*

PROTOCOL, the first copy. The entry of any instrument in the book of a notary or public officer, and which in case of the loss of the instrument may be admitted as evidence of its contents.

PROVENDRY. The lesser part of the altar in the church of St. Mary, Salisbury. 41 E. 3, 5, 6. *Termes de la Ley*.

PROVER, *probator*, mentioned in 28 Edw. 1. st. 2; 5 Hen. 4. c. 2. See tit. *Approver*, and 3 Inst. 129. A man became an approver, and appealed five, and every of them joined battel with him: *Et duellum percussus fuit cum omnibus, et probator devicit omnes quinque in duello; quorum quatuor suspendebantur, et quintus clamabat esse clericum et allocatur, et probator pardonatur*. Mic. 39 E. 3. coram Rege; Rot. 97. Suff.

PROVINCE, *provincia*.] An out country, governed by a deputy or lieutenant. *Lit. Dict.* See *Plantation*.

It was used among the Romans for a country, without the limits of Italy, gained to their subjection by the sword; whereupon that part of France next the Alps was so called by them, and still retains the name, *Provence*.

But in England a province is most usually taken for the circuit of an archbishop's jurisdiction; as the Province of Canterbury, and that of York: yet it is mentioned in some of our statutes, for several parts of the realm; and sometimes for a county.

Ireland is divided civilly into four provinces, Ulster, Leinster, Connaught, and Munster; and ecclesiastically into four archbishoprics, Armagh, Dublin, Cashel, and Tuam.

But see now the 3 & 4 Wm. 4. c. 37, under title *Ireland*.

PROVINCIAL, *provincialis*.] Of or belonging to a province; also a chief governor of a religious order; as of friars, &c. *Stat. Antiq.* 4 Hen. 4. c. 17.

PROVISIO, *provisio*.] Was used for the providing a bishop, or any other person, an ecclesiastical living, by the pope, before the incumbent was dead: it was also called *gratia expectativa*, or *mandatum de providendo*: the great abuse whereof produced the statutes of *provisors* and *præmunire*. See the latter title.

PROVISIONES. The acts to restrain the exorbitant abuse of arbitrary power, made in the parliament at Oxford 1258, were called *provisiones* by Rishanger, who continued *Mat. Paris*, anno 1260; being to provide against the king's absolute will and pleasure. See *Mat. Paris sub annis 1244 & 1254*. Several statutes are also called *provisiones*, particularly *Stat. Merton*, 20 Hen. 3. See also *provisions* made by the king and his council at Westminster, ann. 43 Hen. 3. A. D. 1259, on which the statute of Marlborough, 52 Hen. 3. was afterwards founded.

PROVISIONES signifies also *providentia*, or provisions of victual. *Conell*.

PROVISIONS, *selling unwholesome*. Is reckoned by Blackstone among offences against public health. To prevent which the 51 Hen. 3. st. 6. and the ordinance for bakers, c. 7. prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by 12 Car. 2. c. 25. § 11. any brewing or adulteration of wine is punished with the forfeiture of 100*l.* if done by the wholesale merchant; and 40*l.* if done by the vintner or retail trader. 4 Comm. c. 18. See *Frauds*, III., *Victuals*.

PROVISO. A condition inserted in any deed, on the performance whereof the validity of the deed depends; sometimes it is only a covenant, *secundum subjectam materiam*. 2 Rep. 70.

Proviso, in the most common acceptation, is that clause in a mortgage, whereby the deed is declared to be void, on payment of principal and interest. See *Mortgage*.

The word *proviso* is generally taken for a condition; but

it differs from it in several respects; for a condition is usually created by the grantor or lessor, but a *proviso* by the grantee or lessee; there is likewise a difference in placing the *proviso*; as if, immediately after the *habendum*, the next covenant is that the lessee shall repair, provided always that the lessor shall find timber, this is no condition; nor is it a condition, if it comes among other covenants after the *habendum*, and is created by the words of the lessee; as if the lessee covenants to scour the ditches, *proviso*, that the lessor carry away the soil, &c. 3 Nels. Abr. 21.

It hath been held, that the law hath not appointed any proper place in a deed to insert a *proviso*; but that when it doth not depend on any other sentence, but stands originally by itself, and when it is created by the words of the grantor &c. and is restrictive or compulsory, to enforce the grantee to do some act, in such case the word *proviso* makes a condition, though it is intermixed with other covenants, and doth not immediately follow the *habendum*. 2 Rep. 70. See *Deed*.

A *proviso* always implies a condition, if there be no words subsequent which may change it into covenant: also it is a rule in *provisors*, that where the *proviso* is, that the lessee, &c. shall do, or not do a thing, and no penalty is added to it, this is a condition, or it is void; but if a penalty be annexed, it is otherwise. *Cro. Eliz.* 242; 1 Lev. 155. And where a *proviso* is a condition, it ought to do the office of a condition, i. e. make the estate conditional, and shall have reference to the estate, and be annexed to it; but shall not make it void without entry, as a limitation will. See *Condition*.

A lease was made for years, rendering rent at such a day, *proviso*, if the rent be in arrear one month after, the lease to be void; the question was, whether this was a condition or limitation; for if it was a condition, then the lease is not determined without entry; adjudged, that it was a limitation, though the words were conditional; because it appeared by the lease itself, that it was the express agreement of the parties that the lease shall be void on non-payment of the rent; and it shall be void without entry. *Moor*, 291. See *Ejectment*, *Lease*, *Rent*.

If a *proviso* be the mutual words of both parties to the deed, it amounts to a covenant; and a *proviso* by way of agreement to pay is a covenant, and an action well lies upon it. 2 Rep. 72. See *Covenant*, I.

Plaintiff conveyed an office to defendant, *proviso* that out of the first profits he pay plaintiff 500*l.* And it was resolved, that an action of covenant lay on this *proviso*; for it is not by way of condition or defeasance, but in nature of a covenant to pay the money. 1 Lev. 155. But whether defendant in consideration of 400*l.* granted his lands to plaintiff for ninety-nine years, *proviso* if he pay so much yearly during the life of S. T. &c. or 400*l.* within two years after his death, then the grant to be void, and there was a bond for performance of covenants; in action of debt brought on the bond, it was adjudged, that there being no express covenant to pay the money, there could be no breach assigned on this *proviso*. 2 Mod. 38. See *qu.* and see *ante*.

In articles of agreement to make a lease, *proviso* that the lessee should pay so much rent, &c. although there be no special words of reservation of rent, the *proviso* is a good reservation. *Cro. Eliz.* 486. And *proviso*, with words of grant added to it, may make a grant and not a condition. *Moor*, 174; see 1 And. 19.

When uses are raised by covenant, in consideration of paternal love to children, &c. and after, in the same indenture, there is a *proviso* to make leases, without any particular consideration, it is void; though such a *proviso* might be good, if the uses were created by fine, recovery, &c. because of the transmutation of the estate; and for that, in this case, uses arise without consideration. 1 Rep. 176; *Moor*, 144; 1 Lev. 30. See *Use*.

In a deed, a *proviso*, that if the son disturb the other uses, &c. that then a term granted to him, and the uses to the heirs

of his body, shall be void; this proviso is sufficient to cease the other uses, on disturbance. 8 Rep. 90, 91. But a proviso to make an estate, limited to one and the heirs male of his body, to cease as if he was naturally dead, on his attempting any act by which the limitation of the land, or any the estate in tail, should be undone, barred, &c. hath been adjudged not good; because the estate tail is not determined by the death of tenant in tail, but by his dying without issue male. *Dyer*, 851; 1 Rep. 83. See *Limitation of Lands*.

A testator devised lands to one and the heirs male of his body, proviso, that if he attempt to alien, then his estate to cease and remain to another; the proviso is void. 1 Vent. 523.

A proviso that would take away the whole effect of a grant, as not to receive the profits of lands granted, &c. is void; and so is a proviso which is repugnant to the express words of the grant: in a will, testator made another his executor, provided he did not administer his estate, adjudged this proviso is void for repugnancy. *Cro. Eliz.* 107; *Dyer*, 3.

And if a proviso is good at first, and afterwards it happens that there is no other remedy but that which was restrained, the remedy shall be had notwithstanding the restraint. *Wood's Inst.* 291. Where a proviso is parcel of, or abridgeth a covenant, it makes an exception; when it is annexed to an exception in a deed, it is an explanation; and where added at the end of any covenant, there it extends only to defeat that covenant. 4 Leon. 72, 73; *Moor*, 105, 471. See *Condition, Covenant, Deed*.

PROVISO, TRIAL BY. Is where the plaintiff in an action desists in prosecuting his suit, and doth not bring it to trial in convenient time, the defendant in such case may take out the *venire facias* to the sheriff, which hath in it these words, *Proviso, quod, &c.* i. e. provided that, if plaintiff take out any writ to that purpose, the sheriff shall summon but one jury on them both, and this is called going to trial by proviso. *Old Nat. Br.* 159. See *Trial*.

Process might have been taken out by a defendant in criminal cases by proviso in appeals, in the same manner as in other actions, on default of the appellant, but it may not in indictments, nor in actions where the king is sole party; and it hath been questioned, whether there can be any such process in informations *qui tam*. 2 Hawk. c. 41. § 10. See 7 & 8 Wm. 3. c. 32; 7 T. R. 661; 2 East, 202, 206; and *tit. Trial*.

PROVISOR. One who sued to the court of Rome for a provision. See *præmunire*. It is sometimes also taken for him who hath the care of providing things necessary; a purveyor. *Cowell*.

PROVISOR MONASTERII. The treasurer or steward of a religious house, who had the custody of goods and money, and supervised all accounts. *Cowell*.

PROVISOR VICTUALIUM. The king's purveyor, who provided for the accommodation of his court, is so called by our historians. *Cowell*.

PROVOCATION. To make killing a person manslaughter, &c. See *Homicide*, III. 2.

PROVOST. The principal magistrate of a royal borough in Scotland. A governing officer of a university or college.

PROVOST MARSHAL. An officer of the king's navy, who hath the charge of prisoners taken at sea; and is sometimes used for like purpose at land. See 13 Car. 2. c. 9. and *tit. Marshal*.

PROXIES. Persons appointed instead of others, to represent them.

Every peer of the realm, called to parliament, hath the privilege of constituting a proxy to vote for him in his absence on a lawful occasion; but such proxies are by better of the king, and sometimes proxies have been denied by the king; particularly *annis* 6, 27 and 39 Ed. 3. See *Parliament*, V. 1.

Proxies are also annual payments made by parochial clergy to the bishop, &c. on visitations. See *Procurements*.

PRYK, a kind of service or tenure: according to Blount, it signifies an old-fashioned spur, with one point only, which the tenant, holding land by this tenure, was to find for the king.

In the time of Henry VIII, light horsemen in war were called prickers; because they used such spurs or pryks to make their horses go with speed.

PUBERTY, *pubertas*.] The age of fourteen in men and twelve in women; when they are held fit for, and capable of contracting marriage. See *Age, Infant*.

PUBLICATION. Is used of depositions of witnesses in a cause in Chancery, in order to the hearing; it signifies the showing the depositions openly, and giving out copies of them, &c. pursuant to the rules of the court. See *Chancery, Depositions*.—As to the publication of *Libels* and *Wills*, see those titles.

PUBLIC ACCOUNTS. See *Accounts, Public*.

In addition to the statutes referred to under the above title, the following acts may be briefly noticed:—

By the 2 Wm. 4. c. 26. the commissioners for auditing the public accounts are to examine and audit the accounts of the receipt and expenditure of the colonial revenues; and a statement of every account is to be transmitted by the commissioners to the lords of the Treasury.

By the 2 & 3 Wm. 4. c. 99. all accounts theretofore examined by the commissioners of public accounts in Ireland, are to be examined and audited by the commissioners for auditing the public accounts of Great Britain.

By the 2 & 3 Wm. 4. c. 104. the Treasury may order the public accounts to be made up for certain periods, and delivered to the commissioners of audit.

By the 4 & 5 Wm. 4. c. 15. s. 22. the Treasury may establish regulations for keeping the accounts of the public departments.

PUBLIC ACT of parliament. See *Statute*.

PUBLIC FAITH, *fides publica*.] In the reign of Charles I. there was a pretence or cheat, to raise money of the seduced people, upon what was termed the public faith of the nation, to make war against the king, about the year 1642. 17 Car. 1. c. 18.

PUBLIC REVENUE. By the 4 & 5 Wm. 4. c. 15. for regulating the office of the receipt of his majesty's Exchequer at Westminster, the offices of auditor, tellers, clerk of the pells, and the offices subordinate thereto, are abolished, and a new establishment, consisting of a comptroller-general, and other officers, appointed.

By § 8. the tellers are to pay over all moneys, &c. in their hands into the Bank of England, to the credit of his majesty's Exchequer; and an account is to be thereupon opened by the Bank, to be called "The Account of his Majesty's Exchequer." And by § 9. all moneys thereupon payable into the Exchequer are to be hereafter paid into the Bank.

By § 10. whenever money shall be granted by act of parliament, or vote of the commons, for any specified branch of the public service, his majesty, by royal order, under the sign manual, countersigned by the commissioners of the Treasury, may authorize the comptroller to place at the Bank, to the credit of the public accountant to the crown in the respective branch of service, the amount so granted.

By § 12. the commissioners of the Treasury may authorize the comptroller, by warrant under their hands, to transfer from the general fund of the Exchequer at the Bank, to the credit of the officers whose duty it shall be to make payments on account of the several public departments, the requisite sums for carrying on the respective services; and such comptroller, by warrant under his hand, may authorize the Bank to grant credits on account of the sums therein mentioned to the persons therein described.

§ 13. empowers the Treasury, by warrant, to authorize issues of moneys charged on the consolidated fund, &c. without a royal order.

PUBLIC STORES.

By § 23. quarterly statements are to be made by the comptroller to the commissioners for auditing the public accounts of all payments made to the Bank on account of the Exchequer, and of all moneys drawn from it by the accountants; and an annual statement is to be laid before each house of parliament, on the 20th of April, in each year.

By § 24. the annual account made up on each quarter-day, according to the directions of the 10 Geo. 4. shall be ascertained by the receipts and credits at the Bank.

PUBLIC STORES. By the 7 & 8 Geo. 4. c. 27. the statutes of the 31 Eliz. c. 4. and the 22 Car. 2. c. 5. as to embezzling and stealing the king's naval and military stores, were repealed.

But by the 4 Geo. 4. c. 53. (left unrepealed, as to this particular subject) every person convicted of stealing or embezzling his majesty's ammunition, sails, cordage, or naval or military stores, or of procuring, counselling, aiding, or abetting, any such offender, is liable to be transported for life, or any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding seven years.

By the 1 Geo. 1. st. 2. c. 25. § 34. the principal officers or commissioners of the navy are empowered to issue search warrants, and inflict summary punishment, by fine and imprisonment, where the value of the goods stolen or embezzled does not exceed 20s.

By the 9 Geo. 3. c. 30. § 5. the above officers of the navy board may exercise the office of a justice of the peace, in causing any person charged with stealing or embezzling any naval stores, to be apprehended, committed, and prosecuted.

By the annual mutiny act, a provision is also made for the punishment of certain persons, such as paymasters and persons employed in the commissariat department, embezzling military stores, by the proceedings of a court martial, which may inflict transportation for life or years, &c.

By the 9 & 10 Wm. 3. c. 41. § 1. (made a public act by the 1 Geo. 1. st. 2. c. 25. § 14.) no person, unless authorized by contracting with the principal officers or commissioners of the navy, ordnance, or victualling office, shall make any stores of war, or naval stores, with the king's mark, or any other stores with the broad arrow, on pain of forfeiting the same, and 200*l.*, with costs, one moiety to the king, and the other to the informer.

By § 2. any person, in whose possession such stores so marked shall be found, and any person concealing such stores, is liable to the same penalty, unless he shall produce a certificate under the hand of three or more of the principal officers or commissioners of the navy, &c. expressing the numbers, quantities, or weights of such goods, and the occasion and reason of the same coming to his possession. But by § 4 & 8. persons are exempted from penalties, who have bought stores sold by order of the commissioners of the navy, or to whom the same have been lent by the navy board, or any chief commander of any of the king's ships at sea, on the occasion of any merchant being in distress or otherwise.

By the 9 Geo. 1. c. 8. § 3. persons having or concealing any timber, thick stuff, or plank, marked with the broad arrow, are liable to the same punishment, as for having, keeping, or concealing any other warlike, naval, or ordnance stores.

The 17 Geo. 2. c. 40. § 10. to remove doubts which had arisen respecting the trial and punishment of offenders under the foregoing statutes, enacts that any judge at the assizes, or justices at the quarter sessions, may try any of the offences mentioned in those acts, and may impose any fine not exceeding 200*l.* on the offender, (one moiety to the king, and the other to the informer) and may mitigate the penalty, and may commit the offender in the manner specified by the last-mentioned act.

By the 39 & 40 Geo. 3. c. 89. § 1, which is the principal statute on this subject, every person (not being a contractor, or employed as mentioned in the act of 9 & 10 Wm. 3. c. 41.)

PUBLIC STORES.

who shall willingly, or knowingly, sell or deliver, or cause to be sold or delivered, to any other person, or who shall willingly or knowingly receive, or have in his possession, any stores of war, or naval ordnance, or victualling stores, or any goods whatsoever marked in the manner above mentioned, or any canvass marked either with a blue streak in the middle, or in a serpentine form, or any buntin wrought with one or more streaks of raised tape, (the said stores or goods being in a raw or unconverted state, or being new, or not more than one-third worn); and every one who shall conceal such stores shall be deemed a receiver of stolen goods, knowing them to have been stolen, and is liable to be transported for fourteen years, unless such person shall produce a certificate, under the hands of three of the principal officers or commissioners of the navy, ordnance, or victualling boards, expressing the numbers, quantities, or weights of such stores or goods, and the occasion and reason of such stores or goods coming to his possession.

By § 2. persons having possession of any of the said canvass or buntin, (the same not being charged to be new, or not more than one-third worn), and all persons convicted of any offence relating to the making, or having in possession, or concealing any warlike or naval, or ordnance stores, shall—besides forfeiting the same, and the sum of 200*l.*, together with costs of suit—be corporally punished, by whipping and imprisonment, or by any or either of the said ways and means, in such manner and for such space of time as to the judge or justices, before whom such offender shall be convicted, shall seem meet; but the judge or justices may mitigate the said penalty of 200*l.* as they shall see cause.

By § 3. nothing shall extend to exempt any person being a contractor, or employed in manner above mentioned, except only so far as concerns stores or goods marked as aforesaid; which shall be *bond fide* provided, made up, or manufactured by such person, or by his order, and which shall not have been before delivered into his majesty's stores; unless having been so delivered, they shall have been sold or returned to such person by the commissioners of his majesty's navy, ordnance, or victualling, respectively.

By § 4. if any person shall wilfully and fraudulently destroy, beat out, take out, cut out, deface, obliterate, or erase, wholly, or in part, any of the marks in the said act of the 9 & 10 Wm. 3. or in that act mentioned, or any other mark whatsoever, denoting the property of his majesty in or to any warlike or naval ordnance, or victualling stores, or shall cause or direct any other person so to do, for the purpose of concealing his majesty's property in such stores; such persons shall be guilty of felony, and liable to be transported for fourteen years.

By § 5. if any person convicted of any offence against this act, or the act of 9 & 10 Wm. 3. for which he shall not have been transported, shall be guilty of a second offence, he shall be transported also for fourteen years.

By § 7. the court may mitigate or commute the punishment of transportation, by causing the offender to be publicly whipped, fined, or imprisoned; one moiety of the fine to go to the king, and the other to the informer, and the offender to be imprisoned till the fine be paid.

By §§ 18, 19, 20, 21, 22, 23. powers are given to the commissioners of the navy, ordnance, and victualling board, and to justices out of sessions, to determine offences in a summary way, where the stores found are not exceeding the value of 20*s.*; but an appeal is given to the quarter sessions from such conviction.

By § 24. nothing contained in the act, as to summary jurisdiction, is to prevent a party accused from being prosecuted as a receiver of stolen goods.

By §§ 25, 26. the commissioners of the navy may sell marked stores, and the buyer be protected by a certificate of such purchase. And persons giving or publishing any false certificate are liable to a penalty of 200*l.*

By the 54 Geo. 3. c. 60. the provisions of 9 & 10 Wm. 3. and 39 & 40 Geo. 3. are extended to making, selling, delivering, receiving, having in possession, and concealing cordage wrought with one or more worsted threads.

And by the 55 Geo. 3. c. 127. the provisions of the above acts are further extended to all public stores whatsoever under the care, superintendence, or control of any officer, or person in the service of his majesty, or employed in any public department, or office, either marked with the marks in the above acts specified, or with the broad arrow, and the letters B. O., or with a crown and the broad arrow, or with his majesty's arms, or with the letters G. R., to denote the property of his majesty.

As to the burning or destroying of vessels belonging to the royal navy, see *Malicious Injuries*.

PUBLIC WORSHIP. See *Nonconformists, Service and Sacraments*.

PUBLIC WORKS. By the 4 & 5 Wm. 4. c. 72. intitled "An Act to amend several Acts for authorizing the Issue of Exchequer Bills for carrying on Public Works and Fisheries, and Employment of the Poor; and to authorize a further Issue of Exchequer Bills for the Purposes of the said Acts," his majesty may authorize the commissioners of the Treasury to issue 10,000,000*l.* of exchequer bills.

By § 11. the clauses, powers, &c. respecting advances and accounts made under the therein recited acts are to extend to advances made by commissioners under that act.

By § 12. after reciting that, "in some cases, advances have been made by the said commissioners towards the completion of public works which yet remain unfinished in consequence of the expense of completing the same having, from unforeseen circumstances, exceeded the sum estimated for the completion thereof, and the capital provided for such completion at the time of the application for such advances, and it is expedient, for the security of the money already expended and advanced on such unfinished works, that in addition to the powers and remedies provided by the said recited acts, or some or one of them, for making calls on the proprietors or shareholders of such unfinished works or undertakings under the circumstances aforesaid, that the said commissioners should have authority, if they should think fit, to make advances in anticipation of such calls, or on the security of a further mortgage of such unfinished works, with a view to the completion thereof;" it is enacted, that in all cases in which the said commissioners have made, or shall hereafter make advances, under the powers of the said recited acts or that act, for any incomplete work or undertaking, which shall, after the expenditure of such advance and the capital provided for the same, remain unfinished in consequence of the expense of perfecting the same exceeding the sum estimated for the completion thereof at the time of the application for such advance, the commissioners may make any further advance for the completion of any such incomplete work, either in anticipation of the calls to which the proprietors or shareholders of such work shall be liable under the provisions of the said recited acts or either of them, or on the security of further mortgages of the same works, or on such other security, and upon such terms and conditions as to the periods of repayment or otherwise, as the said commissioners may direct or appoint; and such further mortgages and other securities shall be entitled to such and the same priority, privileges and advantages as any mortgage or security which may have been previously granted to the said commissioners on such unfinished work.

PUIS DARREIN CONTINUANCE. Was a plea of continuance, pending an action, *post ultimum continuationem*. It is now abolished; but the new matter may be pleaded, with an allegation that it arose after the last continuance, or the issuing of the jury process, as the case may be. See *Pleading*.

See *Mulier*. The several judges and barons, not chiefs, are called puisne judges, puisne barons.

PULSATOR. The plaintiff or actor; from *pulsare*, to accuse any one. *Leg. Hen.* 1. c. 26.

PUNISHMENT, pena. The penalty for transgressing the law; and as debts are discharged to private persons by payment, so obligations to the public, for disturbing society, are discharged when the offender undergoes the punishment inflicted for his offence. See *JUDGMENT, Criminal*.

PUPILLARITY. The age of infants preceding puberty. See that title.

PUR AUTRE VIE. Where lands, &c. are held for another's life. See *Occupant*.

PURCHASE,

ACQUISITUM, PERQUISITUM, PERQUISITIO. The buying or other acquisition of lands, or tenements, with money, or by gift, deed, or agreement; as distinct from the obtaining them by descent or hereditary right; *conjunctum perquisitum* is where two or more persons join in the purchase. *Litt.* § 2; *Reg. Orig.* 143.

Purchase, taken in its largest and most extensive sense, is thus defined; the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood; and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is invested in a person not by his own act or agreement, but by the single operation of law. *Litt.* § 12; 1 *Inst.* 18. What is termed in the common law purchase, was by the feudists called conquest, *conquestus* or *conquisitio*: and in this sense it was that William I. was called *Conquestor* or the Conqueror, signifying that he was the first of his family who acquired the crown and realm of England. See 2 *Comm.* c. 15.

This is the legal signification of the word *perquisitio*, or purchase; and in this sense it includes the five following methods of acquiring a title to estates: escheat, occupancy, prescription, forfeiture, alienation. See this Dictionary, under those and other titles connected therewith; and further, titles *Remainder, Executory Devise, Limitation of Estate, &c.*

Mr. Hargrave, after some remarks on the peculiar nature of escheats, observes, that instead of distributing all the several titles to land under purchase and descent, it would be more accurate to say, that the title to land is either by purchase, to which the act or agreement of the party is essential, or by mere act of law: and under the latter to consider, first, descent; and then escheat, and such other titles, not being by descent, as yet like them accrue by mere act of law. 1 *Inst.* 18 b.

One cometh in by purchase when he comes to lands by legal conveyance, and hath a lawful estate; and a purchase is always intended by title, either from some consideration, or by gift; (for a gift is in law a purchase;) whereas descent from an ancestor cometh of course by act of law; also all contracts are comprehended under this word purchase. *Co. Litt.* 18; *Doct. & Stud. cap.* 24.

Purchase in opposition to descent is taken largely; if an estate comes to a man from his ancestors without writing, that is a descent; but where a person takes any thing from an ancestor, or others, by deed, will, or gift, and not as heir at law, that is a purchase. 2 *Litt. Abr.* 403.

When an estate doth originally vest in the heir, and never was nor could be in the ancestor, such heir shall take by way of purchase; but when the thing might have vested in his ancestor, though it be first in the heir, and not in him at all, the heir shall have it in nature of descent. 1 *Rep.* 95, 106.

Consistent with the above rule is Mr. Fearn's explanation of the much-contested point, in what case an heir shall

be said to take by limitation, and in what by purchase, or, in the language of conveyances, what are words of limitation, and what are words of purchase. See fully this Dictionary, title *Remainder*: and *post*, *Dio. I.* of this title.

I. In what Cases Heirs shall be deemed Purchasers: and of the Effect of their taking by Purchase.

II. Of Purchasers for a valuable Consideration; and how protected or made answerable in Equity. See also this Dictionary, under titles *Consideration*, *Fraud*, *Mortgage*, *Trust*, &c.

I. PURCHASE, in its vulgar and confined acceptance, is applied only to such acquisitions of land as are obtained by way of bargain and sale for money, or some other valuable consideration. But this falls far short of the legal idea of purchase; for if I give land freely to another, he is in the eye of law a purchaser, and falls within Littleton's definition, for he comes to the estate by his own agreement, that is, he consents to the gift. *1 Inst. 18.* A man who had his father's estate settled upon him in tail, before he was born, was also a purchaser; for he took quite another estate than the law of descents would have given him. Nay, even if the ancestor devised his estate to his heir at law by will, with other limitations, or in any other shape than the course of descents would direct, such heir took by purchase. *Ld. Raym. 728.* Thus if a man having two daughters, his heirs, devised his land to them and their heirs, they took by purchase as joint-tenants; for the estate of joint-tenants, and tenants in common, was different in its nature and quality from that of co-parceners. *Cro. Eliz. 431.* But previous to the recent statute, *3 & 4 Wm. 4. c. 106*, if a man seised in fee, devised his whole estate to his heir at law, so that the heir took neither a greater nor a less estate by the devise than he would have done without it, he was adjudged to take by descent, even though it were charged with incumbrances; that being for the benefit of his creditors, and others, who had demands on the estate of the ancestor. *1 Roll. Abr. 626; Salk. 241; Ld. Raym. 728.* If a remainder be limited to the heirs of A., there A. himself takes nothing; but, if he died during the continuance of the particular estate, his heirs shall take as purchasers. *1 Roll. Abr. 627; 1 T. R. 634.* But if an estate made to A. for life, remainder to his right heirs in fee, his heirs took by descent; for it is an ancient rule of law, that wherever the ancestor takes an estate for life, the heir could not, by the same conveyance, take an estate in fee by purchase, but only by descent. *1 Rep. 104; 2 Lev. 60; Raym. 334.* And if A. died before entry, still his heir took by descent, and not by purchase; for where the heir takes any thing that might have vested in the ancestor, he takes by way of descent. *1 Rep. 98.* The ancestor, during his life, beareth in himself all his heirs; and therefore, when once he is, or might have been, seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself; and the word "heirs" in this case is not esteemed a word of purchase, but a word of limitation, enuring so as to increase the estate of the ancestor, from a tenancy for life to a fee simple. *Co. Litt. 22.* And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchaser originally nominated in the deed, as must have been the case if the remainder had been expressly limited to him by name; then, in the times of strict feudal tenure, the lord would have been defrauded by such a limitation of the fruits of his signiory, arising from a descent to the heir. *2 Comm. c. 16, p. 242.* See titles *Heir*, *II.*, *Remainder*.

The difference in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: First, That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not to the blood only of some particular ancestor

Secondly, That an estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For, if the ancestor by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and in this deed, obligation, or covenant, shall be binding upon him, so far forth only as he, or any other in trust for him, had any estate of inheritance vested in him by descent from, or any estate *pur autre vie* coming to him by special occupancy, as heir to that ancestor, sufficient to answer the charge, whether he remains in possession, or hath aliened it before action brought. See *1 P. Wms. 777*; and *1 Wm. 4. c. 47.* Therefore if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or assets, by descent from the covenantor; for though the covenant descends to the heir, whether he inherits any estate or not, it lies dormant, and is not compulsory, until he has assets by descent. *Finch. Rep. 86.* See *Assets*, *Real Estate*.

By the late statute above referred to, for the amendment of the law of inheritance, great alterations have been made in the law of descents, and particularly with respect to the cases where an heir shall take by purchase, and where by descent. See *Descent*.

II. It is the rule of equity, that where a man is purchaser for valuable consideration without notice, he shall not be annoyed in equity; not only where he has a prior legal estate, but where he has a better title or right to call for the legal estate than the other. *Treat. Eq. lib. 2. c. 6. § 2.* cited *2 Vern. 589; 2 P. Wms. 678*, &c.

This rule is founded on an obvious principle of equity. It seems, however, to have been broken in upon by the decisions in *Burgh v. Burgh*; [*Burgh v. Francis*]; *Finch, 28* and *Williams v. Lambe*, *3 Bro. C. R. 264*. In the former of which cases the court appears to have interposed to the prejudice of a judgment-creditor, without notice of the plaintiff's equity; and in the latter to the prejudice of a purchaser, without notice of the plaintiff's title as dowress. With respect to those instances in which a *bona fide* purchaser has in equity been postponed, in respect of his conniving at the subsequent fraud of him under whom he derived his title, they are evidently exceptions to the general rule, which is confined to the claim of the purchaser at the time of completing his purchase; a claim which he may forfeit, as to third persons, by subsequent misconduct. *Fonblanque's Note on Treat. Eq. ubi sup.*; and see *Treat. Eq. i. c. 3. § 4*, in n. and title *Mortgage*, *III.*

It has been said, that by taking a conveyance with notice of a trust, the purchaser himself becomes the trustee, and must not, to serve himself, be guilty of a breach of trust, notwithstanding any consideration paid. *2 Vern. 271*. On this proposition seems to be stated too generally; for though an immediate or first purchaser, with notice of an equitable claim in another, shall certainly not be allowed, though a purchaser for valuable consideration, to protect himself against such equitable claim; yet if a person, having notice of an equitable claim in another, purchase from one who had not notice of such claim, he may protect himself by want of notice in his vendor; such protection being necessary to secure to the *bona fide* purchaser without notice, the benefit of his purchase. *Pre. Ch. 51; 1 Atk. 671*; *Bro. C. R. 66*. Neither shall a purchaser, without notice, from a purchaser with notice, be considered in equity as bound by the trust. *2 Vern. 384; Amb. 313.* See *post*. It may be material to remark, that notice is not confined to the time of the contract; for if a person who has a title in equity on the premises, give notice thereof before a full payment of the purchase-money, it is sufficient; *3 P. Wms. 307; 2 Atk. 630; 3 Atk. 304*; or before the execution of the conveyance, though the purchase-money be actually paid.

1 *Att.* 384; *Cases in C.* 34. As to what is a voluntary settlement within the statute, see 3 *Russ.* 273.

A voluntary settlement, made in consideration of natural love and affection, has been held void under the construction of 27 *Eliz.* c. 4. against a purchaser for a valuable consideration; although he had notice of the settlement before all the purchase-money was paid, or the conveyance executed, and though in fact there was no fraud in the transaction. 9 *East*, 59.

Where there is a general trust, as to pay debts, though the purchaser has notice of them, it seems that he is not obliged to see the purchase-money applied: otherwise if the debts be particular, as for payment of debts in a schedule. *Treat. Eq. ii.* c. 6. § 2. But though the purchaser be bound to see to the application of the money, as to the schedule debts, he is not bound to see that only so much real estate is sold or mortgaged, as will discharge such debts; unless there be a collusion between the heir and trustee. 1 *Vern.* 301; 2 *Ch. Ca.* 115, 221. Neither is he bound to see the payment of legacies, if the estate be charged generally with debts and legacies; for not being in such case bound to see to the discharge of debts, he cannot be expected to see to the discharge of the legacies, which cannot be paid till after the debts. *Fonblanque's Note on Tr. Eq. ubi sup. Jebb v. Abbott*, 1 *Bro. C. R.* See 1 *Inst.* 291, in n. and title *Trust*.

As a purchaser for valuable consideration has an equal claim to the protection of a court of equity, to defend his possession, as the plaintiff has to the assistance of the court to assert his right, a court of equity will not, in general, compel a purchaser for valuable consideration, without notice of the plaintiff's title, to make any discovery which may affect his own title; but such discovery will be enforced in favour of a doweress. See 1 *Vern.* 179; 3 *Bro. C. R.* 264.

Thus an assignee of a lease shall not be forced to discover whether the lease is expired; but lessee for years of consors of a statute has been compelled to discover what estate he had from the consors, to the end that he might be liable to the statute. 8 *Vin.* 564, pl. 2, cited *Treat. Eq. lib. 6. c. 3. § 3*.

A purchaser is not compelled to take a title depending upon the words of a will, which were too doubtful to be settled without litigation; and where the title is doubtful, a case will not be directed to the judges as to the title, at the request of the vendor; for even if the judgment were found in favour of the title, it would not bind the purchaser to accept it. *Sharp v. Adcock*, 4 *Russ.* 374. If a good title cannot be made to part of the property agreed to be sold, which is material to the enjoyment of the rest, the purchaser is not bound to complete the contract even in the compensation for the defective part. *South v. Fletcher*, 4 *Russ.* 302. See further, *Snodgrass's Trustees and Purchasers*.

PURGATION, *perjuratio*. The clearing a man's self of a crime, whereof he is publicly suspected, and accused before a court, of which there was formerly great use in England.

Purgation is either *canonica* or *vulgaris*. Canonical purgation is that which is prescribed by the canon law, the form whereof, used in the spiritual court, is that the person suspected take an oath, that he is clear of the fact, and that he is not bound by any oath, and bring his neighbours with him to swear, that they believe him to be true. The vulgar purgation, according to the common law, was by fire or ordeal, or by combat, abolished by canon. *Stuandy v. Stuandy*, 1 *Ch. Ca.* c. 48. See *Ordeal*.

The canonical doctrine of purgation, whereby the parties were obliged to answer upon oath to any matter, however trivial, that might be objected against them (though long ago discredited in the Court of Chancery), continued till the middle of the last century to be upheld by the spiritual courts, when by 13 *Car. 2.* c. 12, it is enacted, that it shall not be lawful for any bishop or ecclesiastical judge, to tender or administer to any person whatsoever, the oath usually

called the oath *ex officio*, or any other oath, whereby he may be compelled to confess, accuse, or purge himself of any criminal matter or thing, whereby he may be liable to any censure or punishment. 3 *Comm.* 100.

Anciently, upon the allowance of benefit of clergy, the person accused was given to the ordinary, to make his purgation, which was to be by a jury of twelve clerks, before the bishop in person, or his deputy, and there, first the party by his own oath, affirmed his innocency; then there were the oaths of twelve compurgators to their belief of it; then witnesses were to be examined on oath, on behalf of the prisoner only; and lastly, the jury were to bring in their verdict on oath, which usually acquitted the prisoner; otherwise if a clerk,—he was degraded or put in penance. 2 *H. & H.* 383; *Wood's Civ. L.* 669. But by the 18 *Eliz.* c. 7, this kind of purgation was taken away. See further, 4 *Comm.* 368.

The 13 *Car. 2.* c. 12, having thus taken away the oath *ex officio* of persons accusing or purging themselves, &c. some maintain that all the proceedings of purgation on common lawne fall too; others say there is still a legal purgation left, but not canonical. *Wood's Inst.* 506, 507.

See further, *Chancery, Clergy, Benefit of, Wager of Law. PURIFICATIO BEATÆ MARIE VIRGINIS*, *Candlemas*; February 2d.] The purification of the blessed Virgin Mary is one of the general returns of writs still in use, viz. the third in Hilary Term. See *Candlemas*.

PURLIEU or **PURLUE**, sometimes written *purallee*, from *Fr. pur, purus, et lieu, locus*.] All that ground near a forest, which being added to the ancient forests by King Henry II., Richard I., and King John, was afterwards disafforested and severed by the *Charta de Foresta*, and the perambulations and grants thereon, by Henry III., so that it becomes *purlue*, viz. pure and free from the laws and ordinances of the forest. *Mamm. For. Laws*, par. 2, c. 20.

Purallee is also said to be properly the perambulation whereby the purlieu is disafforested. 33 *Edw. 1.* st. 5; 4 *Inst.* 304.

Owners of grounds within the purlieu by disafforestation, may fell timber, convert pastures into arable, &c., inclose them with any kind of inclosure, erect edifices and dispose of them as if they had never been afforested; and a purlieu-man may as lawfully hunt, to all intents, within the purlieu, as any man may in his own grounds which were never afforested; he may keep his dogs within the purlieu unexpediated; and the wild beasts belong to the purlieu-man *ratione soli*, so long as they remain in his grounds, and he may kill them. 4 *Inst.* 303.

If the purlieu-man chase the beasts with greyhounds, and they fly towards the forest for safety, he may pursue them to the bounds of the forest; and if he then do his endeavour to call back and take off his dogs from the pursuit, although the dogs follow the chase in the forest, and kill the king's deer there, this is no offence, so as he enter not into the forest, nor meddle with the deer so killed; and if the dogs listen on the deer before he recover the forest, and the deer drag the dogs into the forest, in such case the purlieu-man may follow his dogs and take the deer. 4 *Inst.* 303, 304.

And notwithstanding purlieus are absolutely disafforested, it hath been permitted, that the ranger of the forest shall, as often as the wild beast of the forest range into the purlieu, with his bounds recede them back to the forest. 4 *Inst.* See further, *Derr, Forest*.

PURLIEU-MEN. Those who have ground within the purlieu, and being able to dispend forty shillings a year freehold, who, on these two points, are licensed to hunt in their own purlieus, observing what is required. *Mamm. For. Laws*, 151, 157, 180, 186. See *Purlieu*.

PURLOINING. See *Felony, Larceny, Misdemeanor*.

PURPARTY. See *Pourparty*.

PURPRESTURE. See *Pourpresture*.

PURSE. A certain quantity of money, amounting to 500 dollars, or 125*l.* in Turkey. *Merch. Dict.*

PURSUIVANT. See *Poursuivant*.

PURVEYANCE. See *Purveyance*.

PURVIEW, French *pourveu*, a patent or grant.] The body, or that part of an act of parliament which begins with "Be it enacted," &c. The 3 *Hen.* 7. stands upon a preamble and *purview*. 2 *Inst.* 403; 12 *Rep.* 20. See *Statute*.

PUTAGE, *putagium*, from the French *putaine*, Italian *putta*, *meretrix*.] Fornication.

By the feudal laws, if any heir female under guardianship were guilty of this crime, she forfeited her part to her co-heirs; or if she were an only heiress, the lord of the fee took it by escheat. *Spelman, Cowell*.

PUTATIVUS. Putative, reputed, or commonly esteemed, in opposition to notorious and unquestionable.

When a single woman, with child, swears that such a man is the father, he is called the putative father. See *Bastard*.

PUTURA, *q. polura*.] A custom claimed by keepers in forests, and sometimes by bailiffs of hundreds, to take man's meat, horse meat, and dog's meat, of the tenants and inhabitants within the perambulation of the forest, hundred, &c.; and in the liberty of Knaresburgh it was long since turned into the payment of 4*d.* in money by each tenant. *MS. de temp. Edw.* 3; 4 *Inst.* 307. The land subject to this custom is called *terra putura*. *Plac. apud Cestr.* 31 *Edw.* 3.

PYKER or PYCAR. A small ship or herring boat. See 31 *Edw.* 3. c. 2.

Q.

QUA

QUADRAGESIMA. The fortieth part; also the time of Lent, from our Saviour's forty days' fast. *Lit. Dict.* *Quadragesima Sunday* is the first Sunday in Lent, so called because about the fortieth day before Easter. *Blount.*

QUADRAGESIMALIA. In former days it was the custom for people to visit their mother church on Midlent Sunday, and to make their offerings at the high altar, as the like devotion was again observed in Whitsun-week. But as the procession and oblations at Whitsuntide were sometimes commuted into a rated payment of *pentecostals*, so the Lent or Easter offerings were changed into a customary rate called *quadragesimalia* and *denarii quadragesimales*, also *laetare Jerusalem*, from those words in the hymn for the day. *Dict.*

QUADRANS. A fourth part of a penny; before the reign of Edward I. the smallest coin was a sterling or penny, marked with a cross, by the guidance whereof a penny might be cut into halves for a halfpenny, or into quarters or four parts for farthings; till, to avoid the fraud of unequal cutting, that king coined halfpence and farthings in round distinct pieces. *Mat. West. anno 1279.*

QUADRANTATA TERRÆ, quadrarium.] The fourth part of an acre. See *Fardi. gdeat.*

QUADRIENNIIUM UTILE. In Scotch law the term of four years allowed to a minor after his majority, in which he may by suit or action endeavour to annul any deed to his prejudice granted during his minority. *Bell's Scotch Dict.*

QUADRIVIUM. The centre of four ways, where four roads meet and cross each other. By statute, posts with inscriptions are to be set up at such cross-ways, as a direction to travellers, &c. See *Ways.*

QUÆ EST EADEM, which is the same trespass, &c.] Words used in pleading to supply the want of a traverse.

2 Lil. Abr. 105. As where a plaintiff brings an action of trespass, and the defendant pleads that the plaintiff gave him leave to enter on the land, and that he entered accordingly, *quæ est eadem transgressio*, "which is the same trespass of which the plaintiff complains." See *Pleading, Trespass.*

QUÆ PLURA. A writ which lay where an inquisition had been taken by an escheator of lands, &c. of which a man died seized, and all the land was supposed not to be found by the office or inquisition; this writ was therefore to inquire of what more lands or tenements the party died seized. *Reg. Orig. 293.* But it is now useless, since the taking away the courts of wards and offices *post mortem*, by *12 Car. 2. c. 24.*

QUERE OR QUERIT. A note for the reader to make further inquiry, where any point of law, or matter of debate, is doubted, as not having sufficient authority to maintain it. *2 Lil. Abr. 406.*

QUERENS NON INVENIT PLEGIUM, the plaintiff hath not found pledge.] A return made by the sheriff on a writ directed to him with this clause, viz. *Si A. fecerit B. securum de clamore suo prosequendo, &c. F. N. B. 38.* See *Original.*

QUÆ SERVITIA. See *Per quæ Servitia.*

QUA

QUÆSTA. An indulgence or remission of penance, exposed to sale by the pope. The retailers thereof were called *questionarii*, and desired charity for themselves or others. *Mat. West. anno 1240.*

QUÆSTUS. That which a man hath by purchase, as *hæreditas* is what he hath by descent. *Glanv. lib. 7. c. 1.* See *Purchase.*

QUAKERS, tremuli.] From their pretending to tremble or quake in the exercise of their religion.

In consequence of the claim advanced by Mr. Pease, who had been returned one of the members for the southern division of the county of Durham, to take his seat upon making his solemn affirmation and declaration instead of taking the usual oaths, the House of Commons, on the 8th of February, 1833, appointed a select committee to report such precedents as they could discover bearing upon the subject. Their report, which was brought up on the 11th, presents a full detail of the various enactments which the statute books contained in reference to the Quakers, since they originally attracted the notice of the legislature. The first which they quoted was an act passed in 1674 (the 13 & 14 Car. 2. c. 1), by which it was declared, that any person refusing to take an oath when lawfully tendered, should for the first offence be fined 5*l.*, and if three times convicted, should suffer the penalty of banishment. By a subsequent act (the 15 Car. 2. c. 4. § 16), the further penalty of transportation was affixed to the offence. It was not till the year 1689, that by the 1 W. & M. c. 18 (commonly called the Toleration Act), the affirmation of Dissenters from the Church of England, who scrupled to take an oath, was legally recognized. This act, however, only exempted such persons from the pains and penalties of the statutes against Papists and Non-conformists, and that only on their subscribing a certain declaration of allegiance, and a profession of their faith in the Trinity. It was by the act 7 & 8 Wm. 3. c. 34, passed in 1697, that Quakers were first permitted to substitute their solemn affirmation instead of the usual oath, in civil causes, in the courts of justice. The act, which was to be in force only for seven years, was by a subsequent enactment (13 Wm. 3. c. 4), passed in 1702, continued for the further period of eleven years; and in 1714 (by the 1 Geo. 1. c. 6. § 1), it was made perpetual. The next statute in order was the 8 Geo. 1. c. 6, passed in 1722, by which the forms of the declaration of allegiance and of the solemn affirmation were altered. But the most decisive enactment bearing upon the subject before the committee, was the 22 Geo. 2. c. 46, passed in 1749, by which it was declared, "that in cases wherein by any act or acts of parliament now in force, or hereafter to be made, an oath is or shall be allowed, authorized, directed, or required, the solemn affirmation or declaration of any of the people called Quakers, in the form prescribed, &c. shall be allowed and taken instead of such oath, although no particular or express provision be made for that purpose in such act or acts." It was, however, at the same time provided, that no Quaker should, by virtue

of this act, be qualified or permitted to give evidence in any criminal cases, or to serve on juries, or to bear any office or place of profit in the government. It was not until the 9 Geo. 4. c. 32, passed in 1829, that Quakers and Moravians were for the first time allowed to make their solemn affirmation instead of the usual oath in giving evidence "in any case whatsoever, criminal, or civil."

The decision came to by the House of Commons upon the report of the select committee was in favour of Mr. Pease's claim, who accordingly took his seat on the following day, upon making his affirmation and declaration.

From the report of the committee, it appears that there is only one other case on the journals in which the question of the admissibility of a Quaker to take his seat on affirmation came before the House, namely, that of John Archdale, Esq. returned for Chipping Wycombe, in 1699. This gentleman made his claim by a letter to the Speaker, dated "Tuesday, the 3d of the eleventh month, called January, 1698-9," which was read to the House the same evening. The House after hearing it, ordered that it should be taken into consideration on the Friday following, and that Mr. Archdale should be in attendance on the morning of that day. The act of 7 & 8 Wm. 3. legalizing the affirmation of a Quaker, in certain cases, was at that time in force; but the decision came to by the House, nevertheless, was an order that the Speaker should issue his warrant to the clerk of the crown to make out a new writ for the borough of Chipping Wycombe.

Quakers continued inadmissible to serve on juries, and to places of profit in the government, until the passing of the 3 & 4 Wm. 4. c. 39, introduced into the Commons by Lord Morpeth, whereby Quakers and Moravians are permitted to make their solemn affirmations or declarations instead of taking oaths, in all places and for all purposes whatsoever where an oath is or shall be required, either by the common law or by act of parliament.

By the same act, the form of affirmation to be taken by Quakers and Moravians, instead of the oath of abjuration, is altered, and is hereafter to be made in the words thereby prescribed.

The same provision is contained in the above act as well as in all former statutes declaring persons making false affirmations liable to the punishments enacted against perjury.

Quakers refusing to pay tithes or church rates, justices of peace are to determine them, and order costs, &c. 7 & 8 Wm. 3. c. 34. § 4; 1 Geo. 1. c. 6. Quakers may be committed to prison for non-payment of tithes, on stat. 27 H. 8. c. 20, which is not repealed by 7 & 8 Wm. 3. which gives another remedy. 1 *Ld. Raym.* 323. See *Tithes*.

In the Militia Acts and the several acts for raising men for defence of the realm, provisions are introduced for relieving Quakers against the operation of them by the payment of certain fines; the tenets of the Quakers preventing them from serving in war.

QUALE JUS. A judicial writ, which was brought where a man of religion had judgment to recover land before execution was made of the judgment; it went forth to the escheator between judgment and execution, to inquire *what right* the religious person had to recover, or whether the judgment were obtained by collusion between the parties, to the intent that the lord might not be defrauded. *Reg. Judic.* 8, 16, 46; *Stats. Westm.* 2; 13 *Edw.* 1. st. 1. c. 32.

QUALIFIED. Is applied to a person enabled to hold two benefices. See *Plurality*.

QUALIFIED (or Base) FEE. Is such a one as hath a qualification subjoined thereto. See *Estate*.

QUALIFIED OATH. An oath where the party swears not simply, but circumstantially.

QUALIFIED PROPERTY. See *Possession, Property*.

QUAMDIU SE BENE GESSERIT, *As long as he shall behave himself well in his office.* A clause often inserted in

letters-patent of the grant of offices; as in those of the barons of the Exchequer, &c. which must be intended in matters concerning their office; and is nothing but what the law would have implied if the office had been granted for life. 4 *Inst.* 117. See *Judges*.

QUANTUM MERUIT, *So much as he deserved.* Was an action on the case, express or implied, grounded on a promise to pay the plaintiff for doing any thing so much as he deserved or merited.

If a man retain any person to do work or other thing for him; as a tailor to make a garment, a carrier to carry goods, &c. without any certain agreement; in such case the law implies that he shall pay for the same, as much as they are worth, and shall be reasonably demanded; for which *quantum meruit* until recently might have been brought; and if one sued another on a promise to satisfy him for work done, &c. he must have shown and averred in his declaration how much he deserved for his work. See *Pleading*, I. 1.

QUANTUM VALEBAT, *So much as it was worth.* Where goods and ware sold are delivered by a tradesman at no certain price, or to be paid for them as much as they are worth in general, then *quantum valebat* lay, and the plaintiff was to aver them to be worth so much: so where the law obliges one to furnish another with goods or provisions, as an innkeeper his guests, &c. See *Assumpsit, Pleading*, I. 1.

Formerly *quantum meruit* and *quantum valebat* counts were usually inserted among the other common counts in every declaration in *assumpsit*; but they were in effect abolished by the rules of H. T. 1 Wm. 4. which prescribed a short form for such of the common counts as are retained.

QUARANTINE, QUARENTAINE, *quarantina.* A benefit allowed by law to the widow of a man dying seized of lands, whereby she may challenge to continue in his capital messuage or chief mansion-house (not being a castle), by the space of forty days after his decease, in order to the assignment of her dower, &c. And if the heir or any other eject her, she may bring the writ *de quarantina habenda*; but the widow shall not have meat, drink, &c.; though if there be no provision in the house, according to Fitzherbert, she may kill things for her provision. See *Magna Charta*, c. 7; *Bract. lib.* 2. c. 40; *F. N. B.* 161; and *ante*, tit. *Dower*, III.

QUARANTINE. The term of forty days, during which the persons coming from foreign parts, infected with the plague, are not permitted to land or come on shore.

By the 6 Geo. 4. c. 78. all former acts relating to quarantine were repealed, and the existing quarantine regulations depend upon its provisions and the different orders in council issued under its authority. These orders specify what vessels are liable to perform quarantine, the places at which it is to be performed, and the various formalities to be observed. The publication in the Gazette of any order in council with respect to quarantine, is deemed sufficient notice to all concerned, and no excuse of ignorance is admitted for any infringement of the regulations.

The following is a short abstract of the principal clauses of the act.

By § 8. masters of vessels liable to quarantine are to make signals on meeting other vessels at sea, or being within two leagues of the United Kingdom, or Guernsey, &c. on penalty of 100*l.*

And § 9. masters of vessels are to hoist certain signals when plague or infectious disease on board, on penalty of 100*l.*

§ 10. inflicts a penalty on persons hoisting signals when not liable.

By § 11. masters of vessels, on their arrival from foreign parts, are to give to the pilots an account of the places at which they shall have loaded and touched, on penalty of 100*l.* And pilots are to give notice of any proclamation or order in council requiring the performance of quarantine, on penalty of 100*l.*

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By § 12. pilot to give notice if any articles be on board liable to quarantine, on penalty of 100*l*.

By § 13. pilots are to bring to at request of officer of customs, on penalty of 100*l*.

By § 14. for better ascertaining whether vessels be actually infected, or the persons on board liable to orders touching quarantine, masters of vessels may be interrogated by the principal officer of the customs at the port where they are going; and refusing to answer interrogatories, &c. shall forfeit 200*l*.

§ 15. Vessels subject to quarantine arriving at any port than that at which it ought to be performed, may be forced to repair to the appointed place. Masters of vessels that have touched at infected places, &c. omitting to disclose the same, or omitting to hoist the prescribed signal, are to forfeit 300*l*.

§ 16. Commanders to deliver up books of health, manifests, and log-book, to the superintendent of quarantine, on penalty of 100*l*.

§ 17. Penalty on masters, &c. quitting vessels, or permitting persons to quit them, or not conveying the same to the appointed places, 400*l*. Penalty on persons coming in such vessels, or going on board, and quitting them before discharged from quarantine, to suffer imprisonment for six months, and forfeit 300*l*.

By § 18. the superintendent of quarantine, &c. may punish disobedience or refractory behaviour in persons under or liable to quarantine, or persons having intercourse with them. Persons refusing to repair to the lazaret or vessel, are to forfeit 200*l*.

§ 19. Persons quitting vessels liable to perform quarantine, &c. may be seized.

By § 20. intercourse with stations allotted for quarantine of vessels, may be prohibited by order in council.

By § 21. if any officer of his majesty's customs, or any other person whatsoever, to whom it shall appertain to execute any order concerning quarantine, shall imbecillate any goods performing quarantine, or be guilty of any other breach or neglect of his duty, he shall forfeit such office or employment as he may be possessed of, and pay two hundred pounds; and if any such officer or person shall desert from his duty when employed as aforesaid, or permit any person, vessel, goods, or merchandize, to depart or be conveyed out of the said lazaret vessel or other place as aforesaid, or if any person authorized to give a certificate of a vessel having duly performed quarantine or airing, shall give a false certificate thereof, every such person shall be guilty of felony, and if any such officer or person shall damage any goods performing quarantine under his direction, he shall be liable to pay 10*l*. damages and full costs of suit to the owner.

By § 25. persons forging or uttering false certificates required by order in council, are declared guilty of felony.

§ 26. inflicts a penalty of 100*l*. on persons landing goods, &c. from vessels liable to perform quarantine, or receiving them, or secreting them from vessels performing quarantine.

The system of quarantine is regulated in Ireland by the Irish act, 40 Geo. 3. c. 79.

Under the former quarantine acts it was held that if a pilot quits the ship contrary to a order of the king in council, he may be indicted for a misdemeanor, and punished by the discretion of the court, on the ground of his violating the direction of a positive prohibitory statute. 4 T. R. 206.

QUARANTINE likewise signifies a quantity of ground, containing forty perches. Leg. Hen. 1. c. 16.

QUARE CLAUSUM FREGIT. See Capius, Common Pleas.

QUARE CUM. Are general words used in original writs, &c. See Original.

QUARE EJECT INTRA TERMINUM. A writ which lay by the ancient law where the wrong-doer or ejector was not himself in possession of the lands, but another who claimed under

QUARE IMPEDIT.

him. As where a man leased lands to another for years, and after the lessor or reversioner entered and made a feoffment in fee or for life of the same lands to a stranger, there the lessee could bring a writ of *ejectione firmæ*, or ejectment, against the feoffee; because he did not eject him but the reversioner; neither could he have any such action to recover his term against the reversioner who ousted him, because he was not now in possession. And upon that account this writ was devised upon the equity of Stat. Westm. 2. c. 24. as in a case where no adequate remedy was provided. F. N. B. 198. And the action was brought against the feoffee, for deforcing or keeping out the original lessee, during the continuance of his term; and therein, as in the ejectment, the plaintiff should recover so much of the term as remained; and also should have actual damages for that portion of it whereof he had been unjustly deprived. 3 Comm. c. 11. p. 207.

After the introduction of fictitious ousters, whereby the title may be tried against any tenant in possession (by what means soever he acquired it), and the subsequent recovery of damages, by action of trespass for meane profits, this writ fell into disuse, and it was abolished by the 3 & 4 Wm. 4. c. 27. § 36. See Ejectment.

QUARE IMPEDIT.

A WRIT lying for him who hath purchased an advowson against a person who hinders or disturbs him in his right of advowson by presenting a clerk thereto when the church is void. F. N. B. 32; Stat. Westm. 2. c. 5.

It differs from the obsolete and recently abolished assize of *darrein presentment* (*ultimæ presentationis*), because that lay where a man or his ancestors, under whom he claimed, had formerly presented to the church; and this lies for him who is purchaser himself; but in the latter the plaintiff recovers the presentation and damages, as he also did in the former; in the writ of *darrein presentment*, &c. he recovered only the presentation, not the title to the advowson, as he did in a *quare impedit*; for which reason the remedy by that assize was discontinued. And where a man might have had assize of *darrein presentment*, he may have *quare impedit*. 2 Inst. 356. See *Darrein Presentment*.

A *quare impedit* is properly a possessory writ, which lies for the patron of an advowson to restore him to the possession of his advowson and to his right of presentation. At common law it only lay where the patron was hindered from presenting during the vacancy of the church, plenarty being in all cases a good plea. But now by the Statutes of Westminster 2, 13 Edw. 1. and 7 Ann. c. 18. it lies in every case of an usurpation, though the clerk is admitted and instituted, provided it be brought within six months. And if the patron suffers the six months to elapse, he may still, on the next avoidance, bring his writ of *quare impedit*. By this writ the patron may not only recover the possession of the advowson, but may remove the clerk who has been wrongfully presented, and have his own clerk admitted.

Upon the vacancy of a living, the patron is bound to present within six calendar months, otherwise it will lapse to the bishop. See *Advowson*, II. But if the presentation be made within that time, the bishop is bound to admit and institute the clerk, if found sufficient; unless the church be full, or there be notice of any litigation. For if any opposition be intended, it is usual for each party to enter a *caveat* with the bishop, to prevent his institution of his antagonist's clerk. An institution, after a *caveat* entered, is void by the ecclesiastical law; but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity. But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become litigious; and, if nothing farther be done, the bishop may suspend the admission of either, and suffer a lapse to occur. Yet, if the patron or clerk on either side request him to award a *jus patronatus*, he is bound to do it. This *jus patronatus* is a commission from the bishop,

directed usually to his chancellor, and others of competent learning, who are to summon a jury of six clergymen and six laymen, to inquire into and examine who is the rightful patron (see tit. *Jus Patronatus*); and if, upon such inquiry made and certificate thereof returned by the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events from being a disturber, whatever proceedings may be had afterwards in the temporal courts. 3 *Comm. c.* 16.

The clerk refused by the bishop may also have a remedy against him in the spiritual court, denominated a *duplex querela*, which is a complaint in the nature of an appeal from the ordinary to his next immediate superior; as from a bishop to the archbishop, or from an archbishop to the delegates; and if the superior court adjudges the cause of refusal to be insufficient, it will grant institution to the appellant.

Thus far matters may go on in the mere ecclesiastical course; but in contested presentations they seldom go so far; for upon the first delay or refusal of the bishop to admit his clerk, the patron usually brings his writ of *quare impedit* against the bishop, for the temporal injury done to his property in disturbing him in his presentation. And if the delay arises from the bishop alone, as upon pretence of incapacity, or the like, then he only is named in the writ; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the action; or it may be brought against the patron and clerk, leaving out the bishop; or against the patron only. But it is most advisable to bring it against all three; for if the bishop be left out, and the suit be not determined till the six months are past, the bishop is entitled to present by lapse, for he is not party to the suit; but if he be named, no lapse can possibly accrue till the right is determined. *Cro. Jac.* 93. If the patron be left out, and the writ be brought only against the bishop and the clerk, the suit is of no effect, and the writ shall abate; for the right of the patron is the principal question in the cause. *Hob.* 316; 7 *Rep.* 25. If the clerk be left out, and has received institution before the action brought (as is sometimes the case), the patron by this suit may recover his right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant and party to the suit, to hear what he can allege against it. For which reason it is the safer and now usual way to insert all three in the writ. See *Hob.* 320; *Jenk. Cent.* 200.

Quare impedit will not lie against the ordinary and incumbent, without naming the patron; because at common law the incumbent could not plead any thing which concerned the right of patronage, therefore it is unreasonable that he alone should be named in the writ who could not defend the patronage; but the 25 *Edw. 3. st. 3. c. 7.* enables him to plead against the king, and to defend his incumbency, although he claims nothing in the patronage; and by that statute he shall plead against any common person, though with this difference, that when the inheritance of the patron is to be divested by judgment in a *quare impedit*, there he must be named in the writ; but where the next presentation only is to be recovered, he need not be named; yet where the king presents without a title, and his clerk is inducted, the *quare impedit* is to be against the ordinary and incumbent, for it will not lie against the king; but if he is plaintiff, the writ may be brought against the patron alone, without naming the incumbent. 7 *Rep.* 25; *Cro. Jac.* 650; *Palm.* 306.

By the writ of *quare impedit* a patron may be relieved not only on his presentation to a church, but to a chapel, prebend, vicarage, &c. And this writ lies of a donative; and the special matter is to be set forth in the declaration. It also lieth for a deanery by the king, although it be elective; and for an archdeaconry; but not for a mere office of the church. *Co. Lit.* 344; 1 *Leon.* 205. And the chapter may have a *quare impedit* against the dean of their several possessions. 40 *Edw. 3.* 48.

If the *quare impedit* be for a donative, the writ shall be *quare impedit* to present to the donative; if of a parsonage, then *quare impedit presentare ad ecclesiam*; if to a vicarage, *ad vicarium*; if to a prebend, *ad prebendam*, &c. 3 *Nels. Abr.* 35.

The plaintiff in *quare impedit* must have had an immediate right of presentation, and not merely in reversion or remainder, for it is a possessory action.

If the right of nomination be in one, and the right of presentation in another, and either impede the other in his right, *quare impedit* lies. 3 *T. R.* 646.

If a bishop be disturbed to collate where he ought to make a collation, he may have a writ of *quare impedit*, and the writ shall be *quod permittat ipsum presentare*, &c. and he shall count on the collation; and if the king be disturbed in his collation by letters-patent, he shall have *quare impedit*, &c. *New Nat. Br.* 73.

Grantee of a next avoidance may bring this writ against the patron who granted the avoidance. 39 *Hen.* 6.

It may be brought by executors for a disturbance in *testatoris*; and executors, being disturbed in their presentation, may bring *quare impedit* as well as their testator might. *Owen*, 99; *Lutw.* 1.

Husband and wife jointly, or the husband alone, without his wife, may have the writ *quare impedit*; and if a man who hath an advowson in right of his wife, be disturbed in his presentation, and dies, the wife shall bring it on that disturbance. 14 *Hen.* 4; 5 *Rep.* 97.

The heir shall not have *quare impedit* for a disturbance *tempore patris*; nor can he have execution on a recovery by the ancestor. *Br. Q. In. pl.* 7. 9. But by the 13 *Edw. 1. c. 5.* usurpation of churches during wardship, particular estates of vacancy, &c. shall not bar an heir at full age, reversioner in possession, or a spiritual person in succession, from having writ possessory of *quare impedit*, &c. as the ancestor or predecessor might have had, if such usurpation had been in their time; and the same form of pleading was directed to be had in *darrein presentment* and *quare impedit*.

Where partition is made on record, to present by turns, the coparcener who is disturbed shall not be put to a *quare impedit*; but may have remedy on the roll by *scire facias* if it is otherwise on an agreement to present. See 13 *Edw. 1. c. 5. § 5.* and tit. *Parceners*.

In pleading a right in coparceners to present to an advowson by turns, it is good to state that the right arose because they did not agree to present, which is synonymous to say, if they could not agree. 1 *H. Blackst.* 376.

If three coparceners of an advowson do not agree to present on a vacancy, the eldest or her assigns may present to the first turn, and the second and third (or their assigns) to the next turns, according to the order of the birth of the coparceners. 1 *H. Blackst.* 412.

In *quare impedit* the defendant pleaded that one M. O. under whom he claimed, being seised in fee of one moiety of the advowson, and entitled to present to one turn in every two turns, presented one I. O. in her proper turn; that the church being afterwards vacant, one P. W. under whom the plaintiff claimed, presented in his proper turn; that the church being again vacant, the plaintiff presented, and that the church being a fourth time vacant, it belonged to the defendant to present. On demurrer to this plea, the court held that the defendant had not shown a title to present, since he had not shown whether the third presentation was by usurpation or by agreement, and that it could not be presumed that the defendant was entitled to present in the first and fourth turn, and the plaintiff in the second and third, since the plea averred that M. O. had presented to the first in her proper turn. And *semble*, that if it had appeared by the plea that the plaintiff had presented to the third turn by usurpation, he would still have been entitled to the fourth turn by right. *Birch v. Lichfield, &c. Bp.* 3 *Bos. & Pull.* 444.

Where a declaration alleged that the advowson had descended to the four copartners, and they not agreeing to present jointly on the first vacancy, the elder sister presented, and afterwards, on two subsequent vacancies, that A. and B. presented in right of the second and third sisters respectively, it was held that it was to be presumed that these presentations were by right, and not by usurpation, and therefore did not turn the estate of the coparceners to a mere right; and that *quare impedit* was maintainable by a grantee of the fourth coparcener; and it was not necessary for the plaintiff claiming to present in the fourth turn in right of the youngest sister, to show that the presentations in the turns of the other sisters were made by right. 10 B. & C. 584. S. C.; 5 Bing. 171.

Where the founder of a chapel of ease in the township of A. endowed it with lands for the maintenance of a chaplain, and by his will directed that his son should during his life have the nomination and election of the minister, and might by will or deed set down the order or course for the nomination and election of the minister after his death; and in default thereof, then directed that the minister should be nominated and elected "by all the householders or heads of families in the township, and the heirs male of the founder's body, and such other of his kindred or blood as should have any land in the township, or the greater number of them;" and the son not having set down any order or course for the nomination and election of a minister: held, in *quare impedit*, that the declaration, which averred a nomination and election of a minister by the plaintiffs, "being the greater number of the householders and the heads of families in the township, to whom the nomination and election of the minister then belonged," was ill, even after verdict, for not showing that "the heirs male of the founder's body, and not of his kindred or blood as had lands in the township," concurred in the nomination, or that they were in the minority, or that there were no such persons in existence. *Tamworth v. Chester (Bp.)*, 7 D. & R. 96; 4 B. & C. 555.

If tenant in tail suffer an usurpation, and die, and six months pass, the issue in tail cannot bring *quare impedit*; but at the next avoidance he may have it within the six months. 40 Assize, 4.

As this writ is all in the possession, the presentment of a grantee of the next avoidance is a good title for the grantor and patron in fee to bring it; and likewise for his heir and other grantees. 9 Hen. 7. c. 23; 5 Rep. 97.

The king cannot remove an incumbent presented, instituted, and inducted, although on an usurpation, but by *quare impedit* in a judicial way. *Cro. Jac.* 385. See *Advowson*, III.

Immediately on the suing out of the *quare impedit*, if the plaintiff suspects that the bishop will admit the defendant's or any other clerk, pending the suit, he may have a prohibitory writ, called a *ne admittas*; which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever till such contention be determined. See *Ne admittas*.

In the proceedings upon a *quare impedit*, the plaintiff must set out his title at length, and prove at least one presentation in himself, his ancestors, or those under whom he claims (except in case of a church created by himself, see *post*), for he must recover by the strength of his own right, and not by the weakness of the defendants. *Vaugh.* 7, 8, 5 Bligh, N. S. 126. And he must also show a disturbance before the action brought. *Hob.* 199. Upon this the bishop and the clerk usually disclaim all title, save only the one as ordinary, to whom is left to defend his own right. And upon failure of the plaintiff in making out his own title, the defendant is put upon the proof of his, in order to obtain judgment for himself on the trial. But if the right be found for the plaintiff, if the church be full, and if full, then of whose presentation; if it be of the defendant's presentation, then the clerk is

removable by writ brought in due time: secondly, of what value the living is; and this in order to assess the damages which are directed to be given by the statute of *West. 2. 13 Edm. 1. c. 5*, see *post*: thirdly, in case of plenarty upon an usurpation, whether six calendar months have passed between the avoidance and the time of bringing the action; for then it would not be within the statute, which permits an usurpation to be divested by a *quare impedit*, brought *infra tempus semestris*. So that plenarty is still a sufficient bar in an action of *quare impedit*, brought above six months after the vacancy happens, as it was universally by the common law, however early the action was commenced. 2 Inst. 361; 3 Comm. c. 16. See *Advowson*, III.

In the declaration of the plaintiff it is not sufficient for him to allege that he or such a person from whom he claims, were seised of the advowson of the church, but he must allege a presentation made by one of them; for if he doth not, the defendant may demur to the declaration; and the reason is, that the plaintiff, by joining the last presentation to his own title, is to make it appear that he hath a right to present now as well as then. *Cro. Eliz.* 518; 5 Rep. 97; *Vaugh.* 57. But the want of such allegation may be cured by verdict. 2 Stra. 1006. See 3 B. & P. 444.

And if a man, by the king's licence, creates a church which shall be presentable, if he be disturbed to present to it, he may have a *quare impedit* without alleging a presentation in any person; but anciently it was held he might not, because he could not allege a presentation. 20 Edm. 4. 14; *Mallory's Quare Impedit*, 153.

The only plea the bishop hath by the common law on a *quare impedit* is, that he claimeth nothing but as ordinary; he could not counterplead the patron's title, or any thing to the right of patronage, nor could the incumbent counterplead such title, till the 25 Edm. 3. st. 3. c. 7. by which both bishop and incumbent may counterplead the title of the patron; the one, when he collates, by lapse, or makes title himself to the patronage; the other, being *persona impersonata*, may plead his patron's title, and counterplead the title of the plaintiff. And it has been adjudged, that an incumbent cannot plead to the title of the patronage, without showing that he is *persona impersonata* on the presentation of the patron. *W. Jonas*, 4; *March.* 159. And in a recent case it was held that the bishop cannot counterplead or dispute the patron's title before he has collated. 9 Bing. 681, S. C.; 3 Moore & S. 102.

Several were plaintiffs in a *quare impedit*, the defendant pleaded the release of one of them pending the writ; and it was resolved that this release shall only bar him who made it, and that the writ shall stand good for the rest. 5 Rep. 97.

In all *quare impedit*s a defendant may traverse the presentation alleged by the plaintiff; if the matter of fact will bear it; but the defendant must not deny the presentation alleged, where there was a presentation. *Vaugh.* 16, 17. And if a presentation is alleged in the grantor and grantee, the presentation in the grantor is only traversable, for that is the principal. *Cro. Eliz.* 518.

Quare impedit was brought against two, one of them cast an *essoign*, and *idem dies datus est* to the other, &c. Then an attachment issued against them for not appearing at the day, and process continued to the *grand cape*, which being returned, and the parties not appearing, it was ruled that final judgment should be entered according to the 52 Hen. 3. c. 12. But on motion to discharge this rule, because the defendants were not summoned either on the attachment or grand distress, the summoners being only the feigned names of John Doe and Richard Roe, the judgment was set aside, for the design of the statute was to have process duly executed, and that must be with notice, &c. And where the right is for ever concluded, this being so fatal, the process must never be suffered to be a thing of course. 1 Mod. 248.

Where two defendants in a *quare impedit* plead several

bars, and one of them is found against the plaintiff, and the other with him; he shall not have his writ to the bishop. And if there are many defendants pleading several pleas, the plaintiff shall not have judgment before all the pleas are tried; for though some be for the plaintiff, others may be found against him, and he cannot have judgment without a good title. *F. N. B.* 30; *Hob.* 70.

If it be found that the plaintiff hath the right, and hath commenced his action in due time, then he shall have judgment to recover the presentation; and if the church be full by institution of any clerk, to remove him, unless it were filled *pendente lite*, by lapse to the ordinary, he not being party to the suit; in which case the plaintiff loses his presentation *pro hęc vice*, but shall recover two years full value of the church from the defendant, the pretended patron, as a satisfaction for the turn lost by his disturbance; or in case of insolvency, the defendant shall be imprisoned for two years; and in other cases half a year's value, and half a year's imprisonment. *Stat. Westm.* 2. 13 *Edm.* 1. c. 5. § 3. But if the church remains still void at the end of the suit, then which ever party the presentation is found to belong to, whether plaintiff or defendant, shall have a writ directed to the bishop *ad admittendum clericum*, reciting the judgment of the court, and ordering him to admit and institute the clerk of the prevailing party; and if upon this order he does not admit him, the patron may sue the bishop in a writ of *quare non admittit*, and recover ample satisfaction in damages. *F. N. B.* 38, 47; 1 *Mod.* 254; 3 *Comm.* c. 18. See *Quare non admittit*.

In a *quare impedit*, though it was found that the church was full of another, who was a stranger to the writ, and it did not appear whether he came in by a better title than that which was found for the plaintiff; it was held that the plaintiff might have a general writ to the bishop, which he is bound by law to execute, or shall be amerced, &c. and he cannot return that the church is full of another; for no issue can be joined between the bishop and the plaintiff, because he has no day in court. 6 *Rep.* 51; 3 *Leon.* 136. See *ante* and *post*.

But where the plaintiff recovered an advowson in ejectment, and thereupon had a writ to the bishop, there being another incumbent in the church, who was not a party to the action; adjudged, that this writ would not lie without a *scire facias* to the incumbent. *Sid.* 93.

If it appears in *quare impedit*, either in pleading or by confession of the parties, that neither of them have a title, but that it is in the king, the court may award a writ to the bishop for the king to remove the incumbent, and admit *idoneam personam ad presentationem regis*; but this must be when his title is very plain. *Hob.* 126, 163; 1 *Leon.* 323.

In *quare impedit* the plaintiff and defendant are both actors; so that the defendant may have a writ to the bishop, as well as the plaintiff; but not without a title appearing to the court; wherefore if the defendant never appears, the plaintiff must make out a title for form sake, and so must the defendant, if the plaintiff be nonsuited. *Hob.* 163.

If the plaintiff, after appearance in a *quare impedit*, be nonsuited, it is peremptory, because the defendant on title made, whereby he becomes actor, shall have a writ to the bishop; and it is the same in case of a discontinuance. 7 *Rep.* 27.

It is the nature of a *quare impedit* to be final, either on a discontinuance or nonsuit; and a man cannot have two suits for the same thing in this case against one person, though he may have several *quare impedit*s against several persons. 7 *Rep.* 27; *Hob.* 137.

The parson, patron, and ordinary are sued; the ordinary disclaims, and the parson loseth by default, the plaintiff shall have judgment to recover his presentation, and a writ shall issue to the bishop, &c. with a *cesset executio*, until the plea is determined between the plaintiff and patron. *Vaugh.* 6.

In a *quare impedit* against the archbishop, the bishop, and three defendants; the archbishop pleaded that he claimed

nothing but as metropolitan, and the bishop pleaded that he claimed nothing but as ordinary, and the defendants made title; but there was a verdict against them; it was a question whether the writ of execution should be awarded to the archbishop or the bishop; and it was held that where neither of them are parties in interest, it may be directed to either; but if the bishop is party in interest, it must be directed to the archbishop. 6 *Rep.* 48; 3 *Bulst.* 174. And if the Archbishop of Canterbury be plaintiff in a *quare impedit*, the writ must be directed to the Archbishop of York. *Shom.* 329.

If a defendant pleads *ne disturba* (that he did not disturb), which is, in effect, the general issue in a *quare impedit*, this will be only a defence of the wrong with which he stands charged, and is so far from controverting the plaintiff's title, that the plea, as it were, confesses it; and the plaintiff may presently pray a writ to the bishop, or maintain the disturbance in order to recover damages. *Hob.* 163.

There must be a disturbance to maintain this action. In a *quare impedit*, the patron declared on a disturbance of him to present 1st November; the incumbent pleaded, that 1st May next after, the presentation devolved on the queen by lapse, and she presented him to the church, &c. And on demurrer the plea was held ill, because the defendant had not confessed and avoided, nor traversed the disturbance set forth in the declaration; and though by the demurrer the queen's title was confessed, it appearing that it was already executed, and the defendant having lost his incumbency by ill pleading, the writ shall not be awarded to the bishop for the queen to present again, but for the patron. 1 *Leon.* 194.

The courts at Westminster are very cautious not to abate the writ of *quare impedit* for any want of form, &c. yet if the bishop against whom the writ is brought, or any of the defendants are misnamed, it is good cause of abatement; if the patron be not named in the writ, it may be pleaded in abatement; though death of the patron, pending the writ, doth not abate it if the *quare impedit* is brought against the bishop, patron, and incumbent; and if the incumbent dies pending the writ, and a disturber present again, and dies, *quare impedit* would lie on the first disturbance by journey accounts; but the first writ is abated by the plaintiff's death, also if the plaintiff bring a new writ within fifteen days after the abatement, that shall be a continuance of the first writ, and prevent the defendant taking any advantage; but if the writ abate for any fault in the declaration, the defendant shall have a writ to the bishop to admit his clerk; so if judgment is given on demurrer, &c. *Cro. Eliz.* 324; *Cro. Car.* 651; 7 *Rep.* 57; *Dyer*, 240.

In a plea of *quare impedit*, days are given from fifteen to sixteen, or from three weeks to three weeks, according to the distance of place; and if the disturber come not in on the great distress, a writ is to be sent to the bishop, that he claim not to the prejudice of the plaintiff for that time; and on recovery, judgment is to be given to the party to recover the presentation and advowson. 52 *Hen.* 3. c. 12; 2 *Roll.* Abr. 377.

Though damages are given by *stat. West.* 2. c. 5. they shall not be had against the bishop where he claims nothing but as ordinary, and is no disturber. 3 *Leo.* 59. Before this statute, no damages were allowed on a *quare impedit*, and the king hath none at this day; for although he declares *ad damnum*, &c. he is not within that statute, because by his prerogative he cannot lose his presentation. 6 *Rep.* 52. If the plaintiff hath a verdict, and the church is found vacant, the patron may have the fruits of his presentation, and so not be entitled to damages; in which case a *remitter de damnis* is entered. 3 *Leo.* 59.

The points to be inquired of, where the jury find for the plaintiff, &c. are, of whom and on whose presentation the church is full; how long since it was void; the yearly value of the church, &c., which being found, damages are to be given accordingly. 6 *Rep.* 51. See *ante*.

No costs were recoverable in *quare impedit*, because of the great damages given by the statute of *West. 2. c. 5.* until the passing of the recent act of the 4 & 5 *Wm. 4. c. 39.* By this statute it is enacted, that in all actions of *quare impedit* brought hereafter in England, Wales, or Ireland, where a verdict shall pass for the plaintiff in any such action, in addition to the damages to which he is by law now entitled, he shall also have judgment to recover his full costs against the defendant therein, to be assessed and levied in such manner as costs in personal actions are by law assessed and levied; and where in any such action the plaintiff shall discontinue or be nonsuited, or a verdict shall be had against him, that then the defendant shall have judgment to recover his full costs and charges against the plaintiff, to be assessed and levied in manner aforesaid.

The act contains an important proviso, declaring that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the judge who shall try the cause, or if there shall be no trial by a jury, the court in which judgment shall be given, shall certify that such archbishop, &c. had probable cause for defending such action; but in no case where the defence to any such action shall be grounded upon a presentation or presentations, collation or collations, previously made to any benefice, shall such presentation, &c. be deemed probable cause for defending such action.

Where judgment is given to have a writ to the bishop in *quare impedit*, it shall not be reversed on writ of error brought on the whole judgment, though the judgment by the statute for damages be erroneous and reversed. 5 *Rep.* 58, 59.

Where one recovers in a *quare impedit* against an incumbent, the incumbent is so removed by judgment, that the recoverer may present without any thing farther; but the incumbent continues incumbent *de facto*, till such presentation is made; and if the plaintiff in this suit be instituted on a writ to the bishop, the defendant cannot appeal; if he doth, a prohibition lies, because in this case the bishop acts as the king's ministers, not as a judge. 2 *Roll. Abr.* 265; 1 *Roll. Rep.* 62.

In a writ of *quare impedit*, as was also the case in the assize of *darrein presentment*, and writ of right of advowson, now both abolished (see *Writ of Right*), the patron only, and not the clerk, is allowed to sue the disturber. But by virtue of several acts of parliament, there is one species of presentation which a remedy to be sued in the temporal courts is put into the hands of the clerks presented, as well as of the owners of the advowson, viz. the presentation to such benefices as belong to Roman Catholic patrons, which, according to their several counties are vested in and secured to the two universities of this kingdom. See 3 *Jac.* 1. c. 5; 1 *W. & M.* 12 *Ann.* 2. c. 14; 11 *Geo.* 2. c. 17. By the proceedings provided, viz. that besides the writs of *quare impedit*, which the universities as patrons are entitled to bring, they or their clerks may be at liberty to file a bill in equity against any person presenting to such living and disturbing their right of patronage, or his *cestui que trust*, or any other person whom they have cause to suspect, in order to compel a discovery of any secret trusts, for the benefit of Papists, in violation of those laws whereby this right of advowson is vested in those learned bodies; and also (by 11 *Geo.* 2. c. 17.) to compel a discovery whether any grant or conveyance said to be made of such advowson, were made *bond fide* to a purchaser for the benefit of Protestants, and for a full consideration, without which requisites every such grant and conveyance of any advowson or avoidance is absolutely null and void. This is a particular law, and calculated for a particular purpose; but in no instance, except this, does the common law permit the clerk himself to interfere in recovering a presentation of which he is afterwards to have the advantage. For besides that, he has no temporal right in him till after institution and induction, this exclusion of the clerk

from being plaintiff seems also to arise from the very great honour and regard which the law pays to his sacred function. See 3 *Comm.* c. 16.

The writ of *quare impedit* must be brought in the Common Pleas, unless the king is plaintiff, who may choose his own court. *F. N. B.* 33, E.; 11 *Rep.* 68, b.

It must also be brought in the county where the church is. It commands the disturbers, the bishop, the pseudo-patron, and his clerk, to permit the plaintiff to present a proper person (without specifying the particular clerk) to such a vacant church, which pertains to his patronage; and which the defendants, as he alleges, do obstruct; and unless they so do, then that they appear in court to show the reason why they hinder him. *F. N. B.* 32.

The process in *quare impedit* is summons, attachment, and, at common law, distress infinite; but by the Statute of Marlbridge, c. 12. if the defendant makes default at the return of the distringas, the plaintiff may have judgment and a writ to the bishop.

There was no limitation with regard to time within which *quare impedit* (or any other action touching advowsons) was to be brought; at least none later than the times of Richard I. and Henry III. until the recent statute of the 3 & 4 *Wm.* 4. c. 27. For the period within which *quare impedit* (which is one of the few exceptions to the real actions abolished by the above statute) may now be brought under the provisions of that act, see *Limitation of Actions*, II. See further, *Advowson*; *Juris Utrum*, &c.

QUARE INCUMBRAVIT. A writ which lieth against the bishop who within six months after the vacation of a benefice confers it on his clerk, whilst two others are contending at law for the right of presentation, to show why he hath encumbered the church. *Reg. Orig.* 32.

Or, it is a writ brought after a recovery in *quare impedit*, (and formerly also in assize of *darrein presentment*) against the bishop, who thus admits a clerk, notwithstanding the writ *ne admittas* served on him. See *Ne Admittas*, *Quare Impedit*.

If a man had a writ of right of advowson depending between him and another, and the church was void pendent the writ, the plaintiff should not have a *quare incumbavit* or *ne admittas*, although the bishop incumbered the church; because the plaintiff should not recover the presentation on this writ, but the advowson; where he hath title to present, he may do it, and have *quare impedit* if he be disturbed. *New Nat. Brev.* 108, 109.

This writ may be brought after the six months; and if a plaintiff be nonsuit in a *quare incumbavit*, he may have another writ, and vary from his first declaration, &c. *F. N. B.* 48.

After a *ne admittas* delivered, if the six months pass, the bishop may present his clerk for lapse, and shall not be charged by the writ of *quare incumbavit* for the presentation; but he cannot admit the clerk of the other man, for that would be against the writ *ne admittas* delivered to him. *F. N. B.* 48. But to prevent this he is usually made a defendant in the *quare impedit*.

If the bishop incumber the church, where there is no dispute about it, yet this writ *quare incumbavit* lies; but according to the best opinions there ought to be a suit depending, though there is no actual recovery. 18 *Edw.* 3. 17. *Fitz. Quare Impedit*, 3.

QUARE INTRUSIT, *matrimonio non satisfacto*, a writ that lay anciently where the lord proffered convenable marriage to his ward, and he refused, and entered into the land and married himself to another; that is intruded; the value of his marriage not being satisfied to the lord. This is put an end to by the effect of 12 *Car.* 2. c. 24.

QUARE NON ADMITIT, a writ which lies against a bishop where a man hath recovered his presentation in *quare impedit*, and the bishop refuses to admit his clerk, on pretence of lapse, &c. See *Quare Impedit*.

It is requisite in the writ to mention the recovery, and it

is to be brought in the county where the refusal was. *F. N. B.* 47; 7 *Rep.*; *Dyer*, 40.

In a *quare non* admit the plaintiff shall recover damages; and if the plaintiff have judgment in a *quare impedit*, and a writ is awarded to the bishop; if on this writ the bishop makes a false return, the plaintiff may have *quare non admittit* against him, and have his damages. *Dyer*, 260.

King Edward I. presented his clerk to a benefice in Yorkshire, and the archbishop of that province refused to admit him; on which the king brought a *quare non admittit*, and the archbishop pleaded that the pope had a long time before provided for that church, as one having supreme authority; in that case, therefore, he could not admit the king's clerk: it was adjudged that for his contempt to execute the king's writ the archbishopric should be seized, &c. 5 *Rep.* 12. See *Præmunire*.

If the bishop refuse the king's presentee, and afterwards admit him, yet the king shall have *quare non admittit* for the refusal; and so it is presumed may a common person. *New Nat. Brev.* 106.

QUARE NON PERMITTIT, an ancient writ which lay for one who had a right to present to a church for a turn against the proprietary. *Fleta*, lib. 5. c. 6.

QUARE OBSTRUXIT. A writ which lay for him who having a liberty to pass through his neighbour's ground, could not enjoy his right, because the owner had so obstructed it. *Fleta*, lib. 4. c. 26.

QUARREL, *querela*; à *querendo*.] Extends not only to actions personal, but also to mixed; and the plaintiff in them is called *querens*, and in most of the writs it is said *queritur*, so that if a man release all quarrels (a man's deed being taken most strongly against himself), yet it is as beneficial as all actions, for by it all actions real and personal are released. 8 *Co.* 153; 1 *Inst.* c. 8. § 5, 11. See *Release*.

QUARRELLING IN CHURCH OR CHURCHYARD. All affrays in a church or churchyard are esteemed very heinous offences, as being indignities to Him to whose service those places are consecrated; therefore mere quarrelsome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by the 5 & 6 *Edw. 6.* c. 4. that if any person shall, by words only, quarrel, chide, or brawl in a church or churchyard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiæ*; and if a clerk in orders, from the ministration of his office during pleasure.

The statute also enacted, that if any person in such church or churchyard proceeded to smite or lay violent hands on another, he should be excommunicated *ipso facto*; or if he struck him with a weapon, or drew any weapon with intent to strike, he should, besides excommunication (being convicted by a jury), have one of his ears cut off, or having no ears, be branded with the letter F. in his cheek. But this portion of the act was repealed by the 9 *Geo. 4.* c. 31.

QUARTELOIS. Upper garments, with coats of arms quartered on them, the old habit of English knights. *Walsing.* in *vit. Edw. 2.*

QUARTERISARI. To be quartered, or cut into four quarters, in execution. *Artic. Richardi Scrope Archiep. Ebor. apud Angl. Sacr. par. 2.* 266. Quarterization is part of the punishment and execution of a traitor, by dividing his body into four quarters. See *Treason*.

QUARTER SEAL. The seal kept by the director of the Chancery in Scotland. It is in the shape and impression of the fourth part of the great seal, and is in the Scotch statutes called the Testimonial of the Great Seal. Gifts of lands from the crown pass this seal in certain cases. *Bell's Scotch Dict.*

QUARTER SESSIONS. See *Sessions of the Peace*.

QUARTO DIE POST. The fourth day inclusive after the return of the writ; and if the defendant made his appearance on this day, it was sufficient. The practice with regard to the return of writs is now altered. See *Essoign Day of the Term*.

QUASH, *quassare*; French *quasser*; Latin *casum facere*.] To overthrow or annul. *Bracton*, lib. 5. tract. 2. c. 3. nu. 4. If the bailiff of a liberty return any out of his franchise, the array shall be quashed. An array returned by one who hath no franchise shall be quashed. 1 *Inst.* 156.

The court of B. R. hath power to quash orders of sessions, presentments, indictments, &c. Though this quashing is by favour of the court, and the court may leave the party to take advantage of the insufficiency by pleading, as they generally do where an indictment is for an offence very prejudicial to the commonwealth, as for perjury, &c. 2 *Lit. Abr.* 410. See further, titles *Indictment*, *Information*, &c.

QUASI CONTRACT. An implied contract. See *Assumpsit*.

QUAY. See *Key*.

QUEEN, Lat. *Regina*; Sax. *Cwen*, i. e. *Uxor*, a wife; *propter excellentiam, the wife of the king*.] The queen of England is either queen regent, queen consort, or queen dowager. The queen regent, regnant, or sovereign, is she who holds the crown in her own right; as the first (and perhaps the second) Queen Mary, Queen Elizabeth, and Queen Anne; and such a one has the same powers, prerogatives, rights, dignities, and duties, as if she had been a king. This is expressly declared by 1 *Mar. st. 3.* c. 1. See further, title *King*. But the queen consort is the wife of the reigning king; and she, by virtue of her marriage, is participant of divers prerogatives above other women. *Finch. L.* 86.

She is a public person, exempt and distinct from the king; and not, like other married women, so closely connected as to have lost all legal or separate existence, so long as the marriage continues. For the queen is of ability to purchase lands, and to convey them, to make leases, to grant copyholds, and to do other acts of ownership, without the concurrence of her lord, which no other married woman can do. 4 *Rep.* 25. She is also capable of taking a grant from the king, which no other wife is from her husband. The queen of England hath separate courts and officers, distinct from the king's not only in matters of ceremony, but even of law. and her attorney and solicitor-general are entitled to a place within the bar of his majesty's courts, together with the king's counsel. See *Precedence*. She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will. In short, she is in all legal proceedings looked upon as a feme sole, and not as a feme covert; as a single, not as a married woman. *Finch. L.* 86; *Co. Lit.* 133. For which the reason given is this; because the wisdom of the common law would not have the king (whose continual care and study is for the public, and *circa ardua regni*) to be troubled and disquieted on account of his wife's domestic affairs, and therefore it vests in the queen a power of transacting her own concerns, without the intervention of the king, as if she was an unmarried woman. 1 *Comm.* c. 3.

The queen consort is of ability, without the king, to purchase, grant, and make leases; and may sue and be sued alone, in her own name only, by *præcipe*, not by petition. She may have in herself the possession of personal things during her life, &c. But both her real and personal estate goes to the king after her death, if she doth not in her lifetime dispose of them, or devise them by will. *Co. Lit.* 3, 31, 133; *Finch.* 86; 1 *Roll. Abr.* 912.

By an ancient act, not printed in the common edition of the statutes, but inserted in the statutes of the realm, printed by authority, 32 *Hen. 8.* c. 51. the kings of this realm are empowered to settle lands in jointure on their queens, who are enabled to accept the same and dispose of the profits thereof. And by the same act it is declared that every queen consort shall be deemed a feme sole, and may sue and be sued accordingly, without the intervention of the king; and that all leases, gifts, &c. by or to the queen shall be valid during her life, &c. In the same edition of the statutes is contained an

act, 1 Hen. 8. c. 18. by § 2. of which the then Queen Katherine was declared to have like capacity as if she had been born within this realm.

By 39 & 40 Geo. 3. c. 88. § 8. 9. it is expressly enacted, that the queen consort for the time being may during the joint lives of the king and of such queen consort, by deed or will, dispose of estates purchased by or in trust for her, or vested in her: and also bequeath all her chattels and personal estate as if she were sole: with the exception of places, &c. vested in her only for life.

Acts of parliament relating to her need not be pleaded; for the court must take notice of them, because she is a public person. 8 Rep. 28.

If a tenant of the queen aliens a part of his tenancy to one, and another part to another, the queen may distrain in any one part for the whole, as the king may do. *Wood's Inst.* 32. And in a quare impedit brought by the queen, some say that plurality is no plea; but see 2 Inst. 361.

By 2 Geo. 2. c. 27. the queen was constituted regent of the kingdom, during the king's absence abroad; to be capable of the office, without taking the oaths, or doing any act required by law to qualify any other.—As to the powers of the queen consort during the regency established by 51 Geo. 3. c. 1. see title King.

The queen hath also many exemptions and minute prerogatives. For instance: she pays no toll; *Co. Litt.* 133; nor is she liable to any amercement in any court. *Black L.* 187. But in general, unless where the law has expressly declared her exempted, she is upon the same footing with other subjects, being to all intents and purposes the king's subject, and not his equal.

The queen hath also some pecuniary advantages, which heretofore formed her a distinct revenue, as in the first place, she is entitled to an ancient perquisite called queen's gold (*aurum reginae*): which is a royal revenue, belonging to every queen consort during her marriage with the king, and due from every person who hath made a voluntary offering or fine to the king, amounting to ten marks or upwards, for, and in consideration of any privileges, grants, licences, pardons, or other matter of royal favour conferred upon him by the king: and it is due in the proportion of one-tenth part more, over and above the entire oil ring or fine made to the king; and becomes an actual debt of record to the queen's majesty by the mere recording of the fine. *Pryn. Aur. Reg.* 2. As if an hundred marks of silver be given to the king for liberty to take in mortmain, or to have a fair, market, park, chase, or free-warren; there the queen is entitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of queen's gold, or *aurum reginae*. 12 Rep. 21; 4 Inst. 358. But no such payment is due for any aids or subsidies granted to the king in parliament or convocation; nor for fines imposed by courts on offenders, against their will; nor for voluntary presents to the king; without any consideration moving from him to the subject; nor for any sale or contract whereby the present revenues or possessions of the crown are granted away or diminished. *Pryn.* 6.

The original revenue of our ancient queens, before and soon after the conquest, seems to have consisted in certain reservations or rents out of the demesne lands of the crown, which were expressly appropriated to her majesty, distinct from the king. It is frequent in Domesday-book, after specifying the rent due to the crown, to add likewise the quantity of gold or other renders reserved to the queen. These were frequently appropriated to particular purposes; to buy wool for her majesty's use, to purchase oil for her lamps, or to furnish her attire from head to foot, which was then only very costly, as one single robe in the fifth year of Henry II. stood the city of London in upwards of fourscore pounds. And, for a further addition to her income, this duty of queen's gold is supposed to have been originally granted; those matters of grace and favour, out of which it arose,

being frequently obtained from the crown by the powerful intercession of the queen. There are traces of its payment, though obscure ones, in the book of Domesday and in the great pipe roll of Henry I. In the reign of Henry II. the manner of collecting it appears to have been well understood; and it forms a distinct head in the ancient dialogue of the exchequer written in the time of that prince, and usually attributed to Gervase of Tilbury. From that time downwards it was regulated, claimed, and enjoyed by all the queen consorts of England till the death of Henry VIII.; though after the accession of the Tudor family, the collecting of it seems to have been much neglected. And there being no queen consort afterwards till the accession of James I., a period of near sixty years, its very nature and quantity then became a matter of doubt; and, being referred by the king to the chief justices and chief baron, their report of it was so very unfavourable, that his consort, Queen Ann, (though she claimed it) yet never thought proper to exact it. In 1635, 11 Car. 1, a time fertile of expedients for raising money upon dormant precedents in our old records, the king, at the petition of his queen, Henrietta Maria, issued out his writ for levying it; but afterwards purchased it of his consort at the price of 10,000*l.*, finding it, perhaps, too trifling and troublesome to levy. 19 Rym. Fed. 721. And when afterwards, at the restoration, by the abolition of the military tenures, and the fines that were consequent upon them, the little that legally remained of this revenue was reduced to almost nothing at all, in vain did Mr. Prynne, by a treatise which does honour to his abilities as an antiquary, endeavour to excite Queen Catherine to revive this claim.

Another ancient perquisite belonging to the queen consort, mentioned by all our old writers, and therefore only worthy notice, is this; that on the taking of a whale on the coasts, which is a royal fish, it shall be divided between the king and queen; the head only being the king's property, and the tail of it the queen's. The reason of this whimsical division, as assigned by our ancient records, was to furnish the queen's wardrobe with whalebone. *Bracton. l. 3. c. 3: Britton. c. 17; Flet. l. 1. c. 45 & 46; Pryn. Aur. Reg.* 127. It is remarked by Mr. Christian, that the reason is more whimsical than the division, as the whalebone lies entirely in the head, which is the king's property.

The revenue of our queens, after the death of the king, is settled from time to time by statute. By the 1 & 2 Wm. 4. c. 11. his majesty is empowered, by indenture or letters patent under the great seal, to grant to her majesty an annuity of 100,000*l.* per annum, to take effect from the decease of his majesty, and continue for life, payable out of the consolidated fund, at the receipt of the Exchequer, free from all taxes or public charges. By § 3. his majesty is empowered to grant Marlborough House, St. James's, and the office of keeper of Bushy Park with the office of housekeeper, and custody of the capital manor of Hampton Court to her majesty for life; and so to her executors, administrators, and assigns for one year after her decease. And see *King, V. 2.*

Though the queen is in all respects a subject, yet, in point of the security of her life and person, she is put on the same footing with the king. It is equally treason (by the 25 Edw. 3.) to compass or imagine the death of our lady, the king's companion, as of the king himself: and to violate, or defile the queen consort, amounts to the same high crime, as well in the person committing the fact, as in the queen herself, if consenting. If, however, the queen be accused of any species of treason, she shall (whether consort or dowager) be tried by the peers of parliament, as Queen Ann Boleyn was in 28 Hen. VIII.

The husband of a queen regnant, as Prince George of Denmark was to Queen Anne, is her subject, and may be guilty of high treason against her; but, in the instance of conjugal infidelity, he is not subjected to the same penal restrictions. See further, *King.*

QUEEN DOWAGER. Is the widow of the king, and as such enjoys most of the privileges belonging to her as queen consort. But it is not high treason to conspire her death, or to violate her chastity, because the succession of the crown is not thereby endangered. Yet still, *pro dignitate regali*, no man can marry a queen dowager without special licence from the king, on pain of forfeiting his lands and goods. This, Coke says, was enacted in parliament in 6 Hen. 6, though the statute be not in print. See 2 Inst. 18; 4 Inst. 51. In *Riley's Plac. Parl.* 672, the bill, with the royal assent indorsed, is printed; and in *Cotton's Abridgment* it is cited as *nu.* 27, of that year. It is not contained in the printed parliament rolls. The queen dowager, though an alien born, shall still be entitled to dower after the king's demise, which no other alien is. *Co. Lit.* 31. A queen dowager, when married again to a subject, doth not lose her real dignity, as peeresses dowager do their peerage when they marry commoners. For Catherine, queen dowager of Henry V., though she married a private gentleman, Owen ap Meredith ap Theodore, commonly called Owen Tudor, yet by the name of Catherine, Queen of England, maintained an action against the bishop of Carlisle: and so the queen dowager of Navarre, marrying with Edmond, Earl of Lancaster, brother to King Edward I., maintained an action of dower after the death of her second husband, by the name of Queen of Navarre. 2 Inst. 50.

QUEEN ANNE'S BOUNTY. See *First Fruits*.

QUEEN GOLD, aurum reginae. See *Queen*.

QUE ESTATE, which estate.] A plea where a man entitling another to land, &c. saith that the same estate such other had he has from him. As, for example, in a *quare impedit*, the plaintiff alleges that two persons were seised of lands, whereunto the advowson in question was appendant in fee, and did present to the church, and afterwards the church was void, which estate of the two persons he hath now, by virtue wherof he presented, &c. *Broke*, 175; *Co. Lit.* 121.

A man cannot plead a *que estate* in an estate tail, nor can it be pleaded in estates for life, or for years; a *que estate* of a term may not be pleaded, by reason a term cannot be gained by disseisin, as a fee may; but one may plead a *que estate* in a term in another person, under whom he doth not claim, and be good; for he is not privy to the estate of the stranger, to know his title. 1 Rep. 46; 1 Lev. 190; 3 Lev. 19; *Lutw.* 81.

A thing which lies in grant, cannot be claimed by a *que estate*, directed by itself; yet it may be claimed as appurtenant to a manor, by *que estate* in the manor. 1 Mod. 232.

A man may not prescribe by a *que estate* of a rent, advowson, or toll; but he may of a manor, &c. to which these are appendant. 2 Mod. 144; 3 Mod. 82.

A person cannot plead a *que estate* without showing the deed how he came by it. *Cro. Jac.* 673. This in case of a rent in gross, or lands, which cannot pass from one man to another without deed. *Jenk. Cent.* 26. See *Prescription*.

QUE EST EADEM,

QUE EST LE MESME, } See *Quæ est eadem*, &c.

QUEM REDDITUM REDDIT. A judicial writ which lay (for him to whom a rent-charge or rent-charge was granted, by fine levied in the king's court,) against the tenant of the land who refused to attorn to him, thereby to cause him to attorn, and pay the rent which he rendereth. *Old Nat. Brev.* 126; *West. Symbol. par.* 2, tit. *Fines*, § 156; *Termes de la ley*.

Before the statutes 4 & 5 Anne. c. 16. and 11 Geo. 2. c. 19, which have rendered attornment both unnecessary and inoperative, (see *Butler's note to Co. Lit.* 309, a (1).) there were several writs to compel attornment in certain cases. These were the writs of *per quæ servitia*, *quem redditum reddit*, *quid juris clamat*. The first lay for the conusee in a fine to whom a lord had granted a seignory, the second for the grantee by fine of a rent, to compel the tenant of the land, out of which the rent issues, to attorn, and the third for the grantee by fine of a reversion or remainder, to enforce the attornment of the tenant for life. Even before the statutes which

have taken away attornment, the writs were obsolete in cases where fines were levied to uses, when it was held, that the conusees might bring actions, and distrain without attornment. *Roscoe on Real Actions*, 145.

QUERELA. An action preferred in any court of justice, in which the plaintiff was *querens* or complainant; and his brief complaint or declaration was called *querela*, whence our quarrel against any person.

Quiescit esse à querelis, was to be exempted from the customary fees paid to the king or lord of a court, for the purchase of liberty to prefer such an action. But more usually to be exempted from fines and amercements imposed for common trespasses and faults. *Paroch. Antiquit.* 123. See *Kennel's Glossary*; and *ante*, tit. *Quarrel*.

QUERELA, CORAM REGE ET CONSILIO DISCUTIENDA ET TERMINANDA. A writ whereby one is called to justify complaint of trespass made to the king himself, before the king and council. *Reg. Orig.* 124.

QUERELA FRESCÆ TORTIÆ. See *Fresh Force*.

QUEST, quæst.] Inquest, inquisition or inquiry on the oaths of an impanelled jury. *Cowell.* See *Inquest*.

QUESTION, or Torture. See *Mute*.

QUESTMEN. See *Churchwardens*.

QUESTUS EST NOBIS, Hath complained to us.] The form of a writ of nuisance, which by the equity of the 13 Edw. 1. c. 24. lay against him to whom the house or other thing which occasions the nuisance, is alienated; whereas before the statute this action lay only against him who first levied the thing to the annoyance of his neighbour. *Cowell*.

QUIA DOMINUS REMISIT CURIAM. See *Writ of Right*.

QUIA EMPTORES, Statute of. The Stat. West. 3. 18 Edw. 1. st. 1. is so called from the introductory words. See *Manors, Statute, Tenures*, &c.

QUIA IMPROVIDE. A *supersedeas* granted in behalf of a clerk of the Chancery, sued against the privilege of that court in the Common Pleas, and pursued to the exigent. So in many other cases where a writ is erroneously or improvidently sued. See *Dyer*, 33, n. 18.

QUICK WITH CHILD. See *Execution of Criminals*.

QUID JURIS CLAMAT. A judicial writ issuing out of the record of the fine, which remained with the *custos brevivium* of the Common Pleas before it was engrossed; and it lay for the grantee of a reversion or remainder when the particular tenant would not attorn. *West. Symbol. part* 2, tit. *Fines*, § 118; *Reg. Judic.* 36, 571. See *Quem Redditum Reddit*.

QUIT PRO QUO. The mutual consideration and performance of both parties to a contract. *Kitch.* 184. And as this is the consideration of a good and binding contract or bargain, so that which is contrary to it is what the law calleth *Nudum pactum*. 4 Rep. 83; *Dyer*, 98. See *Consideration, Agreement*.

QUIETARE. To quit, acquit, or discharge, or save harmless.

QUIETE CLAMARE. To quit-claim, or renounce all pretensions of right and title. *Bract. lib.* 5.

QUIETUS, freed or acquitted. A word made use of in the Exchequer in the discharge given to accountants; usually concluding with *abinde recessat quietus*, which is called a *quietus est*. A *quietus est* granted to the sheriff will discharge him of all accounts due to the king. 21 Jac. 1. c. 5. See *Sheriff*. And these *quietuses* are mentioned in the acts of general pardon.

QUIETUS REDDITUS. See *Quit-rent*.

QUINQUAGESIMA SUNDAY. Shrove-Sunday. So named because it is about the fiftieth day before Easter.

QUINQUE PORTUS. See *Cinque Ports*.

QUINSIEME, or QUINZIME. See *Fifteenth*.

Sometimes this word *quinzime*, or *quinzime*, is used for the fifteenth day after any feast, as the *quinzime* of St. John Baptist. 13 Edw. 1. in the preamble.

QUINTAL, or Kintal; *quintalus*.] A weight of lead, iron, &c., usually 100lbs. at six-score per cent. *Cowell*. *Plonden* mentions 200 kintals of wood.

QUINTAINE, *quintena*.] A Roman military sport or exercise by men on horseback, formerly practised in this kingdom to try the agility of the country youth: it was tilting at a mark made in the shape of a man to the navel, in his left hand having a shield, in his right a wooden sword; the whole made to turn round, so that if it was struck with the lance in any other part but full in the breast, it turned with the force of the stroke and struck the horseman with the sword which it held in its right hand. This sport is recorded by *Mat. Paris*, anno 1253.

QUINTO EXACT, *quintus exactus*, mentioned in 31 *Eliz.* c. 3.] The fifth and last call or requisition of the defendant, who is sued to outlawry, when, if he appear not, he is by the judgment of the coroners returned outlawed; if a woman, waived. See *Exigent*, *Outlawry*.

QUI TAM, *Who as well*.] The plaintiff in a penal action describes himself as one who sues as well for the king as himself for any penalty, half of which is given to the crown, and half to the informer. See *Action-Popular*, *Information*.

QUIT-CLAIM, *quinta clamantia*.] A release or acquitting of a man from any action which the releaser hath, might, or may have against him. Also a quitting of one's claim or title. *Bracton*, lib. 5. tract. 5. c. 9. num. 8; lib. 4. tract. 6. c. 13. num. 1. See *Release*.

QUIT-RENT, *quietus redditus*.] A certain small rent, payable by the tenants of manors in token of subjection, by which the tenant goes quiet and free. In ancient records it is called *white-rent*, because paid in silver money, to distinguish it from rent-corn, &c. 2 *Inst.* 19. See *Alba firma*, *Chief-Rents*, *Rents*.

QUOAD HOC. A term often used in law reports to signify, as to the thing named the law is so, &c.

QUOD CLERICI, *Beneficial idæ Cancellarij*.] A writ to exempt a clerk of the Chancery from the contribution towards the proctors of the clergy in parliament. *Reg. Orig.* 261.

QUOD CLERICI NON ELIGANTUR IN OFFICIO BALLIVÆ, &c. A writ which lies for a clerk, who, by reason of some land he hath, is made, or about to be made bailiff, headic, reeve, or some such officer. See *Clerico infra sacros*, &c. *Reg. Orig.* 117; *F. N. B.* 261.

QUOD CUM, *that whereas*.] This being by way of recital, and not positively, is not good in indictments. 3 *Salk.* 188. See *Indictment*.

QUOD EI DEFORCEAT. A writ which formerly might have been made by tenant in tail, tenant in dower, by the curtesy, or for term of life, having lost their lands by default, against him who recovered or his heir. *Reg. Orig.* 171; *Stat. Westm.* 2. c. 4.

Quod ei deforceat might have been brought against a stranger to the recovery; as if a man recovered by default, and made a feoffment, this writ might be had against the feoffee.

If a woman lost by default and took husband, she and her husband should have the *quod ei deforceat*; but where tenant in tail lost by default and died, his heirs should not have a writ of *quod ei deforceat*, but a *formedon*. And if husband and wife lost by default the land of the wife, which she held for term of life, and the husband died, she might not have this writ, for *cui in vita* was her remedy; and when one brought *quod ei deforceat*, he counted that he was seised of the land in his demesne, as of freehold, or in tail, &c. without showing of whose gift he was seised; also he ought to have alleged *explees* in himself, and then the defendant was to deny the right of the plaintiff, &c. and show how that at another time he recovered the land against the plaintiff by *formedon*, or other action; and should say, in the end of his plea, *quod ipse paratus est ad manutenendum jus et titulum suum prædic. per donum*, &c. *unde petit judic.* &c. *New Nat. Br.* 347, 348.

If tenant in tail, or such other tenant, who had a particular estate, lost by default, where he was not summoned, &c. he might have had either a writ of *disceit* or *quod ei deforceat*. *Ibid.* See further, 16 *Vin. Abr.* 145, 148; and *tits. Recovery*, *Writ of Right*.

The writ of *quod ei deforceat* is now abolished by the 3 & 4 *Wm. 4. c. 27.* § 36.

QUOD PERMITTAT. A writ which lay for the heir of him who was disseised of his common of pasture, against the heir of the disseisor, being dead. *Terms de Ley*.

And, according to *Broke*, this writ might have been brought by him whose ancestor died seised of common of pasture, or other like thing annexed to his inheritance, against the deforçant. If a man disturbed by any person in his common of pasture, so that he could not use it, he should have a *quod permittat*: so of a turbary, piscary, fair, market, &c. *New Nat. Br.* 272, 273, 275, 276. And a person might have a *quod permittat* against a disseisor, &c. in the time of his predecessor.

This writ was also abolished by the 3 & 4 *Wm. 4. c. 27.* § 36.

QUOD PERMITTAT PROSTERNERE. A writ which lay against any person who erected a building, though on his own ground, so near to the house of another, that it hung over, or became a nuisance to it. 2 *Lil. Abr.* 413.

Formerly, where a man built a wall, a house, or any thing which was a nuisance to the freehold of his neighbour, and afterwards died; in such case he who received any damage thereby sued a *quod permittat* against the heir of him who did the nuisance, and the form of it was *quod permittat prosternere murum*, &c. 3 *Nels. Abr.* 44.

At the common law an assize of nuisance did not lie against the alienee of a wrong-doer, for the purchaser was to take the land in the same condition it was conveyed to him; but by the statute of *Westm.* 2. c. 24. damages might have been recovered against the person who sold the land, if the nuisance were not abated on request made to him; or against the person to whom he sold it; though this did not extend to the alienee of the alienee. 3 *Nels.* 46; *Lutw.* 1588. This writ has long been obsolete, having given way to the action on the case; and by the 3 & 4 *Wm. 4. c. 27.* § 36. it is likewise abolished. See *Nuisance*, IV.

QUOD PERSONA NEC PREBENDARIJ, &c. A writ which lay for spiritual persons who were distrained in their spiritual possessions, for payment of a fifteenth with the rest of the parish. *F. N. B.* 176.

QUO JURE. A writ which lay for him who had land wherein another challenged common of pasture time out of mind; and was to compel him to show by what right or title he challenged it. *F. N. B.* 128; and *Britton*, more largely, c. 59; *Reg. Orig.* 156.

This has long been out of use, as on the claimant's putting his cattle in the owner may bring trespass, when the claimant must plead and prove his title; and it is among the writs abolished by the 3 & 4 *Wm. 4. c. 27.* § 36. See further, *Common of Pasture*.

QUO MINUS. A writ which lay for him who had a grant of house-bote and hay-bote in another man's woods against the grantor, making such waste whereby the grantee could the less enjoy his grant. *Old Nat. Br.* 148.

This writ also lay for the king's farmer in the exchequer against him to whom he sold any thing by way of bargain touching his farm, or against whom he had any cause of personal action. *Perkins' Grants*, 5. For he supposed, by the vendee's detaining any due from him, he was made less able to pay the king's rent.

Formerly it was allowed only to such persons as were tenants or debtors to the king; afterwards the practice became general for the plaintiff to surmise, that for the wrong which the defendant did him, he was less able to satisfy his debt to his majesty, which surmise gave jurisdiction to the Court of

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Exchequer to hear and determine the cause. *Finch*. 66; *Old Nat. Br.* 148. See *Exchequer, Process*.

Now, by the Uniformity of Process Act, 2 Wm. 4. c. 39. this process in the Exchequer is abolished, and suits are commenced here, as in the other courts, by writ of summons or *capias*.

QUONIAM ATTACHIAMENTIA. One of the oldest books of the Scotch law; so called from the first two words of the volume. The *Regiam Majestatem* is another instance of the like kind.

QUORUM, Lat.] Certain individuals among persons invested with any power, or with the exercise of any jurisdiction, without whom any number of the others cannot proceed to execute the power given by the commission. The word occurs in our statutes, and commissions both of the peace and others, but particularly in commissions to justices of the peace; and a justice of the quorum is so called from the words in the commission, *Quorum A. B. unum esse volumus*. As where a commission is directed to five persons, of whom A. B. and C. D. to be two: in this case A. B. and C. D. are said to be of the quorum, and the rest cannot proceed without them. See *Justices of the Peace*, II.

QUORUM NOMINA. In the reign of Henry VI. the king's collectors and other accountants were much perplexed in passing their accounts by new extorted fees, and forced to procure a then late-invented writ of *quorum nomina* for the allowing and stung out their *quietus* at their own charge, without allowance of the king. *Chron. Angl.*

QUOT. One twentieth part of the moveable estate of a person dying in Scotland, anciently due to the bishop of the diocese where he resided. This is prohibited by the Scotch Act, 1701. c. 14.

QUOTA. A tax to be levied in an equal manner.

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A writ which lies against any person or corporation that usurps any franchise or liberty against the king without good title, and is brought against the usurpers to show by what right or title they hold or claim such franchise or liberty. It also lies for misuser or nonuser of privileges granted; and, by Bracton, it may be brought against one who intrudes himself as heir into land, &c. *Old Nat. Br.* 149.

A writ of *quo warranto* is in the nature of a writ of right for the king against him who claims or usurps any office, franchise, or liberty, to inquire by what warrant or authority he supports his claim, in order to determine the right. *Finch*. L. 322; 2 *Inst.* 282. It lies also in case of nonuser or long neglect of a franchise, or misuser or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. This was originally returnable before the king's justices at Westminster, but afterwards only before the justices in eyre, by virtue of the statutes of *Quo Warranto*, 6 Edw. 1; 18 Edw. 1. st. 2; but since those justices have given place to the king's temporary commissioners of assize, the judges on the several circuits, this branch of the statutes hath lost its effect; and writs of *quo warranto* (if brought at all) must now be prosecuted and determined before the king's justices at Westminster. See 2 *Comm.* c. 17; and *Kydd's Law of Corporations*, ii. c. 4. § 3.

The judgment on a writ of *quo warranto* (being in the nature of a writ of right) is final and conclusive even against the crown. 1 *Sid.* 86; 2 *Show.* 47; 12 *Mod.* 225; *Kel.* 139. This, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by information filed in the Court of King's Bench by the attorney-general, in the nature of a *quo warranto*, wherein the process is speedier, and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him,

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or seize it for the crown; but hath long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only. 2 *Comm.* c. 17.

This proceeding is now applied to the decision of corporation disputes between party and party, without any intervention of the prerogative, by virtue of the 9 Ann. c. 20. which permits an information in the nature of a *quo warranto* to be brought, with leave of the court, at the relation of any person desiring to prosecute the same, (who is then styled the relator,) against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate; provides for its speedy determination; and directs, that if the defendant be convicted, judgment of ouster (as well as a fine) may be given against him, and that the relator shall pay or receive costs according to the event of the suit.

A *quo warranto* information against a whole corporation as a body can be brought only by and in the name of the attorney-general. A *quo warranto* is never granted by leave of the court against persons for usurping a franchise of a mere private nature not connected with public government. *R. v. Ogden*, 10 B. & C. 230.

A *quo warranto* information lies under 9 Ann. c. 20. against the bailiff of a borough by prescription, sending members to parliament, though he be not a corporate officer. 1 D. & R. 438; 5 B. & A. 771.

An information in the nature of a *quo warranto* lies for acting as a trustee under an act of parliament, without due appointment. 1 *Stra.* 299. Against one for usurping the office of steward of a court leet. *Ibid.* 621. For erecting a new office. 2 *Stra.* 836. For the office of constable. *Ibid.* 1213. For a ferry. *Ibid.* 1161. But not for erecting a warren. 1 *Stra.* 687. Nor for the office of churchwarden. *Ibid.* 1196.

The form of this information is thus:

"A. B. attorney-general of the lord the king, who sues for the lord the king in this behalf, comes here into the court of our said lord the king, before the king himself, at Westminster, on —, in this same term, and for the said lord the king gives the court here to understand and be informed, that —, for the space of — now last past, and more, have used and still do use, without any warrant or royal grant, the following liberties and franchises to wit, —: Of all which liberties, privileges, and franchises aforesaid, the said —, during all the time aforesaid, have usurped, and still do usurp, upon the said lord the king, to the great damage and prejudice of his royal prerogative: Whereupon the said attorney of the said lord the king, for the said lord the king, prays the advice of the court in the premises, and due process of law against the said — in this behalf to be made, to answer to the said lord the king, by what warrant he claims to have, use, and enjoy the liberties, privileges, and franchises aforesaid."

This is the form, whether the information be brought for an usurpation without any original title, or for a subsequent forfeiture, where the original title is not disputed. See *Co. Ent.* 527—564.

The process usually awarded on the roll against individuals, whether claiming to act as a corporation, or claiming any other franchise, is a *venire facias*, sometimes with a clause of *non omittas*, and sometimes without. The entry immediately after the conclusion of the information is thus: "Whereupon the sheriff is commanded, that he cause to come," or "that he omit not, &c. but that he cause to come, &c. to answer," &c.

If the defendants do not appear at the day, the next process awarded is a *distringas*. Against a corporation, not prosecuted for acting as a corporation, but for usurping other liberties, the first process awarded is a *distringas*, and the entry on the roll in this form: "Whereupon it is agreed, that the aforesaid mayor and commonalty and citizens of — be distrained by all their lands, &c. so that, &c. to answer to our lord the

king in the premises; and the sheriff is commanded, that he detain them in form aforesaid, so that, &c. at such a day." Co. Ent. 586 a.

Though a *venire facias* and *distringas* are the process usually awarded on the roll, yet it seems that against individuals who cannot be served with the *venire*, process of outlawry lies. See *Cro. Jac.* 528, 531.

When the defendant appears, he may either disclaim or plead as to all the franchises mentioned in the information; or he may plead as to part, and disclaim as to part.

If he disclaim as to all, the entry is in this form:

"The said —, protesting that the information aforesaid is not sufficient in law, and that he is not under any necessity by the law of the land to answer thereto, for plea nevertheless saith, that he never used the aforesaid liberties, privileges, and franchises, nor any of them, nor in the same, or any of them, ever usurped upon the said lord the king, in manner and form as by the said information is supposed, but the same, and every of them, disclaims and disavows; whereupon he prays judgment, and that he may be dismissed by the court." Co. Ent. 527 b.

If he plead as to part, and disclaim as to part, the entry of the disclaimer, after the plea, is in this form:

"And as to the residue of the liberties, privileges, and franchises in the said information above specified, upon the said lord the king supposed to be usurped by the said —, the said — says, that he never used, nor does he now use, the residue," &c. Co. Ent. 529 b.

Where the defendant pleads, the entry is in this form:

"The said —, as to the aforesaid liberty, &c. of —, says, &c. [here he sets out his title to the particular franchise, and so of every other claimed by a distinct title, and concludes his plea as to each, in this manner:] And by this warrant the said — has used, during all the time aforesaid, in the said information mentioned, and still uses the liberties, privileges, and franchises of —, as he well might and at all way; Without this, that the said — has usurped, or now does usurp, the said liberties, &c. on the said lord the king, in manner and form as by the information aforesaid, for the said lord the king, is above supposed: All which the said — is ready to verify, as the court, &c.: Whereupon he prays judgment, and that all and singular the liberties, &c. above by him as aforesaid claimed, may be allowed and adjudged to him, and that he may thereupon be dismissed from this court." See Co. Ent.

The attorney-general then demurs or replies, and the subsequent proceedings are in the same manner as in civil actions.

In a *quo warranto* to show by what authority a person claimed to have a court lect, and alleging farther, *quod usurpavit libertatem sine aliquo concessione, &c.* defendant pleaded *non usurpavit*; and it was objected that this was no good plea; for the answer to *quo warranto* is either to claim or disclaim; but the better opinion was, that by this plea defendant had answered the usurpation, though it did not show by what title he claimed. *Godb.* 91.

In *quo warranto* for using a *fair and market*, and taking toll, issue was taken whether they had toll by prescription or not, and it was found they had; it was moved in arrest of judgment, that there was a discontinuance, because there was no issue as to the other liberties claimed; but it was held, they were too soon to make this objection, and that there can be no discontinuance against the king before judgment; for by virtue of his prerogative, the attorney-general may proceed to take issue on the rest, or may enter a *nolle prosequi*; but if he will not proceed, the court may make a rule on him *ad replicandum*, and then there may be a special entry made of it. *Hardr.* 504.

The judgment seems to be the same, and subject to the same varieties as on the writ of *quo warranto*.

If it be given in favour of the defendant, the entry is in this form:—"It is considered that the liberties, &c. be allowed to the said —," or thus: "The said — may use, have,

and enjoy all the said, &c.; and that the said — as to the said premises may be dismissed from this Court: *Saving always the right of the said lord the king, if hereafter,*" &c.

This *salvo jure* for the king, says Coke, serveth for any other title than that which was adjudged, and therefore William de Penrugge, the king's attorney for prosecuting a *quo warranto* against the abbot of Fischamp for franchises within the manor of Steyning, *sine precepto*, was committed to gaol. 1 *Inst.* 282.

On disclaimer by the defendant the attorney-general prays, "That whereas the said —, by his plea, has disavowed and disclaimed all and singular the liberties, &c. above specified, judgment may be given for the king; and that the said —, with the said liberties and franchises, or any of them, may no way intermeddle, but may hereafter be altogether excluded from the same;" and judgment is accordingly given in that form. Co. Ent. 27 b.

With respect to the form of the judgment for the king, when it is given on the defendant's pleading, there has been much difficulty and dispute.

In the year-book of the 15 *Edw.* 4, this rule is laid down, "That where it clearly appears to the court that a liberty is usurped by wrong, and exercised on no title, either by the king's grant or otherwise, judgment only of ouster shall be entered. But that where it appears that the king or his ancestors have once granted a liberty, and the liberty is forfeited by misuser or nonuser, the judgment shall be, that it be seized into the king's hands." And the reason given for the distinction is, that where the liberty or franchise has been usurped, the king cannot have that which never legally existed; but in cases of an abuser or nonuser of a franchise once lawfully granted, the king resumes that which originally flowed from his bounty; and this course in the latter case, it has been said, is most beneficial for the subject, who, though by forfeiture, misleading, or default, he may lose his liberty, may have recourse to the king's mercy for restitution. See 15 *Edw.* 4. 7 b; *Sawyer's Arg. Quo Warranto*, 17; 5 *T. R.* 551.

From this it would seem that the only cases in which judgment of ouster only ought to be given, is, where there is no colour of title in the defendant; or where a franchise is claimed by prescription, but it is such that by law it cannot be so claimed; or where it is not such a franchise as may subsist in the hands of the crown. See 3 *Comm.* c. 17. cites *Cro. Jac.* 259; 1 *Show.* 280.

So if a man claim to hold a court-baron in virtue of a manor held by a copy of another manor; there judgment of ouster only shall be given, because a copyholder, being only tenant at will, cannot hold a court-baron to have forfeitures, and hold pleas in a writ of right. *Cro. Jac.* 259.

But where there is a colour of title, but the pleading of the defendant is defective, there is only judgment of seizure, and not of ouster. See 9 *Co.* 24 a; *Co. Ent.* 43 a; *Sawyer's Arg.* 17.

Where grants appear, but either the parties are not capable of taking, or their liberty or privilege granted is not allowable by law, the course has been to enter a mixed judgment both of seizure and ouster. *Sawyer's Arg.* 17; *Co. Ent.* 537, 539 a; *Palm.* 1; 2 *Roll. Rep.* 113.

In addition to the judgment of seizure or of ouster, or of seizure and ouster, except only in the case of ouster on disclaimer, there is also judgment that the defendants be taken to make fine to the king for the usurpation. And in this respect it seems the judgment in the information differs from that in the writ of *quo warranto*; for in the latter, it is apprehended, there could be no judgment of *capias pro fine*. The defendant was in the nature of a plaintiff; he made his claim; if he failed in making it good, the judgment was not *capias pro fine*, but *quod sit in misericordia*. *Rast.* Ent. 540 a. pl. 1.

Upon *quo warranto*, when liberties are seized *quousque, &c.*

and they are not replevied, the course is, that judgment final be given, nisi the defendants plead within such a time. *Comberbach*, 18, 19.

Wherever judgment is given for the king on a *quo warranto*, for liberties usurped, the judgment is *quod extinguantur*, and that the usurpers *libertates, &c. nullatenus intromittant*; and in such case the writ must be brought against particular persons. But where the *quo warranto* is for a liberty claimed by a corporation, there it is to be brought against the body politic; and the liberties may be seized, but the corporation still subsists, and is not dissolved without cause of forfeiture. *4 Mod. 52, 58.*

A judgment of seizure cannot be proper where a thing is dissolved. And the judgment in the *quo warranto* against the city of London seems contradictory, for the first part of it is, *quod libertates et franchisias capiantur et seisantur in manus regis*; and the latter part of it is, *quod capiantur ad satisfaciend. Domino Regi de fine suo pro usurpatione libertatis, &c.* And the corporation was not thereby dissolved, for it implied that they were not extinguished. *4 Mod. 52, 58.* See *tit. London*, and under that title particularly as to the abuses of the information by *quo warranto*.

After judgment the regular course is to issue a writ of seizure to the sheriff, which, after reciting the proceedings in the *quo warranto*, commands him to seize the liberties into the king's hands. But this writ, in point of fact, has not always issued. See *Co. Ent. 539 b.*

Where several franchises are granted by the same charter, and one is subordinate and inseparably incident to the other, the forfeiture of the principal is the forfeiture of the subordinate and incident; but when the franchises are independent, and the one may stand without the other, the forfeiture of the one is not the forfeiture of the other. *Palm. 82.*

Where a *quo warranto*, or an information in the nature of it, is brought for several franchises, it is as several writs or several informations, to which there may be several pleas and several judgments; because the defendant may claim one franchise by one title, and another by another. *Palm. 7, 8.*

The court will not consolidate several informations against several persons for distinct offices, for there must be an information against each to enable each to disclaim. *2 Maul. & Selw. 75.*

It has been adjudged that the *4 & 5 Wm. & Mary, c. 18.* by which informations in the Crown Office are not to be sued without express orders in open court, &c., being a remedial law, extends to informations in the nature of a *quo warranto*, which always suppose the usurpation of some franchise. See *Kydd's Law of Corporations*, ii. 410, &c. 415, &c.; and *ante*, *tit. Information*, I. IV.

This statute, and the *9 Ann. c. 20.* leave the power of the attorney-general, with respect to filing informations, whether in the nature of *quo warranto*, or not, exactly as it was at common law; for the *4 & 5 Wm. & Mary, c. 18.* expressly provides, that it shall not be construed to extend to any other information than such as shall be exhibited in the name of their majesties' coroner or attorney in the Court of King's Bench for the time being, commonly called the master of the Crown Office. And the *9 Ann. c. 20.* only introduces some provisions with respect to informations in cases within the meaning of it filed in the name of the latter officer. In point of fact, there are several records in the Crown Office of informations in the nature of *quo warranto*, filed in the name of the attorney-general in the intermediate time between the two statutes, and since the passing of the last, as well in cases within the meaning of the last, as in other cases. *2 Kydd's Corp. 415, &c.*

The distinction between the power of the attorney-general and the master of the crown-office seems to be this, that the power of the latter is confined to cases which concern the public government; whereas that of the former extends also to cases which only concern the private rights of the crown.

2 Ld. Raym. 1409; Hardw. 261; Stra. 637; 3 Burr. 1814, 1817. See *2 Kydd's Corp. 417, &c.*

The cases in which informations in the nature of *quo warranto* are granted under the *9 Ann. c. 20.* are where a man exercises a corporate franchise, or acts as a corporate officer, without having been duly elected and sworn or admitted, and where the office of a corporate officer becomes void by something subsequent, as a motion, &c. *Kydd's Corp. 424.*

To subject a man to an information in the nature of a *quo warranto*, it is necessary that there should be not only a claim, but an user of the franchise. See *Sayer, 245; 5 T. R. 85.*

Such information will lie for the office of bailiff of a court-leet, being a principal officer having a power to summon and select the jury. *2 East, 308.*

Upon an application for a *quo warranto* information, suggesting that the defendants were elected contrary to the provisions of a particular charter, the affidavit must state that the charter was accepted, or that the usage has been in conformity to the charter; and the court, after determining that the affidavit was ill for omitting so to state, refused leave to amend it. *4 M. & S. 253.*

Where the only act done by the party, against whom an application is made for leave to file an information in the nature of *quo warranto*, is voting in an election for members of parliament under any claim of right, the court will refuse it, on the ground that an inquiry into the right of voting belongs more properly to the House of Commons. *1 Stra. 547.*

But an information in the nature of *quo warranto* will lie against a person claiming to have a right of voting by virtue of a burgage tenement. *8 T. R. 599 n.*

The Court of King's Bench, having a discretionary power of granting informations in the nature of *quo warranto*, had long ago established a general rule to guide their discretion as to the time for applications of this nature, viz. not to allow in any case such information against a person who had been twenty years in the possession of his franchise; but having reason to consider this time as too extensive, they by degrees restrained it, by analogy to the Statute of Limitations, and resolved not to allow such information against any person who had been six years in possession. See *4 Burr. 1962, 2022, 2120, 2523; Comp. 75; 1 T. R. 1, 4, 2 T. R. 767; 4 T. R. 282, 284.* And at length the legislature confirmed this regulation, and extended it to informations filed by the attorney-general. By the *32 Geo. 3. c. 58.* it is enacted, that to any information in the nature of *quo warranto*, for the exercise of any corporate office or franchise, the defendant may plead that he has been in possession of or has executed the office for six years or more. And it is by the same act provided, that no defendant shall be affected by any defect in the title of the person from whom he derives his right and title, if that person has been in the undisturbed exercise of his office or franchise six years previous to the filing of the information.

This latter provision must be considered as applying only to cases where issue is taken on the title of the person through whom the defendant claims; for no inquiry can be made into such title where no issue has been taken upon it. *Kyd. Corp. ii. 444, 435, &c.*

Under this act the defendant may plead several pleas, even though he do not plead (in one of them) the limitation imposed by the statute. *8 T. R. 467.*

The six years in the act means six years before making the rule absolute for the information, and not six years before obtaining the rule nisi. *1 Maul. & Selw. 71.*

To obtain leave to file an information, the party applying must lay a proper case before the court, verified by affidavit, on which the court will grant a rule on the defendant to show cause. It was formerly, indeed, so much the practice of the court to grant *quo warranto* informations as of course, that it was held prudent never to show cause against the rule, for fear of disclosing the grounds on which the defendant rested

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his defence. But since these matters have come more under consideration, it is no longer a matter of course; and the court have on several occasions declared that it was the intention of the legislature that they should exercise a sound discretion according to the particular circumstances of the respective cases that came before them, and should not, without good reason, disturb the quiet of any corporation. See 1 *T. R.* 2; 4 *Burr.* 1964, 2022.

The court will make the rule for an information absolute, although the party, after the rule obtained, resign his office, and his resignation be accepted. 2 *Maul. & Selw.* 75.

Where the right, or the fact on which the right depends, is disputed, that is a sufficient reason for granting an information, if the application be made within the proper time. So where the right depends on a point of new or doubtful law. See 1 *Burr.* 1485; *Comp.* 58; *Doug.* 397 (382).

The conduct of the parties on whose behalf the application is made will weigh much with the court, in some instances, in granting or refusing an information. See 4 *Burr.* 1963, 2024, 2120; 5 *T. R.* 300, 573; *Comp.* 75; 4 *T. R.* 223.

It is no reason for refusing an information, that informations formerly granted for the same cause have been abandoned, as that may have been by collusion. But it is a good reason that the prosecutor stands exactly in the same circumstances with the defendant. 2 *T. R.* 770, 771; and see 1 *East*, 86.

In cases where there has been a long acquiescence, and where the objection, if it prevailed, might tend to dissolve the corporation, the court may refuse the application. *Comp.* 58. But though a great number of derivative titles may be affected by judgment of ouster against the defendant, yet, if it be confessed that elections may still be made, the court will not refuse it on that ground alone. 2 *T. R.* 767; and see 8 *East*, 213.

As, however, it is in the discretion of the court to grant a *quo warranto* information, or to refuse it, the court will not, under circumstances tending to throw suspicion on the motives of their relator, grant such application, where the consequence will be to dissolve a corporation. 2 *B. & A.* 479.

On a former application against the same person (as mayor of Helleston, in Cornwall), the court held it to be a valid objection to one relator that he was present and concurred at the time of the objectionable election, even though he was then ignorant of the objection; for a corporator must be taken to be cognizant of the contents of his own charter, and of the law arising therefrom. 2 *B. & A.* 339. And in the same case the court refused to grant the rule, on the ground that the other relator appeared to be a man in low and indigent circumstances, and that there were strong grounds of suspicion that he was applying, not on his own account, nor at his own expense, but in collusion with a stranger.

But it has been since held that it is no objection to granting an information that the person applying is in low and indigent circumstances, and that there is strong ground of suspicion that he is applying, not on his own account, or at his own expense, but in collusion with a stranger; but the court in such a case required security for costs. *Re v. Wakelin*, 1 *Barn. & Adol.* 50.

And as to the competency of the relator, see 1 *B. & Ad.* 689, 690.

Where the application is made in the names of persons unconnected with the corporation, that will in general be a strong reason for refusing it. 1 *T. R.* 23; 1 *East*, 46 n; 3 *T. R.* 574 n.

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The 9 *Ann. c.* 20. gives full costs, on verdict or judgment, to the successful party, whether relator or defendant; but it is only in case of verdict or judgment that, under this statute, the defendant can have costs for a groundless prosecution; but it has been decided that if the prosecutor do not, at his own costs, procure the information to be tried within a year after issue joined, the defendant is entitled to the benefit of the recognizance under the statute of *William & Mary*. See further, *Information*, I.

What cases are within the meaning of the statute has been the subject of some controversy, as the successful party is entitled to his costs only in such cases.

The words of the statute are, the "offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs, and places;" one question has been, whether these words express only corporation offices, or whether they extend to offices in boroughs and other places not corporate. And it seems on the whole decided that the word *places* in the act only extends to offices in places of the same kind with those before enumerated.

It has likewise been urged, that there is a material difference between the case of a person who is compellable to take upon himself a burdensome office, which he could not refuse without being liable to an indictment, and that of a person who voluntarily undertakes an office from which he expects personal importance or some other advantage; and that it is unreasonable that a person, supposed to be elected into an office of the first description, should be liable to pay the costs of a prosecution for ousting him, on account of some defect in his election. 5 *T. R.* 375.

As this statute, 9 *Ann. c.* 20 extends only, as regards costs, to cases where the title of a person to be a corporate officer, as mayor, bailiff, or freeman, is in question, an information to try the right of holding a court is therefore not within it, but stands upon the common law only; and being a prosecution in the name of the king, no costs are given. 1 *Burr.* 402.

The court will not stay proceedings until the prosecutor give security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator, and no fraud is suggested. 2 *Maul. & Selw.* 346.

By the 11 *Geo. 4.* and 1 *Wm. 4. c.* 70. § 14. the jurisdiction of the court of session of Chester was abolished; and by 1 *Wm. 4. c.* 8. § 4. it was enacted that all informations in nature of *quo warranto*, and pleas and proceedings thereon, depending in the said court, should, at the request of the relator or defendant, be transmitted by the late prothonotary of such court, or other officer having the custody thereof, into the Crown Office of the King's Bench, and be proceeded with as if commenced there. It was held, that an information removed from the court of Chester may be proceeded upon in the Court of King's Bench, though no recognizances have been entered into for prosecuting with effect as required in *K. B.* by the 4 & 5 *Wm. & Mary, c.* 18. § 2.

It was formerly a subject of much discussion, whether a new trial could be granted in a *quo warranto* information when the verdict was in favour of the defendant. This depended chiefly on the question, whether such an information was a criminal prosecution; but since it has been held that it is merely a civil proceeding, there is no doubt but that a new trial may be granted where a verdict has been given in favour of the defendant, as well as where it has been given in favour of the crown. 2 *T. R.* 484.

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RAC

RACHETUM, from the French *racheter*, i. e. *redimere*.] The compensation or redemption of a thief. 1 *Stat. Rob. K. Scot.* c. 9.

RACING. See *Horse Races, Gaming, Wager*.

RACK. See *Torture*.

RACK RENT. The full yearly value of the land let by lease, payable by tenant for life or years, &c. *Wood's Inst.* 185. See *Rent*.

RACK VINTAGE. A second vintage or voyage made by our merchants for racked wines, i. e. wines drawn from the lees. See *stat. Antiq.* 32 *Hen.* 8. c. 14.

RAGEMAN. A statute attributed to the fourth year of King Edward I. is so termed, whereby justices were assigned by the king and his council, to hear and determine all complaints of injuries done throughout the realm, within the five years next before Michaelmas, in the fourth year of his reign.

Rageman seems a corruption of the word *regimen*, a rule, form, or precedent. Certain blank charters (or rather confessions) are termed ragemans in *Rot. Parl.* 1 *H.* 4. nu. 69, 93.

RAGLORIA. A word mentioned in the charter of Edward III. whereby he created his eldest son Edward Prince of Wales, in parliament at Westminster, the seventeenth year of his reign, recited by *Selden*, in his *Titles of Honour*, 597, *Cum forestis, parcis, chascis, boscis, warreniis, hundredis, comitis, ragloriis, ringeldiis, nodewardis, constabulariis, ballivis, &c.* *Davies*, in his *Dictionary*, says that *rhaglaw*, among the Welch, signifies *seneschallus, surrogatus, præpositus*.

RAGLORIUS. A steward. *Seld. Tit. of Honour*, 597.

RAGMAN'S ROLL OR **RAGIMUND'S ROLL**. So called from one Ragimund, a legate in Scotland, who, calling before him all the beneficed clergymen in that kingdom, caused them on oath to give in the true value of their benefices; according to which they were afterwards taxed by the court of Rome; and this roll, among other records, being taken from the Scots by Edward I. was re-delivered to them in the beginning of the reign of Edward III.

Sir Richard Baker saith, that Edward III. surrendered, by charter, all his right of sovereignty to the kingdom of Scotland, and restored divers instruments of their former homages and fealties, with the famous evidence called Ragman's Roll.

Sir David Dalrymple calls this Bagimont's Roll, and says the name of the legate was Benemundus de Vicâ, vulgarly called Bagimont. *Annals of Scotland*, anno 1275.

RAN, Sax. *aperta rapina*.] Open or public theft. *Lamb. Archai.* 125; *Ll. Canuti*, c. 58. *Hoveden*.

The term, "all that a man can rap and ran," or still more corruptly, *rap and rend*, is by some derived hence; *rap* from *rapia*, to take by force.

RANGE, from French *ranger*, to order, dispose of.] It is used in the *Forest Laws*, both as a verb, as to range; and a substantive, as to make range. *Charta de Forestâ*, c. 6.

RANGER. A sworn officer of the forest. *Charta de Forestâ*. His authority is in part described by his oath set by *Manwood*, part 1. c. 50; but more particularly part 2. c. 20. num. 15, 16, 17. His office consists chiefly in three points: to walk daily through his charge; to see, hear, and

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inquire of trespasses in his bailiwick; to drive the beasts of the forest, both of venary and chase, out of the disafforested into the forested lands; and to present all trespasses of the forest, at the next court holden for the forest. See *Forest*.

The ranger is made by the king's letters patent, and hath a fee paid yearly out of the Exchequer, and certain fee deer. *Rangeator Forestæ de Whittlewood*, Pat. 14 *Rich.* 2. nu. 8.

RANSOM, French *rançon, redemptio*.] Is properly the sum paid for redeeming a captive or prisoner of war; and sometimes taken in our law for a sum of money paid for pardoning some great offence, and setting the offender at liberty who was under imprisonment. See 1 *Hen.* 4. c. 7. 11 *Hen.* 6. c. 11.

As in the goods of an enemy, so also in his person, a man may acquire a sort of qualified property, by taking him a prisoner in war (*Bro. Abr. tit. Propertie*, 18), at least till his ransom is paid. 2 *Comm.* 402.

The wealth to be amassed by the ransom of prisoners of war, was one of the great inducements to military service; and curious instances of the importance which was attached to this consideration, occur in history. Thus, when the Maid of Orleans was to be brought to her disgraceful trial, the advisers of the measure thought it right to pay her captors, whose property she had become, a sum equal to what it was supposed they might be able to make by her ransom. *Turner's Hist.* vol. iii. p. 101. In *Fenn's Letters* is one from an English admiral, stating his determination to kill or drown the crews of one hundred merchantmen which he had taken, unless the council wish to preserve their lives; vol. i. p. 213; *Lutgard's Hist.* vol. v. p. 118. Sometimes, in the contracts of service, the king stipulated that he should be allowed to buy captives of a certain rank from the captors at a certain price. *Coleridge's n.* 2 *Comm.* 402.

Fine and ransom go together; and some writers tell us that they are the same; but others say that the offender ought to be first imprisoned, and then redelivered or ransomed in consideration of a fine. *Co. Litt.* 127. *Dalt.* 209.

Ransom differs from amercement, being a redemption of a corporal punishment due to any crime. *Lamb. Eirem.* 556. See *Fines for Offences*.

A ship was taken by the French; the master (having a share in her) ransomed her for 1800*l.*, and was taken to France as an hostage for this money. The ransom-money must be raised out of the profits, notwithstanding any former mortgage of the ship; for if there was a precedent mortgage, what would become of that security if the ship had not been redeemed? After the ship was redeemed, she performed her intended voyage, and the freight-money received after redemption was the first profits arising, and out of them the ransom-money is to be satisfied; the insurers always pay a part of the ransom-money. 2 *Eq. Ca. Abr.* 690. See *Insurance*, II. 2.

RANKING OR **CREDITORS**. The Scotch term for the arrangement of the property of a debtor according to the claims of the creditors, in consequence of the nature of their respective securities. See *Bankrupt, Executor, Mortgage, &c.* for similar arrangements in the English law.

RAPE, raptus, vel rapa.] A division of a county, similar to that of a hundred, but oftentimes containing in it more hundreds than one.

Sussex is divided into six rapes only, viz. Chichester, Arundel, Bramber, Lewes, Pevensey, and Hastings; every of which, besides hundreds, hath a castle, river, and forest belonging to it. *Camd. Brittan.* 225, 229. These rapes are incident to the county of Sussex, as lathes are to Kent, and wapentakes to Yorkshire, &c.

These rapes and lathes are considered by *Blackstone* as an intermediate division between the shire and the hundreds, each of them containing about three or four hundreds a piece. These had formerly their rape-reeves and lathes-reeves, a thing in subordination to the shire-reeve (sheriff). Where a county is divided into three of these intermediate jurisdictions, they are called tithings, which were anciently governed by a tithing-reeve. These tithings still subsist in the large county of York, where, by an easy corruption, they are denominated ridings; the north, east, and west riding. 1 *Comm. Introduct.* § 4. p. 116. See the several titles.

We have no mention in the *Domesday Survey* of any mote or court attached to the rape, nor is there any reference to its testimony, as in the case of the hundred. Indeed the rape seems to have been intrusted to the jurisdiction of individuals; for in the account of Sussex, in the *Survey*, we read of *rapum Comitatus de Moritonio, rapum Willielmi de Braiose, rapum Comitatus de Ow, rapum Willielmi de Warene, and rapum Comitatus Rogerii*. The rapes mentioned by their own names are those of Arundel, Hastings, Lewes, and Pevensey; Chichester rape does not appear, it was under Earl Roger's authority, but perhaps usurped from the bishop. *Hrepp* is still a territorial division in Ireland; and it is not improbable that the rapes of Sussex were military districts for the supply of the castles which existed in each. 1 *Ellis's Introduct. to Domesday Book*, 180.

RAPE OF THE FOREST, raptus forestæ.] Trespass committed in the forest by violence; it is reckoned among those crimes, whose cognizance belonged only to the king. *Leg. Hen. 1. c. 10.* See *Forest*.

RAPE OF WOMEN, raptus, from rapio.] An unlawful and carnal knowledge of a woman, by force, and against her will; a ravishment of the body, and violent deflowering her, which is felony by the common and statute law. *Co. Litt.* 190. The word *raptus* (ravished) is so appropriated by law to this offence, that it cannot be expressed by any other; even the word *carnaliter cognovit*, &c. without it, will not be sufficient. *Co. Litt.* 124; 2 *Inst.* 180.

Rape was punished by the Saxon laws, particularly those of King Athelstan, with death. *Bract. lib. 3. c. 28.* But it was afterwards thought too hard, and in its stead another severe, but not capital, punishment, was inflicted by William the Conqueror, viz. castration and loss of eyes, which continued till after *Bracton* wrote, in the reign of Henry the Third. *Lit. Guil. Conq.* c. 19.

But in order to prevent malicious accusations, it was then the law (and it seems continued to be so in appeals of rape, until they were abolished), that the woman should immediately after, "*ad unum vicem jurat et pœnit*," go to the next town, and there make discovery to some credible persons of the injury she has suffered, and afterwards seek redress to the highest constable of the hundred, the coroner, or the sheriff, with the outrage. *Glanv. lib. 14. c. 6; Bract. lib. 3. c. 28.* See 1 *Hale's P. C.* c. 632. Afterwards, by statute *Westm. c. 19*, the time of limitation was extended to forty days. At present there is no time of limitation fixed; for as it is usually now punished by indictment at the suit of the king, the maxim of law takes place, that *nullum tempus currit regi*; but the jury will rarely give credit to a stale complaint. During the former period also, it was held for law, that the woman (by consent of the judge and her parents), might recede the offender from the execution of his sentence,

by accepting him for her husband, if he also was willing to agree to the exchange, not otherwise. *Glan. lib. 14. c. 6; Bract. lib. 3. c. 28.* But this is now not held for law; and it is said that the election of the woman is taken away by virtue of stat. *Westm. 2*, making the rape felony, although she consent afterwards. See *post*.

By stat. *Westm. 1. 3 Edw. 1. c. 13*, the punishment of rape was much mitigated; the offence itself of ravishing a damsel within age (that is, under twelve years old), either with her consent or without, or of any other woman against her will, being reduced to a trespass, if not prosecuted by appeal within forty days, and subjecting the offender only to two years' imprisonment, and a fine at the king's will. But this lenity being productive of the most terrible consequences, it was soon found necessary to make the offence of forcible rape felony, which was accordingly done by stat. *Westm. 2. 13 Ed. 1. c. 34.* And by the 18 *Eliz. c. 7*, it was made felony, without benefit of clergy, as was also the abominable wickedness of carnally knowing and abusing any woman child under the age of ten years; in which case the consent or non-consent was immaterial, as by reason of her tender years she was incapable of judgment and discretion.

Before this statute, it was a question whether a rape could be committed on the body of a child of the age of six or seven years; and a person being indicted for the rape of a girl of seven years old, although he was found guilty, the court doubted whether a child of that age could be ravished; and it was said, if she had been nine years old she might, for at that age she may be endowed. *Dyer*, 304.

Hale was indeed of opinion, that such profligate actions committed on an infant under the age of twelve years, the age of female discretion by the common law, either with or without consent, amounted to rape and felony, as well after as before the statute of Queen Elizabeth. 1 *Hale's P. C.* 631.

The statute of *Eliz.* as well as the former acts on the subject, were repealed by the 9 *Geo. 4. c. 31*, which, by § 16, enacts, that every person convicted of the crime of rape shall suffer death as a felon. By § 17, if any person shall unlawfully and carnally know and abuse any girl under the age of ten years, he shall be guilty of felony, and, on conviction, suffer death; and unlawfully and carnally to know and abuse any girl above the age of ten, and under twelve years, is a misdemeanor, and the offender, on conviction, may be imprisoned with or without hard labour for such term as the court shall award. By § 18, the proof of actual emission is declared not to be necessary to constitute a carnal knowledge, but the offence shall be deemed complete upon proof of penetration only.

A male infant, under the age of fourteen years, is presumed by law incapable to commit a rape, and, therefore, it seems, cannot be found guilty of it. For though in other felonies *malitia supplet ætatem*, yet, as to this particular species of felony, the law supposes an imbecility of body as well as mind. 1 *Hale's P. C.* 631.

But an infant may be a principal in the second degree, if he aid and assist in the commission of the offence, and it appears that he had a mischievous discretion; for the excuse of impotency will not in such case apply. See 3 *C. & P.* 396.

It is no excuse or mitigation of the crime, that the woman at last yielded to the violence, and consented either after the fact or before, if such consent was forced by fear of death or duress,—or that she was a common strumpet, for she is still under the protection of the law, and may be forced; but it was anciently held to be no rape to force a man's own concubine; and it is said by some to be evidence of a woman's consent, that she was a common whore. 1 *Hawk. P. C.* c. 41. § 2; *Co. Litt.* 123. See 1 *Hale's P. C.* 629.

Also formerly it was adjudged not to be a rape to force a woman who conceived at the time, because it was imagined that if she had not consented, she could not have conceived;

though this opinion hath been since questioned, by reason the previous violence is no way extenuated by such a subsequent consent; and if it were necessary to show the woman did not conceive, to make the crime, the offender could not be tried till such time as it might appear whether she did or not. 2 Inst. 190; 1 Hawk. P. C. c. 41. § 2.

The party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame; if she presently discover the offence and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned. 1 Hale's P. C. 634, 635, 636.

And the defendant may give evidence of the woman's notoriously bad character for want of chastity or common decency, or that she had before been connected with the prisoner himself; but he cannot give evidence of any other particular facts to impeach her chastity. R. & R. 211; 2 Stark. 243; 3 C. & P. 589. So what she herself said so recently after the fact, as to preclude the possibility of her being practised on, has been holden to be admissible in evidence as a part of the transaction; but the particulars of her complaint are not evidence of the truth of her statement. 1 East's P. C. 444; 2 Stark. 241.

Moreover, if the rape be charged to be committed on an infant under twelve years of age she may be still a competent witness, if she hath sense and understanding to know the nature and obligations of an oath; or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she hath not, it is thought by Sir Matthew Hale, that she ought to be heard without oath, to give the court information; and others have held, that what the child told her mother, or other relations, may be given in evidence, since the nature of the case admits frequently of no better proof. But it is now settled by a solemn determination of the twelve judges, that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath: and that there is no determinate age, at which the oath of a child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be therefore, many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or such as the jury is bound to believe. 4 Comm. c. 15.

Aiders and abettors in committing a rape, may be indicted as principal felons, whether men or women. 1 Hawk. P. C. c. 41. § 6. Lord Audley was indicted and executed as a principal, for assisting his servant to ravish his own wife, who was admitted a witness against him. Dalr. 107; 1 St. Trials, 265.

And generally, all those who are present, aiding and abetting a man to commit a rape, are principal offenders in the second degree, and this whether they are men or women. An accessory before the fact is, by the 9 Geo. 4. c. 81. § 81. punishable with transportation, not exceeding fourteen

years, or with imprisonment, with or without hard labour, not exceeding three years; and an accessory after the fact with similar imprisonment, not exceeding two years.

Hale observes, that though a rape is a most detestable crime, it is an accusation easily made, and hard to be proved; but harder to be defended by the man accused, although ever so innocent: and he mentions several instances of rapes, which at the time were apparently fully proved, but were afterwards discovered to have been malicious contrivances. 1 Hale's Hist. P. C. 625, 636.

An assault with intent to commit a rape, is a misdemeanor, and punishable under the 9 Geo. 4. c. 81. s. 25. with imprisonment to hard labour, not exceeding two years.

Upon an indictment for an assault, with intent to commit a rape, if a rape be proved to have been actually committed, the misdemeanor is merged in the felony, and the judge should direct an acquittal, and remand the offender, in order that he may be indicted for the felony. 1 East, P. C. 411.

RAPINE, *rapina*.] The taking a thing in private, against the owner's will, is properly theft; but the taking it openly or by violence, is rapine. See Robbery. Rapine on the northern borders was repressed by several old statutes, all of which are now repealed.

RAPTU HEREDIS. A writ for taking away an heir holding in socage; of which there are two sorts, one when the heir is married, the other when he is not; see Reg. Orig. 163; and title, Guardian.

RASE, *rasciva*.] Seems to have been a measure of corn now disused. Toll shall be taken by the rase, and not by the heap or cantel. Ordinance for Bakers, &c. c. 4.

RASURE of a deed, so as to alter it in a material part, without consent of the party bound by it, &c. will make the same void; and if it be rased in the date, after delivery, it is said it goes through the whole. 5 Rep. 23, 119.

Rasure, &c. is most suspicious, when it is in a deed-poll, that there is but one part of the deed, and it makes to the advantage of him to whom made. And where a deed by rasure, addition, or alteration, becomes no deed, the defendant may plead *non est factum*. 5 Rep. 23, 119. See Deed, Pleading.

RATE. A valuation of every man's estate; or the appointing or setting down how much every one shall pay, or be charged with, to any tax.

RATE-TITHE. Is when any sheep or other cattle are kept in a parish for less time than a year, the owner must pay tithe for them *pro rata*, according to the custom of the place. F. N. B. 51. See Tithes.

RATIFICATION, *ratificatio*.] A ratifying or confirming: it is particularly used for the confirmation of a clerk in a prebend, &c. formerly conferred on him by the bishop, where the right of patronage is doubted, or supposed to be in the king. Reg. Orig. 304.

RATIHABITIO. Confirmation, agreement, consent. See 18 Vin. Abr.

Omnis ratibitio retro trahitur et mandato equiparatur. Co. Lit. 207; Wing. 485; a maxim frequently cited in the courts of law.

RATIO. An account; as *reddere rationem*, to give an account, and so it is frequently used. According to another it is a cause, or giving judgment therein; and *ponere ad rationem*, is to cite one to appear in judgment. Hals. 88.

RATIONABILIBUS DIVISIS. A writ which lay where two lords, in divers towns, had seignories joining together, for him who found his waste by little and little to have been encroached on, against the other who had encroached, thereby to rectify their bounds; in which respect Fitzherbert called it in its own nature a writ of right. The Old Nat. Brev. says, that it was a kind of *justitias*, and might be removed by a *pone* out of the county to the Common Bench. See the form and use in F. N. B. 128; and Reg. Orig. 157.

This writ was abolished by the 3 & 4 Wm. 4. c. 27. s. 26. See further, *Perambulation*.

RATIONABILE ESTOVERIUM. Alimony was heretofore so called. See *Magna Carta*, and title, *Baron and Feme*, XI.

RATIONABILI PARTE. A writ of right for lands, &c. See *Right, Writ of, Recto de Rationabili Parte*.

RATIONABILI PARTE BONORUM. A writ which lay for a wife, after the death of her husband, against the executors of the husband, for her third or reasonable part of his goods after debts and funeral charges paid. *F. N. B.* 222.

It appears by Glanville, that by the common law of England, the goods of the deceased (his debts first paid) shall be divided into three parts; one for the wife, another for his children, and the third to the executors: and this writ might have been brought by the children, as well as the wife. *Reg. Orig.* 142.

But it seems to have been used only where the custom of the county served for it; and the writs in the register rehearse the customs of the counties, &c. *New Nat. Br.* 270, 271.

As to children bringing this writ, their marriage is no advancement, if the father's goods be not given in his lifetime; but where a child was advanced by the father, this writ would not lie. *New N. B.* 270. See titles, *Executor*, V. 8; *Will*; and 18 *Vin. Abr.* 158.

RAVISHMENT, *Fr. Ravissement*, i. e. *De captio, rapto*] An unlawful taking away either a woman, or an heir in ward, sometimes it is used in the same sense with rape. See that title.

RAVISHMENT DE GARD, *ravishment of ward*.] A writ which lay for the guardian by knights-service, or in socage, against a person who took from him the body of his ward. *F. N. B.* 140.

By 12 *Car. 2. c. 24.* this writ is taken away as to lands held by knights-service, &c. but not where there was guardian in socage, or appointed by will. It is however now abolished by the 3 & 4 Wm. 4. c. 27. s. 36. See *Guardian*.

The mayor and aldermen and chamberlain of London, who have the custody of orphans, if they committed any orphan to another, he should have a writ of ravishment of ward against him who took the ward out of his possession. *New Nat. Brev.* 317. See *London, Orphans*. And further, *Guardian*.

RAY. Cloth never coloured or dyed. See 17 *Rich. 2. c. 3*; 11 *Hen. 4. c. 6*; 1 *Rich. 3. c. 8*.

RE-AFFORESTED. Is where a forest which had been deforested is again made forest; as the forest of Dean is by 20 *Car. 2. c. 3*.

REAL ACTION. See *Action*.

REAL BURDEN. In Scotch law, a condition imposed on an estate which is effectual against creditors and heirs. The power of imposing such a real burden is exercised by the person granting an heritable bond.

REAL RIGHT. The right of property, *jus in re*: the person having which right may sue for the subject itself. A personal right *jus ad rem* entitles the party only to an action for performance of the obligation.

REAL WARRANTICE, is when infeoffment of one tenement is given in security of another. *Scotch Dict.*

REAL ESTATE. As to what is real, as distinguished from a personal estate, see *Estate*. The term is generally applied to landed property, and includes all estates and interests in lands which are held for life, or for some greater estate, and whether such lands be of freehold or copyhold tenure.

By the 1 Wm. 4. c. 27. all former statutes relating to the payment of debts out of real estate are repealed. This act provides two principal objects: 1. To extend the remedies of creditors against fraudulent devisees; 2. To enable

courts of equity to carry their decrees on this subject into execution.

By the original law of England, personal estate and the annual profits of lands only were liable to the payment of debts, and credit was given only to the extent of visible chattels: the person, however, of the debtor could not be taken in satisfaction of a debt, because the lord had a claim to the service of his tenant; this law was evidently founded on the ancient principle of the feudal system. In the course of time, when commerce began to increase, and a system of mercantile credit to be established, the attention of the legislature was called to the protection of creditors, and the rule of law was partially relaxed: provisions were made in parliament expressly relating to merchants. By the 11 *Edw. 1.* the chattels and devisable burgages were made liable to debts; and if the debtor had no moveables, then his body was to be taken and kept in prison. By a statute, 13 *Edw. 1.* the lands, goods, and body were made liable in certain gradations. The securities under this statute were called statutes merchant, and were held to be bonds of record. In the 27 *Edw. 3.* the security by statute staple (which was also a bond of record) was established, by which the lands, body, and goods were made liable for debts acknowledged before the officer of the staple; and by 23 *Hen. 8. c. 6.* this security was extended to all who chose to adopt it; and which was then called a recognizance in the nature of a statute staple. The provisions of this old statute have long since fallen into disuse.

As to the liability of the heir for the debt of his ancestor, there were two sorts of obligations or contracts known to the law; one called a specialty, the other a simple contract. If the ancestor were bound by a specialty, the estate descended to the heir by the common law, liable to the engagement; but the creditor could not follow the estate in the hands of a *bona fide* purchaser from the heir; and though one heir succeeding to an estate was liable to the debt of his ancestor, yet if the ancestor, after the statute of Wills (32 *Hen. 8.*) devised his estate to a third person, the devisee enjoyed the estate, without being liable for the engagements of the devisor.

This defect was in part remedied by the 3 & 4 Wm. & M. c. 14. the object of which was to place the devisee in the same situation as that in which the heir would have stood had he succeeded to the property; but the act was imperfect, and there were two cases for which it provided no adequate remedy. 1. It did not provide for the case of there being no heir; it only allowed an action to be brought against the devisee and heir, but not against the devisee, if there were no heir. The 1 Wm. 4. c. 47. provides a remedy against the devisee, even though there should be no heir. 2. With respect to specialty debts (bonds and covenants), the 3 & 4 Wm. & M. were held to apply to bond debts or covenants, for the payment of sums certain, and not to the damages for breaches of covenant or contracts under seal; therefore if a man had sold an estate to another, covenanting for title, and died, although the purchaser was evicted for want of title, yet if the vendor had devised his real property to a stranger, such devisee would retain the estate devised against the purchaser, whatever might have been the amount of the purchase money: to prevent this evil, the act 1 Wm. 4. c. 47. places the devisee exactly in the same situation as the heir would stand in, in case the estate had descended to him directly.

With respect to infants. By the feudal law, during the subsistence of wardships, the estate of the heir in chivalry was, during the minority, in the hands of his guardian, who took the whole profits of it to himself. When, therefore, an action was brought against an infant heir, he was entitled to pray the parol to demur (i. e. to put in his plea of non-age, in stay of the creditor's action until he came of full age); and this not merely on account of his inability to defend himself

REAL ESTATE.

pay the debts or perform the covenants of his ancestors, in regard of any lands, &c. descended to him, and shall sell the same before action brought or process sued out against him, such heir shall be answerable for such debts or covenants in actions of debt or covenant, to the value of the lands so sold, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon judgments so obtained against such heir, to the value of the said land, as if the same were his own debts; saving that the lands *bond fide* aliened before action brought shall not be liable to such execution.

§ 7. Provided, that where any action of debt or covenant is brought against the heir, he may plead *riens per descent* at the time of the writ brought against him; and the plaintiff in such action may reply that he had lands, &c. before the writ brought; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands so descended, and thereupon judgment shall be given and execution awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or *nihil dicit*, it shall be for the debt and damage, without any writ to inquire of the lands so descended.

§ 8. Provided, that all devisees made liable by this act shall be liable in the same manner as the heir at law by force of this act, notwithstanding the lands to them devised shall be aliened before action brought.

By § 9. traders' estates shall be assets to be administered in courts of equity; but creditors by specialty are to be paid first.

By § 10. the parol shall not demur by or against infants.
See further, *Parol, Demurrer.*

By § 11. infants are to make conveyances under order of the court of equity; and by § 12. persons having a life interest may convey the fee, if the estate is ordered to be sold.

By § 13. the act, viz. the (Irish) not to repeal act 33 Geo. 3. relating to debts due to bankers.

Excellent as were the provisions of the above act, they still did not extend to the payment of debts by simple contract, except where the person dying was a trader within the bankrupt laws. Its deficiencies have, however, been supplied by a recent statute, 3 & 4 Wm. 4. c. 104. by which the real estate of all persons whatsoever have been rendered liable to the discharge of their debts, whether due by specialty or on simple contract; but the preference is very properly given to the former, which are to be satisfied in full before any part of the latter are paid.

The last-mentioned statute enacts, that when any person shall die seised of, or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold or customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well the debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound: provided always, that in the administration of assets by courts of equity under the act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands.

The following are the principal provisions of the act :—

By § 2. all wills and testamentary limitations, dispositions, or appointments, already or hereafter to be made concerning any manors, &c. or hereditaments, or any rent or charge out of the same, whereof any persons, at the time of their decease, shall be seized in fee simple, in possession, reversion, or remainder, or have power to dispose of the same by their last wills, shall be deemed (only as against such persons, bodies politic or corporate, and their heirs, successors, executors, administrators, and assigns, with whom the persons making any such wills, &c. shall have entered into any bond, covenant, or other speciality binding his, her, or their heirs,) to be fraudulent, void, and of none effect.

By § 3. in the cases before mentioned, every such creditor shall and may have and maintain his action of debt or covenant upon the said bonds, covenants, and specialties against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, or the devisee or devisees of such first mentioned devisee or devisees jointly, by virtue of the act; and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended.

By § 4. If there shall not be any heir at law, against whom, jointly with the devisee or devisees, a remedy is thereby given, in every such case every creditor may have his action of debt or covenant against such devisee or devisees solely, and such devisee or devisees shall be liable for false plea as aforesaid.

§ 5. Provided, that where there shall be any limitation or appointment, devise or disposition, of or concerning any manors, &c. hereditaments, for the payment of just debts, or portions, or sums of money, for any children of any person, in pursuance of any marriage contract, *bond fide* made before such marriage, the same shall be in full force, and the same manors, &c. may be enjoyed by the persons, their heirs, &c., for whom the said limitation, &c. was made, and by their trustees, their heirs, &c., for such estate or interest as shall be so limited, &c. until such debts or portions shall be raised and satisfied.

§ 6. In all cases where any heir at law shall be liable to

Equitable assets in a court of equity, not created by statute, still continue liable to be administered among the whole body of creditors indifferently. As to what are real and what equitable assets and the order in which debts are to be paid out of the former, see *Executor*, V., 6.

REALTY. Is an abstract of real, as distinguished from personality.

REASON. Is the very life of law; and what is contrary to it is unlawful.

When the reason of the law once ceases, the law itself generally ceases; because reason is the foundation of all our laws. *Co. Lit.* 97, 183.

If maxims of law admit of any difference, those are to be preferred which carry with them the more perfect and excellent reason. *Ibid.* See 1 *Comm.* 70.

REASONABLE AID. A duty claimed by the lord of the fee, of his tenants holding by knights-service, to marry his daughter, &c. *Westm. 2. c. 24.* See *Tenures*.

REASONABLE CAUSE. See *Consideration*.

REASONABLE PART. See *Rationabili Parte*.

REATTACHMENT, reattachiamentum. A second attachment of him who was formerly attached and dismissed the court without day, by the not coming of the justices or some such casualty. *Broke, Reg. Orig.* 35.

A cause discontinued, or put without day, cannot be revived without reattachment or resummons; which, if they are special, may revive the whole proceedings: b. t. it general, the original record only. 2 *Hawk. P. C. c.* 17, § 195. And on a reattachment the defendant is to plead *de novo*, &c. See *Day*.

REBATE. Discount; the abating what the interest of money comes to, in consideration of prompt payment. *Merch. Dict.* See *Harry*.

REBELLION, rebellio. Among the Romans, was where those who had been formerly overcome in battle, and yielded to their subjection, made a second resistance: but with us it is generally used for the taking up of arms traitorously against the king whether by natural subjects, or others when once subdued; and the word rebel is sometimes applied to him who wilfully breaks a law so to a villain disobeying his lord. See 25 *Edw. 3. c. 6*; 1 *Rich. 2. c. 6*.

There is a difference between enemies and rebels: enemies are those who are out of the king's allegiance; therefore subjects of the king, either in open war, or rebellion, are not the king's enemies, but traitors. Thus David, Prince of Wales, who levied war against Edw. I. because he was within the allegiance of the king, had sentence pronounced against him as a traitor and rebel. *Fleta, lib. 1. c. 16.* Private persons may arm themselves to suppress rebels, enemies, &c. 1 *Hawk. P. C. c.* 63, § 10.

Rebellion is also used for disobedience to the process of courts of law in Scotland or Ireland.

REBUTTER, from the Fr. buter, i. e. repellere, to put back or bar. The answer of a defendant to a plaintiff's surrejoinder. See *Pleading*.

Rebutter is also where a man by deed or fine (now abolished) grants to warranty any land or hereditament to another; and the person making the warranty, or his heirs, agrees for the same thing: if he who is so sued, plead the deed or fine with warranty, and pray judgment if the plaintiff warrant to the party, against the warranty in the deed, &c. this is called a rebutter. *Terms de Ley.* And if I grant to a tenant to hold without impeachment of waste, and afterwards impeach him for waste done, he may debar me of this action, by shewing my grant; which is rebutter. *Co. Entr.* 284; *Co. Litt.* 365.

RECAPTION, receptio. The taking a second distress of one formerly distrained, during the plea grounded on the former distress: and it is a writ to recover damages for him

whose goods being distrained for rent, or service, &c. are distrained again for the same cause, pending the plea in the county-court, or before the justices. *F. N. B.* 71, 72. See 17 *Edw. 3. c. 7*.

A recaption lies where the lord distrains other cattle of the tenant than he first distrained, as well as if he had distrained the same cattle again, if it be for one and the same cause; but *anno*, 19 *Edw. III.* issue was taken whether the cattle were other cattle of the plaintiff, &c. *New Nat. Br.* 161. See *Replevin*.

If the lord distrain the cattle of the stranger for the same rent, and not his cattle who was first distrained; neither the stranger, nor the party first distrained, shall have the writ of recaption: and if the lord distrain for rent or service, and afterwards the lord's bailiff takes a distress on the same tenant for the same rent or service, pending the plea, the tenant shall not have a recaption against the lord, nor against the bailiff, although the bailiff maketh cognizance in right of the lord, &c. for it may be the lord had no notice of that distress, or the bailiff had no notice of the distress taken by the lord; though in such case action of trespass lies; and if the lord agree to the distress taken by his servant or bailiff, the tenant may have this writ against the lord. *New Nat. Br.* 159.

A man is distrained within a liberty, and sues a replevin there by plaint or writ, and pending that plaint in the liberty he is distrained again for the same cause by the person who distrained before; he shall not on that distress bring a writ of recaption, because the plaint is not pendent in the county-court before the sheriff, nor in C. B. before the justices: but if the plaint be removed by *pone* or *recordari* out of the liberty before the justices, then the party distrained may have a recaption, &c. And if a person be convicted before the sheriff in a writ of recaption, he shall not only render damages to the party, but be amerced for the contempt; and be fined. 39 *Edw. III.* See further, *Replevin*.

For damage-feeasant, beasts may be distrained as often as they be found on the land; because every time is for a new trespass and a new wrong, and no recaption lies.

RECAPTION is also a species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them: so it be not in a riotous manner, or attended with a breach of the peace. 3 *Inst.* 134; *Hal. Annal.* s. 46.

The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants, concealed or carried out of his reach, if he had no speedier remedy than the ordinary process of law. If therefore he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But, as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature: for these reasons it is provided, that this natural right of recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law. 2 *Roll. Rep.* 55, 56, 208; 2 *Roll. Abr.* 565, 566; 3 *Comm.* 4.

As to the recovery of stolen goods on convictions, see *Restitution*.

RECEIPT. All receipts in writing for sums not under 5l. are subjected to certain stamp-duties, varying from 3d. up to 10s.

RECEIVER, Receptor.] Is by us, as with the civilians, commonly used in the evil part, for such as receive stolen goods, &c. The receiving a felon, and concealing him and his offence, make a person accessory to the felony. 2 Inst. 183. See *Accessory*, II. 3.

By the common law, receivers of stolen goods were only guilty of a misdemeanor. Various legislative enactments were made, beginning with the reign of William and Mary, creating this offence a felony, all of which have recently been repealed, and the whole statute law on this subject is now contained in the sections of the 7 & 8 Geo. 4. c. 29. which are here abstracted. By § 54 of that act, if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony either at common law or by virtue of that act, such person knowing the same to have been stolen, such receiver shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony; and in the latter case, whether the principal felon shall or shall not have been previously, or shall or shall not be, amenable to justice: and such receiver may be transported for not exceeding fourteen years, or be imprisoned not exceeding three years; and, if a male, not more than thrice whipped. By § 55. where the original offence is an indictable misdemeanor by the act, such receiver shall be guilty of a misdemeanor, and be liable to be transported for seven years, or imprisoned not exceeding two years, and if a male, whipped. By § 56. all such receivers may be tried in the county or place in which the property is found in their possession, or where the principal may be tried. By § 60. where the stealing or taking of any property is by the act punishable summarily, receivers of such property shall on conviction thereof before a justice of the peace, be liable to the same forfeiture and punishment to which the principal is liable.

By the 30 Geo. 2. c. 24. it shall be lawful for any pawnbroker, or any other dealer, their servants, or agents, to whom any goods shall be offered to be pawned, exchanged, or sold, which shall be suspected to be stolen, to seize and detain the persons offering the same, for the purpose of being examined by a justice, who is empowered, if he sees any grounds to apprehend that the goods have been illegally obtained, to commit the persons offering the same to prison for a period not exceeding six days; and if, on the further examination, the justice shall be satisfied that the goods were stolen, he shall commit the offender to prison to be dealt with according to law; and although it may afterwards appear that the goods in question were fairly obtained, yet the parties who seized the supposed offender shall be indemnified.

In some cases the distinction between a receiver and an accessory have required an attentive consideration; as where goods in a warehouse were severed by some of the parties from the rest for the purpose of stealing, and afterwards taken out of the warehouse by them and other parties to the theft, it was held that the latter were not accessories, but principals; *Rex v. Atwell, et al.* 2 East, P. C. c. 16. § 164; but where goods were entirely taken away from the premises or actual possession of the owner, the party concerned in the further removal of them afterwards was considered as an accessory. *Rex v. King, York Assizes, 1816 or 1818; Russell on Crimes, lib. 4. c. 21.*

A party may be indicted for receiving goods stolen by persons unknown (see *R. & R.* 372); but where the principal is known, it should be stated according to the truth. 2 East, P. C. c. 16. § 164; 3 Camp. 264.

On an indictment against a prisoner for receiving several articles, if it appear that they were received at different times, the prosecutor may be put to his election. But evidence may be given of all the receipts, for the purpose of proving (what is an indispensable ingredient in the offence) guilty

knowledge; at least, of all receipts prior to that on which the prosecutor elects to proceed. *Ry. & M.* 146.

In cases where the principal and receiver are joined in the same indictment and tried together, there is no doubt that the receiver may enter into the full defence of the principal, and avail himself of every matter of fact and point of law tending to his acquittal: and in cases where the principal has been previously convicted, it seems competent to the receiver to controvert his guilt, or to show that the offence did not amount to felony in him, or not to that species of felony of which he was convicted. See *Foster*, 365; *Leach*, 288.

Where the party is indicted as a receiver, and the jury find that he was the principal thief, they must acquit him of receiving; and in such case the judge will, if the grand jury are discharged, order the prisoner to be detained and tried as principal at the next assizes. *Rex v. Maddan, York Assizes, Spring, 1830.*

Upon the trial of the receiver the principal felon may be admitted a witness. *Haslam's case; Patram's case; 2 East, P. C. c. 16. § 166.* And this although pardoned or not convicted. And his evidence is equally admissible after conviction, provided judgment has not been passed upon him, or he has endured the punishment to which he has been sentenced. See *Evidence*, II.

With respect to the venue of indictments for receiving stolen goods, see *ante* and *Indictment*, V.

RECEIVER. Annexed to other words, as receiver of rents, signifies an officer belonging to the king or other personage. *Crompt. Jurisd.* 18. See *Accounts*.

RECEIVER OF THE FINES. An officer who receives the money of all such as compound with the king on original writs sued out of Chancery. *West. Symb. par. 2. § 106; 1 Edm. 4. c. 1.*

RECEIVER-GENERAL OF THE DUCHY OF LANCASTER. An officer of the duchy court, who collects all the revenues, fines, forfeitures, and assessments, within the duchy, or what is there to be received, arising from the profits of the duchy lands, &c. 39 E. c. 7.

RECEIVER OF THE KING'S RENTS AND TENTHS. What he shall take for acquittances, see 33 Hen. 8. c. 39. § 65. See *King*, VI.

RECITAL, recitatio.] Is the rehearsal or making mention, in a deed or writing, of something which has been done before. 1 Lill. Abr. 416.

A recital is not conclusive, because it is no direct affirmation; otherwise, by feigned recitals in a true deed, men might make what titles they pleased, since false recitals are not punishable. *Co. Litt.* 532; 2 Lev. 108.

If a person by deed of assignment recite that he is possessed of an interest in certain lands, and assign it over by the deed, and become bound by bond to perform all the agreements in the deed, if he is not possessed of such interest, the condition is broken: and though a recital of itself is nothing, yet, being joined and considered with the rest of the deed, it is material. 1 Leon. 112. A recital that before the indenture the parties were agreed to do such a thing, is a covenant, and the deed itself confirms it. 3 Keb. 466.

A new reversionary lease shall commence from the delivery, where an old lease is recited, and there is none, &c. *Dyer*, 93; 6 Rep. 36.

A. recites that he hath nothing in such lands, and in truth he hath an estate there, and makes a lease to B. for years. The recital is void, and the lease good. *Jenk. Cent.* 255. In this case, if the recital were true, the lease would not bind.

The recital of one lease in another is not a sufficient proof that there was such a lease as is recited. *Vaugh.* 74. But the recital of a lease in a deed of release, is good evidence of a lease against the releasor, and those who claim under him. *Mod. Ca.* 44.

Where a covenant to lay out a sum in an annuity recited that the covenantor had given a bond for the payment of the

money, the recital was held to be evidence of the bond. *2 P. Wms.* 432. But a recital will not operate as an estoppel, or as evidence against one who was neither a party nor claims under a party to the deed. *1 Salk.* 186. See further, *Deeds*.

RECLAIMING BILL. In Scotch law, a petition of appeal against the judgment of any lord ordinary, or the court of session.

RECOGNITION, *recognitio*. An acknowledgment. It is the title of the first chapter of the *1 Jac.* 1. whereby the parliament acknowledged the crown of England, on the death of Queen Elizabeth, rightfully to have descended to King James.

**RECOGNITIONE ADNULLANDA *per Vim et Duri-
tatem facta*.** A writ to the justice of C. B. for sending a record touching a recognizance, which the cognizor suggests was acknowledged by force and duress; that if it so appear, the recognizance may be annulled. *Reg. Orig.* 183.

RECOGNITORS, *recognitores*. The jury impanelled on an assize; so called because they acknowledged a disseisin by their verdict. *Bract.* lib. 5. See *Assize*, *Jury*.

RECOGNIZANCE, *Fr. reconnaissance; Lat. recognitio, obligatio*. An obligation of record, which a man enters into before some court of record, or magistrate duly authorized, with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like. It is, in most respects, like another bond, the difference being chiefly this, that the bond is the creation of a fresh debt, or obligation *de novo*; the recognizance is an acknowledgment of a former debt upon record, the form whereof is, "That A, B. doth acknowledge to owe to our lord the king, to the plaintiff, to C, D., or the like, the sum of 10*l.*," with condition to be void on performance of the thing stipulated, in which case the king, the plaintiff, C, D., &c., is called the cognizor, *is qui cognoscitur*; as he that enters into the recognizance is called the cognizee, *is qui cognoscit*. This being either certified to, or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal; so that it is not, in strict propriety, a deed, though the effects of it are greater than a common obligation, being allowed a priority in point of payment, and binding the lands of the cognizor from the time of enrolment on record. *29 Car.* 2. c. 3. See *post*.

Recognizances for keeping the peace shall be returned to the sessions. *3 Hen.* 7. c. 1.

For debt or bail they are taken or acknowledged before the judges, a master in Chancery, &c. See *Bail*. And to appear at the assizes, or sessions, they may be taken by justices of peace, which recognizances are to be returned by the justices to the sessions, or an information lies against them. *2 Ed.* Abr. 117. See *Justices*.

By the 10 & 11 *Hm.* 3. c. 7. § 7. (which section is not repealed by the 7 & 8 *Geo.* 4. c. 7. no clerk of assize, clerk of the peace, or other person, shall demand or take any fee of any person bound by any justice of the peace to give evidence against any traitor or felon, for the discharge of any recognizance for such appearance, on pain of 5*l.* with costs.

By the 7 & 8 *Geo.* 4. c. 64. § 2, 3, 4. justices of peace and coroners, before committing or bailing offenders for felony, murder, &c. or misdemeanor, shall take down the examination of the witnesses and prisoners, and bind the parties to such recognizances to prosecute and give evidence. By § 31 such recognizances and others specified shall not be extracted without an order by the judge, recorder, chairman, &c.

As to recognizances of a private kind, in nature of a *statute staple*, by virtue of the *23 Hen.* 8. c. 6. and which are a charge on real estate, the following observations will serve at present; and see further, *Statute Staple*.

By the *23 Hen.* 8. c. 6. the chief justices of the King's Bench and Common Pleas, in term time, or in their absence out of town, the mayor of the staple at Westminster, and the recorder of London, jointly, have power to take recognizances

for the payment of debts in this form—*Noverint universi per presentes Nos A. B. & C. D. teneri et firmiter obligari E. F. in centum libris, &c.* They are to be sealed with the seal of the cognizor, and of the king, appointed for that purpose, and the seal of one of the chief justices, &c. And the cognizees, their executors and administrators, have the like process and execution against the cognizors as on obligations of statute staple. *2 Inst.* 678. See *Statute Staple*.

The execution on a recognizance or statute, pursuant to the *23 Hen.* 8. c. 6. is called an extent; and the body of the cognizor (if a layman), and all his lands, &c. into whose hands soever they come, are liable to the extent; goods (not of other persons in his possession) and chattels, as leases for years, cattle, &c. which are in his own hands, and not sold *bona fide*, and for valuable consideration, are also subject to the extent. *3 Rep.* 13.

But the land is not the debtor, but the body; and land is liable only in respect that it was in the hands of the cognizor at the time of the acknowledgment of the recognizance, or after; and the person is charged, but the lands chargeable only. *Plowd.* 72.

Lands held in tail are chargeable only during life, and do not affect the issue in tail, unless a recovery be passed, when it is as fee-simple land: copyhold lands are subject to the extent only during the life of the cognizor. The lands a man hath in right of his wife shall be chargeable only during the lives of husband and wife together; and lands which the cognizor hath in joint-tenancy with another, are liable to execution during the life of the cognizor, and no longer; for after his death, if no execution was sued in his life, the surviving joint-tenant shall have all; but if the cognizor survive, all is liable. *2 Inst.* 673.

If two or more join in the recognizance, &c. the lands of all ought equally to be charged; and where a cognizor, after he hath entered into a recognizance or statute, conveys his lands to divers persons, and the cognizee sues execution on the lands of some of them, and not all; in this case he or they whose lands are taken in execution, may, by *audita querela* or *scire facias*, have contribution from the rest, and have all the lands equally and proportionably extended. But the cognizor or his heirs, when he sells part of his lands, and keeps the remainder, shall not have any contribution from a purchaser, if his land is put in execution. *3 Rep.* 14; *Plowd.* 72.

If there be a recognizance, and after a statute entered into by one man to two others, his lands may be extended *pro rata*, and so taken in execution. *Yelp.* 12.

This kind of recognizance may be used for payment of debts, or to strengthen other assurance. *Wood.* 288. If a recognizance is to pay 100*l.* at five several days; viz. 20*l.* on each day, immediately after the first failure of payment, the cognizee may have execution by *elegit* on the recognizance for the 20*l.*, and shall not stay till the last day of payment is past, for this is in nature of several judgments. *Co. Litt.* 292; *2 Inst.* 395, 471. When no time is limited in a statute or recognizance for payment of the money, it is due presently. See *Bond*.

To make a good recognizance or obligation of record, the form prescribed must be pursued, therefore they may not be acknowledged before any others besides the persons appointed by the statutes, and the substantial forms of the statute are to be observed herein. But a recognizance may be taken by the judges in any part of England. *Dyer.* 221; *Hob.* 195.

A recognizance for money lent, though it is not a perfect record till entered on the roll, yet, when entered, it is a recognizance from the first acknowledgment, and binds persons and lands from that time. *Hob.* 196. By the *29 Car.* 2. c. 3. no recognizance shall bind lands in the hands of purchasers for valuable consideration, but from the time of enrolment, which is to be set down in the margin of the roll; and recognizances, &c. in the counties of York and Middle-

sex, shall not bind lands unless registered pursuant to 2 Ann. c. 4; 5 Ann. c. 18; 6 Ann. c. 35; 7 Ann. c. 20. See *Registry of Deeds*. The clerk of the recognizances is to keep three several rolls of the entering recognizances taken by the chief justices, &c. and the persons before whom the recognizances are taken; and the parties acknowledging are to sign their names to the roll as well as to the recognizance. 8 Geo. 1. c. 25.

A recognizance is not a record until it is enrolled; and, therefore, where defendant pleaded to *assumpsit* on bills of exchange, &c. that plaintiff was indebted to him by virtue of a recognizance taken in the Court of Exchequer, which was still in force, "as by the said recognizance remaining in the said court before the barons will appear," without stating that it was enrolled, a replication that the plaintiff was not so indebted, concluding to the country, was held good on special demurrer, inasmuch as the plea did not state a debt due by recognizance, which was matter of record. 1 B. & A. 153.

Recognizances and statutes are like judgments, and the cognizee shall have the same things in execution as after judgment. The body of the cognizor himself, but not of his heir or executor, &c. may be taken, though there be lands, goods, and chattels, to satisfy the debt; and if a cognizor is taken by the sheriff, and he let him go, yet his lands and goods are liable. 12 Rep. 1, 2; Plond. 62; 1 And. 273.

By recognizances of debt and bail, the body and lands are bound; though some opinions are, that the lands of bail are bound from the time of recognizance entered into; and some, that they are not bound but from the recovery of the judgment against the principal. 2 Leon. 84; Cro. Jac. 272, 449. See *Bail*.

In B. R. all recognizances are entered as taken in court; but in C. B. they enter them specially where taken, and their recognizances bind from the caption; but those in B. R. from the time of entry; in C. B. a *scire facias* may be brought on their recognizances either in London or Middlesex; on those in B. R. in the county of Middlesex only. 2 Salk. 359.

A recognizance of bail in C. B. is entered specially; the bail are bound to pay a certain sum of money, if the party condemned doth not pay the condemnation, or render his body to prison; and in B. R. recognizances are entered generally that if the party be condemned in the suit or action, he shall render his body to prison, or pay the condemnation-money, or the bail shall do it for him. 2 Lit. Abr. 417. See *Bail*.

One of the best securities we have for a debt is the recognizance in Chancery, acknowledged before a master of that court, which is to be signed by such master, and afterwards enrolled; and the king may, by his commission, give authority to one to receive a recognizance of another man, and to return the same into Chancery; and on such a recognizance, if the cognizor do not pay the debt at the day, the cognizee shall have an *elegit* on the cognizance so taken, as if it were taken in the Chancery. *New Nat. Br.* 589.

It was formerly a question, whether a *ca. sa.* would lie on a recognizance taken in Chancery; but adjudged, that immediately after the recognizance is acknowledged, it is a judgment on record; and then, by the 25 Edw. 3. c. 17. a *ca. sa.* will lie, being a debt on record. 2 Bulst. 62.

If a recognizance be made before a master in Chancery for a debt, or to perform an order or decree of the court; if the condition be not performed, an extent shall issue; or a *scire facias* is the proper process for the cognizor to show what he can say why execution should not be had against him; upon which, and a *scire facias* or two *nihilis* returned, and judgment thereupon, the proper execution is an *elegit*, &c. Cro. Jac. 3.

Where a man is bound by recognizance in Chancery, and the cognizor hath certain indentures of defeasance: if the

recognizee will sue execution on the recognizance, the cognizor may come into Chancery, and show the indentures of defeasance, and that he is ready to perform them; and thereon he shall have a *scire facias* against the cognizee, returnable at a certain day; and in the same writ, he shall have a *supersedeas* to the sheriff not to make execution in the mean time. *New Nat. Br.* 589.

If a person is bound in a recognizance in Chancery, or other court of record, and afterwards the cognizee dieth, his executors may sue forth an *elegit* to have execution of the lands of the cognizor; and if the sheriff return that the cognizor is dead, then a special *scire facias* shall go against the heir of the cognizor, and those who are tenants of the lands which he had at the day of the recognizance entered into. *New Nat. Br.* 590.

In case lands are mortgaged, without giving notice of a recognizance formerly had, if the recognizance be not paid off and vacated in six months, the mortgagor shall forfeit his equity of redemption, &c. 4 & 5 Wm. & Mary, c. 16. See *Mortgage*, III.

When a statute has been shown in court, and the plea discontinued, the conusee, on a re-summors, may have execution without producing it again. 5 Hen. 4. c. 12.

On a *scire facias* to defeat a recognizance, the cognizor shall find surety to the party as well as to the king. 11 Hen. 6. c. 10.

For the period within which an action in a recognizance must be brought, see *Limitation of Actions*.

As to the offence of acknowledging a recognizance in the name of another, see *False Personation*.

See further, *tit. Statute Merchant; Statute Staple; Surety of the Peace*; and 18 Vin. Abr. 163—170.

RECOGNIZEE. He to whom one is bound in a recognizance, mentioned in the 1 Hen. 6. c. 10.

RECOGNIZOR. He who enters into the recognizance.

RE-COMPENSATION. Where a party sues for a debt and the defendant pleads compensation, the plaintiff may allege a compensation on his part, and this is called a re-compensation. *Bell's Scotch Dict.*

RECORD, *recordum*, from the lat. *recordari*, to remember. A memorial or remembrance; an authentic testimony in writing, contained in rolls of parchment, and preserved in a court of record, *Britton*, c. 27. In these rolls are contained the judgment of the court on each case, and all the proceedings previous thereto; carefully registered and preserved in public repositories, set apart for that purpose. The term record is applied to such proceedings of superior courts only, and does not extend to the rolls of inferior courts, the registries of proceedings whereof are not properly called records. *Co. Litt.* 260. See *Courts*.

From the beginning of the reign of Richard I. commences a still extant series of records down to the present day. See 1 Reeve, 218. In the King's Bench the rolls are preserved in the treasury of that court from the beginning of the reign of Henry VI.; in the Common Pleas, from that of Henry VIII. The earlier rolls, from the year 1195 to the end of the reign of Henry V. in the former court, and in the latter, from 1193 to the year 1509, are deposited in the Chapter House of Westminster Abbey. 2 Tidd's Pract.

All courts of record are the king's courts in right of his crown and royal dignity: and therefore no other court has authority to fine or imprison. A court not of record, in the court of a private man: whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow-subjects. Such are the courts barons incident to every manor, and other inferior jurisdictions; where the proceedings are not enrolled or recorded: but as well their existence, as the truth of the matter contained therein, shall, if disputed, be tried and determined by a jury. 3 Comm. c. 3. p. 21.

There are three kinds of records, viz. a judicial record, as an attainder, &c. a ministerial record on oath, being an office

or inquisition found; and a record made by conveyance and consent, as a *fine, recovery*, (now both abolished,) or a *deed enrolled*. 4 Rep. 54. But it has been held, that a deed enrolled, or a decree in Chancery enrolled, are not records, but a deed and a decree recorded; and there is a difference between a record and a thing recorded. 2 Lil. 421.

Records, being the rolls or memorials of the judges, import in themselves such incontrollable verity, that they admit of no proof or averment to the contrary, inasmuch that they are to be tried only by themselves; for otherwise there would be no end of controversies; but during the term wherein any judicial act is done, the roll is alterable in that term, as the judges shall direct; when the term is past, then the record admitteth of no alteration, or proof that it is false in any instance. Co. Lit. 260; 4 Rep. 52.

Matter of record is to be proved by the record itself and not by evidence, because no issue can be joined on it to be tried by a jury like matters of fact; and the credit of a record is greater than the testimony of witnesses. 21 Cur. B. R. Though where matter of record is mixed with matter of fact, it shall be tried by jury. Hob. 124.

A man cannot regularly aver against a record; yet a jury shall not be stopped by a record to find the truth of the fact; and it was adjudged, that on evidence it is at the discretion of the Court to permit any matter to be shown to prove a record. 1 Vent. 362; Allen, 18.

A record may be contradictory in appearance, and yet be good; and though it hath apparent falsehood in it, it is not to be denied; but a record may in some cases be avoided by matter in fact. Style's Reg. 281; Co. Lit. Cro. Car. 329; Hull, 20.

The judges cannot judge of a record given in evidence, if the record be not exemplified under seal: but a jury may find a record although it be not so, if they have a copy proved to them, or other matter given in evidence sufficient to induce them to believe that there was such a record. 2 Lil. Abr. 421. See Trial by Record.

If the transcript of a record be false, the court of B. R. will on motion, order a *Certiorari* to an inferior court, to certify how the record is below; and if it be on a writ of error on a judgment of the Common Pleas, they will grant a rule to bring the record out of C. B. into this court, and then order the transcript to be amended in court, according to the roll in C. B. And a record cannot be amended without a rule of the court, grounded on motion. 2 Lil. Abr. 421, 422.

Where a record is so drawn, that the words may have a double construction, one to make a record good, and another to make it erroneous, the court will interpret the words that way which will make the record good, as being most for the advancement of justice: so if a letter of a word in a record be doubtful, that it may be taken for one letter or another, the court will take it to be that letter which is for upholding the record. See Cro. Id. 101; Cro. Jac. 119, 153, &c.

The court will not supply a blank left in a record, to make it perfect, when before it was defective; as this would be to make a record, which is not the office of the court to do, but to judge of them. 2 Lil. Abr. 420. If a subsequent record hath any relation to one that is precedent; in such case it must appear in pleading, &c. to be the same without any variation. 3 Ld. 907.

Records removed out of inferior courts, on writs of error, and the judgments on such records are to be entered in B. R.; but if removed on the records are not perfected: and if a record once comes into B. R. by writ of error it never goes out again, but a transcript of it may go to the House of Lords, on a writ of error there. 2 Lil. 422. Writ of error removes the record; but the original is no part of it. Jenk. Cent. 111. A record cannot be removed by writ of error, until the judgment in that record is entered: and when and

how a record may be removed, and where and how remanded, see Cro. Jac. 206; 2 Brownl. 145; and tit. Error.

Justices of assise, gaol-delivery, &c. are to send all their records and processes determined, to the exchequer at Michaelmas, in every year; and the treasurer and chamberlains, on sight of the commissions of such justices, are to receive the same records, &c. under their seals, and keep them in the treasury, 9 Ed. 3. st. 1. c. 5.

Judges may reform defects in any record, or process, or variance between records, &c. And a record exemplified or inrolled may be amended for variation from the exemplification. 8 Hen. 6. c. 12. 15. See Amendment.

As to amendments of the record at nisi prius, see Amendment, Variance.

As to making up the record of a cause for trial at nisi prius, see Pleading.

A record that is rased, if legible, remains a good record notwithstanding the rasure; but he who rased it is not to go unpunished for his offence. And in case of a rasure in a judgment, done by fraud to hinder execution, the record hath been ordered to be amended, and a special entry thereof to be made; but though the record by this means be made perfect, the offender may be indicted for the felony. 2 Rol. Rep. 81.

The offence of stealing or fraudulently taking from its place of deposit, or of maliciously obliterating, injuring, or destroying records or other proceedings of courts of law or equity, is punishable by the 7 & 8 Geo. 4. c. 29. § 21. as a misdemeanor, by transportation for seven years, imprisonment, or fine, &c. See Larceny, False Personation.

TRIAL BY RECORD, Is used where a matter of record is pleaded in any action, as a judgment, or the like; and the opposite party pleads *nil tiel record*, "that there is no such matter of record existing." Upon this issue is tendered, and joined in the following form: "And this he prays may be inquired of by the record; and the other doth the like." And hereupon the party pleading the record has a day given him to bring it in; and proclamation is made at the rising of the court on that day, for him "to bring forth the record by him in pleading alleged, or else he shall be condemned;" and, on his failure, his antagonist shall have judgment to recover, by rule of the court, according to the circumstances of the case. The trial of this issue is merely by the record, on the principle already stated.

Titles of nobility, as whether earl or no earl, baron or no baron, shall be tried by the king's writ or patent only, which is matter of record. 6 Rep. 53. Also in case of an alien, whether alien, friend or enemy, shall be tried by the league or treaty between his sovereign and ours, for every league or treaty is of record. 9 Rep. 31. And, also, whether a manor be to be held in ancient demesne, or not, shall be tried by the record of doomsday in the king's exchequer. 3 Comm. c. 22. p. 330. See Ancient Demesne.

Thus, also, upon the plea of a former judgment recovered by the plaintiff against the defendant for the same cause of action; or of another action depending on the same cause; or of outlawry; or of *comperuit ad diem* to a bail-bond; or of any act of parliament; or, in short, of any other matter of record, a general replication is *nil tiel record*; upon which the parties join issue; and the truth or falsehood of such issue is determined by the party producing, or failing to produce, the record in question, on a day given him for that purpose. Sellon's Pract. c. 13.

Where the record pleaded is the record of another court, the only way of producing it is by suing out a *certiorari* from the Court of Chancery, for the court where the record is to certify the record; and upon the return of the *certiorari*, but not till then, the record will be sent by *mittimus* to the court where it is to be produced: and thus a record of K. B. may be removed into C. B. contrary to the general rule, that they are not removable out of that court. Cro. Car. 297; 2 Saund. 344.

RECORD.

Where records are pleaded, they must be shown; and one may not plead any record, if it be not in the same court where it remaineth, unless he show it under the great seal of England, if denied: acts of record must be specially pleaded. *Bro. c. 20*; *Cro. Jac. 560*; *5 Rep. 218*; *10 Rep. 92*; *Style, 22*. Records are to be pleaded entire, and not part of them with an *inter alia* referring to the record; and so should a special verdict find a record, unless a judgment be pleaded, or the declaration is on a judgment in a superior court, when the plaintiff may say *recuperavit* generally; but not in an inferior court, for there all the proceedings must be set forth particularly. *Mich. 22 Car. B. R.*

Though writs are matter of record, they need not be so pleaded. *1 Salk. 1*; *1 Lev. 211*.

See further as to the form of the issue in a trial by record, *Chitty on Stephen on Pleading*.

RECORDS OF THE REALM. In the year 1800, in consequence of very extensive enquiries, and two Reports made by a select committee of the House of Commons, of Great Britain (printed by order of the House, 4th July, 1800, in one very large folio volume), that house presented an address to his majesty, requesting that he would be pleased to give directions for the better preservation, arrangement, and more convenient use of the Public Records of the Kingdom. A commission was accordingly granted by his majesty, authorizing several great officers of state, and learned members of the House of Commons and others, to carry into execution the several measures recommended in the Reports. In 1806 a second commission was issued. The commissioners have proceeded from time to time in the business of the commission: and have printed a collection of the Statutes of the Realm, and many useful indexes and other works of legal and historical importance. Their proceedings have been annually reported to his majesty in his privy council. Abstracts of these annual reports, and accounts of other proceedings of the commissioners, have been from time to time laid before parliament, and ordered to be printed.

Much light will be thrown on the origin of parliaments by the publication of parliamentary writs and records in progress, under the direction of the above commissioners. Dugdale's Collection of Writs is imperfect, and contains none of the returns to parliament which are highly important. Prynn's Parliamentary Writs are imperfect and ill arranged, and the Rolls of Parliament published under the record commission of 1800, having been printed from transcripts in Lincoln's Inn Library instead of from the originals, are full of inaccuracies and clerical errors; it was therefore determined to reprint them. The first volume of this great publication appeared in 1827, and embraces the writs of summons, writs for elections to parliament and returns, and writs of expenses; also the writs of military summons, and other valuable records during the reign of Edward I. The work is rendered useful and easy of reference by an abstract, alphabetical digest, and calendar; the writs are printed in the body in fac-simile with the abbreviations of the original. The body of the work is prefaced by a "Chronological Abstract," accurately stating the date and the particular description of each instrument in chronological order, and referring to the page in the body where it is to be found. Then follows a calendar "of writs and returns," arranged according to the alphabetical order, of the counties and boroughs sending members, showing the date and place of the parliament, and the names of the members. There is also an accurate alphabetical digest of the names of every individual named in the collection of records, stating succinctly in what capacity and at what date he appears on the records, and referring to the page in the body where the record naming him is to be found; and an index to this digest makes it easy of reference. When this elaborate work is complete, it will compose a body of valuable materials for historical and antiquarian deductions, arranged with great perspicuity and unwearied labour.

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The commission still continues in force, but the number of commissioners has been reduced. Valuable as its labours may have been they have been purchased at a very dear rate, having already cost the country nearly 400,000*l.*

A like commission is in force for Ireland. See *54 Geo. 3. c. 113*, for vesting part of the King's Inns Dublin, in his majesty, as a repository for public records there. See also the *57 Geo. 3. c. 62. § 1*, by which the records of certain offices abolished by that act are to be removed to this repository; and the lord lieutenant is empowered to give directions for the safe custody, preservation, and arrangement of all records relating to Ireland.

The system of records in Scotland is such as not only to preserve deeds, to give publicity to titles, and to the burthens by which lands are affected; but also to produce all the effects of an action, and to give a decree which may be the foundation of process capable of attaching the person or estate of a debtor. See *49 Geo. 3. c. 42*, for better regulating the public records of Scotland: and *55 Geo. 3. c. 70*, for the better regulating the formation and arrangement of the judicial and other records in the court of session.

RECORDARI FACIAS LOQUELAM, (frequently abbreviated *re-fa-lo*.) A writ directed to the sheriff to remove a cause, depending in an inferior court, to the King's Bench or Common Pleas; and it is called a *recordari*, because it commands the sheriff to make a record of the plaintiff and other proceedings in the county-court, and then to send up the cause. *F. N. B. 71*; *2 Inst. 339*.

This writ is in the nature of a *certiorari*: on which the plaintiff may remove the plaint, from the county-court without cause; but a defendant cannot remove it without cause shown in the writ, as on a plea of freehold, &c. If the plaintiff is in another court, neither plaintiff nor defendant can remove it without cause. *Wood's Inst. 572*.

If a plea is discontinued in the county, the plaintiff or defendant may remove the plaint into the Common Pleas or King's Bench by *recordari*, and it shall be good; and the plaintiff may declare on the same, and the court hold plea thereof. *New Nat. Br. 158*.

The form of this writ in the register is, *et recordum illud habeas, &c.* But in a *recordari* to remove a record out of the court of ancient demesne, the writ shall say, *loquellam et processum, &c.* And there is a writ to call a record, &c. to an higher court at Westminster, called *recordo et processum mittendis*. *Tab. Reg. Orig.* By the usual writ *recordari*,—the sheriff is commanded, in his full court, to cause to be record of the plaint which is in the said court between A. and B of, &c. and have that record before the justices at Westminster, the day, &c. under the seals, &c. And to the said parties appoint the same day, that they be then there to proceed in that plea as shall be just, &c.

RECORDER, recordator. A person whom the mayor and other magistrates of any city or town corporate, having jurisdiction, and the court of record within their premisses, by the king's grant, associate unto them for their better direction in matters of justice, and proceedings according to law: therefore he is generally a counsellor or other person experienced in the law.

The recorder of London is one of the justices of oyer and terminer, and a justice of peace of the quorum, for putting the laws in execution, for preservation of the peace and government of the city: and being the mouth of the city, he delivers the sentences and judgments of the courts there: and also certifies and records the city-customs, &c. *Charters of King Charles II.*; *Co. Lit. 288*. He is chosen by the mayor and aldermen, and attends the business of the city on any warning by the lord mayor, &c. See *Certificates, Customs of London, London*.

RECOVERY.

RECUPERATIO, from French *recouvrer*, *recuperare*.] In a

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general sense, the obtaining any thing by judgment or trial of law.

A true recovery is an actual or real recovery of any thing, or the value thereof, by judgment; as if a man sue for any land or other thing moveable or immoveable, and have a verdict or judgment for him.

A feigned recovery was a certain form or course set down by law to be observed for the better assuring lands or tenements: and the effect thereof was to discontinue and destroy estates tail, remainders, and reversions, and to bar the entails thereof. *West Symb. part 2. tit. Recoveries, § 1.*

As already stated under the title *Fine of Lands*, by the 3 & 4 Wm. 4. c. 74, fines and common recoveries have been abolished, and a simpler mode of proceeding substituted in those cases in which they were formerly necessary. Many years must, however, elapse, before the learning connected with recoveries will become obsolete; consequently the greater portion of the sketch of the law upon the subject, given in the former editions of this work, is still retained.

The power of suffering a common recovery was a privilege inseparably incident to an estate-tail, and could not be restrained by condition, limitation, custom, recognizance, statute, or covenant. See 1 Burr. 81. But the tenant in tail, in order to be entitled to such privilege, must have been tenant in tail in possession, or he must have had the concurrence of the prior freeholder who claimed under the same settlement. 2 Burr. 1072. See more fully, title *Tail and Fee Tail*.

A true recovery is as well of the value as of the thing; for example—if I buy land of another with warranty, which land a third person afterwards, by suit of law, recovers against me, I have my remedy against him who sold it me, to recover in value, that is, to recover so much in money as the land is worth, or other lands of equal value by way of exchange. *F. N. B. 154; Comell.* And this rule will be found to pervade the whole of the present doctrine of recoveries.

A common recovery was so far like a fine, that it was a suit or action, either actual or fictitious; and in it the lands were recovered against the tenant of the freehold; which recovery, being a supposed adjudication of the right, bound all persons, and vested a free and absolute fee simple in the recoveror.

Fines and recoveries have long been considered as mere forms of conveyances or common assurances, the theory and original principles of them being little regarded. See 1 Wils.

73 Common recoveries were invented by the ecclesiastics, to elude the statutes of Mortmain; and afterwards encouraged by the flattery of the courts of law, in 12 Edw. 4. in order to put an end to all fettered inheritances, and bar not only estates tail but also all remainders and reversions expectant thereon. See further, *Mortmain, Tail and Fee Tail, &c.* In addition to what is said under those titles, and title *Fine of Lands*, the following will serve to develop the original principle of these conveyances; and see *Cruise on Recoveries*.

A recovery, in a large sense, is a restitution to a former right by solemn judgment. At common law, judgments, whether obtained after a real defence made by the tenant to the writ, or whether pronounced on his default or feint plea, had the same efficacy to bind the right of the land in question; and hence men took an opportunity of making use of the action of the court to their own advantage, and to the prejudice of others, who, though in some cases strangers to the action, yet were interested in the land for which it was brought. 2 Inst. 75, 429.

For, whilst these recoveries were governed by the strict rules of common law, particular tenants, as tenant in dower only, and those who had made leases for years, and those whose wives were entitled to dower, often took advantage of them, and by selling the lands and suffering their purchasers

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to recover them, thereby defeated the right of those in remainder or reversion, &c., which were inconveniences so great, that it was thought necessary to provide against them by positive laws. Thus the stat. *Westm. 2. 13 Edm. 1. c. 3.* made provision for him in reversion against the recoveries suffered either by the tenant in dower, by the curtesy, or in tail after possibility of issue extinct, or for life; and by the fourth chapter of this statute, the wife was secured as to her dower; and the statute of *Gloucester, 6 Edm. 1. c. 11*; and *7 Hen. 8. c. 4*; *21 Hen. 8. c. 15.* established the rights of termors, and enabled them to falsify such recoveries. See *Co. Lit. 104*; *Kel. 109*; *F. N. B. 468*; *Plowd. 57*; *Doct. & Stud. 15*.

But there was no express provision made by any statute to preserve the interest of the issue in tail, or of him in reversion, against a recovery suffered by the donee; yet it seems, that for two hundred years after the making the statute *de donis*, they were protected by that statute; therefore we find no express resolution, where such recovery was allowed to bar the issue in tail, or those in remainder or reversion, till the reigns of Edward IV. and Henry VII. though in some cases the donee in tail was allowed to change the entail, and even to bar it. See 1 *Roll. Abr. 342*; *Co. Lit. 343*; *10 Co. 37*; *Plowd. 436*; *2 Inst. 335*; *Co. Lit. 374*; *4 Leon. 132, 133.*

When these recoveries were established as a common conveyance, and the best way of barring the issue in tail, and those in reversion or remainder, the tenant for life began to apply them once more to the prejudice of those who had the inheritance; and though the former statutes gave those who had the inheritance a remedy, yet the provision made by them being tedious and expensive, it was thought proper to make the 32 *Hen. 8. c. 31.* which declared all such covinous recoveries against the particular tenants to be void, in respect to him in reversion or remainder; and though the judges very reasonably determined recoveries against that act to be not only void, but a forfeiture of the particular estate, because it was a manner of conveyance as much known at that time as a fine or feoffment, therefore, by parity of reason, ought to have the same operation, yet that statute did not fully answer the end for which it was made. *Co. Lit. 356 a*; *1 Co. 15*; *Vaugh. 51.*

For if A. had been tenant for life, and made a lease for years to B., and B. had made a feoffment in fee, if the feoffee had suffered a recovery, and vouched the tenant for life, this was no void recovery within the statute, because A. the tenant for life was not seised at the time of the recovery, for the feoffment of the termor was a disseisin to A. and him in reversion; and the statute makes recoveries of tenants for life in possession only void against them to whom the reversion then belongs. *10 Co. 45 a*; *Co. Lit. 362.*

Yet where tenant for life bargained and sold his land in fee by indenture enrolled, and the bargainee suffered a recovery, and vouched the bargainor, this was a void recovery, and a forfeiture within the 32 *Hen. 8. c. 31*; for though the bargain and sale was of the inheritance, yet it passed only an estate for life of the bargainor, which was the greatest estate he could lawfully pass, consequently the reversioner was not divested; therefore the bargainee being a legal tenant for life in possession, the recovery against him, though with a voucher of the bargainor, was void within that act against him in reversion, whose reversion was not turned to a right, as in the former case of a disseisin. *1 Co. 15*; *1 Leon. 123.*

But the former defect was cured by the 14 *Eliz. c. 8.* which repealed the said 32 *Hen. 8. c. 31.* and declared all recoveries (had by agreement of the parties, or by coin) against tenant for life, of any lands whereof he is so seised, or against any other with voucher over of him, to be void as against the reversioners and their heirs.

These statutes made no provision for reversions or remainders expectant on estates tail; therefore, if there were tenant for life, remainder in tail, remainder in fee; and te-

nant for life suffered a recovery, and vouched the remainder-man in tail, who vouched the common vouchee; this was so far from being a void recovery within those statutes, that the reversion in fee was actually barred by it; for the intended recompense which the remainder-man in tail was to have against the common vouchee, was to go in succession, as the estate-tail would have done; and it could not be a covinous recovery within the act, because the remainder-man in tail joined in it, who might at any time have suffered such a recovery to destroy the remainder in fee. 10 Co. 39 b, 45; Co. Lit. 362 a; 3 Co. 60 b; Cro. Eliz. 562; Moor, 690; Cro. Eliz. 570.

These common recoveries were no sooner allowed by the judges to bar estates-tail, but men began to improve them into a common way of conveyance, and to declare uses on them, as on fines and feoffments. Hence it was, that the statutes which provided against any alienations or discontinuances of particular tenants, provided at the same time against their recoveries; thus the 11 Hen. 7. c. 20. declared all recoveries as well as other discontinuances by fine or feoffment of women tenants in tail, of the gift of their husbands, or their ancestors, void; so a recovery against husband and wife of the inheritance of the wife, without any voucher, was declared to be void within the 32 Hen. 8. c. 28; though the statute said "suffered or done by the husband," for that like a feoffment by baron and feme, was in substance the act of the baron only, and so within the statute; but a common recovery suffered by a feme covert, where her husband joined with her, was good to bar her and her heirs. Doct. & Stud. 54; Co. Lit. 326 a; 8 Co. 72; 10 Co. 43; 2 Inst. 342; 2 Rol. Abr. 203. See Baron and Feme, and post, II.; and Cruise on Rec.

- I. The Nature of a Common Recovery; who might suffer it; of what Things it might be suffered.
- II. The Effects of a Recovery. 1. What Estates and Interests might be barred by a Common Recovery. 2. Of single and double Voucher, and Tenant to the Præcipe. And 3. Of Deeds to lead or declare the Uses of a Recovery (or Fine).
- III. Of erroneous and void Recoveries; who may void them, and by what Method; and of the Amendment of Errors in Recoveries; and see Div. I.

I. In order to explain the nature of a common recovery, Blackstone gave the following account of its progress: premising that it was in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding. See 2 Comm. c. 21.

Let us, in the first place, suppose one David Edwards were tenant of the freehold, and desirous to suffer a common recovery in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding. To effect this, Golding was to bring an action against him for the lands; and he accordingly sued out a writ, called a *præcipe quod reddat*, because those were its initial or most operative words, when the law proceedings were in Latin. In this writ the demandant, Golding, alleged that the defendant Edwards (here called the tenant) had no legal title to the land, but that he came into possession of it after one Hugh Hunt had turned the demandant out of it. The subsequent proceedings were made up into a record or recovery roll, in which the writ and complaint of the demandant were first recited; whereupon the tenant appeared and called upon one Jacob Morland, who was supposed, at the original purchase, to have warranted the title to the tenant; and thereupon he prayed that the said Jacob Morland might be called in to defend the title which he so warranted. This was called the voucher, *vocatio*, or calling of Jacob Morland to warranty; and Morland was called the vouchee. Upon this, Jacob Morland, the vouchee, appeared, was impleaded, and defended the title. Whereupon Golding, the demandant, desired leave of the

court to *impart*, or confer with the vouchee in private, which was (as usual) allowed him; and soon afterwards the demandant, Golding, returned to court, but Morland, the vouchee, disappeared or made default. Whereupon judgment was given for the demandant Golding, then called the recoverer, to recover the lands in question against the tenant Edwards, who was then the recoveree; and Edwards had judgment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and lost by his default, which was agreeable to the ancient doctrine of warranty. See that title. This was called the recompense or recovery in value. But Jacob Morland having no lands of his own, being usually the cryer of the court (who, from being frequently thus vouched, was called the *common vouchee*), it is plain that Edwards had only a nominal recompense for the lands so recovered against him by Golding; which lands were now absolutely vested in the said recoverer by judgment of law; and seisin thereof was delivered by the sheriff of the county. So that this collusive recovery operated merely in the nature of a conveyance in fee simple, from Edwards the tenant in tail, to Golding the purchaser.

The recovery here described was with a single voucher only; but sometimes it was with double, treble, or farther voucher, as the exigency of the case required. And indeed it was usual always to have a recovery with double voucher at the least, by first conveying an estate of freehold to any indifferent person against whom the *præcipe* was brought, and then he vouched the tenant in tail, who vouched over the common vouchee. For if a recovery were had immediately against tenant in tail, it barred only such estate in the premises of which he was then actually seised; whereas if the recovery were had against another person, and the tenant in tail were vouched, it barred every latent right and interest which he might have in the lands recovered. Bro. Abr. tit. Tute, 32; Plowd. 8. If Edwards therefore were tenant of the freehold in possession, and John Barker tenant in tail a remainder, there Edwards first vouched Barker, and then Barker vouched Jacob Morland the common vouchee, who was always the last person vouched, and always made default, whereby the demandant Golding recovered the land against the tenant Edwards, and Edwards recovered a recompense of equal value against Barker, the first vouchee, who recovered the like against Morland, the common vouchee, against whom such ideal recovery in value was always ultimately awarded. See post, II.

This supposed recompense in value was the reason why the issue in tail is held to be barred by a common recovery. For, if the recoveree should obtain a recompense in lands from the common vouchee, (which there was a possibility in contemplation of law, though a very improbable one, of his doing,) these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail. Doct. and Stud. b. 1. Dial. 26. This reason also held with equal force as to most remaindermen and reversions, to whom the possibility remained and reverted as a full recompense for the realty which they were otherwise entitled to; but it would not always hold; and therefore the judges were even *astuti* in inventing other reasons to maintain the authority of recoveries. And, in particular, it was said that though the estate-tail was gone from the recoverer, yet it was not destroyed, but only transferred; and still subsisted, and would ever continue to subsist, (by construction of law,) in the recoverer, his heirs, and assigns; and, as the estate-tail so continued to subsist for ever, the remainders or reversions, expectant on the determination of such estate-tail, could never take place. 2 Comm. c. 21.

To such awkward shifts, such subtle refinements, and such strange reasoning, remarks the learned commentator, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *De donis*. The design for which these contrivances were set on foot was certainly laudable.

able, the unripping the fetters of estates-tail. Our modern courts of justice, however, adopted a more manly way of treating the subject: by considering common recoveries in no other light than as the formal mode of conveyance by which tenant in tail is enabled to alienate his lands. And it was therefore avowed by the judges, that the true reason of common recoveries being bars was not the recompense in value, though that was the foundation of almost all the arguments on the subject, but that they were common conveyances. See 2 Lev. 28; Pig. Rec. 14; Vin. Abr. Recovery (A.); Plowd. 514; Bac. Law Tr. 149; Com. Dig. Estates (B. 27.)

Infants were not capable of suffering common recoveries on account of their want of understanding; although, if an infant were permitted to suffer a common recovery in person, he must, as in the case of a fine, and for the same reason, have reversed it during his minority, which must be tried by inspection of the judges, otherwise the recovery would bind him for ever afterwards. But if an infant suffered a common recovery, in which he appeared by attorney, he might reverse it at any time after he attained his full age; as it might be tried by a jury whether he was an infant or not when he appointed an attorney, and which by law an infant is not capable of performing. *Cruise on Rec.*

It was formerly doubted whether a common recovery bound an infant who appeared by his guardian, and the practice therefore was, when an infant intended to suffer a common recovery, that he and his guardian should petition the king to grant letters under the privy seal to the judges of the court of C. B. directing them to permit such infant to suffer a recovery; but it was still in the discretion of the judges to permit the infant to suffer it or not, according to the circumstances of his case; and if the judges, upon examination, found it necessary, or that it would be advantageous to the infant that he should suffer a recovery, they then admitted persons of known integrity and fortune to appear as his guardians, and to suffer a recovery for him in court. But these sort of recoveries, suffered by privy seal, were afterwards disused, and private acts of parliament universally substituted in their stead. *Cruise on Recoveries.*

A recovery, as well as a fine, by a feme-covert, was good to bar her, because the *præcipe* in the recovery answered the writ of covenant in the fine to bring her into court, where the examination of the judges destroyed the presumption that this was done by the coercion of her husband, for then it was presumed they would have refused her. 10 Co. 43, a; 2 Roll. Abr. 395.

Whenever a husband and wife appeared in the court of C. B. to suffer a common recovery, the wife was always privately examined as to her consent. And where a warrant of attorney was acknowledged before commissioners appointed by a writ of *dedimus potestatem de alternata faciendo*, by a husband and wife, the commissioners were positively directed by a rule of court (11d. Term, 11 Geo. 3.) to examine the wife, separately and apart from her husband, as to her free and voluntary consent to the suffering such recovery. *Cruise on Rec.*

The king could not suffer a common recovery, for if he did, he must have been either tenant or vouchee; and in both cases the defendant must have counted against him, which the law did not allow. Pig. 74; Plowd. 241.

Idiots, lunatics, and generally all persons of nonsane memory, were disabled from suffering common recoveries, as well as from levying fines; though, if an idiot or lunatic suffered a common recovery, and appeared in person, no averment could afterwards be made that he was an idiot or lunatic. But if he appeared by attorney, it seems that such averment would be admitted upon the same principle that an averment of infancy might have been made against a warrant of attorney, acknowledged by an infant, for the purpose of suffering a common recovery, since the fact of idiocy might

have been tried by a jury with as much propriety as the fact of infancy. *Cruise on Rec.*

Although no averment of idiocy or lunacy can be made against a recovery, where the parties appear in person, yet evidence of weakness of understanding has been admitted on a trial in ejectment, to invalidate a deed to make a tenant to the *præcipe* for suffering a recovery, and the recovery has in that manner been set aside. *Cruise on Rec.* See further *Fine of Lands*, IV.; *Idiots and Lunatics*, V.

By the 47 Geo. 3. st. 2. c. 8. every person (femes-covert being solely and secretly examined by the lord of the manor or his steward,) might appoint an attorney for the purpose of surrendering any copyhold premises of which a recovery was to be suffered to the use of any person to make him tenant to the plaintiff, and appoint any person to appear as vouchee, and to do any acts requisite for perfecting any such recovery, and direct the demandant in such recovery to surrender the tenements recovered, &c.

By the 59 Geo. 3. c. 80. all persons (feme-coverts being examined separately,) might appoint attorneys to appear for them as tenants to the plaintiff or writ, or as vouchees or vouchees for perfecting common recoveries of such lands, holden in ancient demesne, as were not held by copy of court roll.

As to persons restrained by statute from suffering common recoveries, see *ante*, the introduction to the present title.

If a man were seised of a reputed manor, which really was no manor, and he suffered a common recovery of this by the name of a manor, this was a good recovery of the lands which constituted the reputed manor, though strictly speaking there was no manor recovered; because the law supported this, as all other conveyances, according to the intention of the parties; for it would have been severe to vacate the conveyance when the purchaser recovered them by the assent of the vendor under such a denomination. 2 Roll. Abr. 396; 6 Co. 64; 2 Roll. Rep. 67; 2 Vent. 32, S. P. See *Cro. Eliz.* 524, 707; and 1 Kcb. 591, 691, *cont.*

So, if a recovery were suffered of a manor with its appurtenances, lands which had been reputed parcel of the manor should pass; for it was but equitable, *quod voluntas Domini volentis, rem suam in alium transferre rata habeatur*; and though the recovery did not mention the lands reputed parcel of the manor, but only the manor itself, yet that was supplied by the indenture, which was of the manor, and all lands reputed parcel thereof, and though occupied together but two years. 1 Sid. 190; 1 Lev. 27; 1 Kcb. 591, 691; 2 Mod. 235.

If a man having a third part of a manor suffered a recovery of a moiety, this was good to pass his interest in the third part; for where the words of a conveyance (which a recovery is agreed to be) contained more than the grantor can convey, it would be an unreasonable interpretation to make this void and entirely useless, when they were sufficient to convey so much as might lawfully pass; so if the recovery had been in this case of the third part of the manor, by the name of the moiety, part and purparty of the manor, this had been good for the whole third part, and not only for a moiety of the third. *Cro. Car.* 109, 110.

The principal use of a recovery was to enable a tenant in tail to bar not only his estate tail, but also all remainders, reversions, conditions, collateral limitations, and charges not prior to the estate, and to acquire or pass a fee simple in an estate commensurate with the estate of the settlor; but a reversion vested in the crown could not, as generally understood, be barred by a recovery.

A recovery produced other effects, viz. it operated by estoppel, when suffered without a proper tenant to the *præcipe*, or by persons having contingent or expectant, or other rights or interests, or by expectant heirs, and in some other cases, so as to conclude the parties suffering it, and all persons claiming under them, except issue in tail; it operated as a

confirmation of all prior estates or charges made by the tenant in tail who suffered it; it released or extinguished rights, interests, and powers; it destroyed or extinguished contingent remainders and executory interests; it worked a discontinuance to the issue in tail, if not duly suffered by tenant in tail; it revoked devises; it created a forfeiture in many cases where suffered by a tenant for life, or by persons not having the freehold.

A common recovery in the Common Pleas of copyhold lands, would not pass them; though it was said if lands were customary freeholds, and passed by surrender in a borough court, a recovery in C. B. of such lands would be good. 1 *Atk.* 474; but see *contra*, 2 *Ves.* 603. For the method of suffering recoveries of copyholds, see *Pig.* 100; *Bac. Abr. Copyhold*, (C).

Recovery might have been suffered of a trust-estate by *cestui que trust*, as effectually as of a legal estate. 1 *P. Wms.* 91; 9 *Mod.* 143; *Fearne*.

See further, of what things a recovery might have been suffered, *Vin. Abr. Recovery*, (S); *Wils.* 283; *Pig.* 97.

II. 1. THE force and effect of common recoveries may appear, from what has been said, to have been an absolute bar not only of all estates tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail might, by this method of assurance, convey the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders, reversions, charges, and incumbrances dependent upon it. But, though a common recovery barred a contingent remainder, by destroying the particular precedent estate which supported it, yet it did not bar a springing use, nor an executory devise. *Pig.* 127. And it was a rule that an executory devise could not be prevented or destroyed by any alteration whatsoever in the estate out of which, or after which, it was limited. *Fearne*, 3d edit. 306. See *Executory Devise, Perpetuity*. If the remainder were in abeyance, a common recovery would bar it. 6 *Co.* 42a. A term limited to commence on failure of issue, might also be barred by a recovery. 1 *Lev.* 35. So a power appendant, or in gross, was barrable by a recovery. *Pig.* 135. But a recovery would not bar a mortgage, because that was to be considered as a charge upon the estate, and could not be defeated. 2 *Atk.* 591. Tenant in tail mortgaged for years, and died without suffering a recovery, the mortgage was held not good; but if he had suffered a recovery afterwards, it would have let in the mortgage. 1 *Wils.* 276. As to the operation of recovery in general, by letting in all the preceding incumbrances, and rendering valid all the preceding acts of tenant in tail, see *Pig.* 120; *Cruise on Rec.* 159. And as to the mode formerly adopted of guarding against a recovery's letting in the incumbrances of the remainder-man, see 1 *Inst.* 203, b. in n.

By the 34 & 35 *Hen. 8. c. 20.* no recovery had against tenant in tail of the king's gift, whereof the remainder or reversion is in the king, should bar such estate tail, or the remainder or reversion of the crown. See *Tail and Fee-tail*. And by the 11 *Hen. 7. c. 20.* no woman, after her husband's death, should suffer a recovery of lands settled on her by her husband; or settled on her husband and her by any of his ancestors. And by the 14 *Eliz. c. 8.* no tenant for life of any sort could suffer a recovery so as to bind them in remainder or reversion. For which reason, if there were tenant for life, with remainder in tail, and other remainders over, and the tenant for life were desirous to suffer a valid recovery, either he, or the tenant to the *præcipe* by him made, must have vouched the remainder-man in tail, otherwise the recovery was void; but if he did vouch such remainder-man, and he appeared and vouched the common vouchee, it was then good; for if a man were vouched and appeared, and suffered the recovery to be had against the tenant to the

præcipe, it was as effectual to bar the estate tail as if he himself were the recoveree. *Salk.* 571.

In all recoveries it was necessary that the recoveree or tenant to the *præcipe* as he was usually called, should be actually seised of the freehold, else the recovery was void. *Pigot*, 28; 6 *T. R.* 708. For all actions to recover the seisin of lands must be brought against the actual tenant of the freehold, else the suit will lose its effect; since the freehold cannot be recovered of him who has it not. And, though these recoveries were in themselves fabulous and fictitious, yet it was necessary that there be *actores fabulæ*, properly qualified. But the nicety, thought by some modern practitioners to be requisite in conveying the legal freehold, in order to make a good tenant to the *præcipe*, was removed by the provisions of the 14 *Geo. 2. c. 20.* which enacted, with a retrospect and conformity to the ancient rule of law, that, though the legal freehold were vested in lessees (for life), yet those who were entitled to the next freehold estate in remainder or reversion might make a good tenant to the *præcipe*;—that, though the deed or fine which created such tenant were subsequent to the judgment of recovery, yet if it were in the same term, the recovery should be valid in law; and that, though the recovery itself did not appear to be entered, or were not regularly entered on record, yet the deed to make a tenant to the *præcipe*, and declare the uses of the recovery, should, after a possession of twenty years, be sufficient evidence on behalf of a purchaser for valuable consideration that such recovery was duly suffered. 2 *Comm. c. 21.* And by this act also, common recoveries should, after twenty years from the time of suffering them, be deemed valid, if it appeared on the face of such recovery that there was a tenant to the writ; and if the persons joining in such recovery had sufficient estate and power to suffer the same; notwithstanding the deed or deeds for making the tenant to the *præcipe* should be lost, or not appear. For the operation of this statute see 1 *Burr.* 115 2 *Burr.* 1074.

Under a devise of land to a trustee and his heirs, out of the rents and profits to pay an annuity to the testator's wife, and the overplus to his nephews, and after his wife's death to the use of his nephews, and the survivor for their lives; remainder to the use of the trustee to preserve contingent uses and estates during their lives; and after their deceases, in trust for the heirs male of the body and bodies of the nephews; and in default of such issue, then to the use of another in fee; the Court of King's Bench held, that the limitation in trust for the heirs male of the nephews was executed by the statute, and therefore united with the prior use executed in them for life; and that a recovery suffered of the whole estate by the survivor of the nephews after the death of the other nephew without issue, and after the death of his own issue, barred the entail, and defeated the subsequent limitation in fee. 11 *East*, 377.

In consequence of its being required that the tenant to the *præcipe* should have the freehold, great difficulties were frequently thrown in the way of barring entails, and occasionally serious mischiefs arose. So long as the freehold remained in the tenant for life, or if there were no tenant for life in the tenant in tail, who was to suffer the recovery, there was no difficulty. But it often happened that the freehold was in a trustee, or had been aliened by the tenant for life or tenant in tail, and the person in whom it was vested could not be traced, or refused to concur in making the tenant; sometimes it was a question of construction whether the freehold was vested in trustees. If, under the impression that they had not the freehold, they were not made to join in the conveyance to the tenant, the recovery was void. Not unfrequently, from omitting to investigate the title when a recovery was to be suffered, or from some other cause, it was not known that the freehold was not in a trustee, or that it had been aliened, and from ignorance of this circumstance the recovery was void. These mischiefs could only be remedied by obtaining

the concurrence of the person in whom the freehold was vested, and suffering a new recovery. If a recovery was void for want of a proper tenant to the *præcipe*, and the defect was not discovered in the lifetime of the tenant in tail who suffered it, the evil was incurable, and the estate was lost by the persons claiming under the recovery. See 1 *Pres. on Conv.* p. 28.

When a tenant in tail in remainder was desirous of suffering a recovery, he was at the mercy of the person having the freehold, who had it in his power to withhold his assent. There were instances of this power being abused, and of the person having the freehold extorting from the remainder-man a consideration for his concurrence. This sometimes occurred when the freehold continued in the first tenant for life, who might or might not be connected with the remainder-man; but it more frequently occurred when the freehold was vested in an alienee, who was generally a stranger. There were cases in which great skill and caution were requisite in making the tenant to the *præcipe*, in order to preserve powers, rights, and interests, which might otherwise have been prejudiced or extinguished, as the following examples will show. If a tenant for life conveyed to a tenant to the *præcipe*, to enable a remainder-man in tail to suffer a recovery, he would, without caution, extinguish the powers annexed to his estate for life, and let in upon his own estate the incumbrances of the remainder-man. The expedients adopted to prevent this mischief were extremely subtle and artificial. By similar expedients a tenant for life, with a contingent remainder in tail either to himself or his children, might assist a remote remainder-man in tail in suffering a recovery without destroying the contingent remainder. If a person having either an estate tail or an estate for life, with a contingent remainder to his children, (but as not unfrequently happened, it was doubtful which,) was desirous of barring his supposed estate tail by a recovery, but at the same time wished to prevent the forfeiture of his supposed life estate, and the destruction of the contingent remainder, a different contrivance, no less artificial, was resorted to. In recoveries of copyholds most of these precautions were unnecessary.

After the demandant had obtained judgment in a recovery, a writ of seisin was sued out to be executed by the sheriff of the county where the lands lay, and he returned that he had executed the writ, and delivered seisin of the lands to the demandant. But this was a false return, for the writ was never executed, and seisin was never in fact delivered. So that where the law required that the demandant should recover against the actual tenant of the freehold, when he had recovered the lands, it failed in the final object of the action, namely, that of giving him possession. Thus the suit was to commence with all the formalities of a real action, but to end with dispensing with the only object of those formalities, namely, to give to the demandant the lands sued for. See *The First Report of the Real Property Commissioners*, 20—25.

As to the use of the single and double voucher, it has been already observed, that the tenant who lost the land had, on his vouching over, a recompence in value adjudged against him, which was to go in the same succession as the voucher would have done: now a recovery with single voucher was sufficient to bar an estate-tail, where the tenant in tail was tenant to the *præcipe*, and seised of the lands in tail at the time of the *præcipe* brought against him; for the recompence in value must have followed the descent of the land which he lost, and when that proved to be the estate tail, then the law was supposed to have required for it, consequently not prejudiced by the recovery; but because a single voucher could bar only the estate which the tenant was seised of at the time of the *præcipe* brought, and not any right which he had, it was found necessary to admit the use of a double voucher; for if such tenant in tail discontinued the tail, and took back

an estate, or disseised the discontinuee, a recovery against him with a voucher over could not bar the estate-tail; for the recompence came in lieu of the land recovered, which was the defeasible estate, consequently the issue had nothing in value for the estate-tail, without which he could not be barred. *Bro. tit. Recovery.* *Yelv.* 51; 3 *Co.* 5; *Moor*, 256.

But if in that case tenant in tail after disseisin had, either by fine or release made a tenant to the *præcipe*, and came in himself as vouchee, and then vouched over the common vouchee; such double voucher had been sufficient to bar the tenant in tail, and his heirs, of every estate of which he was at any time seised; for when the tenant in tail came in as vouchee, it was presumed he would, and he had an opportunity to set up every title he had, to defeat the demandant; and since what he offered was not sufficient to bar the demandant, the court took it for granted he had no other title than what he set up, therefore would give him but one recompence for all. 3 *Co.* 6, b; *Plowd.* 8; *Cro. Eliz.* 562; *Poph.* 100; *Moor*, 365; *Hob.* 263.

Thus we see how estates-tail were barred by recoveries, and the uses of the single and double voucher; and in that respect the operation of a recovery was correspondent to that of a fine, for they were but different ways of transferring estates-tail for security of purchasers; but the operation of a fine differed from a recovery in respect to strangers who had reversions or remainders expectant on estates-tail; for a fine did not bar them, unless they omitted to make their claim within five years after the estate-tail was spent, and their reversion or remainder becomes executed; but a recovery reached them immediately, and at the same time barred the estate-tail and all reversions and remainders on account of the supposed and imaginary recompence. *Co. Lit.* 372, a; 2 *Roll. Abr.* 396; *Moor*, 156; *Bro. tit. Recovery*, 28, 55.

And as a common recovery suffered by tenant in tail barred all reversions and remainders expectant, so it avoided all charges, leases, and incumbrances made by those in reversion or remainder, and the recoveror should enjoy the land, free from any charge, for ever; as where he in remainder on an estate-tail, granted a rent-charge, and the tenant in tail suffered a recovery; it was adjudged, that the grantee could not distrain the recoveror; for since the rent was only at the first good, because of the possibility of the grantor's remainder coming in possession, when that possibility ceases, by the recovery of tenant in tail, such grant must then become void. *Moor*, 158; *Cro. Eliz.* 718; 1 *Co.* 62; 2 *Roll. Abr.* 396; *Moor*, 154; 4 *Leon.* 150, &c.; *Poph.* 5, 6. See *ante*, II.

Tenant to the *præcipe* might have been either by fine, feoffment, lease and release, or by bargain and sale enrolled. *Wils.* 281. See further, *Vin. Abr. Recovery* (U.); *Com. Dig. Recovery*, (B. 3.): *Pig.* 65, 72. As to the doctrine of tenant to the *præcipe* by disseisin, see 1 *Burr.* 60; 2 *Burr.* 1065. Tenant to the *præcipe* made by fine, recovery suffered, fine reversed; yet held a good recovery, for there was a tenant at the time. 2 *Salk.* 568. For if the person against whom the *præcipe* was brought, were, at the time when the *præcipe* was sued, or at any time before judgment, actual tenant of the freehold, it was immaterial what became of it afterwards. 1 *Inst.* 203 b, in n.

Though there was no tenant to the *præcipe*, the recovery was good against the party who suffered it, by way of estoppel; though not against remainder-men or strangers. 10 *Mod.* 45. And though the tenant for life kept the possession, yet the recovery would be good. *Pig.* 41. And a surrender by tenant for life should be presumed on a recovery of 40 years' standing. 2 *Stra.* 1129, 1267; see 2 *Burr.* 1069.

It was no objection to a recovery with double voucher, that the tenant jointly vouched the tenant for life and remainder-man in tail, who vouched over the common vouchee. 2 *Taunton*, 59.

In a recovery, if the acknowledgment of the vouchee was taken abroad, a notarial certificate made to authenticate the

affidavit of the commissioners, must have distinctly stated that the affidavit was sworn. 2 Taunton, 205.

3. If fines or recoveries were levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, enured only to the use of him who levied or suffered them. *Dyer*, 18. And if a consideration appeared, yet as the most usual fine, "*sur cognizance de droit come ceo, &c.*" conveyed an absolute estate, without any limitations, to the cognizee: (see *Fine*,) and as common recoveries did the same to the recoveror; these assurances could not be made to answer the purpose of family settlements, (wherein a variety of uses and designations is very often expedient,) unless their force and effect were submitted to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. The fine or recovery itself, like a power once gained in mechanics, might be applied and directed to give efficacy to an infinite variety of movements, in the vast and intricate machine of a voluminous family settlement. And, if these deeds were made previous to the fine or recovery, they are called deeds to lead the uses; if subsequent, deeds to declare. As, if A. tenant in tail, with reversion to himself in fee, would settle his estate on B. for life, remainder to C. in tail, remainder to D. in fee; this was what, by law, he had no power of doing effectually, while his own estate-tail was in being. He therefore usually, after making the settlement proposed, covenanted to levy a fine, (or, if there were any intermediate remainders, to suffer a recovery,) to E., and directed that the same should enure to the uses in such settlement mentioned. This was a deed to lead the uses of the fine or recovery; and the fine when levied, or recovery when suffered, enured to the uses so specified, and no other. For though E. the cognizee or recoveror, had a fee-simple vested in himself by the fine or recovery; yet, by the operation of this deed, he became a mere instrument or conduit-pipe, seised only to the use of B., C. and D. in successive order: which use was executed immediately by force of the statute of uses. Or, if a fine or recovery were had without any previous settlement, and a deed were afterwards made between the parties declaring the uses to which the same should be applied, this would be equally good, as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses. For by the 1 & 2 Ann. c. 16. indentures to declare the uses of fines and recoveries, made after the fines and recoveries had and suffered, were good and effectual in law, and the fine and recovery should enure to such uses, and be esteemed to be only in trust; notwithstanding any doubts that had arisen on the statute of frauds, 29 Car. 2. c. 3. to the contrary. See 2 Comm. c. 21. and the appendix in that volume; and *post*, tit. Uses.

III. THE judgment obtained in a common recovery being a matter of record, and similar in almost every respect to a judgment in an adversary suit, can only be reversed by a writ of error: but no person has a right to bring such writ of error, unless he has an immediate interest in the lands whereof the recovery was suffered; though the right of bringing such writ is not forfeited to the crown on an attainder for high treason. *Cruise on Rec.*

As a common recovery can only be reversed by writ of error, or some proceeding of a similar nature, to which none are entitled, but those who have an immediate interest in the lands, the law allows all strangers, whose interests are affected by a recovery, to falsify it, by action, entry, or plea. Thus, where a recovery has been suffered by tenant in tail, although the issue in tail cannot enter, because the recovery operates as a discontinuance, yet he may bring his action; and if the recovery is pleaded against him, he may falsify by pleading matter to avoid it; but in cases of this kind he is restrained, in the same manner as in a writ of error, from pleading any thing contrary to the record. *Cruise on Rec.* cites *Booth*, 77.

As to the remedies for termors affected by recoveries, see *ante*, the introduction to this title.

A recovery ought not to be reversed unless writs of *scire facias* are issued against the terre-tenants and the heir: because the errors in a recovery ought not to be examined until all the parties interested in supporting it be before the court: but this circumstance is discretionary, and not *stricti juris*. 3 Mod. 119, 274; *Holt*, 614.

Nothing can be assigned for error in a common recovery which contradicts the record: and therefore no incapacity in a vouchee can be assigned for error, where he appeared in person: but if a vouchee appears by attorney, an averment may then be made, either that such vouchee died before the day on which judgment was given; or that he laboured under some personal disability, which rendered him incapable of suffering a recovery. See 1 Wils. 42; 4 Rep. 7; *Cro. Eliz.* 739. and *ante*, 1.

By the 23 Eliz. c. 3. no recovery (fine, &c.) shall be reversed for false or incongruous Latin, rasure, interlining, misentering of a warrant of attorney, or not returning of the sheriff, or other want of form in words, and not in matter or substance. And by the 10 & 11 Wm. 3. c. 14. no recovery (fine, or judgment in a real action, &c.) shall be reversed or avoided, for any error or defect therein, unless the writ of error, or suit for reversing such recovery, &c. be brought and prosecuted with effect within twenty years after such recovery suffered, &c. Saving the right of infants, femes covert, &c. so as they bring their writ of error within five years after their disabilities removed. By this latter statute, a writ of error must be brought within twenty years after the recovery has been suffered, and not within twenty years after the title has accrued. *Cruise on Rec.*

Recoveries are in certain cases permitted to be amended in order to avoid their being reversed, on a point of form only. But the court of C. P. will not grant leave to amend an affidavit only: it must appear on the face of the deed, to lead the uses, that there is sufficient ground for an amendment; and that all parties interested assent at the time of the amendment. See 1 H. Blackst. 73; 1 Bos. & Pul. 187; 2 Bos. & Pul. 560, 578, 580, n. 455; 3 Bos. & Pul. 362; 2 New Rep. C. P. 431; 6 Taunton, 73, 145, 171.

The court will not amend a warrant of attorney, which is the deed of the party. 6 Taunton, 373, 652. But where vouchee's warrant of attorney omitted to express in the body thereof against whom the plea of land was, but it appeared who the defendant was, by the *præcipe* engrossed at the foot of the warrant, the court held that the authority must refer to the plea described by the *præcipe*, and permitted the recovery to pass. *Id.* 373.

See 3 & 4 Wm. 4. c. 74, *post*, as to the cases in which recoveries are now valid without amendment.

Where a recovery is suffered of lands held in ancient demesne, it must be reversed by writ of deceit. See *Ancient Demesne*.

And for the provisions of the 3 & 4 Wm. 4. c. 71. with respect to recoveries suffered in the Common Pleas of lands in ancient demesne, see *Fine of Lands*, VII.

A common recovery suffered in a copyhold court can only be reversed by petition to the lord, in the nature of a writ of false judgment. But it seems that the lord of a manor is not in all cases, bound to allow of any proceedings on such a petition. See *Show. P. C.* 67; 1 Vern. 367.

A common recovery may also be invalidated, circuitously, by evidence on a trial in ejectment.

Although a common recovery can only be reversed by the Court of Common Pleas in the first instance, and by the judges of the two other courts in the Exchequer Chamber (see upon a writ of error from the Court of Common Pleas (*see Error*), yet the Court of Chancery can in fact invalidate a common recovery, where it appears to have been obtained by fraud or imposition, by compelling the recoveror to convey

the estate to the person who is entitled in equity to have it, or by declaring the recoveror to be a trustee for such person. And a court of equity will also restrain the operation of a common recovery to those purposes for which it was intended, and will not allow it to have a more extensive effect. 2 *Eq. Abr.* 695; *Pre. Chan.* 485; and see *Fine of Lands*, VII.

It has been already observed (see *ante*, I.), that a recovery suffered by an infant in person shall not bind; but though he may avoid it, yet it cannot be done by any entry in *pais*, but by writ of error, and this too during his minority; for the judgment of the court being on record, must be set aside by an act of equal notoriety; but an infant may avoid a recovery by writ of error, as well where he comes in as vouchee, as where he is tenant to the *præcipe*; for though (strictly speaking) the recovery is not against him where he is not tenant to the *præcipe*, yet for the greater security of the purchaser, and to strengthen the recovery by the use of the double voucher, the person who really has the right to the land in demand, comes in as vouchee; and then, by vouching over the common vouchee, has one recompense for all his titles; consequently, if he be the person who really loses the land, he ought in reason to reverse the recovery, as well where he comes in as vouchee, as where he is seised of the land and is tenant to the *præcipe*. 1 *Roll. Abr.* 742; 1 *Lev.* 342.

If tenant in tail within age has come in as vouchee by attorney in a common recovery, he in remainder may assign this for error, for he is party in interest to the recovery; and where a man's interest is bound by another's act, it is but reasonable he should be allowed to free himself from the mischief by taking advantage of any error in it. 1 *Roll. Abr.* 755, 796.

In a writ of error to reverse a recovery, suffered by an infant, who appeared by guardian, the error assigned was in the entry of his admission by guardian, viz. *quod I. B. sequatur pro J. S.*; whereas it was objected, that since the infant was tenant to the writ, it ought to have been entered that the guardian was admitted to defend for the infant; but this exception was disallowed, because the words *ad sequend.* for the infant, signify the same with *ad defendend.*; for *ad sequend.* is to follow and attend the business and suit of the infant; and the guardian being assigned to do that, must likewise have been assigned to take care of or take upon him the defence of the infant's suit. 2 *Saund.* 94, 95; 1 *Mod.* 48.

In error to reverse a recovery, the errors assigned were, 1. that the writ of entry was brought of an advowson of a rectory, and of a rent issuing out of the rectory, which was a *locus petiti*, therefore the writ vicious; but this was disallowed, because the advowson and rectory are different things; so he who has the advowson has only the right of presentation; but he who has the rectory has the profits of the church, out of which the rent issues; consequently there can be no *locus petiti* in this case, because by the demand of the advowson of the rectory, and of the rent issuing out of the rectory, the demandant recovers more than by a demand of the rectory only. Another error assigned was in the demand of a rent or pension of four marks issuing out of the rectory, which was so uncertain a demand, a pension being a different thing from a rent, and recoverable in the spiritual court; but this was disallowed, because it is plain there is but one sort of four marks demanded, and the pension or rent must be synonymous here, because they are demanded as issuing out of the rectory; therefore the pension cannot be of the nature of an annuity, which charges the persons only, because it is expressly to issue out of the rectory. *Poph.* 29; 5 *Co.* 41 *a*.

In a writ of error to reverse a common recovery, the error insisted on was, that the warrant of attorney of the vouchee bore date before the *summoneas ad warrantizand.* issued, yet the judgment was affirmed, because the vouchee

may come in, if he will, before the *summoneas ad warrantizand.* and make his attorney; therefore, to support the common recovery, it shall be presumed the vouchee was present in court, and appointed his attorney; and so the *dedimus* for the warrant and the *summoneas ad warrantizand.* void. 1 *Sid.* 213; 1 *Lev.* 180; *Raym.* 70.

Part of the proceedings (taken in France) on a recovery, were written on paper; the documents were in French, and there was a translation certified by a notary, written on parchment: the court refused to allow it to pass, on the ground that the notary should have made an affidavit that he was acquainted both with the French and English languages, as well as that the translation was faithful; and that the French documents ought to have been written on parchment. 3 *M.* & *P.* 28.

By the 3 & 4 *Wm. 4. c. 74. § 8.* if it shall be apparent, from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been if there had been no such error, misdescription, or omission.

By § 10. no common recovery already suffered or hereafter to be suffered shall be invalid in consequence of the neglect to enrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale had been duly enrolled.

And by § 11. no common recovery already suffered or hereafter to be suffered shall be invalid in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such recovery, provided the person who was the owner of or had power to dispose of an estate in possession, not being less than an estate for a life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits, after payment of any charges thereon, and whether any surplus after payment of such charges shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ; and an estate shall be deemed to be an estate in possession, notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved.

For the other provisions of the above act relating to recoveries, particularly those whereby recoveries have been abolished, see *Fine of Lands*, VII., *Tail*.

RECOUPE, from the French *recouper*.] The keeping back or stopping something which is due; and in our law we use it for to defalk or discount; as if a person had a rent of ten pounds out of certain lands, and he disseised the tenant of the land; in an assise brought by the disseisee, if he recovered the land and damages, the disseisor should *recoupe* the rent due in the damages; so of a rent-charge issuing out of land paid by the tenant to another, &c. might *recoupe* the same. *Terms de Ley*; *Dyer*, 2. See *Set off*.

RECTA PRISA REGIS. The king's writ to prisage or taking of one butt or pipe of wine before, and another behind the mast, as a custom for every ship laden with wines. Edward I. in a charter of many privileges to the barons of the cinque ports discharged them of this duty. *Concili.* See further, titles *Customs on Merchandize*, *Prisage*.

RECTITUDO. Right or justice. Sometimes it signifies

legal dues, a tribute or payment. *Leg. Ed. Confess. c. 30; Leg. Hen. 1. c. 6.*

RECTO, right; breve de recto, a writ of right, which was of so high a nature, that as other writs in real actions were only to recover the possession of the land, &c. in question; this aimed to recover the seisin and the property, and thereby both the rights of possession and property were tried together. *Co. Lit. 158. See Writ of Right.*

It had two species, writ of right patent and writ of right close: the first was so called, because it was sent open, and was the highest writ of all others, lying for him who had a fee simple in the lands or tenements sued for, against tenant of the freehold at least, and in no other case. *F. N. B. 1, 2, &c.* But this writ of right patent seems to have been extended farther than originally intended, for a writ of right of dower, which lies for tenant in dower, is patent, as appears by *F. N. B. 7.* And the like may be said in some other cases. *Table Reg. Orig.* Also there was a special writ of right patent in London, otherwise termed a writ of right according to the custom, which lay of lands or tenements within the city, &c. The writ of right patent was likewise called *breve magnum de recto*. *Reg. Orig. 9; Fleta, lib. 5. c. 32.*

If a person seised in fee-simple died seised of such estate, and a stranger abated and entered into the land, and deforced the heir, the heir might sue a writ of right patent against the tenant of the freehold of the same land, or an assize of *mort d'ancestor*. *11 Ass. 17.*

In a writ of right patent, the demandant was to count of his own seisin, or of the seisin of his ancestor, if one brought the writ as heir to an ancestor, he might lay the seisin and esplees as in pernancy of the profits of the lands in his ancestors; and where it was brought by a bishop or body politic, seisin of the esplees is to be laid in themselves, or in their predecessors. *New Nat. Brev. 10.*

A writ of right close was brought where one held lands and tenements by charter in ancient demesne, in fee-simple, fee-tail, or for term for life, or in dower, and was disseised; it was directed to the bailiff of the king's manors, or to the lord of ancient demesne, if the manor were in the hands of a subject, commanding him to do right in his court: this writ was also called *breve parvum de recto*. *F. N. B. 11; Reg. Orig. 9; Britton, c. 120.*

Where a writ of right close was directed to the lord of whom the lands were holden, and he would not hold his court to proceed on it, a writ should issue requiring him to hold his court, &c. And if the lord held his court, but would not do the demandant right, or delay it, the plea might have been removed by the writ called *tolt* into the county court of the sheriff, and from thence by *recordari* into the Common Pleas. *New Nat. Brev. 6, 7.*

Glanvil seems to make every writ, whereby a man sued for any thing due unto him, a writ of right, c. 10—12.

All writs of right, with the exception of a writ of right of dower, are now abolished. See further, *Writ of Right*.

RECTO DE ADVOCATIONE ECCLESIAE. A writ which lay at common law, where a man had right of advowson of a church, and the parson of the church dying, a stranger presented his clerk to the church; the party who had the right, not having brought his action of *quare impedit* nor *darrein presentment*, but having suffered the stranger to usurp on him; and it lay only where an advowson was claimed in fee to him and his heirs. *F. N. B. 30. See Advowson, III. 3 Comm. c. 16.*

RECTO DE CUSTODIA TERRÆ ET HÆREDIS. A writ of right of ward of the land and heir. A writ which lay for him whose tenant, holding of him in chivalry, died in nonage, against a stranger who entered on the land, and took the body of the heir. By the *12 Car. 2. c. 24.* it became useless as to lands holden in *capite*, or by knight's service; but not where there was guardian in socage, or appointed by the last will and testament of the ancestor.

Guardian in socage was always entitled to an action of

ravishment of ward (*ravishment de gard*, see that title,) if his ward or pupil were taken from him; but then he must have accounted to his pupil for the damages he so recover. *Hale on F. N. B. 139.* This writ has, however, been altogether abolished by the *3 & 4 Wm. 4. c. 27. § 36.* For the form, see in *F. N. B. 139; Reg. Orig. 161.*

RECTO DE DOTE. A writ of right of dower, which lies for a woman who has received part of her dower and demands the residue against the heir of the husband or his guardian. *F. N. B. 7, 8, 147; Co. Lit. 32, 38. See Dower.*

RECTO DE DOTE UNDE NIHIL HABET. A writ of right of dower whereof she hath nothing, which lies in case where the husband having divers lands or tenements hath assured no dower to his wife, and she thereby is driven to sue for her thirds against the heir or his guardian. *Old Nat. Brev. 6; Reg. Orig. 170. See Dower.*

RECTO QUANDO (or QUIA) DOMINUS REMISIT CURIAM. A writ of right when or because the lord hath remitted his court, which lay where lands or tenements in the seignior of any lord were in demand by a writ of right; if the lord in such case held no court (or had waived his right) at the prayer of demandant or tenant, but sent to the king's court his writ to put the cause thither for that time (saving to him at other times the right of his seignior), then this writ should issue out for the other party, and had its name from the words therein contained. *F. N. B. 16. See Writ of Right.*

RECTO DE RATIONABILI PARTE. A writ of right of the reasonable part, which lay between privies in blood, as brothers in gavelkind, sisters, and other coparceners, for land in fee-simple. If there were two sisters, and the ancestor died seised of land in fee, and one of the sisters entered into the whole, and deforced the other, she who was deforced should have the writ of right *de rationabili parte*, to have her reasonable or proportionable part; and if where there were two sisters, after the death of the ancestor they entered and occupied in common as coparceners, and then one of them deforced the other to occupy that which was appendant or appurtenant to the messuage, &c. which they had in coparcenary, she who was deforced should have this writ. Also, if the ancestor were disseised of lands, and died, and one sister entered into the whole land, and deforced her sister, she should have the writ against her other sister: for it lay as well on a dying seised of the ancestor, if one sister entered on all, as where the ancestor did not die seised; and it was a writ of right patent, &c. *F. N. B. 9; New Nat. Brev. 19, 20.*

In this writ the demand should be of a certain portion of land, to hold in severalty; and voucher and view did not lie in it, because of the privacy of blood; but in a *rationabili parte* the view was granted, *anno 15 H. 8.* for that the ancestor did not die seised, &c. The process on the writ, after removing into C. B., was summons, grand cape, and petit cape, &c. *F. N. B. 9. See Booth on Real Actions.*

RECTO SUR DISCLAIMER. Right on disclaimer. A writ which lay where the lord, in the Court of Common Pleas, avowed on his tenant, and the tenant disclaimed to hold of him; on which disclaimer the lord should have this writ; and if he averred and proved that the land was holden of him, he recovered back the land from the tenant for ever. This writ was grounded on the statute of *Westm. 2. c. 2; Old Nat. Brev. 150. See Disclaimer.*

The three last-mentioned writs have all been recently abolished. See *Limitation of Actions, I. II.*

RECTOR, Lat.] A governor. *Rector ecclesiæ parochialis* is he who hath the charge and cure of a parish church. It has been held that *rector ecclesiæ* is one who hath a parsonage where there is a vicarage endowed. And when dioceses were divided into parishes, the clergy who had the charge in those places were called rectors; afterwards, when their rectories were appropriated to monasteries, &c. the monks kept the great tithes; but the bishops were to take

care that the rector's place should be supplied by another, to whom he was to allow the small tithes for his maintenance, and this was the vicar. See *Parson, Vicar*.

RECTORIAL TITHES. See *Tithes*.

RECTOR, rectoria. Is taken *pro integrâ ecclesiâ parochiali, cum omnibus suis iuribus, feodis, decimis, altisque proventuum speciebus*. *Spelm.* Also the word rectoria hath been often applied to the rector's mansion or parsonage-house. *Paroch. Antig.* 549. See *Parson, Parsonage*.

RECTUM. Right; anciently used for a trial or accusation. *Bract. lib. 3*.

RECTUM ESSE. See *Rectus in Curia*.

RECTUM ROGARE. To ask for right; to petition the judge to do right. *Leg. Inae, c. 9*.

RECTUM, stare ad rectum. To stand trial at law, or abet, by the justice of the court. *Hord.* 655.

RECTUS IN CURIA. Right in court; one who stands at the bar, and no man objects any offence against him. *Smith de Repub. Angl. lib. 2, c. 3*. When a person outlawed hath reversed the outlawry, so that he can participate of the benefit of the law, he is said to be *Rectus in Curia*.

RECUSANTS. Are persons who wilfully absent themselves from their parish church, and on whom heavy penalties were imposed by various statutes, passed in the reign of Elizabeth and James I. See *Dissenters, Nonconformists, Oaths*.

RED, Sax. ræd. Advice; Redbana is one who advised the death of another. See *Deobana*.

RED BOOK OF THE EXCHEQUER, Liber rubens Scaccarii. An ancient record, wherein are registered the names of those who held lands *per baroniam* in the time of Hen. II. *Riley*, 687. It is a manuscript volume of several miscellaneities, in the keeping of the king's remembrance, in his office in the Exchequer; and hath some things (as the number of the hides of lands in many of our counties, &c.) relating to the times before the Conquest. There is likewise an exact collection of the escheques under King Hen. I., Ric. II., and King John; the ceremonies used at the coronation of Queen Eleanor, wife to King Hen. III., &c. and entries of several ancient charters of liberties, granted by the earliest kings of England.

REDDENDUM. Is used substantively for the clause in a lease, whereby the rent is reserved to the lessor; which anciently consisted of corn, flesh, fish, and other victuals. *2 Rep.* 72.

In debt for rent, the plaintiff declared on a lease made August 25, 11 Wm. 3. of a messuage, &c. for seven years to commence from the 24th day of June before; *reddendum* quarterly at Michaelmas, St. Thomas's day, Lady-day, and Midsummer, 3*l.* 10*s.* sterling, the first payment to be made at Michaelmas then next; and assigned for breach that 14*l.* of the rent was in arrear for one year, ending 24th December, anno 18 Wm. And on demurrer to this declaration, it was objected that on this lease there was no year could be ended on the 24th of December, but on St. Thomas's day, according to the *reddendum*; which was held to be true, because where special days are limited in the *reddendum*, the rent must be computed from those days, not according to the *habendum*; and that the rent is never computed from the *habendum*, but when the *reddendum* is general, i. e. paying quarterly so much. 1 *Salk.* 141. See *Deed, II.; Lease, Rent*.

REDDIT SE, hath rendered himself. Where a man procures bail for himself to an action in any court at law; if the party bailed at any time before the return of the second *scire facias* against the bail, renders himself in discharge of his bail, they are thereby discharged. 2 *Lall. Abr.* 430. See *Bail, Scire facias against Bail*.

REDDITARIUS. A renter; *redditarium*, a rental of a manor, or other estate. *Cartular. Abbat. Glaston, MS.* 92.

REDDITION, redditio. A surrendering or restoring; being also a judicial acknowledgment that the thing in de-

mand belongs to the demandant, and not to the person so surrendering. See *Stat. Antig.* 34 & 35 Hen. 8. c. 24.

REDITOS ASSISUS. A set or standing rent. See *Assises*.

REDEEMABLE RIGHTS. Those rights which return to the conveyor or disposer of land, &c. upon payment of the sum for which such rights are granted. See *Mortgage, Rent-Charge, &c.*

RE-DELIVERY. A yielding and delivery back of a thing: if a person has committed a robbery, and stolen the goods of another, he cannot afterwards purge the offence by any re-delivery, &c. *Co. Litt.* 69; *H. P. C.* 72. See *Larceny, Robbery*.

RE-DEMISE. A re-granting of lands demised or leased. See *Demise and Re-demise*.

REDEMPTION, redemptio. A ransom or commutation. By the old Saxon laws, a man convicted of a crime paid such a fine according to the estimation of his head, *pro redemptio sua*. Redemption is also applied to the payment of mortgages, &c. See that title.

RE-DISSISEIN, re-dissaisin. A disseisin made by him, who once before was found and adjudged to have disseised the same man of his lands or tenements; for which there formerly lay a special writ called a writ of disseisin. *Old Nat Br.* 106; *F. N. B.* 188. See *Assise of Novel Disseisin, Disseisin*.

REDRESS OF INJURIES. The more effectually to accomplish the redress of injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger; by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited: this remedy is therefore principally to be sought by application to these courts of justice; that is, by civil suit or action. 3 *Comm.* 2.

REDUBBERS. Those that bought stolen cloth, and turned it into some other colour or fashion, that it might not be known again. *Britton, c. 29*; 3 *Inst.* 134; *Stat. Wallie*, 12 *Edw.* 1, c. 4.

REDUCTION. The Scotch term for an action for the purpose of repealing or rendering null and void some deed or claim against the party.

REDUCTION, and REDUCTION-IMPROBATION. The reduction is a reassignatory action by which deeds, services, decrees, or illegal acts by any body corporate, may be rendered void. The action of reduction has a certification which renders the deed called for, and not produced, incapable of receiving any effect until it be produced. The action of improbation is founded on actual forgery, and the certification thereon has the effect of rendering the deed called for, and not produced, for ever void and null. The junction of two actions, which forms what is called the reduction improbation, confers on the simple reduction all the efficacy of the improbation, and secures the person who uses it from all future trouble from the deed called for, if it be not produced in the action. *Bell's Scotch Dict.*

RE-ENTRY, from the Fr. reentrer, rursus intrare. The resuming or retaking a possession lately had; as if a man makes a lease of lands, &c. to another, he thereby quits the possession; and if he covenants with the lessee that, for non-payment of the rent at the day, it shall be lawful for him to re-enter, this is as much as if he conditioned to take again the lands into his own hands, and to recover the possession by his own act, without assistance of the law. But words in a deed give no re-entry, if a clause of re-entry be not added. *Wood's Inst.* 140.

One may reserve a rent on condition in a feoffment, lease, &c. that if the rent is behind he shall re-enter, and hold the lands till he is satisfied, or paid the rent in arrear; and in this case if the rent is behind, he may re-enter; though when the feoffee, &c. pays or tenders on the lands all the arrears, he may enter again. And the feoffor, &c. by his re-entry, gaineth no estate of freehold, but an interest, by

the agreement of the parties to take the profits in the nature of a distress. here the profits shall not go in part of satisfaction of the rent; but it is otherwise if the feoffor was to hold the land till he was paid by the profits thereof. *Litt. 327; Co. Litt. 203.*

The distinction, when the profits taken by the lessor after entry are, and when they are not, to be in satisfaction of the rent, is not admitted in equity; for the courts of equity will always make the lessor account to the lessee for the profits of the estate during the time of his being in possession of it: and decree him, after he is satisfied the rent in arrear, and the costs, charges, and expences attending his entry, and detention of the lands, to give up the possession to the lessee; and deliver and pay him the surplus of the profits of the estate, and the money arising thereby. *1 Inst. 283, (a) in n.*

All persons who would re-enter on their tenants for non-payment of rent, are to make a demand of the rent; and, to prevent the re-entry, tenants are to tender their rent, &c. *1 Inst. 201.* If there is a lease for years, rendering rent, with condition, that, if the lessee assigns his term, the lessor may re-enter; and the lessor assigneth, and the lessor receiveth the rent of the assignee, not knowing or hearing of the assignment, he may re-enter notwithstanding the acceptance of the rent. *3 Rep. 85; Cro. Eliz. 553.* See further, *Rent.*

A feoffment may be made upon condition, that if the feoffor pay to the feoffee, &c. a certain sum of money at a day to come, then the feoffor to re-enter, &c. *Litt. § 322.* See *Entry, Use.*

RE-EXCHANGE. The like sum of money, payable by the drawer of a bill of exchange which is returned protested, as the exchange of the sum mentioned in the bill is back again to the place whence it was drawn. *Lex Mercat. 98.* See *Bill of Exchange.*

RE-EXTENT. A second extent on lands or tenements, on complaint that the former was partially made, &c. *Broke, 213.* See *Extent.*

RE-FA-LO. The abbreviation of *recordari facias loquelam*; see that title.

REFARE, from Sax. *reaf*, or *rufan*.] To bereave, take away, or rob. *Leg. Hen. 1. c. 83.*

REFERENCE. The sending any matter by the Court of Chancery to a master; and by the courts at law to a prothonotary, or secondary, to examine and report to the court.

In Chancery, by order of court, irregularities, exceptions, matters of account, &c. are referred to the examination of a master of that court. An original or amended bill may also be referred for scandal or impertinence.

In the court of B. R. matters concerning the proceedings in a cause by either of the parties, are proper matters of reference under the secondary, and for him in some ordinary cases to compose the differences betwixt them; and in others to make his report how the matters stand, that the court may settle the differences according to their rules and orders.

If a question of mere law arises in the course of a cause in Chancery, as whether by the words of a will an estate for life or in tail is created; or whether a future interest devised by a testator shall operate as a remainder on an executory devise; it is the practice of that court to refer it to the opinion of the judges of the Court of K. B. or C. P. upon a case stated for that purpose, wherein all the material facts are admitted, and the point of law is submitted to their decision, who thereupon have it solemnly argued by counsel on both sides, and certify their opinion to the chancellor: and on such a certificate the decree is usually founded. It seems that the Master of the Rolls, sitting for the Chancellor, may make such a reference; but not when sitting at the Rolls. *2 Bro. C. C. 88.* The Court of Exchequer is both a

court of law and equity: therefore, if a question of mere law arises in the course of the exercise of its equitable jurisdiction, the barons will decide upon it in that suit, without referring it to another jurisdiction. *3 Comm. 452, 3, and n.*

As to reference to arbitration, see *Arard.*

REFERENDARY, *referendarius*.] An officer abroad of the same nature as masters of request were to the king among us; the referendaries being those who exhibit the petitions of the people to the king, and acquaint the judges with his commands. And there was such an officer in the time of the English Saxons here. *Spelman.*

REFORMATION OF RELIGION. The change from the Catholic to the Protestant religion, and the destruction of the power of the pope in these kingdoms, which commenced in the reign of Henry VIII., and was established, after some interruption, in the reign of Queen Elizabeth, and finally sanctioned at the Revolution on the abdication of James II. See *Church, Uniformity, &c.*

In Scotland what is called the Reformation took place in 1560, and was established by the act 1567, c. 2.

REFUSAL. Is where one hath by law a right and power of having or doing something of advantage to him, and he declines it. See *Executor.*

There is a refusal by the bishop to admit a clerk presented to a church for illiterature, &c.; in which case, if a bishop once refuses a clerk for insufficiency, he cannot accept of him afterwards, if a new clerk is presented. *5 Rep. 58; Cro. Eliz. 27.* See *Parson, Quare Impedit.*

In trover, a demand of the goods, and a refusal to deliver them, must, in some cases, be proved. See *Trover.*

REGALE EPISCOPORUM. The temporal rights and privileges of a bishop. *Brady.*

REGAL FISHES. Whales and sturgeon; some add porpoises. See *1 Eliz. c. 5*; and *ante, tits. King, Queen.*

REGALIA, *Jura omnia ad Fiscum spectantia*; *Spelman*.] The royal rights of a king, which the civilians reckon to be six, viz. power of judicature; of life and death; of war and peace; masterless goods, as waifs, estrays, &c.; assessments; and minting of money. See *King.*

The crown, sceptre with the cross, sceptre with the dove St. Edward's staff, four several swords, the globe, the orb with the cross, and other articles used at the coronation of our kings, are commonly called the regalia. See a relation of the coronation of King Charles II. in *Baker's Chronicle.*

Regalia is sometimes taken for the dignity and prerogative of the king; and these the feudal writers distinguish into the *majora* and *minora regalia*; the former comprehending what relates to his power and dignity, the latter to his fiscal or pecuniary prerogatives. *1 Comm. 241.* See *King, V.*

Regalia is also taken for those rights and privileges which the church enjoys by the grants and other concessions of kings, and sometimes for the patrimony of the church. *25 Regalia Sancti Petri, &c.* It signifies also those lands and hereditaments which have been given by kings to the church. *viz. Cepimus in manum nostram baroniam et regalia que archiepiscopus Eborum de nobis tenet. Prynne, lib. Angl. ii. § 1.* These, whilst in the possession of the church, were subject to the same services as all other temporal inheritances, and after the death of the bishop, they of right returned to the king, until he invested another with them; which, in the reign of William the Conqueror, and some of his immediate successors, was often neglected or delayed, and as often the bishops complained thereof. This appears in *Ordericus Vitalis, lib. 10,* and other writers in those days. *Neubrigensis lib. 3, cap. 26.* tells us they complained against Henry II. for the same cause.

REGALIA FACERE. To do homage or fealty when he is invested with the regalia. *Malmsbury, de Gestis Pontificum, p. 129, de Anselmo.*

REGALITY. Was a territorial jurisdiction in Scotland

granted with land from the crown. The lands were said to be given *in liberam regality*, and the persons receiving the right were termed lords of regality. The jurisdiction of the lord of regality was equal to that of the sheriff; but his criminal jurisdiction was much more unbounded, as he was competent to judge in the four pleas of the crown, and possessed the same criminal jurisdiction with the justiciary, excepting in the case of treason; and a criminal amenable to a court of regality might have been repledged from the sheriff, or even from the court of justiciary. These jurisdictions were abolished by the operation of the statute 20 Geo. 2. c. 50.

REGARD, regardum; remardum; Fr. regard; aspectus, respectus. Signifies, generally, any care or diligent respect; yet it hath also a special acceptation, wherein it is only used in matters of the forest, either for the office of regardor, or for the compass of the ground belonging to that office. *Crom. Jur.* 175, 199. Touching the former, see *Manwood*, part 1. 191, 198. And touching the second signification, the compass of the regardor's charge is the whole forest; that is, all the ground which is parcel of the forest, for there may be woods within the limits of the forest that are no parcel thereof, and those are without the regard. *Manwood*, part 2. c. 7, note 1. And see *10 Car. 2. c. 1*.

As to the court of regard and the office of regardor, see *Forest*.

REGARDANT, Fr. regard, marking, v. regard. As a vill in regardant was called regardant to the manor, because he had the charge to do all base services without the manor, and to see the same free of all things that might annoy it. This word is only applied to a villen or tith, yet in old books it was sometimes attributed to servants. *1 Inst.* 120. A villen regardant, it seems, was rather so called because annexed to the manor, regarding or relating to it. See *Tenure, Villen*.

REGARDER, regardator, Fr. regardier, spectator. The officer of the king's forest, who is sworn to make the regard of it; and has been used in ancient time to view and inquire of all offences of the forest, as well of vert as of venison; and of concealment of any offences or defaults of the foresters, and all other officers of the king's forest, relating to the execution of their offices, &c. *Cromp. Jurisd.* 159; *Manwood*.

This officer was ordained in the beginning of the reign of Henry II. Regarders of the forest must make their regard before any general sessions of the forest, or justice seat, can be holden, when the regarders go through the forest, once every halfweek, to see and inquire of the trespasses therein; *ad videndum, ad inquirendum, ad ostendendum, ad certificandum, &c.* *Manw. part 1. p. 191.* A regardor may be made either by the king's letter patent, or by any of the justices of the forest, at the general view, or such times as the regard is to be made, &c. *Manw. See Forest.*

REGAL INCONSULTO. A writ issued from the king to the judges not to proceed in a cause which may prejudice the king, without the king being advised.

James I. granted an officer C. B. to sue Mitchell, and thereupon Brownlow, chief protonotary, brought an assize against him; and the defendant Mitchell obtained the king's writ to the judges, requiring the grant of this officer, commanding them not to proceed *regal inconsulto*. And it was argued against the writ that the court might proceed, because the writ doth not mention that the king had a title to the thing in dispute, nor any prejudice which might happen to the king if they should proceed:—the cause was compromised. *Moor*, 844.

A writ of *regal inconsulto* may be awarded, not only for the party to the plea, but on suggestion of a stranger, on cause shown that the king may be prejudiced by the proceeding, &c. *Jenk. Cent.* 97.

A writ of *regal inconsulto* does not lie but when it appears

plainly to the court that the party's title is in disaffirmance of the king's title. *Hudr.* 179.

When the defendants will not pray in aid, this writ is in nature thereof, to inform the court how it concerns the crown, and to inhibit their proceedings. See 9 Rep. 16 a; *Cro. Eliz.* 417. Where the tenant or defendant does not pray in aid, but a writ *de domino rege inconsulto* is brought, and directed to the judges, and it appears to the court that the cause is not available or sufficient in law, the court ought to disallow the writ and proceed in the action; and if the cause appears to the court to be just and lawful, and not brought for delay, then the judges ought to surcease. See 2 Inst. 209; *And.* 280; *Mo.* 421. And further, *Fin. Abr.* tit. *Rege inconsulto*.

REGIAM MAJESTATEM. A collection of the ancient laws of Scotland. Another of these books is entitled *Quoniam Attachamenta*, both being termed from the initial words. The *Regiam Majestatem* is said to have been compiled by order of David I. king of Scotland, who reigned from 1124 to 1153.

REGIO ASSENSU. A writ whereby the king gives his royal assent to the election of a bishop. *Reg. Orig.* 294.

REGISTER, more correctly registrar, registrarius. An officer who writes and keeps a registry. See *Registry*.

REGISTER is the name of a book wherein are entered most of the forms of writs, original and judicial, used at common law, called the Register of Writs. Coke affirms that this register is one of the most ancient books of the common law. *Co. Litt.* 159.

Blackstone terms it the most ancient and highly venerable collection of legal forms, upon which *Fitzherbert's Natura Brevium* is a comment; and in which every man who is injured will be sure to find a method of relief exactly adapted to his own case described in the compass of a few lines, and yet without the omission of any material circumstance. 3 *Comm.* 183.

REGISTRY, registrum, from the old Fr. gister, i. e. in lecto reponere. Properly the same with repository. The office books and rolls wherein the proceedings of the Chancery or any spiritual court are recorded, &c. are called by this name.

REGISTRY, or REGISTER OF THE PARISH CHURCH, registrum ecclesie parochialis. That wherein baptisms, marriages, and burials, are registered in each parish every year; which was instituted by Lord Cromwell, anno 13 Henry VIII., while he was vicar-general to that king.

The acts in force relating to parish registers are the 6 & 7 Wm. 3. c. 6; 9 & 10 Wm. 3. c. 35. § 4; and the 52 Geo. 3. c. 146. By the latter act, copies of these parish registers are to be subscribed by the minister and churchwardens, and transmitted yearly to the registrar of every diocese.

Parish registers, although not originally intended for the purposes of evidence, are generally admissible in support of the facts to which they relate, for they are made by persons in an official situation, whose duty it is to make the entries accurately of the facts immediately within their own knowledge. The evidence, however, afforded by these registers, is of a very defective and limited nature, and the want of a general registration of births, marriages, and deaths, is severely felt. In 1834 a select committee of the House of Commons was appointed to investigate the subject, which, after examining a number of witnesses, made a report expressing a decided opinion that a new national system of registration should be attempted. Soon afterwards a bill, chiefly based on the recommendations of the committee, was introduced into the Commons by Mr. W. Brougham, and was pending at the time the sessions was adjourned.

REGISTER, OR REGISTRY OF DEEDS. The registering of deeds and incumbrances is a great security of titles to purchasers of lands, and to mortgagees; and some laws have been made requiring the same.

By the 2 *Ann. c. 4.* a registry is to be kept of all deeds and conveyances affecting lands executed in the West Riding of Yorkshire, and a public office erected for that purpose; and the register is to be chosen by freeholders having 100*l.* per annum, &c. The 6 *Ann. c. 35.* ordains, that a memorial and registry of all deeds, conveyances, wills, &c. which affect any lands or tenements, shall be made in the East Riding of the county of York; and the register is to be sworn by the justices in quarter sessions, and every leaf of his book signed by two justices.

By the 8 *Geo. 2. c. 6.* a registry shall be of all deeds made in the North Riding of the county of York. Memorials of wills must be registered within six months after the death of the testator: the register neglecting his duty, or guilty of fraudulent practices, shall forfeit his office and pay treble damages; and persons counterfeiting any memorial, &c. be liable to the common penalties of forgery.

By the 7 *Ann. c. 20.* a memorial and registry is to be made of all deeds and conveyances, and of all wills, whereby lands are affected, &c. in the county of Middlesex, in the like manner as in the West and East Ridings of Yorkshire.

Deputy of the chief clerk of the King's Bench appointed a register for Middlesex instead of the chief clerk. 25 *Geo. 2. c. 4.*

It is provided by the 5 *Ann. c. 18.* and subsequent statutes, that bargains and sales may be inrolled with the register, and shall be as valid as if inrolled according to the 27 *Hen. 8. c. 16.* See *Bargain and Sale, Inrolment.*

By the above statutes, deeds, conveyances, and wills, shall be void against subsequent purchasers or mortgagees, unless registered before the conveyances under which they claim; also no judgment, statute, or recognizance, shall bind any lands in those counties but from the time a memorial thereof shall be entered at the register's office; but the acts do not extend to copyhold estates, leases at a rack-rent, or to any leases not exceeding twenty-one years, where the possession goes with the lease, nor to any chambers in the inns of court.

The expediency of establishing a general registry for deeds throughout the kingdom was very fully considered a few years ago by the Real Property Commissioners, who, in their second report, expressed a strong opinion in its favour, and drew out a plan of the register, which they recommended to be adopted. A bill founded on their report was subsequently introduced into the House of Commons by the then attorney-general, Sir John Campbell, but was rejected; and a similar fate befel it in the following sessions.

In Scotland registration has the effect of giving a creditor a lien on the effects of a debtor, and entitling him to the effect of a decree for the same.

REGIUS PROFESSOR. A royal professor, or reader of lectures in the universities, founded by the king. King Henry VIII. was the founder of five lectures in each university of Oxford and Cambridge, viz. of Divinity, Greek, Hebrew, Law, and Physic; the readers of which are called in the university statutes *Regii Professores.*

REGNI POPULI. A name given to the people of Surrey and Sussex, and on the sea-coasts of Hampshire. *Blount.*

REGNUM ECCLESIASTICUM. In some countries, formerly, the clergy held there was a double supreme power, or two kingdoms in every kingdom; the one a *Regnum Ecclesiasticum*, absolute and independent of any but the pope over ecclesiastical men and causes, exempt from the secular magistrate; the other a *Regnum Seculare* of the king or civil magistrate, which had subordination and subjection to the ecclesiastical kingdom: but these usurpations were exterminated here by Henry VIII. 2 *Hale's Hist. P. C.* 321.

REGRATOR, regratarius. It originally signified one who bought provisions in order to sell them again for gain; and such person was considered anciently as an enemy to the community. It is now confined to persons buying and selling

again in the same market, or within four miles thereof. See *Spelm. v. Regratarius*, and *ante*, tit. *Forestaller.*

REGRESS, LETTERS OF. These were granted by the superior of lands mortgaged to the wadsetter or mortgagor. Their object was this:—by the wadset or mortgage the mortgagor was completely divested, and when he redeemed he appeared to claim an entry from the superior as a stranger; and the superior was no more bound to receive the mortgagor than he could have been forced to receive any third party; to remedy this, letters of regress were granted by the superior, under which he became bound to re-admit the mortgagor at any time when he should demand entry. *Bell's Scotch Dict.* See now the 20 *Geo. 2. c. 50.*

REGULARS, regulares. Such as professed to live under some certain rule; as Monks, or canons regular, who ought always to be under some rule of obedience. See *Clergy.*

REGULUS, SUBREGULUS. Words often mentioned in the councils of the English Saxons. The first signifies *Comes*, the other *Vicecomes*. But in many places they signify the same dignity; as in the old books in the archives of Worcester cathedral. *Conell.* See *Subregulus.*

REHABERE FACIAS SEISINAM, Quando Vicecomes liberavit seisinam de majore parte, quam deberet. A writ judicial, of which there is another of the same name and nature. *Reg. Judic.* 13, 51, 54. It lay when the sheriff in the habere facias seisinam had delivered more than he ought.

REHABILITATION, rehabilitatio. A restoring to former ability. It was one of those exactions claimed by the pope heretofore in England by his bull or brief for re-enabling a spiritual person to exercise his function who had been disabled. See 25 *Hen. 8. c. 21.* and *tit. Pope, Rome.*

REIF, Sax. refian, spoliare. Robbery. *Conell.*

REJOINDER, rejoinctio. The answer or exception of a defendant in any action to the plaintiff's replication. It ought to be a sufficient answer to the replication, and follow and enforce the matter of the bar pleaded. *Abr.* 433. See *Departure, Pleading.*

RELATION, relatio. Is where, in consideration of law, two different times or other things are accounted as one; and by some act done, the thing subsequent is said to take effect by relation from the time preceding; as if one deliver a writing to another to be delivered to a third person as the deed of him who made it, when such third person hath paid a sum of money: now, when the money is paid, and the writing delivered, this shall be taken as the deed of him who made and delivered it, at the time of its first delivery, to which it has relation (see *tit. Deed, III. 7; Escrow*; and so things relating to a time long before shall be as if they were done at that time. *Terms de Ley; Shep. Epit.* 837.

This device is most commonly to help acts in law, and make a thing take effect; and shall relate to the same thing the same intent, and between the same parties only; and it shall never do a wrong, or lay a charge upon a person that is no party. *Co. Litt.* 190; 1 *Rep.* 99; *Plowd.* 168. 2 *Vent.* 200.

When execution of a thing is done, it hath relation to the thing executory, and makes all but one act to record, although performed at several times. 1 *Rep.* 199. See *Execution, Judgment, &c.*

Sale of goods of a bankrupt by commissioners shall have relation to the first act of bankruptcy, and be good, notwithstanding the bankrupt sells them afterwards. See *Bankrupt.*

If an infant or feme covert disagree to a settlement to them made, when they are of age, or discover it, it shall relate, as to this purpose, to discharge them of damages from the time. 3 *Rep.* 29; *Co. Litt.* 310. See *Infant, &c.*

Letters of administration relate to the death of the intestate, and not to the time when they were granted. *Stylr.* 341. See *Executor.* When the wife is endowed of lands by the heir, she shall be in immediately from the husband by relation. 36 *Hen. 6. 7.* See *Dower.*

It is a rule in pleadings, grants, &c. *Ad proximum antecedens fiat relatio*; but that rule has an exception, (viz.) nisi impediatur sententia. And it hath been held, that this rule hath many restrictions, i. e. *fiat relatio*, so as there is no absurdity or incongruity; therefore it is always *secundum subjectam materiam*. *Hurd*. 77; 3 *Salk*. 199. See also the argument in *Thelluson's Will case*, 1 *Bos. & Pul.* 374.

RELATOR, Lat.] A rehearser or teller; applied to an informer. See *Information*, *Quo Warranto*.

RELEASE.

RELAXATIO. The gift or discharge of a right of action, which any one hath or claimeth against another, or his land. *Tomes de la Ley*.

An instrument whereby estates, or other things, are extinguished, transferred, abridged, or enlarged. *West. Symbol.* part 1. l. 2. § 50. And whereby a man quits and renounces that which he before had. *Com. Dig.* tit. *Release*.

A RELEASE OF LAND is classed by *Blackstone* among the secondary or derivative sort of conveyances; and is by him defined to be, a discharge or conveyance of a man's right in lands or tenements to another that hath some former estate in possession. See further *Conveyance*, *Dead*, *Lease and Release*.

The words generally used in such releases are *remised*, *released*, and *for ever quit claimed*. See *post*, II.

- I. Of Releases generally.
- II. Of the Words and Ceremony required in a Release; and how far a Covenant, Agreement, or a Disposition by Will, may operate as a Release.
- III. What shall be released by a Release of all Claims and Demands.
- IV. What shall be released by a Release of all Actions and Suits; and of all Right and Title in Land.
- V. How far a Possibility, or contingent Interest, or Demand, may be released.

I. THERE is a release in fact and a release in law. *Perkins' Grants*, 71. A release in fact is that which the very words expressly declare. A release in law is that which doth acquit by way of consequence or intendment of law. How these are available, and how not, see *Littlton* at large, l. 3. c. 8. *Cowell*.

A release is the giving or discharging of a right of action which a man hath claimed, or may claim, against another, or that which is his; or it is the conveyance of a man's interest or right which he hath to a thing to another who hath possession thereof, or some estate therein. 1 *New Str.*

According to *Co. Litt.* releases are distinguished into express releases in deed, and those arising by operation of law; and are made of lands and tenements, goods and chattels; or of actions real, personal, and mixt. 1 *Inst.* 264, a.

Releases of land may enure or take effect in various ways; either, first, by way of enlarging an estate, (*enlarger l'estate*), when the possession and inheritance are separated for a particular time, and he who hath the reversion or inheritance releases to the tenant in possession all his right and interest. Such release is said to enlarge his estate, and to be equal to an entry and feoffment, and to amount to a grant and attornment. 1 *Inst.* 267, n. Thus, if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee. *Litt.* § 405. But in this case the release must be in possession of some estate for the release to work upon; for if there be a lessee for years, and he in fee enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the lessee. *Litt.* 459.

When it is said, however, that a release which enures by enlargement cannot work without a possession, it must be understood to mean, not that an actual estate in possession is necessary, but that a vested interest suffices for such a release to operate upon. By comparing this with the operation of a lease and release, (see that title,) it will be seen that not only estates in possession, but estates in remainder and reversion, and all other incorporeal hereditaments, may be effectually granted and conveyed by lease and release; but it is an inaccuracy to say that the lessee, in these cases, is in the actual possession of the hereditaments; the right expression is, that they are actually vested in him by virtue of the lease of possession and the statute. 1 *Inst.* 270, (a), n. 3.

To make releases operate by enlargement, it is generally necessary that the lessee, at the time the release is made, should be in actual possession of, or have a vested interest in, the lands intended to be released; that there should be a privity between him and the lessor; and that the possession of the lessee should be notorious. To this latter circumstance, however, the statute of uses furnishes an exception, exemplified in the operation of a lease and release: where the bargainee has a vested interest, immediately after the execution of the bargain and sale, without any entry, attornment, or other act of notoriety whatsoever; though at common law, till entry or attornment, the lessee was not capable of a release. But, from the general principles above noticed, tenant by *elegit* or *statute merchant* is not capable of a release that is to operate by enlargement; while tenants in dower, or by the curtesy are; as they have the notoriety of possession and privity of estate with respect to the lessor. See 1 *Inst.* 273, (a), in n.

Secondly, By way of passing an estate, (*mitter l'estate*); as when one of two coparceners releaseth all her right to the other, this passeth the fee-simple of the whole. 1 *Inst.* 273.

In both these cases there must be a privity of estate between the lessor and lessee; that is, one of their estates must be so related to the other as to make but one and the same estate in law. 1 *Inst.* 272, 273; 2 *Comm.* c. 20.

Thirdly, By way of passing a right, (*mitter le droit*); as if a man be disseised, and releaseth to his disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful. *Litt.* § 466.

Releases of this kind must be made either to the disseisor, his feoffee, or his heir. In all these cases, the possession is in the lessee, the right in the lessor, and the uniting the right to the possession completes the title of the lessee. But the different degrees of title in the disseisor, his feoffee, or his heir, give the releases made to them different operations. They all agree in this respect, that no privity is required, or indeed can from the nature of the case exist between them and the lessor. 1 *Inst.* 274, (a), in n.

At common law, lands could not be transferred from one to another but by feoffment with livery of the seisin. This produced a notoriety of the transmutation of the possession. This notoriety was, in some measure, effected by a disseisin; but that was only a tortious possession, liable to be defeated by the disseisee. Thus the disseisor had the possession, the disseisee the right. To complete the title of the disseisor it was necessary he should acquire the right. This could not be done by a feoffment, as that was a transfer of the possession; but it was effected by a release, which in this case operated as an actual transfer of the right. 1 *Inst.* 264, (a), in n.

Thus in the case of a release, *per mitter le droit*, when made to the feoffee of the disseisor, the feoffee is in by title, his estate cannot be divested or disaffirmed but by an act equal to that which created it. A release does not affect his possession or title, but discharges it from the right of the lessor; so that, whether the whole fee is in the feoffee, or

carved out into particular estates, it remains unaltered by the release, except as it is discharged by it from the right of the releasor. 1 *Inst.* 275, (a), in n. In the case of a release to the heir of the disseisor, it is to be observed, that a disseisor has a mere naked possession, unsupported by any right; and that the disseisee may restore his possession, and put a total end to the possession of the disseisor by entry. But though the feoffee of the disseisor comes in by title, still the right of possession remains in the disseisee, and he may equally enter on the feoffee as on the disseisor; so that a release, *per mitter le droit*, gives both to the disseisor and his feoffee the right of possession, and the right of property. But if the disseisor dies, the entry of the disseisee is taken away, and a presumptive right of possession is in the heir; so that the release of the disseisee only passes the right of property. 1 *Inst.* 277, (a), in n.

Fourthly, By way of extinguishment; as if my tenant for life makes a lease to A. for life, remainder to B. and his heirs, and I release to A.; this extinguishes my right to the reversion, and shall enure to the advantage of B.'s remainder as well as of A.'s particular estate. *Litt.* § 470. See title *Extinguishment*. Where the releasee cannot have the thing *per mitter le droit*, yet the release shall enure, by way of extinguishment, against all manner of persons; as when the lord grants the seigniority to his tenant, such releases absolutely extinguish the rent, &c. although the releasee be only tenant for life. See 1 *Inst.* 267, (a), in n.; 193, (b); 273, (b).

Fifthly, By way of entry and feoffment; as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee. 1 *Inst.* 278. It has been already observed, that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country; but if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land; for the occupancy of the releasee is considered as a matter of sufficient notoriety already. 2 *Comm. c.* 20; and see 1 *Inst.* 275, (b), in n.

A release is to be adapted to the nature of the case, and the purposes for which the release is intended; so that if a man be disseised of lands or dispossessed of goods, and release all actions, he may, notwithstanding, enter into his lands, or retake his goods, the right and property being still in him, though he has divested himself of his remedy. *Hob.* 169; 4 *Co.* 63.

So, where a man has divers means to come to his right, he may release one, and yet take advantage of the other; but if a man has not any means to come to his right but by way of action, there, by a release of all actions, his right by judgment of law is gone, because by his own act he has barred himself of all means to come to it. 8 *Co.* 152; *Co. Lit.* 286.

Heretofore releases were construed with much nicety and great strictness; and being considered as the deed or grant of the party, were, according to the rule of law, taken strongest against the releasor. They now receive such interpretation as these grants and agreements do, and are favoured by the judges as tending to repose and quietness. *Dyer*, 56; *Plowd.* 289; *Heth.* 15; 8 *Co.* 148.

Hence it hath been established as a general rule in the construction of releases, that where there are general words only in a release, they shall be taken most strongly against the releasor; but where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the special words. 1 *Mod.* 99; 1 *Ld. Raym.* 235.

It is necessary, in all cases where a release of lands is

made, that the estate be turned to a right; as in a disseisin, &c. where there are two rights, a right of possession in the disseisor, and a right to the estate in the disseisee; now when the disseisee hath released to the disseisor, here the disseisor hath both the rights in him, viz. the right to the estate and also to the possession; or else it is requisite that there be privity of estate between the tenant in possession and the releasor, for a release will not operate without privity. 2 *Lit.* 435. A release made by one that at the time of the making thereof had no right, is void; and a release made to one that at the time of making thereof hath nothing in the lands, is also void, because he ought to have a freehold, or possession, or privity. *Noy's Max.* 74.

He that makes a release must have an estate in himself, out of which an estate may be derived to the releasee; the releasee is to have an estate in possession in deed, or in law in the land whereof the release is made, as a foundation for the release; there must be privity of estate between the releasor and releasee; and sufficient words in law not only to make the release, but also to create and raise a new estate, or the release will not be good. 1 *Inst.* 22. A release to a man and his heirs will pass a fee-simple; and if made to a man, and the heirs of his body, by this the releasee hath an estate tail; but a release of a man's right in fee-simple is not sufficient to pass a fee-simple. 1 *Inst.* 273.

A release made by deed-poll, of right to lands, &c. needs no other execution than sealing and delivery, and will operate without consideration. But it is convenient to put a valuable consideration therein, lest it should be judged fraudulent by stat. *Litt.* § 445; *Lit. Convey.* 230, 248; *Cro. Jac.* 270. See *Consideration*.

II. A RELEASE which operates by *mitter l'estate* is where two persons come in by the same feudal contract as joint tenants or coparceners, and one of them releases to the other the benefit of it. In releases which operate by this mode, the releasee being supposed to be already seised of the inheritance by virtue of the former feudal contract, and the release only operating as a discharge from the right or privity of another, seised under the same contract, words of inheritance in the release are useless. So, in cases of releases *per mitter le droit*, words of inheritance are not necessary; as the disseisor to whom or to whose feoffee or heir the release is made, (see *ante*, I.) acquires the fee by the disseisin, and therefore cannot take it under the release. But where the release operates by enlargement, the releasee having no such previous inheritance, and possession being either for life or in fee, (as originally granted,) the release gives the estate to the releasee for his life only, unless it is expressly made to him and his heirs. 1 *Inst.* 273, (b); 274, (a), in n.

Littleton says, that the proper words of a release are *remisio, relaxatio, et quietum clamasse*, which have all the same signification. Lord Coke adds, *renunciare, acquiescere*, and says that there are other words which will amount to a release; as if the lessor grants to the lessee for life that he shall be discharged of the rent, this is a good release. *Lit.* § 445; 1 *Inst.* 264; *Plowd.* 140.

So a pardon, by act of parliament, of all debts and judgments, amounts to a release of the debt, the word pardon including a release. 1 *Sid.* 261.

An express release must regularly be in writing and by deed, according to the common rule, *eodem modo oritur, eodem modo dissolvitur*; so that a duty arising by record must be discharged by matter of as high a nature; so of a bond or other deed. *Co. Lit.* 264, b; 1 *Roll. Rep.* 13; 2 *Leon.* 76, 213; 2 *Roll. Abr.* 408; 2 *Sand.* 48; *Moor.* 573, pl. 787.

But a promise by words may, before breach, be discharged or released by word of mouth only. 1 *Sid.* 177; 2 *Sul.* 73; *Cro. Jac.* 485, 620. Vide *Cro. Car.* 383; 1 *Mod.* 262; 1 *Mod.* 259; 1 *Sid.* 293.

A release of a right in chattels cannot be without deed. 1 Leon. 288.

A covenant perpetual, as that the covenantor will not sue beyond a certain limitation of time, is a defeasance, or absolute release: and this construction has been made to avoid circuity of action; for in such case the party should, contrary to his covenant, sue, the other party would recover precisely the same damages which he sustained by the other's suing; but if the covenant be, that he will not sue at such a time, this does not amount to a release, nor is it pleadable in bar as such, but the party hath remedy only on his covenant. *Moor*, 23, pl. 80, 811, 1 *Roll. Abr.* 939; *Brig.* 118; 2 *Balst.* 95, 290; *Hard.* 113, 1 *Le.* 41; 2 *Salk.* 573, 575; *Carth.* 210; 1 *Ld. Raym.* 419, 611; *Cro. Eliz.* 152; 1 *And.* 307; 1 *Roll. Abr.* 939; *Carth.* 63; *Salk.* 375; 1 *Show.* 46.

So a covenant not to sue on a bond during the life of the obligor, and if any person to whom the chargee should assign the bond should recover the principal, the obligee would pay the obligor interest during his life on the amount recovered, was held no bar to an action by an assignee of the bond in the name of the obligee, since such covenant did not amount to a release. 6 *Bing.* 547.

So also if the covenant be conditional and the condition not performed; as where a creditor covenanted (in an assignment of effects to trustees for creditors) not to sue the debtors if the trustees fairly accounted for the effects, and the trustees refused to account, the covenant was held not a release of the debts. 2 *Chit.* 541.

If two are jointly and severally bound in an obligation, and the obligee, by deed, covenants and agrees not to sue one of them; this is no release, and he may notwithstanding sue the other. *Cro. Car.* 551; *March*, 95; 2 *Salk.* 575. *Hutton v. Leger*, 6 *Taunton*, 289. And see 3 *Burn. & C.* 208.

But if two are jointly and severally bound, a release to one discharges the other. 1 *Ld. Raym.* 420. See 2 *Fent.* 217; 1 *Ld. Raym.* 611; 1 *Le.* 152; and further, tit. *Agreement, Bond, Covenant*.

It seems agreed, that a will, though sealed and delivered, cannot amount to a release, because it is ambulatory and revocable during the testator's life, and, by reason of the executor's consent, requisite to every disposition of a personal thing by will, and the injury that might accrue to the testator's creditors, were a will allowed to operate as a release. *Stil.* 286; 1 *Fent.* 39.

Therefore, where in debt on an obligation, by the representative of a testator, a defendant pleaded that the testator by his last will in writing released to the defendant; this was adjudged ill, and that no advantage could be taken by plea. 1 *Stil.* 421.

But it hath been held in equity, that though a will cannot enure as a release, yet provided it were expressed to be the intention of the testator that the debt should be discharged, the will would operate accordingly; and that in such case it would be plainly an absolute discharge of the debt, though the testator had survived the legatee. 1 *P. Wms.* 85; 2 *Vern.* 52; and see 6 *Ves.* 519, per the Master of the Rolls.

So, in another case, it was held, that a release by will can only operate as a legacy, and must be assets to pay the testator's debts; and if a debt so released by will be afterwards received by the testator himself in his life-time, the legacy is extinct; and such release by will intimates no more than that the executors should not, after the testator's death, trouble or molest the debtor. 2 *P. Wms.* 332.

If a debt is mentioned to be devised to the debtor, without words of release or discharge of the debt, and the debtor die before the testator; this will not operate as a release, but will be considered as a lapsed legacy, and the debt will subsist. 2 *Vern.* 52.

A debt is only a right to recover the amount of the debt by way of action: and as an executor cannot maintain an

action against himself, or against a co-executor, the testator, by appointing the debtor an executor of his will, discharges the action, and consequently discharges the debt. Still, however, when the creditor makes the debtor his executor, it is to be considered but as a specific bequest or legacy, devised to the debtor to pay the debt; and therefore, like other legacies, it is not to be paid or retained, till the debts are satisfied; and if there are not assets for the payment of the debts, the executor is answerable for it to the creditors. In this case, it is the same whether the executor accepts or refuses the executorship. On the other hand, if the debtor makes the creditor his executor, and the creditor accepts the executorship, if there are assets, he may retain his debt out of the assets, against the creditors in equal degree with himself; but if there are not assets, he may sue the heir, where the heir is bound. 1 *Inst.* 264, (b), in n. See *Executor, Legacy, Will*.

In the case of *Smith v. Stafford*, (*Hob.* 216.) the husband promised the wife, before marriage, that he would leave her worth 100*l*. The marriage took effect; and the question was, whether the marriage was a release of the promise: all the judges but *Hobart* were of opinion, that as the action could not arise during the marriage, the marriage could not be a release of it. The doctrine of this case was admitted in that of *Gage v. Acton*; which arose upon a bond executed by the husband to the wife, before marriage, with a condition making it void if she survived him, and he left her 1000*l*. Two of the judges were of opinion, that the debt was only suspended, as it was on a contingency which could not, by any possibility, happen during the marriage. But *Holt*, chief justice, differed from them: he admitted, that a covenant or promise by the husband to the wife, to leave her so much in case she survives him, is good; because it is only a future debt on a contingency, which cannot happen during the marriage, and that is precedent to the debt: but that a bond debt was a present debt, and the condition was not precedent, but subsequent; that made it a present duty, and the marriage was consequently a release of it. The case afterwards went into Chancery. The bond was taken there to be the agreement of the parties, and relief accordingly decreed. See 1 *Salk.* 825; 12 *Mod.* 290; 2 *Vern.* 181. A like decree was made in the case of *Camel v. Buckle*, 2 *P. Wms.* 243. See *Baron and Feme*.

III. *LITTLETON* says, that a release of all demands is the best release to him to whom it was made; and *Coke* says, that the word demand is the largest word in law, except claim; and that a release of all demands discharges all sorts of actions, rights and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes, commons, &c. *Litt.* § 508; *Co. Litt.* 291.

But notwithstanding the large import of the word demands, yet there are several instances where the generality of the word hath been restrained to the particular occasion for which the release was made.

By a release of all demands, all actions real, personal, and mixed, and all actions of appeal, are extinct. *Litt.* § 509; 8 *Co.* 154.

So a release of all demands extends to inheritances, and takes away rights of entry, seizures, &c. *Co. Litt.* 291. But if the king releaseth all demands, yet as to him the inheritance shall not be included. *Bro. Prerogative*, pl. 62; *Bridge.* 124.

By a release of all demands made to the tenant of the land, a common of pasture shall be extinct. *Co. Litt.* 291.

A release of all demands will bar a demand of a relief, because the relief is by reason of the seigniority to which it belongs. *Cro. Jac.* 170.

If A. being possessed of goods loses them, and they come to the hands of B. who being in possession, A. by deed re-

leases to B. all actions and demands personal which at any time before *habuit vel habere potuit* against B. for any cause, matter, or thing whatsoever; this shall bar A. of the property of the goods; so that B. has the absolute right in him by this release. 2 Roll. Abr. 407.

By a release of all demands all manner of executions are gone, for the recoveror cannot sue out a *fieri facias, capias*, or *elegit*, without a demand. Litt. § 508; 2 Roll. Abr. 407.

By a release of all demands to the conusor of a statute-merchant, before the day of payment, the conusee shall be barred of his action, because the duty is always in demand; yet if he releases all his right in the land, it is no bar. Co. Litt. 291; Bridgm. 124.

So, a bond conditioned to pay money at a day to come, is a debt and duty presently, and may be discharged by a release of all actions and demands before the day of payment. Cro. Jac. 300.

But in an action of debt for non-performance of an award made for payment of money at a day to come, there is no present debt, nor any duty before the day of payment is come; therefore it cannot be discharged before the day, by a release of all actions and demands. 1 Id. 214; Cro. Jac. 300.

So, if a man devises a legacy of 20*l.* to J. S. at the age of twenty-three, though the legatee, after he attains the age of twenty-one, and before the day of payment, may release it, yet by the word demands, it is not released, but there must be special words for the purpose. 10 Co. 51.

A release of all demands does not discharge a covenant not broken at the time; but a release of all covenants will release the covenant. Cro. Jac. 173; 2 Roll. Abr. 407; Noy, 123. For the difference, when broken or not, see Dyer, 217; Litt. Rep. 86; 3 Leon. 69; 5 Co. 71; Hos's case; 10 Co. 51; Co. Litt. 292; 8 Co. 153; 1 And. 8, 64; and see tit. *Covenant*.

If a lessee for life grants over his estate by indenture, reserving rent during the continuance of the estate, and afterwards releases to the assignee all demands; this shall discharge the rent, for he had the freehold of the rent in him at the time. 2 Roll. Abr. 408; Cro. Jac. 486; Bridgm. 123; 2 Roll. Rep. 20; Poph. 136.

So, if lessee for years grants over by indenture all his estate, reserving a rent during the term, and afterwards releases to the assignee all demands, this shall release the rent; for though he cannot have an action to demand all the estate, yet this is an estate in him of the rent, and assignable over; and in an action of debt for any arrears after, he shall claim it as a duty accrued from the estate; and it shall not be said that the duty arises annually on taking the profits, but this had its commencement and creation by the reservation of the contract, which was before. 2 Roll. Abr. 408.

If there be lessee for years rendering rent, and the lessor grants over the reversion, and the lessee attorns, and after the lessee assigns over his estate, and after the assignee of the reversion releases all demands to the first lessee, yet this shall not release the rent; for there is neither privity of the estate or contract between them after the assignment; but if the release had been made to the assignee, it had extinguished the rent. 2 Roll. Abr. 408; Moor, 544; Cro. Eliz. 606.

If he who has a rent-charge in fee releases to the tenant of the land all demands from the beginning of the world till the making of the deed of release; this shall discharge all the rent, as well that to come as what is past. 20 Ass. pl. 5; 2 Roll. Abr. 408.

It is said by Littleton and Coke, that by a release of all demands a rent-service shall be released; but this it is said is to be intended of a rent-service in gross, as a seignior. Litt. § 510; Co. Litt. 291. Therefore, where in action of covenant on a lease for years, to pay the rent reserved, the defendant pleaded release by the plaintiff of all demands, at a day before the rent in question became due; the plaintiff replied, that the release was in performance of an award of

all matters in controversy between the plaintiff and defendant; and on demurrer it was adjudged, that the rent was not discharged by this release; as it became due by the perception of the profits, and was not like to a rent-charge, or a rent-parcel of a seignior; and that this rent being incident to the reversion, and part thereof, was no more released than the reversion itself; and this construction should the rather prevail, as it was not the intention of the party to release this rent; but Twisden said, that in releases and deeds, when words are heaped up, the party who is to take advantage may take the strongest word, and the strongest sense, and that is the reason they are put in; and as to the intent, that must be gathered from the words, and men must take care what words they use: and he said, he could see no difference between this rent, and a rent in fee, both are rent-services, and neither demandable before they become due, otherwise than as in 40 Ed. 3. 47. it is said, there is a continual demand betwixt lord and tenant; and in this case there is a tenure between the lessee and him in reversion: and the reason why the reversion is not touched by this release is, because it can pass only by way of extinguishment, and not by way of passing an interest; but it was adjudged against the release. 1 Lev. 99, 100; 1 Sid. 141; 1 Keb. 499, 510; see 2 Salk. 578.

Where a release, contained in a deed, recited that A. stood indebted to his creditors in the several sums set to their respective names, and that they had agreed to take fifteen shillings in the pound of him, upon the whole of their respective debts, and in consideration of the payment thereof each and every of them did release him from all manner of actions, debts, claims, and demands in law or equity; this release was held to extend only to the respective debts and all actions touching them: and that the general words had reference to the particular recital, and were restrained by that. 4 M. & S. 423.

A. the mother of B. having entered into a bond on his behalf for 1000*l.*, B. executed an indemnity bond of the same date, conditioned for the payment of 1000*l.*, three months after her decease. A. afterwards made a codicil to her will, by which she relinquished two debts due from B. of 1000*l.* and 500*l.*; and desired him to be punctual in indemnifying her estate against the bond for 1000*l.* Soon after the execution of this codicil, A. executed a release to B., in which (reciting the existence of certain debts of 500*l.*, 480*l.*, and 300*l.* due on bonds, &c.) it was expressed that she had agreed to release B. from those sums, and of and from all and every other sum or sums of money, claims and demands thereby secured, and all other sum and sums of money, claim and demand whatsoever, and released him accordingly from those sums, and all claim on account of those sums, or for, or on account of any other matter, cause, or thing whatsoever; the court of C. P. held that this release did not extend to the indemnity bond; and that no extrinsic evidence could be admitted to explain the intentions of A. as to the release. 1 New Rep. C. P. 113.

A deed *inter partes* cannot operate as a release to strangers therefore a charter-party between A. and B. in consideration of a former charter-party between A. and C. which charter-party in consideration of the freight B. was to pay was thereby declared null and void, A. agreeing to cancel the first in consideration of the second, &c. and C. was thereby acquitted of all claims which A. might have against him in virtue of the first charter-party, was held not to operate as a release from A. to C. of the first charter-party. 3 M. & S. 308.

IV. A RELEASE of all actions discharges a bond to pay money on a day to come; for it is *debitum in presenti, præsens sit solvendum in futuro*; and it is a thing merely in action, and the right of action is in him who releases, though no action will lie when the release is made. Co. Litt. 292. See Bond.

But a release of actions does not discharge a rent before the day of payment, for it is neither *debitum* nor *solutum* at the time of the release; nor is it merely a thing in action, for it is grantable over. *Co. Litt.* 292.

So, if a man has an annuity for a term of years, for life, or in fee, and he, before it be in arrear, releases all actions; this shall not release the annuity, for it is not merely in action because it may be granted over. *Co. Litt.* 292; 1 *Bulst.* 178; *Cro. Eliz.* 897; *Moor*, 113. But such release shall release the arrears incurred before. 39 *Hen.* 6. 43; 2 *Roll. Abr.* 404.

By a release of all manner of actions, all actions, as well criminal as real, personal, and mixed, are released. *Co. Litt.* 287.

A release of actions real is a good bar in actions mixed as assise of novel disseisin, waste, *quare impedit*, annuity; and so is a release of actions personal. *Co. Litt.* 284. But not after the grantee has made his election. 1 *Jones*, 215.

A release of all actions is regularly no bar to an execution; for execution is no action, but begins where the action ends. *Co. Litt.* 289; 8 *Co.* 153.

Also a release of all actions does not regularly release a writ of error; for it is no action, but a commission to the justices to examine the record; but if therein the plaintiff may recover, or be restored to any thing, it may be released by the name of action. 2 *Inst.* 40; *Yelv.* 209; *Co. Litt.* 288. But, by a release of all suits, a man is barred of a writ of error. *Latch.* 110. So, by a release of all suits, a man is barred of execution, because it cannot be had without application to the court, and prayer of the party, which is his suit. *Co. Litt.* 291; 8 *Co.* 153.

A release of all actions is a good bar to a *scire facias*, though it be a judicial writ, for the defendant may plead to it, and it is in nature of a new original given by the statute. *Co. Litt.* 290; *Comb.* 455.

So, in *replevin*, a release of all actions is a good bar, for the avowant is defendant, though in some respects he is plaintiff. 2 *Roll. Rep.* 75.

So, if a man by wrong takes away my goods; if I release to him all actions personal, yet by law I may take the goods out of his possession. *Co. Litt.* 286; *Skin.* 57.

If a man releases all actions, by this he shall release as well actions which he hath as executor, as those in his own right; 39 *Ed.* 3, 26; 2 *Roll. Abr.* 101; 2 *L. Rep.* 1397, *S. C.* cited by *Powell*; and said by him to be clearly so, unless there was an action of his own for the release to work upon.

If a man releases all quarrels; a man's deed being taken most strongly against himself, it is as beneficial as all actions, for by it all actions real, personal, and mixed, are released; and all causes of action, though no action then depending. *Co. Litt.* 292.

Where a lessor, whose bailiff had made a distress for rent, commenced an action in the bailiff's name, and with his consent, against the sheriff, for taking insufficient pledges in *replevin*, and the bailiff, without the lessor's privity, released the sheriff, and the release was pleaded *puis darrein continuance*, the Court of Common Pleas set aside the plea. 7 *Taunt.* 48.

So, where the obligor of a bond, after notice of its being assigned, took a release from the obligee, and pleaded it to an action brought by the assignee in the name of the obligee, the Court of Common Pleas set aside the plea, nor would they under those circumstances suffer the obligor to plead payment to the obligee. *Legh v. Legh*, 1 *Box. & Pull.* 447; and see 1 *Chitt. R.* 390; and tit. *Obligation*, vol. v.; and 4 *N. & A.* 419.

If one of several plaintiffs fraudulently release the action, the court will set aside a plea of release; but the fraud must be clearly made out by the affidavits of the party seeking to

set aside the release. 1 *Young & J.* 362; and see 4 *Moo.* 192; 7 *Moo.* 356.

The general words in a release are qualified by the recital. Thus, where the release recited that disputes were subsisting between A. and B., about which actions had been brought, and that it had been agreed that each of them should execute a release of all actions, causes of action, claims, and demands, brought by him against the other; it was held, that the release must be confined to actions then depending. 3 *B. & Ad.* 175. And see 4 *M. & S.* 423, *ante*, III.; and 2 *B. & A.* 38.

If a person release to another all his right which he hath in the land, without using any more words, as, "To hold to him and his heirs, &c." the releassee hath only an estate for life. *Dyer*, 263. A release made to a tenant in tail, or for life, of right to land, shall extend to him in remainder or reversion. 1 *Inst.* 207. By release of all a man's right unto lands, all actions, entries, titles of dower, rents, &c. are discharged; though it bars not a right that shall descend afterwards. And a release of all right in such land will not discharge a judgment not executed; because such judgment doth not vest any right; but only makes the land liable to execution. 8 *Rep.* 151; 3 *Salk.* 298.

It is said a release of all one's title to lands, is a release of all one's right. *Litt.* § 509; 1 *Inst.* 292. By a release of all entries, or right of entry, which a man hath into lands, without more words, the releasor is barred of all right or power of entry into those lands; and yet if a man have a double remedy, viz. a right of entry, and an action to recover, and then release all entries, by this he is not barred and excluded his action; nor doth a release of actions bar the right of entry. *Plowd.* 484; 1 *Inst.* 345.

If a disseisee releases to the disseisor all actions; this is no release of his right of entry; for when a man has several means to come at his right, he may release one, and yet take benefit of the other. *Co. Litt.* 28, b; 8 *Co.* 141.

V. To prevent maintenance, and the multiplying of contentions and suits, it was an established maxim of the common law, that no possibility, right, title, or any other thing that was not in possession, could be granted or assigned to strangers. A right in action could not be transferred even by act of law; nor was it considered as transferred to the king by the general transferring words of an act of attainder. See 3 *Rep.* 2, b.

But a right or title to the freehold or inheritance of lands might be released in five manners. 1. To the tenant of the freehold, in fact, or in law, without any privity. 2. To him in remainder. 3. To him in reversion. 4. To him who had right only, in respect of privity; as if the tenant were disseised, the lord, notwithstanding the disseisin, might release his services to him. 5. To him who had privity only, and not the right; as, if tenant in tail made a feoffment in fee, after this feoffment, no right remained in him; yet in respect of the privity only, the donor might release to him the rent and services. So, 6. If the terretenants, and the person entitled to the right or possibility, joined in a grant of the lands, it would pass them to the grantee, discharged from the right or possibility. See 10 *Rep.* 49, b). But the law is now altered, in the above instances, in many respects. As to the assignment of things in action, see tit. *Assignment*. A contingent remainder in real estates could only be transferred by a fine and a common recovery, in which the remainder-man came in upon the voucher; but fines and recoveries are now abolished. See *Fine of Lands*; *Recovery*; *Remainder*.

On the principles of the common law above stated, it was held, that an heir at law cannot release to his father's disseisor in the life-time of the father; for the heirship of the heir is a contingent thing, for he may die in the lifetime of the father,

or the father may alien the lands. *Litt.* § 446; *Co. Litt.* 265, a; 10 *Co.* 51; *Bridgm.* 78.

So, if the conusee of a statute released to the conusor all his right to the land, yet he might afterwards sue execution, for he had no right to the land, but only a possibility. 1 *And.* 133; *Co. Litt.* 265; 9 *Roll. Abr.* 405; *Cro. Eliz.* 552.

So, if a creditor release to his debtor all the right and title which he hath to his lands, and afterwards get judgment against him, he may extend a moiety of the same land; for he had no right to the land at the time of the release, and the land is not bound but in respect to the person. 2 *Mod.* 281; 2 *Lev.* 215.

So, if a plaintiff releases all demands to the bail in the King's Bench, and afterwards judgment be given against the principal, execution may be sued against the bail; for that, at the time of the release, there was only a possibility of the bail becoming chargeable. 5 *Co.* 70; *Co. Litt.* 265; *Moor.* 469; *Cro. Eliz.* 579; *Hut.* 17; and see *Moor.* 852.

So, if A. recovers in trespass against B. in B. R., and B. brings a writ of error, pending which A. releases to B. all executions, and afterwards the judgment is affirmed, and new damages given to A. for the delay, (on 3 *Hen.* 7. c. 10.) this release shall not bar A. to have execution of those damages, because he had not any right to have execution, nor to any duty when the release was made. 2 *Roll. Abr.* 404; *Cro. Jac.* 337; 1 *Roll. Rep.* 11.

If the next presentation to a church be granted to A. and B. and living the incumbent, A. releases all his estate, title, and interest to B., this release is void, it being of a chose in action; otherwise, had the release been made after the avoidance, at which time the interest would have been vested in A. *Cro. Eliz.* 173, 600; *Owen.* 85; 1 *Leon.* 167; 3 *Leon.* 256; *Dyer.* 244; 10 *Co.* 48.

A city orphan cannot at law release her orphanage part to her father, for she hath no right in her during the life of her father; but it hath been held in equity, that such release being for a valuable consideration, as on the marriage of a daughter, and a portion given her by the father, such release may operate as an agreement to waive the orphanage, and hath accordingly been so decreed in equity. 1 *P. Wms.* 638; 2 *P. Wms.* 527; *Preced. Chan.* 545.

If there be a devise of a term for years to A. for life, remainder to B.—B. may release his right to A., and such release shall extinguish his interest, though it was objected that B. had only a possibility at the time of the release made. 10 *Co.* 47.

A duty uncertain at first, which on a condition precedent is to be made certain afterwards, is but a possibility which cannot be released. 5 *Co.* 702; 2 *Mod.* 281. As a *nomine poenae* waiting on a rent, which cannot be released till the rent is behind, as the non-payment of the rent makes the *nomine poenae* a duty. *Yelv.* 215; *Bownl.* 116. So, if a man covenant to pay 10*l.* on the birth of a child, the covenantor cannot be released of the 10*l.*; it resting merely in contingency whether such child ever will be born or not. *Yelv.* 192.

So, if an award be, that on a plaintiff's delivering to defendant, by a certain day, a load of hay, defendant shall pay him 10*l.*; in this case the 10*l.* cannot be released before the day, for it rests merely in possibility and contingency, whether the money shall ever be paid, for it becomes a duty on delivery of the hay only, and not before. *Yelv.* 215. See *Award.*

In debt on bond against the defendant as administrator, &c. the defendant pleaded a release; whereby the plaintiff, reciting that there were several controversies between the defendant and him, about a legacy and the right of administration, releases to the defendant all his right, title, interest, and demand of, in, and to the personal estate of the intestate; and, on demurrer, this was held to be no plea; and a difference was taken by *Holt*, between a release of all demands

to the person of the obligor or administrator, and a release of all demands to the personal estate of the obligor or intestate: that the last will not discharge the bond, as the other may, because the bond does not give any right or demand upon the personal estate, &c. until judgment and execution sued. *Salk.* 575; 2 *Ld. Raym.* 786.

If A. promises B. in consideration that he will sell to his son certain merchandise, at such a price, that if his son does not pay it at the feast of St. Michael next ensuing, he himself will pay it; and before Michaelmas, A. releases all actions and demands to him who made the promise, this shall not release the assumpsit: for till Michaelmas it cannot be known whether his son will have paid it or not, and, till default by him, the other is not bound to pay it; so it is a mere contingency till Michaelmas, which cannot be released. 2 *Roll. Abr.* 407, 408.

For more learning on this subject, see *Bac. Ab.* tit. Release, (7th ed.); 18 *Vin. Abr.*; and *Com. Dig.* tit. Release.

RELEGATION, *relegatio*.] A banishing, or sending away.

Abjuration is forswearing the realm for ever; relegation is banishment for a time only. *Co. Litt.* 133. See *Transportation*.

RELEVANT, applying to the matter in question—so relevancy of proof is the effect of it as applied to the action or suit.

RELICTA VERIFICATIONE. Where a judgment is confessed by *cognovit actionem* after plea pleaded, and the plea is withdrawn, it is called a confession, or *cognovit actionem relicta verificatione*. See *Judgments acknowledged*.

RELIEF, *relevamen*; but in Domesday, *relevatio, relevium*.] A certain sum of money which the tenant, holding by knights-service, grand serjeanty, or other tenure, for which homage or legal service is due, and being at full age at the death of his ancestor, paid unto his lord at his entrance. See *Bracton*, lib. 2. c. 36; *Britton*, c. 69; *Grand Customary of Normandy*, c. 34.

Skene, de Verbor. signif. verb. Relevium, saith, relief's a French word, from the Latin *relevare*, to relieve, or take up that which is fallen; for it is given by the tenant or vassal, who is of perfect age, after the expiring of the wardship, to his superior lord, of whom he held his lands by knights-service, that is, by ward and relief: for, by payment thereof he relieves, and, as it were, raiseth up again his lands, after they were fallen down into his superior's hands, by reason of wardship, &c.

Relief is otherwise thus explained, viz. a feudatory or beneficiary estate in lands was at first granted only for life, and after death of the vassal it returned to the chief lord, for which reason it was called *feudum caducum*, v. z. fallen to the lord by the death of the tenant; afterwards, these feudatory estates being turned into an inheritance, by the connivance and assent of the chief lord, when the possessor of such an estate died, it was called *hereditas caduca*, i. e. it was fallen to the chief lord; to whom the heir having paid a certain sum of money, he did then *relevare hereditatem caducam* out of his hands; and the money thus paid was called a relief.

This must be understood after the conquest; for, in the time of the Saxons, there were no reliefs, but *heriots* paid to the lord at the death of his tenant; which in those days were horses, arms, &c. and such tributes could not be exacted by the English immediately after the conquest, for they were deprived of both by the Normans; and instead thereof, in many places, the payment of certain sums of money was substituted, which they called a relief; and which continues to this day.

Relief reasonable, or, as it is sometimes called, *lawful* and ancient relief, is such as is enjoined by some law, or becomes due by custom, and doth not depend on the will of the lord. What that was we may read in the laws of William the Con-

queror, c. 22. and of *Henry 1. c. 14.* and before that time in the laws of *Canute*, c. 97. viz. the relief of an earl was eight war horses, with their bridles and saddles, four *lorions*, four helmets, four shields, four pikes, four swords, four hunting horses and a palfrey, with their bridles and saddles; the relief of a baron or thane was four horses, two with furniture, and two without, two swords, four lances, four shields, and an helmet, *cum loried*, and fifty marks in gold. The relief of a *ravasar* was his father's horse, his helmet, shield, lance, and sword, which he had at his death. The relief of a villain or countryman was his best beast, &c. *Cowell*. See *Tenures*.

RELIGION, religio. Virtue, as founded on reverence of God, and expectation of future rewards and punishments; a system of Divine Faith and Worship, as opposed to others. *Jhus*. That habit of reverence towards the Divine Nature, whereby we are enabled and inclined to serve and worship Him, after such a manner as we conceive most acceptable to Him, is called religion. *Wilkins*.

All blasphemies against God, as denying His Being or Providence, all profane scoffing at the Holy Scriptures, or exposing any part to contempt or ridicule, all impostures in religion, as false pretending to extraordinary commissions from God and receiving or abiding the people with false commendations of judgments, &c.; all open lewdness and other scandalous offences of this nature, because they tend to subvert all religion or morality, which are the foundation of government, are punishable by the temporal judges with fine and imprisonment, and also such corporal punishments as to the court in discretion shall seem meet, according to the heinousness of the crime. *1 Hawk. P. C. c. 5.*

Blackstone enumerates the following, as the crimes against God and religion, which are punishable by the laws of England: APOSTASY, as to which see title *God and Religion*; HERESY, see that title; REVILING THE ORDINANCES OF THE CHURCH, see that title; BLASPHEMY, SWEARING (PROFANE), CONJURATION OR WITCHCRAFT, see those titles; RELIGIOUS IMPORTORS, see title *Prophecies*; SIMONY, see that title; PROFANATION OF THE LORD'S DAY, see title *Sunday*; DRUNKENNESS, LEWDNESS, see those titles. See *Church, Conformity*, &c. See also titles *Clergy, Parson, Service and Sacraments*, &c.

Seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace. *1 Hawk. P. C. c. 5. § 6.*

RELIGIOUS HOUSES, religiosæ domus. Houses set apart for pious uses, such as monasteries, churches, hospitals, and all other places where charity was extended to the relief of the poor and orphans, or for the use or exercise of religion. See *Monasteries*.

In the *Natitia Monastica, or a short History of the Religious Houses in England and Wales*, by *Tanner*, in alphabetical order of counties, is accurately given a full account of the founders, the time of foundation, titular saints, the order, the value, and the dissolution under *Henry VIII.*, with references to printed authors and manuscripts which preserve any remains relating to each house; with a preface of the institution of religious orders, &c. *Cowell*.

RELIGIOUS MEN, religiosi. Such as entered into some monastery or convent, there to live devoutly. And in ancient deeds of sale of land, the purchasers were often restrained by covenant from giving or alienating to, or for the benefit of, to the end the land might not fall into mortmain. *Cowell*. See *Mortmain*.

RELINQUISHMENT A forsaking, abandoning, or giving over. It has been adjudged, that a person may assign an ill demanded or debt, &c. and have a release for that which is well demanded. *Step. Pl. c. 1. Sec. 1.*

RELICUÆ, reliquæ. Remains, such as the bones, &c. of saints who are dead, preserved by persons living, with great veneration, as sacred memorials of them. They are

forbidden to be used or brought into England by several statutes; and justices of peace were, by *3 Jac. 1. c. 26.* empowered to search houses for Popish books and reliques, which, when found, are to be defaced and burnt, &c.

RELOCATION. A reletting or renewal of a lease. Where a landlord, instead of warning a tenant to remove, has allowed him to continue without making any new agreement, this is termed in the law of Scotland *tacit relocation*.

REMAINDER.

REMANENTIA.] An estate limited in lands, tenements, or rents to be enjoyed after the expiration of another particular estate. And a remainder may be either for a certain term, or in fee-simple or fee-tail. *Broke, tit. Donee and Remainder, 245; Glan. lib. 7. c. 1.* The difference between a remainder and reversion, according to *Spelman*, is this, that by a reversion, after the appointed term, the estate returns to the donor or his heirs, as the proper fountain; whereas by remainder it goes to some third person or a stranger. *Cowell*.

Remainder is described to be a remnant of an estate in lands or tenements, expectant on a particular estate created together with the same, and at the same time, and is so expectant on the particular estate, that unless it can take effect when the particular estate determines, it is void. *Co. Lit. 49, 148; 2 Co. 51; Moor, 344; Vaugh. 269.*

- I. *Of the Nature of Remainders, vested or contingent, and the general Rules relating thereto.*
- II. *Of Contingent Remainders and Remainders in Abeyance.*
- III. *Of Cross Remainders, and those arising by Implication and Construction of Law.*
- IV. *Of what Things a Remainder may be made or limited.*
- V. *What Words are sufficient to create a Remainder; and herein in what cases the Heir shall take by Words of Purchase or Words of Limitation, and the effect thereof. And see more particularly, titles Descent, Purchase,*

I. AN estate in remainder may be defined to be an estate limited to take effect and be enjoyed after another estate is determined. As if a man, seised in fee-simple, grants lands to A. for twenty years, and after the determination of the said term, then to B. and his heirs for ever; here A. is tenant for years, remainder to B. in fee. In the first place, an estate for years is created or carved out of the fee, and given to A., and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee. *Co. Lit. 148.* They are indeed different parts, but they constitute only one whole; they are carved out of one and the same inheritance; they are both created, and may both subsist together; the one in possession, the other in expectancy. So, if land be granted to A. for twenty years, and after the determination of the said term to B. for life; and after the determination of B.'s estate for life, it be limited to C. and his heirs for ever; this makes A. tenant for years, with remainder to B. for life, remainder over to C. in fee. Now here the estate of inheritance undergoes a division into three portions; there is, first, A.'s estate for years carved out of it; and after that B.'s estate for life; and then the whole that remains is limited to C. and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only, being nothing but parts or portions of one entire inheritance; and if there were a hundred remainders, it would still be the same thing, upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal to the whole. And hence, also, it is easy to collect that no remainder can be limited after the grant of an estate in fee-simple; because a fee-simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the whole of the estate; a remainder, therefore, which is only a portion or residuary part of the

estate, cannot be reserved after the whole is disposed of. *Plowd.* 29; *Vaugh.* 269. A particular estate, with all the remainders expectant thereon, is only one fee-simple; as 40*l.* is part of 100*l.*, and 60*l.* is the remainder of it; wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon than after the whole 100*l.* is appropriated there can be any residue subsisting. 2 *Comm.* c. 11.

Thus much being premised, the student will be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

First, there must necessarily be some particular estate, precedent to the estate in remainder; as an estate for years to A., remainder to B. for life; or an estate for life to A., remainder to B. in tail; this precedent estate is called the *particular* estate, as being only a small part, *particula*, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason, that *remainder* is a relative expression, and implies that some part of the thing is previously disposed of; for where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession. See *Co. Lit.* 49; *Plowd.* 25.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder; it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree; but an estate of freehold must be created to commence immediately; for it is an ancient rule of the common law, that an estate of freehold cannot be created to commence *in futuro*, but it ought to take effect presently, either in possession or remainder. 5 *Rep.* 94. Because at common law no freehold in lands could pass without livery of seisin, which must operate either immediately or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance, which imports an immediate possession. Therefore, though a lease to A. for seven years, to commence from next Michaelmas, is good; yet a conveyance to B. of lands, to hold to him and his heirs for ever, from the end of three years next ensuing, is void. So that, when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed, and for the grantor to deliver immediate possession of the land to the tenant of this particular estate; which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As where one leases to A. for three years, with remainder to B. in fee, and makes livery of seisin to A.; here, by the livery the freehold is immediately created and vested in B. during the continuance of A.'s term of years. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it, must, indeed, be deferred till hereafter; but it is, to all intents and purposes, an estate commencing *in præsentia*, though to be occupied and enjoyed *in futuro*.

As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to support the remainder. But a lease *at null* is not held to be such a particular estate as will support a remainder over. 8 *Rep.* 75. For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it in order to constitute a remainder. Besides, if it be a free-

hold remainder, livery of seisin must be given at the time of its creation; and the entry of the grantor, to do this, determines the estate at will in the very instant in which it is made. *Dyer*, 18. Or, if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of remainder; for it is a separate independent contract, distinct from the precedent estate at will; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken. *Raym.* 151. And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also; as where the particular estate is an estate for the life of a person not *in esse*, or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate; in neither of these cases the remainder over is void. *Co. Lit.* 298; 2 *Roll. Abr.* 415; 1 *Jon.* 58.

Secondly, the remainder must commence, or pass out of the grantor, at the time of the creation of the particular estate. *Lit.* § 671; *Plowd.* 25. As where there is an estate to A. for life, with remainder to B. in fee; here B.'s remainder in fee passes from the grantor at the same time that seisin is delivered to A. of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made, on the particular estate, whenever a freehold remainder is created. For if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor, otherwise the remainder is void. *Lit.* § 671. Not that the livery is necessary to strengthen the estate for years; but as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery made to the tenant of the particular estates to relate and enure to him in remainder, as both are but one estate in law. *Co. Lit.* 49.

Hence the remainder must be created in the same instrument with the particular estate. *Co. Lit.* 49 a. The particular estate, however, may be made by a will, and the remainder by a codicil, or *vice versa*, for they are, for this purpose, parts of the same assurance. 2 *Bla.* 698.

A remainder may also be limited by an appointment in execution of a power contained in the conveyance by which the particular estate is created, because from the retrospective relation which appointments bear to the instrument containing the power, they are considered as legally inserted therein. *Cornish on Remainders*, 45. But see 1 *Preston on Abstracts* 115.

Thirdly, the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. *Plowd.* 25; 1 *Rep.* 66. As if A. be tenant for life, remainder to B. in tail; here B.'s remainder is vested in him at the creation of the particular estate to A. for life, or if A. and B. be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor; wherefore both these are good remainders. But if an estate be limited to A. for life, remainder to the eldest son of B. in tail, and A. dies before B. hath any son; here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate, and even supposing that B. should afterwards have a son, he shall not take by this remainder: for as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone for ever. 1 *Rep.* 188. And this depends upon the principle before laid down, that the precedent particular estate, and the remainder, are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first es-

tate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate and the remainder supported thereby. 3 Rep. 21. The thing supported must fall to the ground, if once its support be severed from it. 2 Comm. c. 11.

If a man makes a lease to A. for life, and that after the death of A. and one day after, the land shall remain to B. for life, &c. this is a *void remainder*, because not to take effect immediately on the determination of the first estate, and so during that time there would be an interruption of the livery, and no tenant of the freehold, either to do the services, or answer to the *præcipes* of strangers; *Plumd. 25; Raym. 144*; that the law is nice to an instant. 1 *Ld. Raym. 316*.

It is upon these rules, but principally the last, that the doctrine of contingent remainders depends. For remainders are either vested or contingent. Vested remainders, whereby a present interest passes to the party, though to be enjoyed *in futuro*, are where the estate is invariably fixed to remain to a determinate person after the particular estate is spent. As if A. be tenant for twenty years, remainder to B. in fee; here B.'s is a vested remainder, which nothing can defeat or set aside.

In a recent case it was held, on a devise to A. remainder to the right heir male of the testator in fee, that the remainder vested, upon the testator's death, in the party then answering the description. 2 N. & M. 544; and see 12 *East, 589*; 1 *Brown's C. C. 292*; 1 B. & A. 546; 1 M. & S. 744.

See *post*, II. and also *post*, V. as to the distinction between remainders *vested* and *executory*.

II. *CONTINGENT* or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event, so that the particular estate may chance to be determined, and the remainder never take effect. 3 Rep. 20.

Thus if A. be a tenant for life, with remainder to B.'s eldest son (then unborn) in tail, this is a contingent remainder, for it is uncertain whether B. will have a son or no; but the instant that a son is born, the remainder is no longer contingent, but vested. Though if A. had died before the contingency happened, that is, before B.'s son was born, the remainder would have been absolutely gone, for the particular estate was determined before the remainder could vest.

Though undoubtedly it is a property of all contingent remainders that it is uncertain whether they will ever take effect, yet it is not that uncertainty which constitutes a remainder contingent, because every vested remainder for life or a tail is also subject to the same uncertainty, as to its determination, namely, to die, or die without issue before the determination of the particular estate. The true criterion seems to be, whether there is a present capacity of taking effect in possession if the particular estate were to determine; if there be, the remainder is vested, and not otherwise. Thus if there be a lease for life to A., and after the death of J. D. remainder to B. in tail; while J. D. lives, B.'s remainder is contingent, because if A. were then to die, there would be no capacity of its taking effect in possession; but if J. D. were to die, living A., in that case B.'s remainder would immediately become vested; and yet if B. were also to die without issue, living A., it would never actually take effect at all. See *Fearne Con. Rem. p. 216*. 7th edit.

The same rule applies to the estate so commonly created in settlements of trustees to preserve contingent remainders; it is quite uncertain, and depends on a contingency whether it will ever actually come into possession, yet it is a vested remainder. See 2 *Comm. 169 n*.

By the strict rule of law, if A. were tenant for life, remainder to his own eldest son in tail, and A. died without issue

born, but leaving his wife *enfeint*, or big with child, and after his death a posthumous son was born, this son could not take the land by virtue of this remainder; for the particular estate determined before there was any person *in esse* in whom the remainder could vest. *Salk. 228*; 4 *Mod. 282*. But, to remedy this hardship, it is enacted by the 10 & 11 *Wm. 3. c. 16*, that posthumous children shall be capable of taking in remainder in the same manner as if they had been born in their father's lifetime; that is, the remainder is allowed to vest in them while yet in their mother's womb.

The particular case on which this statute was passed (as many statutes have arisen from circumstances of private hardship or injustice), was as follows:—A father had devised an estate to his son for life, with a remainder to the first and other sons of the son in tail; the son died, leaving his wife pregnant, who was afterwards delivered of a son: the courts of C. P. and K. B. held clearly that the grandson, not being born at the expiration of the estate for life, was not entitled to take it; but the lords, moved by the hardship of the case, reversed the judgment of the courts below, contrary to the opinions of all the judges. *Reeve v. Long, 1 Salk. 227. & alibi*. But the House of Commons, in reproof of what they considered as an assumption of legislative authority in the Lords, immediately brought in an act which passed into the above statute. The statute only mentions *marriage and other settlements*; and it is probable that devises were designedly omitted to be expressed, from delicacy, and that the authority of the judgment of the peers might not be too openly impeached. As the statute says that the posthumous son, in this case, shall take the estate as if born before the death of the father, he is entitled to the intermediate profits from the death of the father; 3 *Atk. 203*; which is different from the case of a descent devested by the birth of a posthumous child. See *Descent, Rule I*.

This species of contingent remainders, to a person not in being must however be limited to some one that may, by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines. 2 Rep. 51. As if an estate be made to A. for life, remainder to the heirs of B.; now, if A. dies before B., the remainder is at end; for during B.'s life he has no heir, *nemo est hæres viventis*; But if B. dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. See *post*. This is a good contingent remainder, for the possibility of B.'s dying before A. is *potentia propinqua*, and therefore allowed in law. *Co. Litt. 378*. But a remainder to the right heirs of B. (if there be no such person as B. *in esse*), is void. *Hob. 83*. For here there must be two contingencies happen; first, that such a person as B. shall be born; and secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who hath none (we have seen), is good; for by common possibility he may have one; but if it be limited in particular to his son John or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name. 5 Rep. 51. A limitation of a remainder to a bastard, before it is born, is not good; for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. *Cro. Eliz. 509*.

It is not merely there being two contingencies to happen, or what Lord Coke calls a possibility on a possibility, in order to the vesting of the estate, which will make the possibility too remote; but there must be some legal improbability in the contingencies. Butler mentions a case, *Routledge v. Dorril, 2 Ves. jun. 337*, where limitations of a money fund were held *valid*; although, to entitle one of the objects to take under it, it was necessary, first, That the husband and wife must have had a child; 2. That that child must have had a child; 3. That the last-mentioned child must have

been alive at the decease of the survivor of his grandfather and grandmother; 4. That if a boy, he must have attained twenty-one,—if a girl, that age, or be married. *Fearne, Cont. Rem.* 251, n. c. 7th ed.; 2 *Comm.* 170, n. 5.

Next, with respect to a contingent remainder, where the person to whom it is limited is fixed and certain, but the event upon which it is to take effect is vague and uncertain. Where land is given to A. for life, and in case B. survives him, then with remainder to B. in fee; here B. is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A. and B. it is contingent; and if B. dies first, it never can vest in his heirs, but is for ever gone; but if A. dies first, the remainder to B. becomes vested. 2 *Comm.* c. 11.

Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate less than a freehold. Thus, if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void; but if granted to A. for life, with a like remainder, it is good. 1 *Rep.* 130. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void; it cannot pass out of him without vesting somewhere; and in the case of a contingent remainder, it must vest in the particular tenant, else it can vest no where; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void. 2 *Comm.* c. 11.

But although every contingent freehold remainder must be supported by a preceding freehold, it is not necessary that such preceding estate continue in the actual seisin of its rightful tenant; it is sufficient if there subsists a right of entry to such preceding estate at the time the remainder should vest. *Fearne, Cont. Rem.* p. 288. 7th ed.

A contingent remainder is defined by *Fearne* to be a remainder limited so as to depend on an event or condition which may never happen to be performed; or which may not happen or be performed till after the determination of the preceding estate; for if the preceding estate (unless it be a mere trust estate) determine before such event or condition happens, the remainder will never take effect.

Under this definition we may properly distinguish four sorts of contingent remainders. 1. Where the remainder depends entirely on a contingent determination of the preceding estate itself. 2. Where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate. 3. Where the condition, upon which the remainder is limited, is certain in event, but the determination of the particular estate may happen before it. 4. Where the person to whom the remainder is limited is not yet ascertained, or not yet in being. *Fearne*, 3, 4.

In the case of *Dormer v. Fortescue*, [reported in its various stages by the name of *Dormer v. Fortescue*; *Dormer v. Parkhurst*; *Barrington d. Dormer v. Parkhurst*; *Smith v. Parkhurst*, or *Parkhurst*; *Parkhurst v. Smith, &c.* See Bro. P. C. tit. *Fine, Remainder*,] an estate was limited (after several precedent estates) to the use of A. for ninety-nine years, if he should so long live; and after his decease, or the sooner determination of the estate limited to him for ninety-nine years, to the use of trustees and their heirs during his life, upon trust, to preserve the contingent remainders; and after the end or determination of that term, to the use of A.'s first and other sons successively in tail-male; remainder to the heirs of the body of the original settler; remainder to such settler's right heirs. All the preceding estates being determined, A. came into possession of the lands limited to him for ninety-nine years; and having a son, they joined in levying a fine, and suffering a common recovery, in which the son was vouched. If the trustees took a vested estate of freehold during the life of A., the recovery was

void, there not being a good tenant to the *præcipe*, the father being only tenant for years; but if they took a contingent estate, the freehold was in the son, and of course there was a good tenant to the *præcipe*. Upon this point the case was argued in the court of K. B. and afterwards on appeal before the House of Lords, where all the judges were ordered to attend. Lee, C. J., when the cause was heard in K. B., and Willes, C. J., in delivering the opinion of the judges in the House of Lords, entered very fully into the distinction between contingent and vested remainders. They seem to have laid down the following points:—That a remainder is contingent, either where the person to whom it is limited is not in *esse*, or where the particular estate may determine before the remainder can take place; but that in every case where the person to whom the remainder is limited is in *esse*, and is actually capable, or entitled to take, on the expiration or sooner determination of the particular estate, supposing that expiration or determination to take place at that moment, there the remainder is vested. That the doubt arose by not adverting to the distinction between the different nature of the contingency in those cases where the remainder is limited to a person in *esse*, but the title of the remainder-man depends on a collateral or extraneous contingency, which may or may not take place during the continuance of the preceding estate; and those cases where the preceding estate may end beyond the continuance of the estate in remainder. Thus, if an estate is limited to A. for life, and, after the death of A. and J. S., to B. for life, or in tail, there, during the life of J. S., the title of B. depends on the contingency of J. S. dying in the lifetime of A. This being an event which may or may not take place during the continuance of the preceding estate, B.'s estate is necessarily contingent. But then, supposing J. S. to die, still it remains an uncertainty whether B.'s estate will ever take place in possession; for if the remainder be limited to B. for life, there, if B. dies in A.'s lifetime, A.'s estate would endure beyond the continuance of the estate limited in remainder. The same would be the case if the remainder over were limited to B. in tail, and B. was to die in A.'s lifetime without issue. Yet in both cases it was agreed that B. took not a contingent, but a vested remainder. Hence they inferred, that it was not the possibility of the remainder over never taking effect in possession, but the remainder-man's not having a capacity or title to take, supposing the preceding estate at that instant to expire or determine, together with its being uncertain whether he ever will obtain that capacity or title during the continuance of the preceding estate, that makes the remainder contingent. Upon these grounds they determined that the trustees took a vested remainder, and that the recovery therefore was void. The doctrine established in this case is laid down very precisely by *Coke*, 10 *Rep.* 85. where he with great accuracy of expression observes, that where it is dubious and uncertain whether the use or estate limited in future shall ever vest in interest, or not, then the use or estate is in contingency; because, upon a future contingent, it may either vest or never vest, as the contingent happens. See 1 *Rep.* 137 b; 1 *Inst.* 265 a, in n.; and *post*, V.

If an estate be limited, either at common law, or by way of use, to one for life, or in tail, remainder to the right heirs of J. S., who is then dead; this is a good remainder, and vests presently in the person who is heir at law to J. S. by purchase; see *post*, V; and though a daughter be the heir at law, and after a son is born, yet shall the daughter retain the land against him; for she being heir, and coming within the description at the time when the remainder was limited, it then vested and settled in her immediately, as a remainder by purchase, and shall not by any accident after be defeated. 2 *Roll. Abr.* 415; 1 *Co.* 95, 103; *Plowd.* 56.

But if J. S. be living at the time of the remainder limited to his right heirs, this puts such remainder in abeyance of the contingency; that is, it is in no person, but in nubibus, it

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the contingency happens; for it is not in the feoffor or donor, because he has limited it out of him, and all remainders must pass out of him at the time of the limitation, though they do not presently vest in the person intended; and in the right heirs of J. S. it cannot be, because he cannot have heirs during life; so there is no person in *rerum natura* within the description to take it; therefore it is, in the mean time, in *abeyance* or *expectancy*, to vest or not vest, as the case happens; for if J. S. dies during the particular estate, then the remainder presently takes place in his heirs, but if the particular estate determines, by death or otherwise, in the life of J. S., then such remainder is become totally void, and can never vest; but the estate settles again in the feoffor or donor, as if no such limitation or remainder had been; and he becomes tenant to the *procurator*, and is obliged to do the services; and though J. S. die soon after, yet his heir can have no benefit by it, not being capable of taking the remainder when it fell. 1 Co. 1. 7; Co. Litt. 378 a; 2 Co. 51; 3 Rep. 117 415; Plowd. 28, 558; Poph. 74; Moor. 720; 3 Co. 1. 20; 10 Co. 50; Raym. 145; Pollex. 56. See *Fearne*, 41, 52, &c. where this doctrine of the remainder being in *abeyance* is considered as in some measure unintelligible; and another question depending thereon is stated thus: "A man [by settlement or will] makes a disposition of a remainder or future interest, which is to take no effect at all until a future event or contingency happens; it is admitted that no interest passes by such a disposition to any body before the event referred to takes place. The question is, what becomes of the intermediate reversionary interest from the time of the making of such future disposition until it takes effect? It was said by the grantor or testator at the time of making such disposition, it is confessedly not included in it; the natural conclusion seems to be, that it remains where it was, viz. in the grantor or the testator, and his heirs, for want of being departed with to any body else. When the future disposition takes effect, then the reversionary or future interest passes, pursuant to the terms of it; but if such future disposition takes effect, either by reason of the determination of the particular estate, or of the contingency, or otherwise, what is then then to draw the estate, which was a mere subject of it, out of the grantor or his heirs, or the heirs of the testator, or who can derive title to an estate under a prospective disposition which confessedly never takes any effect at all? *Fearne*, 285, 286, 533.

But if there be no such J. S. at the time of the limitation, though he be after born, and dies during the particular estate, yet his heirs shall never have the remainder. So, if a remainder be limited to A. son of B. in tail, &c. or to E. wife of D. in truth there is no such A. or E., though B. has a son called A., or D. marries one E., yet they can never take the remainder; because if there be such persons as the words of the gift import, there the remainder ought to vest in them presently, and they will never after be made capable of taking it, but if there be no such person then *in esse*, none who the limitation by that description after can lay claim to it, because the limitation was present to such persons, but a remainder *propter nuptias*, into filio, or *propter nuptias* heredi maritus of A., or *propter nuptias* hæredibus de sanguine patris, or *propter nuptias* of A., or to the right heirs of A., there being then such marries, and vest when such persons come into use as are intended by the description, because here appears no present person for any person in particular; therefore, if they answer the description at any time before the particular estate determines, it is time enough; and so there is a diversity between a remainder limited to one by name in particular, and such a remainder limited by description or circumlocution, or by a general name and a special name. *Co. Litt. 3; 1 Co. 20; 2 Co. 51; Hob. 83; Moor, 104; Dyer, 337; 2 Leon. 210. 1 R. & L. Rep. 54.*

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A. to remain to B. and his heirs; this remainder is contingent, and cannot vest presently, for if A. survives B. it is void; and because, otherwise, the operation of livery would be interrupted during the life of A., for he cannot give himself any estate, his livery operating to pass estates from him not to give any to him who had the whole before; therefore, during his life the operation of the livery must cease, and by consequence no remainder can take effect in virtue of that livery, which *pro tempore* being at an end, all that depended thereon ceases too, and can never after be revived; for the livery must carry out all the estates at once from the feoffor, and if he comes again into the possession before they can all take effect, this breaks the force of the livery, and brings back again to him all that such livery had taken out from him, and then they never can take effect but by a new livery. This is the reason of the common case, that one cannot give lands to another to begin after his death, because, being to make livery presently, if that cannot operate presently, it can never operate at all; for it is a contradiction to give lands to one by a solemn livery, which is an act executed, and works presently; and yet, by words, to restrain that operation to a future time. But in the principal case, where A. dies first, there no interruption is of the livery, for B. had an estate for life by virtue thereof; and before that determines, the same livery which carried the remainder in abeyance, for the uncertainty of its taking effect, does on A.'s death direct and settle, or bring down the remainder to B. and his heirs. 10 Co. 85.

If a lease be made to A., B., and C., for their lives, and if B. survives C., then to remain to B. and his heirs: this remainder is in abeyance, because, though the person be certain, yet since it depends on C.'s dying before him, till that be known the remainder cannot vest. So if a lease be made to A. for life, and after the death of B., who is a stranger, to remain to C. in fee, or to A. in fee; these remainders are in abeyance or contingency, and depend on B.'s dying before C. or A., for if he survives them the remainder cannot take effect. 3 Co. 20; 10 Co. 85; Co. Litt. 378.

If a lease were made to A. for life, remainder to the abbot of D. and his successors, though the abbot were then dead, so as there were then no abbot at all, yet the remainder should be good if an abbot were made before the death of A. So of a remainder to a mayor and commonalty, dean and chapter, prior and convent, &c. though there be then no mayor, dean or prior. So of a remainder to the bishop of D., parson of D., or other sole corporation, and his successors; these remainders (not being limited to them by name specially, but to them generally, and so whoever comes within the description before the determination of the particular estate, is capable of taking by virtue thereof,) are good remainders in abeyance, &c. But if there be no such corporations at the time of the limitation, then the remainders are totally void; and none created after, though by the same name, can take these remainders, not even if a patent be then passed to make such corporation. *Co. Litt.* 261; *Hob.* 33; 2 *Co.* 51; 10 *Co.* 30; *Moor*, 104; 1 *Roll. Rep.* 254; 2 *Bulst.* 275.

Contingent remainders may be defeated by destroying or determining the particular estate upon which they depend before the contingency happens whereby they become vested. 1 Rep. 66, 135. Therefore, when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life estate before any of those remainders vest; the consequence of which is, that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life estate, he by that means defeats the remainder in tail to his son; for his son not being *in esse* when the particular estate determined, the remainder could not then vest; and as it could not vest then, by the rules before laid down it can never vest at all.

In these cases, therefore, it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If, therefore, his estate for life determines otherwise than by his death, the estate of the trustees for the residue of his natural life will then take effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency. See *post*, V. This method is said to have been invented by Sir Orlando Bridgman, Sir Geoffrey Palmer, and other eminent counsel, who betook themselves to conveyancing during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life; and when, after the Restoration, those gentlemen came to fill the first offices of the law, they supported this invention, within reasonable and proper bounds, and introduced it into general use. 2 *Comm. c.* 11. See *Moor*, 486; 2 *Roll. Abr.* 797, pl. 12; 2 *Sid.* 159; 2 *Chan. Rep.* 170.

III. When lands are given in undivided shares to two or more particular estates, so as that, upon the determination of the particular estates in any of those shares, they remain over to the other grantees, and the reversion or remainderman is not let in till the determination of all the particular estates, then the grantees take their original shares as tenants in common; and the remainders limited to them, on the determination of the particular estates, are known by the appellation of cross remainders. These remainders may be raised both by deed and will; in deeds they can only be created by express words, but in wills they may be raised by implication. 1 *Inst.* 195, b. in n.

A. having issue five sons, his wife being *enseint*, devised two-thirds of his lands to his four younger sons, and the child *in ventre sa mere*, if he were a son, and their heirs; and if they all died without issue male of their bodies, or any of them, that the lands revert to the right heirs of the devisor. By this devise, the younger sons were tenants in tail in possession, with cross remainders in tail to each other, and no part shall revert to the heir of the devisor till all the younger sons be dead without issue male of their bodies. *Dyer*, 303.

But where one having issue three sons, A., B., and D., devises one house to A. and his heirs, another to B. and his heirs, and a third to D. and his heirs; provided, that if all his said children die without issue, that then the messuages remain and be to his wife and her heirs: It was held by three judges, that on the death of one of the sons without issue, the wife might enter, and that here there were no cross remainders from one son to another, because, being devised to them severally by express limitation, there shall be no greater estate to them by implication. *Gilbert v. Witty*, *Cro. Jac.* 655; 2 *Roll. Rep.* 281; 1 *Vent.* 224; *Raym.* 455; *Fitzg.* 97; 2 *Jon.* 82; *Carth.* 173.

In the above case it was said, by Justice Dodderidge, that cross remainders should never be raised by implication between more than two. This doctrine received some countenance from what was said by the courts in the cases of *Cole v. Livingstone*, 1 *Ventr.* 224; *Holmes v. Maynell*, *T. Raym.* 452; and some other cases. See 4 *Leon.* 14. But it seems entirely exploded by the cases of *Burden v. Burville*, *B. R. Pasch.* 18 *Geo.* 3; *Richmond, (D.) v. Cudogan, (E.)*, *Chanc. May*, 1773; *Wright v. Halford, et al.* *Comp.* 31; and some other subsequent cases. It seems, however, to be admitted in these cases, that to raise cross remainders between more than two, stronger implication is required than to raise them between two only; 1 *Inst.* 195, b. in n; and see 4 *T. R.* 713; that the rule is, that as between two only it shall be presumed that cross remainders were intended to be raised; but if there be more than two, it is necessary to resort to other words in

a will to discover an intention to raise them. See also 2 *East*, 86, 47; 1 *Taunt.* 284; and 2 *Comm.* 381, n. 5.

One seised of lands in fee, by will devises Black Acre to A. his daughter, and her heirs, and White Acre to his daughter B. and her heirs; and if she die before the age of sixteen years, living A., then A. to have White Acre to her and her heirs; and if A. die, having no issue, living B., then B. to have the part of A. to her and her heirs; and if both die having no issue, then to J. S. and his heirs: the testator dies; B. attains her age of sixteen years, and then dies, without issue in the life of A.; and it was held by three justices, against *Dyer*; 1st. That the daughters had an estate tail on the whole will, and not a fee determinable on a contingency subsequent; 2dly. That by the words, "If both die without issue," no cross remainders in tail were created by implication, but that on B.'s death without issue after sixteen, J. S. should have her part presently without staying till the death of A. without issue. *Dyer*, 330; 1 *Bendl.* 212; 1 *Roll. Abr.* 839; *Vaugh.* 267.

A. seised of lands in fee, by will devises all his lands in the county of, &c. to his two daughters B. and D. and their heirs, equally to be divided betwixt them; and in case they happen to die without issue, then to his nephew J. S. and the heirs male of his body, and dies; and it was adjudged that on the death of B. one of the daughters of the other sister took her moiety as a cross remainder. *Raym.* 452; *Ken.* 17; 2 *Jon.* 172; 2 *Show.* 136; *Pollax*, 434; and see 2 *Leon.* 545; 3 *Mod.* 107.

Richard Holden, seised in fee, and having issue a son and three grandchildren, by his will devised part of his estate to his wife for her life; and the reversion of such part, expectant on her death, and all other his freehold tenements, &c. he gave to his son Richard Holden for life, and after his death to his first and other sons successively in tail male, and for default of such issue, and after the determination of the said estates, he gave the premises to his grandson Richard Holden, and his grand-daughter Elizabeth Holden, to be equally divided between them, and to the heirs of their respective bodies issuing; and for default of such issue, he gave the premises to his grand-daughter Anne in fee. The testator died seised, Richard the son died without issue male, whereupon Elizabeth and the grandson entered, and Elizabeth died without issue generally; Anne Holden married John Jervis, and the question was, whether there were cross remainders between Elizabeth and Richard the grandson, or whether the moiety of Elizabeth should go to Anne or to Richard? And it was resolved that there were no cross remainders between them, because here are no express words, nor is there any necessary implication, without one of which cross remainders cannot be raised; that the words, and for default of such issue, being relative to what goes before, mean only, and for default of heirs of their respective bodies; and therefore it is no more than as if it had been a devise of one moiety to Richard and the heirs of his body, and of the other moiety to Elizabeth and the heirs of her body; and for default of heirs of their respective bodies, remainder over; in which case there could be no doubt; and it was held that this case differed from the case *supra*, the word respective being in that case, and the first devisees were the testator's daughters, and the remainderman only a nephew; whereas in the present case Anne was as near to the testator as Richard. *Comber v. Hill*, 2 *Kely.* 188; 2 *Barn. K. B.* 367; *Browne v. Williams*, *Mich.* 8 *Geo.* 2.

It was formerly held that cross remainders could only be raised by will, and were not to be allowed in a deed; but it is now settled that though they cannot be implied in a deed, they may be created by the express words of the deed. See 1 *Saund. R.* 186, note, and *Mr. Butler's note*, *Co. Lit.* 85, b. And see 1 *East*, 416; 2 *Barn. & A.* 810; 1 *Brod. & B.* 40; 4 *Russell*, 78.

IV. As to estates of inheritance, there can be no doubt but that the grantor, having a perpetual and durable interest in the estate, may share and divide it, or grant as many remainders over as he thinks proper. *Bac. Abr. tit. Remainder, 7th edit.*

Not only lands and tenements, but also rents, commons, estovers, or any other interest or profits *in esse*, wherein the grantor hath the absolute property to him and his heirs, may be granted with remainder over. *Plowd. 379; 9 Co. 48, 97.*

So, if one hath the office of park-keeper, forester, gaoler, sheriff, &c. to him and his heirs, he may grant those offices to one for life, remainder to another for life, &c. for *omne majus continet in se minus*; and as they are grantable over in fee, so may they be granted in succession to one for life, with remainders over, &c. *9 Co. 48; 1 And. pl. 201.*

It was formerly doubted whether there could be a remainder of a rent *de novo*; that is, whether a man seised of lands in fee could thereout grant a rent-charge to one for life or years, remainder to another in fee or in tail; and this doubt arose from the rent not having any existence before it was created, consequently, no reversion could be left to the grantor, out of which the remainder was to arise. But it is now settled that such grant in remainder is good, the grantor having the absolute interest in the estate out of which it is to arise, and his intention gives it, being for the whole, out of which the lesser estates are carved. But if he grant such rent for life or years, to one, without going further, he cannot after grant the reversion thereof to another, because he has no reversion in him. *2 Roll. Abr. 415; 2 Co. 70, 76; 2 Vent. 240; 1 Lev. 144; 1 Sid. 285; 2 Salk. 577; 2 Lutw. 1225; Moor, pl. 100. See Rent.*

The king may grant an estate in an office, to commence in futuro, or on a contingency, for he hath no inheritance in the office as to the execution of it, but in point of interest only to grant. And there is a diversity between offices in fee existing, and such as are granted only for life; which, being as a new thing created, may, as a rent *de novo*, be granted to commence in futuro. *4 Mod. 275; 1 Ld. Raym. 52; Carth. 850; Salk. 465; Comb. 334.*

If one be created baron, viscount, earl, &c. by patent, and after, in the same patent, the same honour is granted to another in remainder, yet this operates as a new grant, and not as a remainder; for the king had no reversion of that honour in him, though he had still the same power of appointing one in succession to take it, as he had of granting it to the first. *Show. Parl. Ca. 5, 11.*

As to personal goods and chattels, it was formerly held that they, in their own nature, were incapable of any limitation over, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring a frequent circulation thereof, in which they differ from lands and tenements which are permanent; therefore, what is called an estate in lands is termed property in personal chattels. Wherefore it was held that a grantor's devise of a personal thing to one, though but for an hour or minute, was a gift for ever; and an absolute disposition of the entire property. *Bro. Devise, 18; Plowd. 521; Dyer, 74; 8 Co. 94.*

Hence it was a long time before the courts of justice could be prevailed upon to have any regard for a devise over, even of a chattel real, or a term for years, after an estate for life limited thereon; because the estate for life being, in the eye of the law, of greater regard and consideration than an estate for years, they thought he, who had it devised to him for life, had therein included all that the deviser had a power to dispose of; but now such remainders over are allowed under the name of executory devises, and are established both in courts of law and equity, provided they tend not to a perpetuity, so as to make estates unalienable. *4 New Abr. 294. See Executory Devise.*

Also a distinction was formerly taken between a devise of a personal chattel to one for life, with a remainder over, and of the use only; that in the first case the devisee for life had the absolute property; but not so in the second, for that the first devisee had not the property of the goods, but only a special interest in them, so that there still remained a property which might be limited over: but this distinction is now exploded, and the devisee in remainder is allowed in equity the like remedy in both cases. *Plowd. 521; Cro. Car. 346; 1 Roll. Abr. 610; March, 106; Owen, 33; 1 Ch. Ca. 129; 2 Vern. 245; 1 P. Wms. i. 502, 651; 2 Comm. c. 25. p. 398.*

But a devise of a term for years, or personal chattel, to one, for a day, or an hour, is a devise of the whole term or interest, if the limitation over is void, and it appears at the same time that the whole was intended to be disposed of from the executors. *1 P. Wms. 666.*

A. being possessed of a term for ninety-nine years, devised it to B. for life, and after to six others successively, for their lives, if the term so long continue; and all the seven persons being dead, and the term continuing, it was adjudged, that it should revert to the executors of the testator, and that it did not vest in the survivor of the devisees, so as to transmit it to his representatives. *1 Salk. 231; 1 Ld. Raym. 325.*

A farmer devised his stock (which consisted of corn, hay, cattle, &c.) to his wife for life, and after her death to the plaintiff. It was objected, that no remainder can be limited over of such chattels as these, because the use of them is to spend and consume them; but the Master of the Rolls said the devise over was good, but added, if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useless, the defendant was only to answer the value of them at the time of the sale; and an account was decreed to be taken accordingly. *Abr. Eq. 301.*

A. gives his sister, by will, 10*l.* and directs that such part of his personal estate, as his wife should leave of her substance, should go to the sister; whatever the wife has not employed in that way shall go over, and be accounted for. *1 P. Wms. 651.*

The above authorities show that a termor cannot create a life estate in his term with a remainder (using the word in its strict sense); but it would seem that such a remainder may be created in chattels real, where a termor carves out a less estate for years than his own, and gives over the residue of the term by way of remainder. *See Cornish on Remainders, 92; and 1 Burr. 282; 1 M. & S. 692.*

But if a chattel real, money, goods, or other personal things, are devised to one, and the heirs of his body, or to one, and, if he dies without heirs of his body, remainder over, by which the devisee has an estate-tail; this remainder is totally void, and the courts of equity will not allow of a bill by the remainder-man to compel security, &c. or to have the money, &c. after the death of the first devisee, but it shall go to his executors or administrators; for the first devise gives the absolute property of a personal estate, as the like devise of a real estate, before the statute *De donis*, gave the absolute fee, upon which no limitation could be made further; and as the heirs are the representatives to take the real estate, so are the executors to take the personal estate; and this is not within the statute *De donis*, but remains as at common law. *2 Vent. 349; 2 Vern. 600; 1 Salk. 156.*

If A. devise that his goods and furniture shall remain in his house, to be enjoyed, according to the limitations of his will, by those entitled to the house; the first, who would be tenant in tail of the house, becomes absolute owner of the goods. *See further, Executory Devise.*

V. THE word remainder is no term of art, nor is it necessary to create a remainder. So that any words, sufficient to show the intent of the party, will create a remainder; be-

cause such estates take their denomination of remainders, more from the nature and manner of their existence, after they are limited, than from any previous quality inherent in the word REMAINDER. To make them such, therefore, if a man gives land to A. for life, and that after his death the land shall revert, or descend, to B. for life, &c. this is a good remainder, and may be pleaded as such. 1 Roll. Abr. 416; Plowd. 29; 1 Roll. Rep. 319; Dyer, 125.

So, if lands are given to one, and the heirs male of his body, and to him, and the heirs female of his body; this limitation to the heirs female is a remainder; because it is not to take place till the estate to the heirs male is spent. Co. Litt. 377 a.

So, if lands are given to a widow, and to the heirs of the body of her late husband, on her begotten; this is a remainder to the heirs of the body of the husband; because it cannot take effect till after the widow's death, who has an estate for life. Co. Litt. 26, 200; 2 Mod. 210.

So, an estate limited to A. for life, or in tail, and after his decease, or for default of such issue, to B. and the heirs of his body, is good; though there be not the word remainder. So, if a lease be made to A. for life, and that after his death B. shall have the profit; this is a good remainder to B. Plowd. 159; Moor, pl. 54; Dyer, 125; 1 Roll. Rep. 319; Cro. Eliz. 10, 742.

So, a lease to A. for life, and that after his death his children shall have it, is a good remainder. 6 Co. 17 b; Raym. 83.

Nay, though an estate be limited expressly as a remainder, yet, if it be not so in construction of law, the word remainder will have no force to make it such. As, where A. seised of lands in fee, he and B. levied a fine to D. in fee, who granted and rendered to B. in tail, rendering rent to A., and if B. died without issue, *tenementa præd. integrè remanebunt* to A. and his heirs; B. suffered a common recovery, A. distrained for his rent: this was adjudged a reversion, and as such the rent passed with it to A., and was chargeable on the land in whose hands soever it came, by virtue of the contract, which cannot be destroyed by the recovery, though the reversion is thereby barred. Cro. Eliz. 727, 768, 792; Moor, pl. 795; Co. Litt. 299; Raym. 142.

If a lease be made to A. for eighty years, if he so long live, and if he die within the term, then the land to go over to another for the residue of the eighty years; this is a good remainder, because, though the term or interest be determined, yet the land and part of the years still remain; these years may be made the measure of the succeeding interest, as any other number of years may be. Cro. Eliz. 216; 1 Leon. 218; 1 Co. 153; 3 Leon. 195; 2 Roll. Abr. 415; Plowd. 198; Moor, 247, 520, pl. 441; 1 And. 259.

J. S. seised of lands in fee, by indenture, demises them to A. for life, *habendum* to B., D., and E., his three sons for their lives, and the life of the survivor of them successively; after the death of A., it was adjudged in this case: First, that if the sons could take, it must be by way of remainder, they not being parties to the deed; and then it must be as joint-tenants, which could not be by reason of the word "successively." Secondly, that they could not take in succession, for the uncertainty whose estate or interest was to commence first. Hob. 313; Hut. 37.

A., by indenture, makes a lease to B. for forty years, if A. so long live, and after his death to D. (who was no party to the deed), for one thousand years; and then A. levies a fine, and dies, and five years pass after his death, and then the plaintiff claiming under D. enters, &c.: this is no remainder at all to D.; for, first, presently it cannot vest by reason of the lessor's life interposing, therefore no remainder is vested. Secondly, as a contingent remainder, it cannot be good; because then it ought to have a particular estate to support it, and ought to be in abeyance, or contingency, to vest or not vest when that determines: but here the first lease is no such

particular estate, because that reaches not to the commencement of the remainder; nor is the remainder limited with regard to the particular estate, because it is not to commence on the determination of that, but at a future time, viz. on the death of the lessor; and there is no contingency in the case, for it is to take effect, at all events, on the death of the lessor, be it before or after the end of the term; therefore, it can be no other than a future *interesse termini*, to begin after the death of the party who grants it, which, being but for years, it may well do, because it enures by way of contract; and though the grantee there was no party to the deed, and therefore, as objected, could take nothing, yet it appears that judgment was given for the plaintiff; which proves, first, that the grantee had an interest; secondly, that this interest was not barred by the fine, and five years non-claim after the death of the grantor, not being touched, devested or turned to a right; thirdly, that though the grantee was no party to the indenture, yet he might well take by virtue thereof, if he gets the indenture to make out his title; for the grantor cannot derogate from his own grant, or avoid his own acts. Raym. 140.

We next come to consider the question, what shall be words of limitation, and what words of purchase.

In a grant of an estate in fee simple to A., it is necessary to give it to A. and his heirs: of an estate in fee-tail, to A. and the heirs of his body; and a grant to A. without any additional words, gives him only an estate for life. Hence the word *heirs*, and the words *heirs of the body* in the second, are said to be words of limitation; because they limit or describe what interest A. takes by the grant, viz. in one case a fee-simple, in the other a fee-tail; and the heirs, in both instances, take no interest, any farther than as the ancestor may permit the estate to descend to them. But if a remainder is granted, or an estate devised, to the heirs of A. where no estate of freehold is at the same time given to A., the heir of A. cannot take by descent from A.; but he takes by purchase under the grant, in the same manner as if the estate had been given to him by his proper name. Here the word *heirs* is called a word of purchase. 2 Comm. c. 11 p. 172, in n.

Further to elucidate this contested question, it may be proper to state the much talked-of rule in *Shelly's case*, and Mr. Fearn's definition of the terms words of limitation, and words of purchase.

The rule in *Shelly's case* is this:—When the ancestor by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee, or in tail, always in such cases the *heirs* are words of limitation, and not words of purchase. 1 Co. 104. And the remainder is said to be executed in the ancestor, where there is no intervening estate; or vested, where an estate for life or in tail intervenes. 2 Comm. c. 11, in n. Otherwise, (continues Coke,) if an estate for years is limited to the ancestor, the remainder to another for life, the remainder to the right of the lessee for years, then his heirs are purchasers, &c. 1 Co. 104.

Mr. Fearn, after examining the terms used by Coke, in laying down the above rule, and vindicating them from the charge of inaccuracy, to which Mr. Douglas had consigned them liable, seems to have fully settled the distinction between words of limitation and words of purchase, in the following manner.

When the words *heirs*, &c. operate only to expand an estate in the ancestor, so as to let the heirs described into its extent, and entitle them to take derivatively through or from him, as the root of succession, or person in whom the estate is considered as commencing, they are properly words of limitation; but when they operate only to give the estate imported by them, to the heirs described, originally, and as the persons in whom that estate is considered as commencing

and not derivatively from or through the ancestor, they are properly words of purchase. Lord Coke, in the rule above alluded to, very properly refers the word *purchase* to the express objects of limitation, viz. *heirs*, &c. And when such heirs, &c. originally acquire the estate by those words, he styles them words of purchase; otherwise, not. In general, words of *purchase* are those, by which, taken absolutely without reference to, or connexion with, any other words, the estate first attaches, or is considered as commencing in the person described by them; whilst words of *limitation* operate by reference to, or connexion with, other words, and extend or modify the estate given by those other words. This is evidently the line of distinction adopted by Lord Coke, and which pervades the terms of the rule in question; and is in fact admitted by all who do not deny the word *heirs*, in the common limitation to a man and his heirs for ever, to be words of limitation. But it is to be remarked, that when the words *heirs male of the body*, &c. operate as words of *purchase*, that is, when they do not attach in the ancestor, but vest in the person answering the description of such special heir, they appear to have a sort of equivocal or mixt effect: for though they give the estate to the special heir originally, and not through or from his ancestor, yet the estate which he so takes has such a reference to the ancestor, as to pursue the same course of succession, in the same extent of duration or continuance, through the same persons, as if it had attached in and descended from the ancestor. *Fearne's Cont. Rem.* 107—109, &c. edit. 1791.

If, then, an estate be given to A. for life, and after his death to the heirs of his body, this remainder is executed in A. or it unites with his estate for life; and the effect is the same as if the estate had at once been given to A. and the heirs of his body; which expression limits an estate-tail to A.; and the issue have no indefeasible interest conveyed to them, but can only take by descent from A. So also, if an estate be given to A. for life, with remainder to B. for life, or in tail, remainder to the heirs, or the heirs of the body of A.; in this case A. takes an estate for life, with a vested remainder in fee, or in tail: and his heir, under this grant, can only take by descent at his death. *Fearne*, 21. But in order that the estate for life, and the remainder in tail or in fee, should thus unite and coalesce, and heirs be a word of limitation, the two estates must be created by the same instrument, and must be either both legal, or both trust estates. *Doug.* 440; 2 *T. R.* 444. The rule with regard to the execution or coalition of such estates seems now to be the same in equitable as in legal estates. 1 *Bro. C. R.* 206. And in all these cases where a person has an estate tail, or a vested remainder in tail, he can bar it and cut off the expectations or inheritance of his issue. *Doug.* 233.

In order, therefore, to procure a certain provision for children, the method was invented of granting the estate to the father for life, and after his death to his first and other sons in tail; for the words son or daughter were held to be words of purchase; and the remainder to them did not, like the remainder to heirs, unite with the prior estate of freehold. But if the son was unborn, the remainder was contingent, and might have been defeated by the alienation of the father, by forfeiture, fine, or recovery; though a conveyance of a greater estate than he has by bargain and sale, or by lease and release, is no forfeiture, and will not defeat a contingent remainder. 2 *Le. 60*; *1 Mod* 151. To prevent this alienation by tenant in tail, it was necessary to determine trustees, to whom the estate is given upon such a contingent estate, if at all, comes into existence; and this they are said to support and preserve the contingent remainders. This is called a strict settlement, and is the only mode (executory devises excepted) by which a certain and indefeasible provision can be secured to an unborn child. But, in the case of articles or covenants before marriage, for

making a settlement upon the husband and wife, and their offspring, if there be a limitation to the parents for life, with a remainder to the heirs of their bodies, the latter words are generally considered as words of purchase, and not of limitation. And a court of equity will decree the articles to be executed in strict settlement. See *Fearne*, 124, and the examples there cited. It being the great object of such settlements to secure fortunes for the issue of the marriage, it would be useless to give the parents an estate tail, of which they would almost immediately have the absolute disposal. And therefore the courts of equity will decree the estate to be settled upon the parent or parents for life; remainder (or, upon the determination of such estate for life by forfeiture) to trustees, to support contingent remainders, for their lives; remainder (after the decease of the parents) to the first and other sons successively in tail; with remainder to all the daughters in tail, as tenants in common; with subsequent remainders, or provisions, according to the occasions and intentions of the parties.

In these strict settlements, the estate is unalienable till the first son attains the age of twenty-one; who, if his father is dead, has then, as tenant in tail, full power over the estate; or, if his father was living, the son could formerly bar his own issue by a fine, independent of the father. *Cruise*, 161. See *Fine*. But the father, and the son at that age, can cut off all the subsequent limitations, and dispose of the estate in any manner they please, formerly by joining in a common recovery, and now by the mode of assurance recently substituted for a recovery. See *Recovery*, and *ante*, 11. This is the origin of the vulgar error, that a tenant of an estate-tail must have the consent of his eldest son to enable him to cut off the entail; for that is necessary, where the father has only a life-estate, and his eldest son has the remainder in tail.

But there is no method whatever of securing an estate to the grandchildren of a person who is without children at the time of the settlement; for the law will not admit of a perpetuity: which has been defined to be "any extension of an estate beyond a life in being, and twenty-one years after." 2 *Bro. C. R.* 30. See *Executory Devise*. Hence, where in a settlement the father has a power to appoint an estate to or amongst his children, he cannot afterwards give this to his children, in strict settlement, or give any of his sons an estate for life, with a remainder in tail to his eldest son: for if he could do this, a perpetuity would be created by the original settlement. 2 *T. R.* 241. See 2 *Comm.* c. 11, in n.

From what has been imperfectly stated under this title, the student will observe how much nicety is required in creating and securing a remainder; and, in some measure, see the general reasons upon which this nicety is founded. It were endless to attempt to enter upon the particular subtleties and refinements into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided. It has been already hinted, (see *ante*, IV.) that in devises by last will and testament, (which being often drawn up when the party is *mors condis*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, fore-thought, and advice,) remainders may be created, in some measure, contrary to the rules laid down: though lawyers will not allow such dispositions to be strictly remainders; but call them by another name, that of executory devises, or devises hereafter to be executed; as to which see further this Dictionary, under that title.

The descent of remainders was, until recently, governed by different rules from estates in possession, but by a late statute both are now placed on the same footing. See *Descent*.

With respect to the time within which persons claiming in remainder must pursue their rights, see the provisions of the recent statute, under the title, *Limitation of Actions*, II. 1.

For more information on this subject, see *Bac. Ab. tit. Remainder*, (7th ed.); *Vin. Ab.* title *Remainder*: this Dict. titles

Executory Devise, Recovery, Tail; and, for a clear and comprehensive statement of this abstruse branch of legal learning, Fearne's valuable essays on contingent remainders and executory devises. See also *Cornish on Remainders*, an excellent treatise.

REMANENTES, *remansi*, belonging to]—*de hominibus sive tenentibus qui huic manerio remansi sunt. Domesday.*

REMEDY, *remedy*.] The action or means given by law for the recovery of a right; and it is a maxim of law, that whenever the law giveth any thing, it gives a remedy for the same.

REMEMBRANCERS, *rememoratores*.] Formerly called clerks of the remembrance; officers of the exchequer, of which, until recently, there were three, distinguished by the names of the king's remembrancer, the lord treasurer's remembrancer, and the remembrancer of first fruits. Upon their charge it lies to put the lord treasurer and the justices of that court in remembrance of such things as are to be called on and dealt in for the king's benefit.

The king's remembrancer enters in his office all recognizances taken before the barons for any of the king's debts, for appearances, &c.; and he takes all bonds for such debts, and makes out process for breach of them; also he writes process against the collectors of customs, subsidies, excise, and other public payments for their accounts. All informations on penal statutes are entered and sued in his office; and he makes the bills of composition on penal laws, and takes the instalment of debts. And all matters of English bills in the exchequer chamber remain in the office of this remembrancer. He has delivered into his office the indentures, fines, and other evidences, which concern the passing any lands to or from the king. In *Crastino Annuarum*, yearly, he reads in the court the oath of all the officers of the court, when they are admitted. Writs of prerogative, or privilege, for officers and ministers of the court, are made out by him; and commissions of nisi prius, by the king's warrant, on trial of any matters within his office. At the assizes in the country he hath the entering of judgments, of pleas, &c. And all differences touching irregularities in proceedings shall be determined by the king's remembrancer; who is to settle the same, if he can, and give costs where he finds the fault; but, if not, the court is to determine it, &c.

By order of court, his majesty's remembrancer, or his deputy, are diligently to attend in court, and to give an account touching any proceedings as they shall be required; and they enter the rules and orders of the court.

By 57 Geo. 3. c. 60. for regulating certain offices in the Court of Exchequer in England, it was enacted that after the termination of the existing interests in the offices of king's remembrancer, and as soon as the office should become vacant by death, resignation, &c. the duties thereof should be discharged in person, and not by deputy; and the lords of the Treasury were required to regulate the duties, emoluments, and establishments, of the said office accordingly. The fees of the office so regulated to continue chargeable, and be applicable to the future salaries: the surplus, if any, to be applied to the public use.

The treasurer's remembrancer issued out process of *fiat facias* and extents, for debts to the king, and against sheriffs, escheators, &c. not accounting. He took the accounts of all sheriffs, and made the record, whereby it appeared whether sheriffs, and other accountants, paid their proffers due at Easter and Michaelmas; and he made another record, whether sheriffs, and other accountants, kept their days prefixed. There were also brought into his office all the accounts of customers, comptrollers, and accountants, to make entry thereof on record. All estreats of fines, issues, and amerciaments, set in any of the courts at Westminster, or at the assizes, or sessions, were certified into his office; and by him delivered to the clerk of the estreats, to make out process on them; and he might issue process for discovery of

tenures; and all such revenue as was due to the crown by reason thereof, &c.

By the 3 & 4 Wm. 4. c. 99. the office of the lord treasurer's remembrancer was, with the offices connected therewith, abolished. Part of the duties of this office had been previously transferred to other offices; part ceased by the act, and the remainder are to be performed by his majesty's remembrancer.

The remembrancer of the First Fruits' Office is to take all compositions, and bonds for payment of first fruits and tenths, he makes process against all such persons as do not pay the same. 5 Rich. 2. st. 1. c. 14; 37 Edw. 3. c. 4.

REMISSION. A pardon from the king, and passed under the great seal, the taking of which is a confessing the fault. *Scotch Law Dict.* These remissions do not prevent a private party from pursuing for damages. See *Pardon*.

REMITTER, from the Lat. *remittere*, to restore, or send back.] An operation in law; upon the meeting of an ancient right, remediable, and a latter (defeasible) estate, in the same person; (the latter being cast upon him by law; whereby the ancient right is restored and set up again; and the new defeasible estate ceased; and thus he is in, of his first or better estate. See 1 Inst. 347, b; Litt. § 659.

The reason of this invention of the law is in favour of right; and that title which is first, and most ancient, is always preferred. *Dyer*, 68; *Finch's Lam*, 119.

A remitter must be to a precedent right: for regularly to every remitter there are two incidents, viz. an ancient right and a defeasible estate of freehold coming together. *Dart and Stud.* c. 9; *Wood's Inst.* 528.

Remitter is classed (with retainer), by Blackstone, among those remedies for private wrongs which are effected by the mere operation of law; and is defined to be, where he who hath the true property, or *jus proprietatis*, in lands, but is out of possession thereof, and hath no right to enter, without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and, of course, defective title. In this case, he is remitted, or sent back, by operation of law, to his ancient and more certain title.

The right of entry, which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one, and his defeasible estate shall be utterly defeated and annulled by the instantaneous act of law, without his participation or consent. *Litt.* § 659; *Co. Litt.* 358; *Cro. Jac.* 149.

But if the subsequent estate, or right of possession, be gained by a man's own act or consent, as by immediate purchase, being of full age, he shall not be remitted; for the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right. *Co. Litt.* 348, 350. Therefore, it is to be observed, that to every remitter there are regularly these incidents; an ancient right and a new defeasible estate of freehold, uniting in one and the same person; which defeasible estate must be cast upon the tenant, not gained by his own act or folly. The reason given by Littleton, why this remedy, which operates shortly, and by the mere act of law, was allowed, is because, otherwise, he who hath right would be deprived of all remedy. *Litt.* § 661.

The above distinctions may seem superfluous to an law observer, who perhaps would imagine, that since the law hath now both the right, and also the possession, it signifies by what means such possession shall be said to be gained. But the wisdom of our ancient law derives nothing in vain. As the tenant's possession was gained by a defective title, it was liable to be overturned by showing that defect, in a writ of entry; and then he must have been driven to his writ of right to recover his just inheritance, which would have been doubly hard, because, during the time he was himself tenant, he could not establish his prior title by any possessory action. The law, therefore, sent to

him to his prior title, or puts him in the same condition as if he had recovered the land by action. Without the remitter, he would have had *jus et seisinam* separate; a good right, but a bad possession. Now, by the remitter, he hath the most perfect of all titles, *juris et seisinæ conjunctionem*. 3 *Comm.* c. 10, p. 190.

There shall be no remitter to a right, for which the party has no remedy by action: as if the issue in tail be barred by the fine or warranty of his ancestor, and the freehold is afterwards cast upon him; he shall not be remitted to his estate-tail: for the operation of the remitter is exactly the same, after the union of the two rights, as that of a real action would have been before it. As then the issue in tail could not, by any action, have recovered his ancient estate, he shall not recover it by remitter. See *Co. Litt.* 349; *Mour.* 115; 1 *And.* 286; 3 *Comm.* 19; and 1 *Inst.* 347, a, in n.

And now by the recent statute of limitations, 3 & 4 *Wm.* c. 27, § 34, the right and title to lands is wisely extinguished when the party is barred by that act of his remedy by entry or action.

There were formerly three degrees of title where a person, dispossessed of his lands, acquired them, in the view of the law, independent of any anterior right. Thus, if A. was dispossessed by B., who then possessed as B., it was a mere naked possession, unsupported by any right, and A. might restore his possession, and put a final end to the possession of B., by a writ of right, without any previous action: but if B. died, the possession descended on his heir by act of law: in this case, the heir came to possession of the land by a lawful title, and acquired in the eye of the law, an apparent right of possession, which was so far good against the person dispossessed, that he lost his right to recover the possession by entry, and could only recover it by an action of law. The actions used in these cases were called

possessory actions. But if A. permitted the possession to be withheld from him beyond a certain period of time, without claiming it, or suffered judgment in a possessory action to be given against him by default, or if he agreed in tal. to make a discontinuance: in all these cases B.'s title was strengthened, and A. could no longer recover by a possessory action; and his only remedy then was, by an action on the right: these last actions were called *droiturel* actions, and were the ultimate resource of the persons dispossessed. Now if, at any of these three stages of the adverse fact, the dispossessor, without any fault in him, came to the possession of the estate by a defeasible title, he was considered to be in, not as of his new right, but as of his ancient and better right; and, consequently, the right of the person, who supposing the dispossessed still to be in as of his defeasible estate, would be entitled to the lands, upon the cession or determination of that estate, was gone for ever. In these circumstances, the dispossessed was said to be remitted to his ancient estate: the principal reason whereof was, as has already been stated, that the person so remitted could not seek to enter upon the estate, so that in those cases where the possession was recovered by entry, the remitter had the effect of an entry. In those cases where the estate was recoverable by action, it had the effect of a judgment at law: but since there was no remitter where the person came to the defeasible estate, came to it by his own act, or his own assent; hence the defeasible estate to enable the party to be remitted, must have been made to him either by descent, or must have come to him by descent, or act of law: neither was there any remission where the ancient estate was not recoverable either by action or by entry. So that in those cases where the dispossessed was beyond the three stages just alluded to, if he afterwards came to the estate by a defeasible title, he remained seized as of that estate, and is not remitted to his more ancient title. 1 *Inst.* 347 b, in n. See *Release*, 1.

Now by the 3 & 4 *Wm.* c. 27, § 39, no descent cast after

December, 1833, shall toll or defeat any right of entry or action for the recovery of land; and by § 36, all real and mixed actions are with a few exceptions abolished.

The doctrines of the common law respecting remitter were greatly altered by 27 *Hen.* 8. c. 10; that statute executes the possession to the party in the same plight, manner, and form as the use was limited to him. It operates only with respect to the first taker, and therefore the issue of the issue is remitted.

Lands are given to a man and his wife, and the heirs of their two bodies; and after the husband alienates the land in fee, and then takes back an estate to him, and his wife, for their lives; here they will both be remitted: but if he take an estate again to himself for life, remitter will not be allowed against his own alienation. *Co. Litt.* 354.

When the entry of a person is lawful, and he takes an estate in the land for life, or in fee, &c. (except it be by matter of record, or otherwise to conclude or estop him,) he shall be remitted. *Co. Litt.* 363. And a remitter to one in possession, may be a remitter to another in remainder, if the remainder be not bound, which estops it. *Cro. Car.* 14.

A father was tenant for life, remainder to his son for life, remainder to the right heirs of the body of the father; he and his son conveyed the lands to the uncle in fee, who died without issue; so that the son, who was heir in tail to the father, was now heir at law to the uncle, and the fee descended on him; the wife of the uncle brought dower, but the son being remitted to his former estate, no dower accrued to the wife, for the estate of which she claims dower is gone. 1 *Leon.* 37; 9 *Rep.* 136.

Where a person lets land for term of life to another, who granteth it away in fee; if the alienee make an estate to the lessor, it will be a remitter to him, because his entry is lawful. *Litt.* § 694.

Many questions as to remitter formerly arose out of cases where a discontinuance had been effected of lands which took away the right of entry; but by the 3 & 4 *Wm.* c. 27, § 39, no discontinuance subsequent to December, 1833, shall toll or defeat any right of entry or action for the recovery of land. See further *Discontinuance*.

For more learning on this subject, see 18 *Fin. Abr.* *Remitter*.

REMITTITUR. In cases of appeal, the record itself, or a transcript thereof, is sent from the court of B. R. to the Exchequer Chamber, or House of Lords: when judgment is given in the superior court, or the writ of error abates, or is discontinued, the record or transcript is returned (*Remittitur*, sent back,) to the court of K. B., and the entry of this circumstance is termed a *Remittitur*. See *Tidd's and Sellen's Pract.*

There is also a *Remittitur* or release of damages. See *Damages*, II.

REMOVAL OF THE POOR. See *Poor*, VI.

REMOVER, is where a suit or cause is removed out of one court into another; and for this there are divers writs and means. 11 *Rep.* 41. Remanding of a cause, is sending it back into the same court, out of which it was called and sent for. *March.* 106. See *Appeal*; *Habeas Corpus*.

RENANT, or rather *reniant*, i. e. *negans*, denying; from the *Fr. renier*, *negare*, to deny or refuse. 32 *Hen.* 8. c. 2.

RENCOUNTER, a sudden meeting, as opposed to a duel which is deliberate. See *Homicide*.

RENDER, *Fr. rendre*, *Lat. reddere*,] To yield, give again, or return.

This word was used in levying a fine, which was either single, where nothing was rendered back by the cognisee; or double, when it contained a grant and render back again of the land, &c. to the cognisor. *West's Synb.* See *Fine of Lands*.

There are certain things in a manor which lie in *prender*, that is, which may be taken by the lord or his officers when

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they happen, without any offer made by the tenant, such as escheats, &c.; and certain which lie in *render*, i. e. must be rendered or answered by the tenant, as rents, heriots, and other services: also some services consist in seisin; and some in *render*. *West's Symb. par.* 2; *Perkin's Res.* 696.

RENOVANT, from *renovare*, to renew, or make again.] A parson sued one for tithes, to be paid of things *renovant*, &c. *Cro. Jac.* 480. See *Tithes*.

TO RENOUNCE, to give up a right. See *Renunciation*.

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REDDITUS,] Said to be from *redeundo*, because *Retroit et quotannis redit*. *Fleta*, lib. 3. c. 14. Rather *à reddendo*, from its being rendered. See *post*; and title *Deed*. A sum of money, or other consideration, issuing yearly out of lands or tenements. *Plowd.* 132. 188. 141. Generally taken as the consideration payable by a tenant for lands, or tenements held under a lease or demise.

Rents are classed, by *Blackstone*, among incorporeal hereditaments. The word rent or render, *redditus*, according to him, signifies a compensation or return, it being in the nature of an acknowledgment, given for the possession of some corporeal inheritance. See 1 *Inst.* 144.

It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a profit; yet there is no occasion for it to be, as it usually is, a sum of money; for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered by way of rent. *Co. Litt.* 142.

But it cannot be part of the profits demised, as the herbage or vesture of the land, for that would be an exception out of the grant, not a rent reserved. *Co. Litt.* 47 a.; 2 *Com.* 41.

It may also consist in services or manual operations; as, to plough so many acres of ground, to attend the king or the lord to the wars, and the like; which services, in the eye of the law, are profits.

This profit must also be certain; or that which may be reduced to a certainty by either party. It must also issue yearly; though there is no occasion for it to issue every successive year; but it may be reserved every second, third, or fourth year: yet as it is to be produced out of the profits of lands and tenements as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise, and are annually renewed. It must issue out of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always part of the thing granted. *Plowd.* 13; 8 *Rep.* 71.

It must, lastly, issue out of lands and tenements corporeal; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain. Therefore, a rent, strictly speaking, cannot be reserved out of an advowson, a common, an office, a franchise, or the like; but a grant of such annuity or sum (e. g. by a lessee of tithes, or other incorporeal hereditament,) may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt for the amount of the rent agreed upon; though it doth not affect the inheritance, and is no legal rent in contemplation of law. 1 *Inst.* 47. 144. See 2 *Woodd.* 69. and *post*, II. *ad fin.* The king however might always reserve a rent out of incorporeal hereditaments: the reason of which is, that he, by his prerogative, can distrain on all the lands of his lessee. 1 *Inst.* 47. a in n.

So rent cannot issue out of personal chattels: and where chattels are demised with land, the whole rent shall issue out of the land. 2 *Wils.* 375.

I. Of the Nature and Properties of the several Sorts of Rent.

II. Statutes concerning Rent: and of the remedies for

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recovery thereof: See also *Distress*; *Ejectment*; *Sufferance*.

III. In what cases a demand for Rent is necessary.

IV. Of the time of demanding Rent, and the place where the demand is to be made.

I. THERE are, at common law, three manner of rents; rent-service, rent-charge, and rent-seck. *Litt.* § 213.

Rent-service is so called, because it hath some corporeal service incident to it; as, at the least, fealty, or the feudal oath of fidelity. 1 *Inst.* 142. For, if a tenant holds his land by fealty, and 10s. rent; or by the service of ploughing the lord's land, and 6s. rent; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or *arrear*, at the day appointed, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. *Litt.* § 215.

The services are of two sorts, either expressed in the lease or contract, or raised by implication of law. When the services are expressed in the contract, the *quantum* must be either certainly mentioned, or be such as, by reference to something else, may be reduced to a certainty; for if the lessor's demands be uncertain, it is impossible to give him an adequate satisfaction or compensation for them, as the jury cannot determine what injury he has sustained. *Co. Litt.* 95. a; *Stil.* 397; 2 *Ld. Raym.* 1160.

The services implied are such as the law obliges the tenant to perform when there are none contracted for in the grant; and these are more or less, according to the duration of the gift; as at common law, before the statute *quoniam emporum terrarum*, if the tenant made a feoffment in fee without any reservation of services, the feoffee held by the same services by which the feoffor held over; because the services being an incumbrance on the land, which the tenant could not discharge without his lord's consent, must follow the land, into whose hands soever it comes. *Co. Litt.* 22. a.

A rent-charge is where the owner of the rent hath no future interest, or reversion expectant, in the land; as where a man, by deed, maketh over to others his whole estate in fee simple, with a certain rent payable thereout; and adds to the deed a covenant or clause of distress, that if the rent be arrear, or behind, it shall be lawful to distrain for the same. In this case, the land is hable to the distress, not of common right, but by virtue of the clause in the deed: and therefore it is called a rent-charge, because in this manner the land is charged with a distress for the payment of it. *Inst.* 143.

A clear rent-charge must be free from the land-tax. *Doug.* 602.

Where a man seised of lands, grants by deed-poll, or indenture, a yearly rent to be issuing out of the same land, to another in fee, in tail, for life or years, with a clause of distress; this is a rent-charge, because the lands are charged with a distress by the express grant or provision of the parties, which otherwise it would not be. So, if a man make a feoffment in fee, reserving rent, and if the rent be behind, that it shall be lawful for him to distrain; this is a rent-charge, the word reserving amounting to a grant from the feoffee. *Litt.* § 217; *Co. Litt.* 170. a; *Plowd.* 134.

A rent granted for equality of partition by one coparcener to another, is a rent-charge, and distrainable of common right, without clause of distress; and although there be no tenure of the sister who grants it; for as the law, for the conveniency of coparceners, allows of such grants, it must consequently give a remedy to the grantee for recovery of it. *Litt.* § 252.

A rent-charge, granted for life by a tenant for years, is

good as a chattel interest, and the goods of a stranger, who is not shown to hold the premises by title paramount to the rent-charge, as by a prior mortgage, may be distrained for the arrears. 1 *Ad. & E. 19.*, S. C., 3 *N. & M.* 349.

An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burden imposed upon and issuing out of lands: whereas an annuity is a yearly sum chargeable only upon the person of the grantor. Therefore if a man by deed grant to another the sum of 20*l.* per annum, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity; which is of so little account in the law, that, if granted to an eleemosynary corporation, it is not within the statutes of Mortmain; and yet a man may have a real estate in it, though his security is merely personal. 2 *Comm. c. 3.* See 1 *Inst.* 144.

Rent-seck, *redditus sicus*, or harrin rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

A rent-seck is so called, because it is unprofitable to the grantee; as, before seisin had, he can have no remedy for recovery of it; as where a man seised in fee grants a rent in fee for life or years, or where a man makes a feoffment in fee or for life, remainder in fee, reserving rent, without any clause of distress, these are rents-seck; for which, by the policy of the ancient law, there was no remedy, as there was no tenure between the grantor and grantee, or feoffor and feoffee; consequently, no fealty could be due. *Litt. § 215*, 218; *Cro. Car.* 520; *Kelm.* 104; *Cro. Eliz.* 656.

And it hath been ruled in equity, where an annuity was devised by will to A., and the land subject to the annuity, to B., that B. should give seisin of the rent-seck to A., that he might have remedy for recovery of it at common law; it being the original intention of the gift, that the devisee should have some benefit from it. *Moor*, 626; 3 *Chan. C.* 24.

So, when a bill was brought for 3*l.*, for a rent of 5*s.* arrear for twelve years, the equity of the bill being that the deeds by which the rent was created were lost, consequently no remedy for the rent at law; the court, on the plaintiff's proving constant payment till the last twelve years, decreed the defendant to pay the arrears and growing rent; for aces, by payment, it was evident the plaintiff had a right to the rent, and that he could not, without deeds, make a title at law; therefore the court decreed the defendant to pay the rent, and so subjected his person, which possibly might not have been liable by the deed which created the rent. 1 *Chan. Ca.* 120. This was previous to 4 *Geo. 2. c. 28.* See *post*, II.

Though a rent is an incorporeal hereditament, it is susceptible of the same limitations as other hereditaments. Hence it may be granted or devised for life, or in tail, with remainders or limitations over. But there is this difference between an intail of lands, and an intail of rent; that the tenant in tail of lands, with the immediate reversion in fee in the donor, might, by a common recovery, bar the intail and the reversion. See *Recovery*. Whereas the grantee in tail of a rent *de novo*, without a subsequent limitation of it, i. e. acquired, by a common recovery only a base fee, determinable upon his decease, and failure of the issue in tail; but if there were a limitation of it in fee, after the limitation in tail, the recovery of the tenant in tail gave him the fee-simple. This was resolved in the cases of *Smith v. Farnby*, *Carth.* 52; *Sid.* 285; 2 *Keb.* 29, 55, 84; *Weeks v. Pauch*, *Lutw.* 1224; *Chaplin v. Chaplin*, 3 *P. Wms.* 229; 2 *Eq. Abr.* 384, 385.

The reason of this difference is, that it would be unjust that the conveyance of a grantee of a rent should give a longer duration or existence to the rent, than it had in its original creation. It is true that the barring of an estate-tail in land is equally contrary to the intention of the grantor.

But a rent differs materially from land. The old principles of the feudal law looked upon every modification of landed property, which was considered to be against common right, with a very jealous eye. Now a rent-charge was supposed to be against common right; the grantee of the rent-charge being subject to no feudal services, and being a burden on the tenant who was to perform them. Upon this principle the law, in every instance, avoided giving, by implication, a continuation to the rent, beyond the period expressly fixed for its continuance. Thus, if a tenant in tail of land die without issue, his wife is entitled to dower for her life out of the land, notwithstanding the failure of the issue; but the widow of a tenant in tail of rent is not entitled to her dower against the donor. So, if a rent is granted to a man and his heirs, generally, and he dies without an heir, the rent does not escheat, but sinks into the land. It is upon this principle, that, when there was not a limitation over in fee, a tenant in tail of rent acquired by his recovery no more than a base fee; as has been already stated: but if there were a limitation in fee, after the particular limitation in tail, the grantor had substantially limited the rent in fee; and therefore it was doing him no injustice, that the recovery should give the donee who suffered it an estate in fee simple. 1 *Inst.* 298, *a. in n.*

The case of *Chaplin v. Chaplin* was, that Lady Hanby, the grandmother of Porter Chaplin, being seised in fee, conveyed certain lands, to the use and intent that the trustees, named in the deed, should receive and enjoy a rent-charge of 30*l.* per annum, and to them and their heirs, with power to distrain for it, and to enter and hold the land on non-payment for forty days: and then the rent was declared to be to the use of Porter Chaplin in tail; remainder to the use of the same person who had the land in fee. P. C. died, leaving issue, who married, and died without issue; and the question was, Whether the widow was entitled to dower in this rent? and determined she was not. It is stated to have been afterwards disclosed to the Court, that the legal estate of the rent in fee was in the trustees: but it is observable, that it was not necessary that any new matter should be adduced to disclose this to the court, as it appeared on the face of the deed: for a conveyance to A. and his heirs, to the use and intent that B. and his heirs may receive a rent out of the estate, gives B. the legal fee of the rent: so that if it is afterwards declared that B. and his heirs are to stand seised of the rent to uses, the intended *cestuis que use* take only trust or equitable estates. If, therefore, it is intended to limit a rent in strict settlement, it is necessary to do it by way of grant at common law, to some person and his heirs, to the uses intended to be limited. This gives the grantee the mere seisin to the uses, and the uses declared upon it will be executed by the statute. See 1 *Inst.* 298, *a. in n.*

There are also other species of rents, which are reducible to these three. Rents of assize are the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied. 2 *Inst.* 19. Those of the freeholders are frequently called chief-rents, *redditus capitales*; and both sorts are indifferently denominated quit-rents, *quieti redditus*; because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were anciently called white-rents, or blanch farms, *redditus albi*; in contradistinction to rents reserved in work, grain, or baser money, which were called *redditus nigri*, or black mail. 2 *Inst.* 19. See those several titles. Rack-rent is only a rent of the full value of the tenement, or near it. A fee-farm rent is a rent-charge issuing out of an estate in fee; of at least one-fourth of the value of the lands, at the time of its reservation: for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee simple, instead of the usual method for life or years. 1 *Inst.* 143.

It seems that the quantum of the rent is not essential to create a fee-farm. See 1 *Inst.* 145, *b. n. 5.* And also, whether a fee-farm must necessarily be a rent-charge; or may not also be a rent-seck; and *Doug.* 605.

These are the general divisions of rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rents-seck, rents of assize and chief-rents, (if paid for three years within twenty years preceding the act, or if created since,) as in case of rents reserved upon lease. 4 *Geo. 2. c. 28. § 5.*

The rent in a lease must be reserved to the lessor, or his heirs, &c., and not to a stranger. See 1 *Inst.* 213 *b.* The principle which gave rise to this rule is, that rent is considered as a retribution for the land, and is therefore payable to those who would otherwise have had the land. It is to be observed, that remainder-men in a settlement, being at first view neither feoffers, donors, lessors, nor the heirs of feoffers, donors, or lessors, there seems to have been, for some time after the statute of Uses, a doubt whether the rents of leases, made by virtue of powers contained in settlements, could be reserved to them. In *Chudleigh's case*, 1 *Rep.* 159, it is positively said, that if a feoffment in fee be made to the use of one for life, remainder to another in tail, with several remainders over, with a power to the tenant for life to make leases, reserving the rent to the reversioners, and the tenant for life accordingly make leases: neither his heirs, nor any of the remainder-men, shall have the rent. But, in *Harcourt v. Pole*, 1 *Anders.* 275, it was adjudged, that the remainder-men might distrain in these cases: and in *T. Jones*, 36, the dictum in *Chudleigh's case* is denied to be law. The determination in *Harcourt v. Pole* will appear incontrovertibly right, if we consider that both the lessees and remainder-men derive their estate out of the reversion or original inheritance of the settler; and therefore the law, to use *Coke's* expression in *Whitlock's case*, 8 *Rep.* 71, will distribute the rent to every one to whom any limitation of the use is made. 1 *Inst.* 214, *a. in n.*; and see *Id.* 213, *b. in n.*

By the words "yielding and paying," in any indenture of lease, a covenant on the part of the lessee, to pay so much rent, is implied at law; and where the lease is not by deed, the law will imply a promise by the tenant to pay the landlord for his permission to occupy the premises. A special covenant, however, is generally inserted where there is a lease in writing. But in either case the payment of rent is obligatory upon the lessee, so long as he continues to hold the premises without obstruction on the part of the lessor, or such persons as the lessor may have covenanted against. 1 *Rol. Abr.* 519, *l. 26*; 8 *T. R.* 402; 9 *Ves.* 330; 1 *W. Saund.* 241, *b. n. (5).*

II. At common law where a man was seised of a rent-service, rent-charge, rent-seck, or fee-farm rent, either in fee or in tail, and died, neither his heir nor personal representative could recover from the tenant the arrears of rent which had become due in the testator's life-time. *Co. Lit.* 162, *a.* It was the same in the case of a tenant *pur autre vie* of a rent, who died, living *cestui que vie*; and where a man was seised of such a rent for his own life and died, though his executors or administrators might have had an action of debt for the arrears at common law, yet they had no power to distrain. *Ibid.*

To remedy these defects it was enacted by the 32 *Hen. 8. c. 37.* that the executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of life, of rents-service, rent-charges, rents-seck, and fee-farms, unto whom any such rent or fee-farm be due, shall have an action of debt for such arrears against the tenants, who ought to have paid in the life-time of their testator, or against their

executors and administrators, and distrain for the arrears on the land charged with the payment, so long as the lands continue in the seisin or possession of the tenant in demesne, who ought to have paid the rent or fee-farm, or in the seisin or possession of any other person claiming only from the same tenant by purchase, gift, or descent, in like manner as their testator might have done. § 1.

This act shall not extend to any manor in Wales, whereof the inhabitants have used to pay to every lord, at his first entry, any sum of money for discharge of all duties and penalties wherewith the inhabitants were chargeable to any of the lord's ancestors. § 2.

If any man have, in right of his wife, any estate in rents or fee-farms, and the same be unpaid in the wife's life, the husband, after the death of his wife, his executors and administrators, shall have action of debt for the arrears, or may distrain. § 3.

If any have any rents or fee-farms for term of life of any other person, and the rent, &c. be unpaid in the life of such person, and after the said person doth die, he to whom the rent or fee-farm is due, his executors and administrators, shall have an action of debt, or distrain for the same. § 4.

In a modern decision it was held, that the executor of a person who was seised in fee of land, and demised it for a term of years, reserving a rent, could not distrain for arrears of rent accrued in the testator's life-time, for the latter was not a tenant in fee-simple of a rent within the meaning of the above statute. 3 *B. & Ad.* 849.

Now, however, by the 3 & 4 *Will. 4. c. 42. § 37.* executors or administrators of any lessor or landlord may distrain upon the lands demised for any term, or at will, for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as he might have done in his lifetime.

By § 38, such arrearsages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been determined, provided such distress be made within six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant, from whom such arrears became due. Provided also, that all the powers and provisions in the statutes relating to distresses for rent, shall be applicable to the distresses made as aforesaid.

The only clause in the 12 *Car. 2. c. 24.* for converting military into common soccage tenures, which seems to affect rents, is a proviso (§ 5.) to preserve rents certain, and to make the reliefs on them universally the same as on the death of tenant in common soccage. 1 *Inst.* 162 *b. in n.*

By the 8 *Ann. c. 14.* no goods, upon any tenements leased, shall be taken by any execution, unless the party, at whose suit the execution is sued out, shall, before the removal of such goods, pay to the landlord of the premises, or his bailiff, all money due for rent for the premises; provided the arrears do not amount to more than one year's rent: and in case the arrears shall exceed one year's rent, then the party, paying the said landlord, or his bailiff, one year's rent, may proceed to execute his judgment: and the sheriff is required to levy and pay to the plaintiff, as well the money paid for rent, as the execution-money. § 1.

The act contains a proviso to prevent prejudice to the crown, in recovering and seizing debts, fines, and forfeitures. § 8. See *Ogilby v. Wiggate*, *Part Cas.*

Landlord died, and, after execution executed, administration is granted to A.; he is not entitled to a year's rent. 1 *Strange*, 97.

The administrator of the landlord may have an action against the officer for taking the goods in execution, and removing them from the premises before the landlord was paid a year's rent. 1 *Strange*, 212.

On motion on behalf of the landlord, the sheriff was ordered to pay him his year's rent, without deducting poundage. 1 *Strange*, 643.

The statute extends to the immediate landlord, and not to the ground landlord. 2 *Strange*, 787. After the landlord had been paid a year's rent on one execution, another execution came in, and he moved to be paid another year's rent on the last execution, but was denied; for the intent of the act was only to continue a lien as to one year, and to punish him for his laches if he lets more run in arrear. 2 *Strange*, 1024.

By the 1 *Wm. 4. c. 11.* the provisions of the last-mentioned statute are extended to cases of goods attached by writ of *pone per rados* or writ of extent thereon, issued out of the courts at Durham.

At common law the lessor of lands could only distrain during the continuance of the lessee's estate, where the term was express, the lessor's remedy by distress was gone. See *Co. Lit.* 47 b, 221 b, *note*. To remedy this defect it was enacted by the 8 *Geo. 2. c. 14. § 6. 7.* that it shall be lawful for any person having rent due or any lease for life, years, or at will determined, to distrain for such arrears after determination of the lease, provided that such arrears be due within six calendar months after the determination of such lease, and during the continuance of such land tenancy, and during the possession of the tenant from whom such arrears became due.

By 1 *Geo. 2. c. 28.* in case any tenant for life or years, or other person who shall come into possession of any lands, &c. under or by collusion of such tenant, wilfully hold over, after the determination of such term, and after demand made in writing, for delivering possession, such person holding over shall pay double the yearly value of the lands, &c. so determined. § 1.

In all cases between landlord and tenant, on the day's rent being in arrear, the landlord having a right by law to re-enter for non-payment, may, without any formal demand or re-entry, serve a declaration in ejectment, and in case of judgment or consent for confessing lease, entry, and ouster, it shall appear that half a year's rent was due before a declaration served, and no sufficient distress to be found, and that the lessor in ejectment had power to re-enter, the lessor in ejectment shall recover judgment. § 2.

As the statute dispenses with a demand for rent in those cases only where there is no sufficient distress on the premises, and six months rent in arrear, it is still necessary for the lessor to comply with all the formalities of the common law, before he can proceed on a clause of re-entry for non-payment of rent, if there is a sufficient distress on the premises. 7 *T. R.* 117. But an insertion in the proviso of the lease, that the right of entry shall accrue upon the rent being lawfully demanded, will not render a demand necessary if there is no sufficient distress, for it is only stating in express words that which is in substance contained by the principles of the common law in every proviso of this nature. 2 *M. & S.* 525; and see 2 *B. & C.* 490.

Lessees, &c. filing a bill in equity, shall not have an injunction against proceedings at law, unless they shall, within ten days after answer filed, bring into court such money as the lessors in their answer shall swear to be in arrear, over and above all just allowances and costs taxed, there to remain till the hearing of the cause, or to be paid to the lessors on good security, subject to the decree of the court; and in case such bill shall be duly filed and execution executed, the lessors shall be accountable for only so much as they shall really make of the premises from the time of their re-entry; and if the same shall happen to be less than the annual rent reserved, the lessees shall not be restored to the possession until they shall make up the deficiency to the lessors. § 3.

If the tenant, at any time before trial, tender or pay into

court all arrears with costs, proceedings on ejectment shall cease. § 4. It must be before trial. 7 *Last*, 360; 2 *B. & C.* 490.

Previous to the above statute, the courts both of law and equity had exercised a discretionary power of staying the lessor from proceeding at law, in cases of forfeiture for non-payment of rent, by compelling him to take the money really due to him. See *Andr.* 341; 2 *Salk.* 597; 8 *Mod.* 345; 10 *Mod.* 383; 2 *Vern.* 103; *Wils.* 75; 2 *Str.* 900.

In debt for double the yearly value under the 4 *Geo. 2. c. 18.* the plaintiff, after stating a demise to the defendant's wife, and the subsequent intermarriage with the defendant, alleged in the first count a notice to quit, and demand of possession delivered to the defendant and his wife; and in the second count alleged a notice to quit, and demand of possession delivered to the wife previous to the intermarriage, the Court of Common Pleas held that to support the second count the husband need not be joined for conformity; and that to sustain the action it was not necessary to have given a notice to the husband subsequent to the marriage. 1 *New R.* 174.

By the 11 *Geo. 2. c. 19.* it shall be lawful for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the tenements occupied by defendants, in an action on the case for the use and occupation of what was held; and if in evidence on the trial any parol demise or agreement, not by deed, whereon a certain rent was reserved, shall appear, plaintiff may make use thereof as an evidence of the quantum of the damages. § 14.

Where any tenant for life dies before or on the day on which any rent was reserved, on any demise which determined on the death of such tenant for life, the executors or administrators of such tenant for life may, in an action on the case, recover of the under-tenants, if such tenant for life die on the day on which the same was made payable, the whole, or if before such a day, then a proportion of such rent, according to the time so reserved for the year, or half year, or quarter, or other time, in which the rent was growing due, making all just allowances. § 15.

The above clause gives action on the case to executors of a lessor or landlord, being only tenant for his own life, where he dies before or on a rent day; and by his death the lease or demise determines; in which case the lessee or under-tenant, by the common law, might have avoided paying any rent. 1 *Inst.* 162 b, *in note*.

If any tenant holding tenements at a rack-rent, or where the rent reserved be full three-fourths of the yearly value of the premises, who shall be in arrear for one year's rent (see *post*), desert the premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears, it shall be lawful for two justices of the peace (having no interest in the premises), to go upon and view the same, and to affix, on the most notorious part, notice in writing what day (at the distance of fourteen days at least), they will return to take a second view; and if on such second view the tenant, or some person on his behalf, shall not appear and pay the rent in arrear, or there shall not be sufficient distress on the premises, the justices may put the landlord in possession; and the lease to such tenants as to any demise therein contained only shall become void. § 16.

In case any tenant give notice of his intention to quit, and shall not accordingly deliver up the possession at the time in such notice contained, the tenant, his executors or administrators, shall pay to the landlord double the rent which he should otherwise have paid. § 18.

The remedy given by this section of the act 11 *Geo. 2. c. 19.* is extended by the 57 *Geo. 3. c. 52.* to cases where half a year's rent is in arrear.

See also the provisions of the 1 *Geo. 4. c. 87.* and 1 *Wm. 1. c. 70.* under title *Ejectment*.

By the 11 Geo. 2. c. 19. above quoted, landlords are empowered to follow goods fraudulently and clandestinely removed off the premises within thirty days; but this applies to the goods of the tenant only, and not to those of a stranger. 5 M. & S. 38; 4 Campb. 136. See *Distress*.

See the 56 Geo. 3. c. 88. and 58 Geo. 3. c. 39. to amend the law of Ireland respecting the recovery of tenements, from absconding, overholding, or defaulting tenants, and for protection of the tenant from undue distress, by which many provisions of the English acts are extended to Ireland.

The general remedy for rent is by distress, under the restrictions and directions of the foregoing statutes, and as to which, see further at length, tit. *Distress*. But there are also other remedies particularized by *Blackstone*, 3 Comm. c. 15. which it will be sufficient here to notice in a summary manner, as they are treated of under the several titles in this Dictionary.

By action of debt for the breach of the express contract. This is the most usual remedy, when recourse is had to any action at all for the recovery of pecuniary rents; to which species of render almost all free services are now reduced since the abolition of the military tenures; but for a freehold rent reserved on a lease for life, &c., no action of debt lay by the common law during the continuance of the freehold out of which it issued; for the law would not suffer a real injury to be remedied by an action that was merely personal. 1 Rol. Abr. 595. But by the 8 Ann. c. 14. § 4. an action of debt is given for rents on leases for life or lives, as upon a lease for years; and by the 5 Geo. 3. c. 17. which enables ecclesiastical persons to lease tithes and other incorporeal inheritances, action of debt is given (by § 3) for recovery of rent on such leases; and perhaps the first of these statutes extends to leases of incorporeal hereditaments. See 1 Inst. 47 a, in note.

In debt for rent, without showing in what parish the lands were situated, and a particular of the demand describing them in a wrong parish, yet it was held that the plaintiff might recover, it not appearing that any misrepresentation was intended, or that defendant held more than one parcel of land of plaintiff, so as to be misled by the particular. 3 M. & S. 380.

Until recently an assize of *mort d'ancestor* or *novel disseisin* lay of rents as well as of lands, if the lord, for the sake of trying the possessory right, made it his election to suppose himself ousted or disseised thereof. This, however, was seldom heard of; and all other real actions to recover rent, being in the nature of writs of right, and therefore more dilatory in their progress, were entirely disused, and are now abolished. Such were the writ of *consuetudinibus et serviciis*, the writ of *cessavit*, and the writ of *right sur disclaimer*, as to which, see those titles, and also title *Gavellet*. On the other hand, the writ of *ne injuste vexes* (see that title), and the writ of *mesne* (see *Mean*), were remedies for the tenant against the oppression of the lord.

III. MANY of the decisions under this and the following division are, by reason of the statute remedies against non-payment of rent, become of less consequence than they were at the time of their determination, but seem still worthy of being preserved, as showing, in some measure, the evils remedied by those statutes.

With respect to the necessity of demanding rent, there is a material difference between a remedy by re-entry and a remedy by distress for non-payment of the rent; for where the remedy is by way of re-entry for non-payment, there must be an actual demand made previous to the entry, otherwise it is tortious; because such condition of re-entry is in derogation of the grant, and the estate at law being once defeated, is not to be restored by any subsequent payment; and it is presumed, that the tenant is there residing on the premises, in order to pay the rent for preservation of his es-

tate, unless the contrary appears by the lessor's being there to demand it: therefore, unless there be a demand made, and the tenant thereby, contrary to the presumption, appears not to be on the land ready to pay the rent, the law will not give the lessor the benefit of re-entry to defeat the tenant's estate, without a wilful demand in him, which cannot appear without a demand hath been actually made on the land. Co. Lit. 201 b; Hob. 207, 331; 5 Co. 56; Dyer, 51; Plowd. 70; 7 Co. 56; Vaugh. 32; this was at common law; but now see the 4 Geo. 2. c. 28. § 2; ante, Div. II. and tit. *Re-entry*.

So if there had been a *nomine pence* given to the lessor for non-payment, the lessor must demand the rent before he can be entitled to the penalty. Hut. 114; Hob. 207, 331. 7 Co. 56.

Where the remedy for recovery of rent is by distress, there needs no demand previous to the distress, though the deed says, that if the rent be behind, being lawfully demanded, that the lessor may distrain; but the lessor, notwithstanding such clause, may distrain when the rent becomes due. So it is if a rent-charge be granted to A., and if it be behind, being lawfully demanded, that then A. shall distrain. he may distrain without any previous demand, because this remedy is not in destruction of the estate, for the distress is only a pledge for payment of it, and the taking a distress is a legal demand of the tenant to pay the rent, which was all that was required by the deed; and the tenant is not injured by the taking of the distress, because, on tender of the rent, the pledges are immediately to be restored, or a writ of *detinue* lies after the quantum of the rent has been settled in the replevin; whereas in the case of re-entry, or of a penalty, the tenant is really injured, either by loss of his estate or the payment of a greater sum than the rent, which cannot be restored on payment of the rent; therefore he shall not be punished in such cases without a wilful default in law, which cannot otherwise appear than by the proof of a demand, which was not answered by the tenant. Hob. 207. Hut. 13, 23; Moor, 883; 2 Rol. Abr. 426.

But this general distinction must be understood with these restrictions:

That if the king makes a lease, reserving rent, with a clause of re-entry for non-payment, he is not obliged to make any demand previous to his re-entry; but the tenant is obliged to pay his rent for the preservation of his estate, because it is beneath the king to attend his subject to demand his rent. 4 Co. 73; 5 Co. 56; Latch. 23; Moor, 152; Dyer 87, 88.

But this exception is not to be extended to the duchy lands, though they be in the hands of the king, for the king must make a demand before he can re-enter into such lands; but this is by the 1 Hen. 4. c. 18. which provides, that when the duchy lands come to the king they shall not be under such government and regulations as the demesnes and possessions belonging to the crown. Moor, 149, 160.

So if a prebendary make a lease, rendering rent, and the rent be in arrear, and demanded, that it shall be lawful for the prebendary to re-enter, if the reversion in this case comes to the king, the king must in this case demand the rent, though he shall be by his prerogative excused of an implied demand; for the implied demand is the act of the law, the other the express agreement of the parties, which the king's prerogative shall not defeat. Therefore, in case of the king, if he makes a lease reserving rent, with a proviso that if the rent be in arrear for such a time (being lawfully demanded, or demanded in due form), that then the lease shall be void; it seems that not only the reversion in this case, but also the king himself, who continues the reversion in his own hands, is obliged to make an actual demand by reason of the express agreement for that purpose. Dyer, 87, 210.

But if the king, in cases where he need not make a demand, assigns over the reversion, the patentee cannot enter for non-

payment without a previous demand, because the privilege is inseparably annexed to the person of the king 4 Co. 73, *Moor*, 404; *Cro. Eliz.* 462; *Dyer*, 87.

Another exception is, where the rent is payable at a place off the land, with a clause that if the rent be behind, being lawfully demanded at the place off the land, or where the clause is, that if the rent be behind, being lawfully demanded of the person who is to pay it, that then he may distrain; in these cases, though the remedy be by distress only, yet the grantee cannot distrain without a previous demand; because there the distress and demand being not complicate, but different acts to be performed at different places and times, the demand must be previous to the distress; for distress is an act of grace, not of common right, and therefore must be used in the manner that it is given. *Hob.* 208; 2 *Roll. Abr.* 426; *Moor*, 83; *Braml.* 171; but see *Hut.* 23, *contra*.

But where the clause is no more than that if the rent be behind, being lawfully demanded (without saying at any place off the land, or of the person of the grantor), that then the grantee may distrain, there needs no actual demand; because there the distress and demand is but one complicate act, the one included in the other, and all done at one time and place, viz. on the land; for the distress is in itself a lawful act, and, therefore, needs no actual demands previous to it; because all that was required by the deed was a lawful demand, which the distress in its own nature is. 2 *Roll. Abr.* 426; *Hob.* 208; and see *Dyer*, 348. See *ante*, II.

And there seems to have been formerly another exception admitted, that where the remedy was by way of entry for non-payment, that yet there needed no demand if the rent were made payable at any place off the land; because they looked on the money payable off the land to be in nature of a sum in gross, which the tenant had at his own peril undertaken to pay; but this opinion has been entirely exploded, for the place of payment does not change the nature of the service, but it remains in its nature a rent as much as if it had been made payable on the land; therefore the presumption is that the tenant was there to pay it, unless it be overthrown by the proof of a demand; and without such demand, and a neglect or refusal, there is no injury to the lessor, consequently the estate of the lessee ought not to be defeated. *Plowd.* 70; 4 Co. 73; *Moor*, 408, 598; *Cro. Eliz.* 415, 436, 536.

But when the power of re-entry is given to the lessor for non-payment, without any further demand, there it seems that the lessee has undertaken to pay it, whether it be demanded, or not; and there can be no presumption in his favour in this case; because by dispensing with the demand he has put himself under the necessity of making an actual proof that he was ready to tender and pay the rent. *Dyer*, 68.

There is another exception when the remedy is by distress, and that is when the tenant was ready on the land to pay the rent at the day, and made a tender of it; there it seems there must be a demand previous to the distress; because, where the tenant has shown himself ready on the day by the tender, he has done all that in reason can be required of him; for it would put the tenant to endless trouble to oblige him every day to make a tender, it being altogether uncertain when the lessor will come for his rent when he has omitted to receive it the day he appointed by the lease for payment and receipt; wherefore as the lessee must expect the lessor, not may distrain for it at the day appointed, or else the lessor has lapsed the day of payment, and was not on the land to receive it, he must give the tenant notice to pay it before he can distrain; for the tenant shall be put to no trouble where it appears that he has omitted nothing on his part. *Hob.* 207. 2 *Roll. Abr.* 427.

And where the tender was made by a tenant on the land at the day, there a demand on the land is sufficient to justify a distress after the day; because the demand, in such case, is

of equal notoriety with the tender, and by parity of reason the tenant ought to take notice of such demand, as well as the lessor of the tender on the land. *Hob.* 207.

But if the tenant had tendered the rent on the day to the person of the lessor, and he refused it, it seems, by the better opinion, that the lessor cannot distrain for that rent, without a demand of the person of the tenant; because the demand ought to be equally notorious to the tenant as the tender was to the lessor. *Hob.* 207; 2 *Roll. Abr.* 427.

So, if the services by which the tenant holds be personal, as homage, fealty, &c. the demand must be of the person of the tenant, because this service is only performable by the very person of the tenant, therefore a demand where he is not, would be improper. *Hut.* 13; *Hob.* 207.

Again, if the rent be rent-seck, and the tenant be ready at the last instant of the day of payment to pay the rent, and the grantor is not there to receive it, he must afterwards demand it of the person of the tenant on the lands, before he can have his assize; because the tenant, by the tender at the day, has done all that was required on his part; and if the grantee might have his assize, after such tender on the day, without a demand of the person, the tenant might be made a disseisor, and damages for the disseisin might be laid on him without any wilful default in him; but in the case of a rent-charge, after such tender of the tenant on the land, the grantee may afterwards demand the rent on the land, because he has his remedy by distress, which is no more than a pledge for the rent; and this being to be found and taken on the land, the grantee need only demand his rent where he can find his remedy, which is on the land; but in this case, if the grantee cannot find the tenant on the land to demand the rent, he may, on the next feast on which the rent is payable, demand all the arrears on the land; and if the tenant is not there to pay it, he has failed of his duty, and is guilty of a wilful default, which amounts to a denial; and that denial being a disseisin of the rent, the grantee may have his assize, and by that shall recover the arrears. *Cro. Car.* 508; 7 Co. 57; *Hob.* 207; 2 *Roll. Abr.* 427.

But if there has been neither a tender of the rent nor a demand of the grantee on the day, there the grantee may afterwards demand the rent on the land; because the tenant having omitted to do his duty by a tender on the day, he is still obliged to answer the legal demands of the grantee, which is well made on the land, because the rent issues thereout; for where there is no tender on the day of payment, the rent is due and payable every day afterwards; therefore a demand in the same manner as the law requires, is sufficient; consequently the non-payment, after a demand on the land, is a denial and disseisin, for which the grantee may have his assize. *Litt.* § 233; 7 Co. 57; 2 *Roll. Abr.* 427.

If a lease be made, reserving rent, and a bond given for performance of covenants and payment of the rent, the lessor may sue the bond without demanding the rent. *Cro. Eliz.* 332; *Cro. Car.* 76; *Hob.* 8.

If there be several things demised in one lease, with several reservations, with a clause, that if the several yearly rents reserved be behind, or unpaid in part, or in all, by the space of one month, after any of the days on which the same ought to be paid, that then it shall be lawful for the lessor, into such of the premises, whereupon such rents, being behind, is or are reserved, to re-enter; these are in the nature of distinct demises and several reservations, consequently there must be distinct demands on each demise to defeat the whole estate demised. *Vaugh.* 71, 72. But see 4 *Geo.* 2. c. 28, § 2.

Also as to the necessity of a demand of the rent, there is a difference between a condition and a limitation; for instance, if tenant for life (as the case was by marriage settlement with power to make leases for twenty-one years, so long as the lessee, his executors or assigns, shall duly pay the rent reserved), make a lease pursuant to the power, the tenant is at

his peril obliged to pay the rent without any demand of the lessor; because the estate is limited to continue only so long as the rent is paid; therefore, for non-performance, according to the limitation, the estate must determine; as if an estate be made to a woman *dum sola fuerit*, this is a word of limitation which determines her estate on marriage. *Vaugh. 31, 32; Hob. 331; 2 Roll. Abr. 429; 2 Mod. 264; 3 Co. 64; Dyer, 87, 88; Noy, 145.*

Where a rent-charge is granted with power to the grantee, in case the rent should be in arrear for a time specified, to enter and enjoy the lands charged, and receive and take the rents and profits for his own use, until satisfaction of the arrears of rent and costs, the grantee may, on the rent-charge becoming in arrear, maintain ejectment against the tenant without proof of a previous demand of the rent, for it is not a case of forfeiture. *3 N. & M. 567.*

IV. RENT is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation. *Co. Litt. 201.* But in case of the king, the payment must be either to his officers at the Exchequer, or to his receiver in the country. *4 Rep. 73.* And, strictly, the rent is demandable and payable before the time of sun-set of the day whereon it is reserved, though perhaps not absolutely due till midnight. *Co. Litt. 302; 1 Anders. 253; 1 Saund. 287; Prec. Chanc. 555; Salk. 578.*

If the lessor dies before the sun is set on the day upon which the rent is demandable, it is clearly settled that the rent unpaid is due to his heir, and not to his executor; but if he dies after sun-set, and before midnight, it seems to be the better opinion that it shall go to the executor, and not to the heir. *1 P. Wms. 178.*

There is a material difference between the reservation of a rent payable on a particular day, or within a certain time after, and the reservation of a rent payable at a certain day, with a condition that, if it be behind by the space of any given time, the lessor shall enter; in both cases a tender on the first or last day of payment, or on any of the intermediate days, to the lessor himself, either upon or out of the land, is good; but in the former case it is sufficient if the lessee attends on the first day of payment at the proper place; and if the lessor does not attend there to receive the rent, the condition is saved. In the latter case, to save the lease, it is not sufficient that the lessee attends on the first day of payment, for he must equally attend on the last day. *10 Rep. 129 a; Plowd. 70 a, b; Cro. Eliz. 48. See 1 Inst. 202 a, in n.*

The other effects of this question of the time of the rent becoming due, are now in equal measure superseded by the statute regulations already stated and alluded to. But the following determinations on the subject may, notwithstanding, be requisite to be known.

The time for payment of rent, and consequently for a demand, is such a convenient time before the sun-setting of the last day as will be sufficient to have the money counted; *4 Taunt. 549; 1 Swanst. 343, note;* but if the tenant meet the lessor on the land at any time of the last day of payment, and tenders the rent, that is sufficient tender, because the money is to be paid indefinitely on that day, therefore a tender on the day is sufficient. *Co. Litt. 202 a; Dalst. 44; Sav. 258; 4 Leon. 171; 1 Saund. 287.*

If the rent be payable at Easter, and the tenant pays the rent in the morning of that day, and the lessor dies at two hours before noon of the same day, the payment is voluntary, and yet it is a good satisfaction against the heir. *10 Co. 127 b; and see 1 Swanst. 346; Henniker v. Turner, 4 B. & C. 157.*

If a lease is made rendering rent at Michaelmas between the hours of one and five in the afternoon, with a clause of re-entry, and the lessor comes at the day, about two in the afternoon, and continues to five, this is sufficient. *Cro. Eliz. 15.* The demand may be made by attorney. *4 Leon. 479.* But

the power must be special, for such land and of such tenant *Yels. 37; 1 Brownl. 138.* Demand must be proved by witnesses. *Dyer, 68.* Must be made of the precise sum due. *1 Leon. 305; Sav. 121; Mo. 207.*

If a lease be made reserving rent on condition that if the rent be behind at the day, and ten days after (being in the mean time demanded), and no distress to be found upon the land, that the lessor may re-enter; if the rent be behind at the day, and ten days after, and a sufficient distress be on the land till the afternoon of the tenth day, and then the lessee takes away his cattle, and the lessor demands the rent at the last hour of the day, and the lessee does not pay it, and there is not any distress on the land, yet the lessor cannot enter, because he made no demand in the mean time between the day of payment and the ten days, which by the clause he was obliged to do. *Cro. Eliz. 63.* But see *4 Geo. 2. c. 28* and *ante, II.*

As to the place of demanding rent, there is a difference between a remedy by re-entry and distress; for when the rent is reserved on condition that, if it be behind, the lessor may re-enter, in such case the demand must be upon the most notorious place on the land; therefore, if there be a house on the land, the demand must be at the fore-door thereof, because the tenant is presumed to be there residing, and the demand being required to give notice to the tenant, that he may not be turned out of possession without a wilful default, such demand ought to be in the place where the end and intention will be best answered. *Co. Litt. 153, 201; 2 Roll. Abr. 428.*

And it seems the better opinion, that it is not necessary to enter the house, though the doors be open, because that is a place appropriated for the peculiar use of the inhabitant, into which no person is permitted to enter without his permission, and it is reasonable that the lessor shall go no farther to demand his rent than the tenant should be obliged to go, when he is bound to tender it; and a tender by the tenant at the door of the house of the lessor is sufficient, though it be open without entering; therefore, by parity of reason, a demand by the lessor at the door of the tenant, without entering, is sufficient. *Dalst. 59; Co. Litt. 201; 1 And. 27; 3 Leon. 13* and see *Cro. Eliz. 13.*

But when the demand is only in order for a distress, then it is sufficient if it be made on any notorious part of the land, because this is only to entitle him to his remedy for his rent, therefore, the whole land being equally debtor, and chargeable with the rent, a demand on it, without going to any particular part of it, is sufficient. *Co. Litt. 153.*

See other cases on this subject, *Co. Litt. 202; B. Ind. 23; Cro. Eliz. 324; Cro. Car. 507, 521; Co. Litt. 1; 1 Roll. 4 Co. 73; Cro. Eliz. 462; Mo. 404; Dyer, 37; 2 Roll. Abr. 428; Dyer, 229; Bac. Ab. tit. Rent (ed. by Gorton & Dodd.)*

As to the apportionment of rent, see *Apportionment, Int. Estates.*

For the provisions of the recent Statute of Law Int. 3 (3 & 4 Wm. 4. c. 27), with respect to rents, see *Limitation of Actions, II. I.*

For more learning on this subject, see *18 Vin. Abr. in Rent; and see Distress, Ejectment, Lease, Rep. in Distress.*

RENTAL, corrupted from *rent-roll*. A roll where the rents of a manor are written and set down, by which the lord's bailiff collects the same. It contains the lands and tenements let to each tenant, and the names of the tenants, the several rents arising, and for what time, usually a year. *Compl. Court Keep. 475.*

RENTAL-RIGHT. A species of lease given usually at a low rent, and for life: where they were given to a tenant who, he heirs, they were a good ground of possession to the first heir after the decease of the original tenant. Such tenants were called *Rentals*, or *kindly-tenants*. See *Bell's Scot. & Int. Law*.

RENTAL'D TRIND BOLL, is when the trinds (tithes) have

been liquidated and settled for so many bolls of corn yearly, by rental or an old use of payment. *Scotch Dict.*

RENTS OF ASSIZE. The certain rents of freeholders and ancient copyholders; so called, because they were assised, and different from others, which were uncertain, paid in corn, &c. 2 *Inst.* 19. See *Rent*, I.

RENTS RESOLUTE, redditus resoluti. Are accounted among the fee-farm rents to be sold by 22 *Car.* 2. c. 6. being such rents or tenths as were anciently payable to the crown from the lands of abbots and religious houses; and after their dissolution, notwithstanding the lands were demised to others, yet the rents were still reserved, and made payable again to the crown. *Conell.*

RENUNCIATION. The act of renouncing a right; as executors may renounce or refuse to take probate of a will. See *Executors*.

REPARATIONS. A tenant for life or years may cut down timber-trees to make reparations, although he be not compelled thereto; and when a house is ruinous at the time of lease made, and the lessee suffers it to fall, he is not bound to rebuild it; and yet if he fell timber for reparations, he may justify the same. *Co. Litt.* 54.

Lessee covenants, that from and after the amendment and reparation of the houses by the lessor, he at his own charges will keep and leave them in repair. In this case the lessee is not obliged to do it unless the lessor first make good the reparations. And if it be well repaired at first, when the lease is made, and later it decays, the lessor must first repair before the lessee is bound to keep it so. *Cro. Jac.* 672; see also *Lease* c. 72; and *Covenant, Lease, Waste*.

REPARATIONE FACIENDA. An ancient writ which lay in many cases, one whereof was where there were tenants in common or joint-tenants of a house, &c. which was fallen into decay, and one was willing to repair it, but the others were not. In this case, the party willing to repair the same should have this writ against the others. *F. N. B.* 127.

And if a man had a house adjoining to my house, and he suffered his house to be in decay to the annoyance of my house, I might have had a writ against him to repair his house. So, if a person had a passage over a bridge, and another ought to have repaired the bridge, who suffered it to fall in decay, &c. *New Nat. Br.* 281.

REPEAL, from the Fr. *rappel*, i. e. *revocatio*.] A revocation; as the repealing of a statute is the revoking or disannulling it. *Rastal.*

It is said a pardon of felony, &c. may be repealed on disproving the suggestion. 1 *Keib.* 19. See *Pardon*. A deed or will may stand good as to part, and be repealed for the rest. *Style*, 241.

REPETUNDARUM CRIMEN. The crime of receiving a bribe to prevent justice. See *Barratry, Bribery, Extortion*, &c.

REPLEADER, replacitare. To plead again. See *Pleading* I. 3. *ad finem*.

Repleader is to be had where the pleading hath not brought the issue in question which was to be tried. Also, if a verdict be given where there was no issue joined, there must be a repleader to bring the matter to trial, &c. 2 *Lil.* 460.

It was held that, at common law, a repleader was granted before trial, because a verdict did not cure an immaterial issue; but that now a repleader ought never to be awarded before trial, because the fault in the issue may be helped by the statute of *joinders*. That if a repleader is denied where it should be granted, or *à converso*, it is error; and the judgment in repleader is general, (*viz.*) *quod partes replacent*. They must begin again at the first fault, which occasioned the immaterial issue; if the declaration and the bar, and the replication, be all ill, they must begin *de novo*; but if the replication be good, and the replication ill, they must begin at the replication, and no costs are allowed on either side.

and a repleader cannot be awarded after a default. 2 *Salk.* 579.

Though a repleader is allowed after verdict, it has been adjudged not to be awarded after demurrer; (but a repleader hath formerly been granted after demurrer, and likewise after the demurrer argued); and that a repleader can never be awarded after a writ of error, but only after issue joined, &c. *Litch.* 147; 3 *Lev.* 440; *Mod. Ca.* 102.

See the form of a Repleader, *Lutw.* 1622.

REPLEGIARE. To redeem a thing detained or taken by another, by putting in legal sureties. See *Replevin*.

Repleading is applied in the Scotch law to the power of reclaiming a criminal, and trying him under a different jurisdiction from that of the court before which he is accused.

REPLEGIARE DE AVERIIS. A writ brought by one whose cattle are distrained, or put in the pound, on any cause, by another person, on surety given to the sheriff to prosecute or answer the action at law. *F. N. B.* 68; *Reg. Orig.* 7 *H.* 8. c. 4. See *Replevin*.

REPLEVIN,

REPLEVIN, from *replere*, to redeliver to the owner on pledges; 1 *Inst.* 145 b; or, to take back the pledge. 3 *Comm.* 13. It is sometimes incorrectly used for the hauling a man.

- I. The Definition of the Term; and the general Principles of the Law of Replevin.
- II. More particularly for whom and for what Things a Replevin lies.
- III. Of the different Kinds of Replevins; out of what Courts they issue; and of the Power and Duty of the Sheriff.
- IV. 1. Of the Pledges to be taken by the Sheriff, and the Proceedings against him for taking insufficient Pledges.
2. Of the Pleadings and Damages.
- V. Of the Original Writ, and the Writ of Withernam.
- VI. 1. Of the Writ of second Deliverance; and,
2. The Writ De Proprietate probanda.
- VII. Of the Writ De Retorno habendo; of Return irreplevisable; and in what Manner the Sheriff is to return and execute such Processes.

I. A REPLEVIN is a remedy grounded and granted on a distress; being a re-deliverance of the thing distrained, to remain with the first possessor, on security (or pledges) given by him to try the right with the distrainer, and to answer him in a course of law. Or, it is bringing the writ called *replegiari facias* by him who has his cattle or goods distrained by another, and putting in surety to the sheriff, that on delivery of the thing distrained, he will prosecute the action against the distrainer. *Litt. lib.* 2. c. 12. § 219; 1 *Inst.* 145 b.

Replevin is a writ, and usually granted in cases of distress, and is a matter of right; so that if a man grants a rent with clause of distress, and grants further, that the distress taken shall be irreplevisable, yet it may be replevied; for such restraint is against the nature of a distress, and no private person can alter the common course of the law. *Co. Litt.* 145.

An action of replevin is founded upon, and is the regular way of contesting the validity of a distress; being a re-delivery of the pledge, or thing taken in distress, to the owner, by the sheriff or his deputy, upon the owner's giving security to try the right of the distress, and to restore it if the right be adjudged against him; after which, the distrainer may keep it till tender made of sufficient amends, but must then redeliver it to the owner. 3 *Comm.* c. 9. p. 147, cites 1 *Inst.* 145; 8 *Rep.* 147.

In other words, a replevin is a judicial writ to the sheriff complaining of an unjust taking and detention of goods and chattels, commanding the sheriff to deliver back the same to the owner upon the security given to make out the injustice of such taking, or else to return the goods and chattels. *Gilb. on Replev.* 80.

The remedy of replevin, though seldom used except in cases of distress, seems equally applicable to other cases of wrongful taking. See Lord Redesdale's remarks, 1 *Sch. & Lef.* and Lord Ellenborough's, 2 *Stark. Ca.* 287; *Bac. Abr.* v. 7. p. 67.

In this writ or action both plaintiff and defendant are called actors; the one, i. e. the plaintiff, suing for damages; and the other, the avowant or defendant, to have a return of the goods or cattle. 2 *Bendl.* 84; *Cro. Eliz.* 799; 2 *Mod.* 149. Therefore, either party may carry down the cause; and if the defendant give notice, and do not go on to trial, the court will give costs against him; for the same reason, the defendant may not move for judgment of non-suit unless the plaintiff has given notice of trial. *Bull. N. P.* 61.

That the avowant (the person making the distress) is in nature of a plaintiff, appears, 1st, from his being called an actor, which is a term in the civil law, and signifies plaintiff; 2dly, from his being entitled to have judgment *de retorno habendo*, and damages, as plaintiff; 3dly, from this, that the plaintiff may plead in abatement of the avowry, consequently, such avowry must be in nature of an action. *Carth.* 122; 6 *Mod.* 103; *Yelv.* 148.

The avowant, being in nature of a plaintiff, need not aver his avowry with an *hoc paratus est verificare*, more than any other plaintiff need aver his count. *Plowd.* 263. See *post*, IV.

Nor shall he have a protection cast for him more than any other plaintiff. 2 *Inst.* 339.

But though an avowry be in nature of an action, yet one tenant in common may avow for taking cattle damage feasant. *Cro. Eliz.* 530.

Replevin is an action founded on the right, and different from trespass. *Carth.* 74; *Yelv.* 148; *Hob.* 16; *Cro. Eliz.* 799.

It is now held, that as no lands can be recovered in this action, it cannot with any propriety be considered as a real action; though the title of lands may incidentally come in question, as it may do in an action of trespass, or even of debt, which are actions merely personal. *Finch's Law*, 316; and see *Comb.* 476; *Fitzg.* 109.

Formerly, when the party distrained upon intended to dispute the right of the distress, he had no other process by the old common law than by a writ of replevin, *replegiari facias*; which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice, in respect to the matter in dispute, in his own county court. *F. N. B.* 68. But this being a tedious method of proceeding, the beasts or other goods were long detained from the owner, to his great loss and damage. 2 *Inst.* 139. For which reason, the statute of *Marlbridge*, (52 *Hen. 3.*) c. 21, directs, that without suing a writ out of the chancery, the sheriff immediately, upon plaint to him made, shall proceed to replevin the goods. See *post*, III. And for the greater ease of the parties, it is further provided by 1 & 2 *P. & M.* c. 12. that the sheriff shall make at least four deputies in each county for the sole purpose of making replevin. See *post*, III. Upon application, therefore, either to the sheriff or one of his said deputies, security is to be given in pursuance of the statute of *West. 2.* 13 *Edw.* 1. c. 2; 1st. That the party replevying will pursue his action against the distrainer; for which purpose he puts in *plegios de proseguendo*, or pledges to prosecute. 2dly. That if the right be determined against him, he will return the distress again; for which purpose he is also bound to find *plegios de retorno*

habendo. See *post*, IV. Besides these pledges, the sufficiency of which is discretionary, and at the peril of the sheriff, the 11 *Geo. 2. c. 19. § 23.* requires that the officer granting a replevin on a distress for rent shall take a bond with two sureties in a sum of double the value of the goods distrained, conditioned to prosecute the suit with effect and without delay, and for return of the goods, which bond may be assigned to the avowant or person making cognizance on request made to the officer, and, if forfeited, may be sued in the name of the assignee. See *post*, IV. And certainly as the end of all distresses is only to compel the party distrained upon to satisfy the debt or duty owing from him, this end is as well answered by such sufficient sureties, as by retaining the very distress, which might frequently occasion great inconvenience to the owner, and that the law never wantonly inflicts. The sheriff, on receiving such security, is immediately, by his officers, to cause the chattels taken in distress to be restored into the possession of the party distrained upon, unless the distrainer claims a property in the goods so taken. For if by this method of distress the distrainer happens to come again into possession of his own property in goods which before he had lost, the law allows him to keep them without any reference to the manner by which he thus has regained possession, being a kind of personal remitter. See *Remitter*. If, therefore, the distrainer claims any such property, the party replevying must sue out a writ *de proprietate probando*, in which the sheriff is to prove by an inquest in whom the property previous to the distress subsisted. *Finch. L.* 316. And if it be found to be in the distrainer, the sheriff can proceed no further, but must return the claim of property to the Court of King's Bench or Common Pleas, to be there further prosecuted, if thought advisable, and there finally determined. *Co. Litt.* 145; *Finch. L.* 450.

But if no claim of property be put in, or if (upon trial) the sheriff's inquest determine it against the distrainer, then the sheriff is to replevy the goods, (making use of even force if the distrainer makes resistance, 2 *Inst.* 193,) in case the goods be found within his county. But if the distress be carried out of the county or concealed, then the sheriff may return that the goods or beasts are *eloiigned*—*elongata*, carried to a distance, to places to him unknown; and thereupon the party replevying shall have a writ of *capias in withernam*; in *vetito* (or more properly, *repetito*) *namio*; a term which signifies a second or reciprocal distress in lieu of the first, which was *eloiigned*. It is therefore a command to the sheriff to take other goods of the distrainer in lieu of the distress formerly taken and *eloiigned*, or withheld from the owner. *F. N. B.* 69, 73. So that here is now distress against distress; one being taken to answer the other, by way of reprisal, and as a punishment for the illegal behaviour of the original distrainer. For which reason, goods taken in *withernam* cannot be replevied till the original distress is forthcoming. 3 *Comm. c. 9*. See *post*, III.

But, in common cases, the goods are delivered back to the party replevying, who is then bound to bring his action of replevin, which may be prosecuted in the county court, be the distress of what value it may. 2 *Inst.* 139. But either party may remove it to the superior Courts of King's Bench or Common Pleas, by writ of *recordari* or *pone*. 2 *Inst.* 23; the plaintiff at pleasure, the defendant upon reasonable cause. *F. N. B.* 69, 70. And also, if in the course of proceeding any right of freehold comes in question, the sheriff can proceed no further; so that it is usual to carry it up in the first instance to the courts of Westminster Hall. *Finch. L.* 317. Upon this action brought, and a declaration delivered, the distrainer, who is now the defendant, makes avowry; that is, he avows taking the distress in his own right, or the right of his wife; and sets forth the reason of it, as for rent arrear, damage done, or other cause; or else, if he justifies in another's right, as his bailiff or servant, he is said to make cognizance; that is, he acknowledges the taking, but insists that

such taking was legal, as he acted by the command of one who had a right to distrain; and on the truth and legal merits of this avowry or cognizance the cause is determined. If it be determined for the plaintiff, viz. that the distress was wrongfully taken, he has already got his goods back into his own possession, and shall keep them, and moreover recover damages. *1. N. B. 69. See 21 H. 2. c. 19; and post, IV.* But if the defendant prevents by the default or nonsuit of the plaintiff, then he shall have a writ *de retorno habendo*, whereby the goods or chattels (which were distrained and then replevied) are returned again into his custody, to be sold or otherwise disposed of, as if no replevin had been made. And at the common law the plaintiff might have brought another replevin, and so in *infinitum*, to the intolerable vexation of the defendant. Wherefore the statute of *Westm. 2. c. 2.* restrains the plaintiff, when nonsuited, from suing out any fresh replevin, but allows him a judicial writ, issuing out of the original record, and called a writ of *Second Deliverance*, in order to have the same distress again delivered to him on giving the like security as before. And if the plaintiff be a second time nonsuit, or if the defendant has judgment upon verdict or demurrer in the first replevin, he shall have a writ of return irreplevisable, after which no writ of second deliverance shall be allowed. *2 Inst. 340.* But in case of a distress for rent arrears, the writ of second deliverance is in effect taken away by *17 Car. 2. c. 7*; which directs that if the plaintiff be nonsuit before issue joined, then upon suggestion made on the record in nature of an avowry or cognizance; or if judgment be given against him on demurrer, then without any such suggestion; the defendant may have a writ to inquire into the value of the distress by a jury, and shall recover the amount of it in damages, if less than the arrear of rent; or if more, then so much as shall be equal to such arrear, with costs; or if the nonsuit be after issue joined, or if a verdict be against the plaintiff, then the jury encompelled to try the cause shall inquire concerning the sum of the arrears, and the value of the goods, &c. distrained; and thereupon the defendant shall have judgment for such, or so much thereof, as the goods, &c. distrained amounted unto. And if (in any of these cases) the distress be insufficient to answer the arrears distrained for, the defendant may take a further distress or distresses. *See 1 Vent. 64.* But otherwise, if pending a replevin for a former distress, a man distrains again for the same rent or service, then the party is not driven to his action of replevin, but shall have a writ of recaption, and recover damages for the defendant, the distrainor's, contempt of the process of the law. *F. N. B. 71; 3 Comm. c. 9. See Recaption.*

II. It is a general rule, that the plaintiff ought to have the property of the goods in him at the time of the taking; and not only a general property, which every owner hath, but also a special property, such as a person hath who hath goods pledged with him, or who hath the cattle of another to manure his lands, &c. is sufficient to maintain a replevin, and in such cases either party may bring a replevin. *Co. Litt. 145; Winch. 26.*

He that brings replevin must have an absolute, or at least a special, property in the thing distrained; and therefore several men cannot join in a replevin, unless they be joint-tenants, or tenants in common. Executors may have a replevin of a taking in *vid. testatoris*. So, if the cattle of a *feme sole* be taken, and she afterwards intermarry, the husband alone may have replevin; but, if they join after verdict, judgment will not be arrested, because the court will presume them jointly interested; (as they may be, if a distress be taken of goods of which a man and woman were joint tenants, and afterwards intermarry); the avowry admitting the property to be in the manner it is laid. *Bull. N. P. c. 4. p. 53.*

A replevin doth not lie of things which are *feræ naturæ*,

as conies, hares, monkies, dogs, &c.; but if things, wild by nature, are made tame, or are reclaimed, so long as they continue in that condition, they belong to the person who hath the possession of them, and he may bring replevin; and the general rule herein seems to be, that a replevin lies for any thing that may by law be distrained. *2 Roll. Abr. 430; Godb. 124. See Distress.*

We read of *canes replegiati*, hounds replevied, in a case between the abbot of *St. Alban's* and *Geoffrey Chaldwick*, *24 Hen. 3.*

Goods may be replevied by writ, which is by the common law, or by plant, which is by statute law, for the more speedy having again their cattle and goods.

A replevin lies of a leveret; for it has *animum revertendi*; for the same reason it lies of a ferret; but it is said not to lie for a mastiff dog, though an action of trespass will. *Br. Repl. 64; 2 Roll. Abr. 430. Sed quære?*

Replevin lies of a swarm of bees. *F. N. B. 68.*

But not of trees, or timber growing; nor of things annexed to the freehold, because such things cannot be distrained; yet replevin lies of certain iron belonging to the party's mill. *F. N. B. 68.*

So replevin doth not lie of deeds or charters concerning lands, for they are of no value, but as they relate thereto. *Bro. Repl. 34.*

Nor of money, or leather made into shoes. *Moor, 394; 2 Brownl. 139.*

If a mare in foal, a cow in calf, &c., are distrained, and they happen to bring forth their young, whilst they are in the custody of the distrainor, a replevin lies for the foal, calf, &c. *Bro. Repl. 41; F. N. B. 69; 1 Sid. 82.*

Replevin lies for a ship; so for the sails of the ship. *March, 110; Raym. 232.* Replevin lies not for goods taken beyond sea, though brought hither by the defendant afterwards. *1 Show. 91.*

Where an act of Parliament orders a distress and sale of goods, this is in the nature of an execution, and replevin does not lie: but if the sheriff grants one, yet it is not such a contempt as to grant an attachment against him; and *Powell, Justice*, said, he remembered a case in the Exchequer, where a distress was taken for a fee-farm rent due to the king and a replevin granted, yet, on debate, no attachment was granted, though it was in the king's case. *Trin. 12 W. 3. in C. B. Bradshaw's case.* But it is now determined that, if goods be taken in execution, (or on a conviction before justices,) the sheriff shall not make replevin of them; and if in such case the sheriff should make replevin, he would subject himself to an attachment; for goods are only replevisable where they have been taken by way of distress. *Bull. N. P. c. 4. p. 53.*

Whether goods taken under a warrant of distress by commissioners of sewers may be replevied while in the hands of the officer, and whether they may be replevied by the sheriff or his deputy, is doubtful: but if they be actually replevied, and the proceedings in replevin be removed into K. B. that court will not quash the proceedings on a summary application, but will leave it to the defendant in replevin to put his objection on record. *6 T. R. 522.*

Where a magistrate has jurisdiction, and adjudges, and on refusal to pay, issues a warrant of distress and sale, the goods taken under such warrant are not replevisable. *Per Richardson, J., 1 B. & B. 57. And see 2 B. & B. 391.*

But when justices exceed the special jurisdiction given to them by a particular statute, the goods which have been distrained in consequence of such excess of jurisdiction may be replevied, even though the court of appeal has confirmed the warrant of distress; as where a distress was taken for a poor's rate for lands not in the occupation of the plaintiff, the court held, notwithstanding the sessions, on appeal, had confirmed the rate, that the distress was replevisable, because the determining that a man may be assessed for what he

does not occupy, was an excess of the jurisdiction given by the 43 Eliz. c. 2, and 17 Geo. 2. c. 38. 2 Bla. 1330.

If I distrain another's cattle damage-tenant, and, before they are impounded, he tenders me sufficient amends; now, though the original taking was lawful, my subsequent detainer of them, after tender of amends, is wrongful, and he shall have an action of replevin against me to recover them; in which he shall recover damages only for the detention and not for the caption, because the original taking was lawful. *F. N. B.* 69. See 3 Comm. c. 9. But if the tender were before the taking, the taking is tortious: if after impounding, neither the taking nor detaining is tortious. And after the avowant has had return irreplevisable, yet if the plaintiff make sufficient tender, he may have his action of *detinue* for the detainer after. *Bull. N. P.* 60.

Where cattle distrained damage-tenant were put in a private pound, but were intended to be forwarded to a public pound, a tender of amends was held good. 4 Bing. 230.

III. REPLEVIN may be made either by original writ of replevin, at common law, or by plaint, under the *stat. of Marl.* 52 H. 3. c. 21; *Co. Litt.* 145; *F. N. B.* 69.

The following are the words of this statute: "That if the beasts of any person be taken, and wrongfully withheld, the sheriff after complaint made to him thereof, may deliver them, without let or gainsaying of him that took the beasts, if they were taken out of liberties; and if the beasts were taken within any liberties, and the bailiff of the liberty will not deliver them, then the sheriff, for default of those bailiffs, should cause them to be delivered."

The mischiefs before this act, as has been already hinted, were the great delay and loss the party was at, by having his beasts or goods withheld from him; as also, that when cattle were distrained and impounded within any liberty which had return of writs, the sheriff was obliged to make a warrant to the bailiff of the liberty to make deliverance; and there was another mischief, when the distress was taken without and impounded within the liberty. To remedy which, by this statute, the sheriff, on plaint made to him without writ, may, either by parol or precept, command his bailiff to deliver the beasts or goods, that is, to make replevin of them; and by these words, (*post querimoniam sibi factam*) the sheriff may take a plaint out of the county-court, and make a replevin presently, which he is to enter in the court; as it would be inconvenient, and against the scope of the statute, that the owner, for whose benefit the statute was made, should tarry for his beasts till the next county-court, which is holden from month to month. And by this act, the sheriff may hold plea in the county-court on replevin by plaint, though the value be of 40s. or above; and yet, in other actions, he shall only hold plea where the matter is under 40s. value. 2 Inst. 139; 13 Co. 21; 1 Keb. 205; *Dalt.* Sh. 430.

Replevins by writ issue, properly, out of Chancery, returnable into the courts of K. B. and C. B. at Westminster. *F. N. B.* 68; *Gillb. Distr. & Repl.* 68. and *post*, V.

Replevins by plaint are made by the sheriff by force of the above-mentioned statute of *Marlbridge*; by which he is directed, on complaint made to him by the party that his goods or cattle are distrained, to command his bailiff, (which may be by parol or precept, to make deliverance; and which plaint may be taken at any time, and as well out of, as in court. *Bro. Repl. pl.* 4; *Co. Litt.* 145; 2 Inst. 139.

It becomes the sheriff's duty, on complaint, by parol or by precept to his bailiff, to replevy the cattle, which precept may be given before any county-court: but such plaint is afterwards to be entered by the party who made the complaint, and not by the sheriff. 2 Com. Rep. 591.

The action of replevin is of two sorts: 1. In the *detinet*; 2. In the *detinuit*. Where the party has had his goods redelivered to him by the sheriff, upon a writ of replevin, or

upon a plaint levied before him, the action is in the *detinuit*; but where the sheriff has not made such replevin, but the defendant still has the goods, the action is in the *detinet*. However, of late years no action has been brought in the *detinet*, though there is much curious learning in the old books concerning it. The advantage the plaintiff has in bringing an action of replevin in the *detinet*, in preference to an action of trespass *de bonis asportatis*, is, that he can oblige the defendant to re-deliver the goods immediately, in case, upon making his avowry, they appear to be replevisable: but as, in such cases, he may more speedily have them delivered to him by application to the sheriff in the common way, it is of no use, unless the distrainer have eligned the goods, so that the sheriff cannot get at them to make replevin; and in such case the plaintiff may bring an action of replevin in the *detinet*, and after avowry, pray that the defendant may give deliverance; or he may, upon return of an *elongavit* to the *plures* writ of replevin, have a writ to the sheriff, commanding him to take other beasts, &c. of the defendant in *withernam*, but if the defendant, before the return of the *withernam*, appear to the writ of replevin, and offer to plead *non cepit*, it shall stay the *withernam*, for the defendant shall not be concluded by the return of an *elongavit*, since the sheriff can make no other return where he cannot find the thing to be replevied. *Bull. N. P.* c. 4.

The hundred court, and courts of lords of manors, may by prescription hold plea in replevin, so may incidentally have power to replevy goods or cattle; but that, it seems, must be by process of the court after a plaint entered, but not by parol complaint out of court. *Carth.* 380.

Therefore, where in trespass for taking goods, &c. the defendant justified that the place where, &c. was a hundred, and time out of mind had a court of all actions, replevins, &c. grantable in or out of court, *virtute cujus*, &c.; the question was, If good or not? And the reason of the doubt was, because the county-court could not hold plea in replevin at common law; but were enabled by the statute of *Marlbridge*, which extends not to the hundred court, which is a court derived out of the county-court; but per *Cur.* clearly, supposing they may grant them in court, yet they cannot prescribe to grant them out of court. 2 Salk. 580, 5 Mod. 252; *Skin.* 674; *Carth.* 380; 1 *Ld. Raym.* 219.

The sheriff is obliged to grant replevins in all such cases as they are allowed by law; and the officer who takes the goods, by virtue of a replevin issuing for what cause soever, is not liable to an action of trespass, unless the party, in whose possession the goods were, claims property in them. and note, that in all cases of misbehaviour by the sheriff or other officers, in relation to replevins, they are subject to the control of the king's superior courts, and punishable by attachment for such misbehaviour. *Carth.* 381.

And though the sheriff may grant replevins by plaint, and may proceed thereon in his county-court, yet if any thing touching freehold come in question, or ancient demesne be pleaded, the sheriff can proceed no further; nor can any such proceedings be carried on in the hundred court, court baron, or any other court claiming a jurisdiction herein by prescription. 2 H. 7. 6; 4 H. 6. 30; *Co. Litt.* 145 b.

So, when the king is party, or the taking is in right of the crown, in these cases the sheriff is to surcease. *Bro. Repl. pl.* 3; 1 *Brownl.* 3.

The following is the provision of 1 & 2 P. & M. c. 13, already alluded to; "That the sheriff shall at his first county-day, or within two months after he receives the patent, depute and proclaim in the shire-town four deputies to make replevins, not dwelling twelve miles distant from one another; on pain to forfeit, for every month he wants such deputy or deputies, 5*l.*, to be divided between the king and the prosecutor."

IV. 1. WHEN the sheriff makes replevin, he ought to take

two kinds of pledges; *plegi de prosequendo*, by the common law, and *plegi de retorno habendo*, by the statute of *West. 2. c. 2.* by which it is provided, "That sheriffs or bailiffs, from thenceforth, shall not only receive of the plaintiff pledges for pursuing the suit, before they make deliverance of the distress, but also for return of the beasts, if return be awarded; and if any take pledges otherwise, he shall answer for the price of the beasts, and the lord that distrains shall have his recovery by writ, that he shall restore to him so many beasts or cattle; and if the plaintiff be not able to restore, his superior shall restore."

By the 11 *Geo. 2. c. 19.* officers, having authority to grant replevins, shall, in every replevin of a distress for rent, take in their own names, from the plaintiff and two sureties, a bond in double the value of the goods distrained; (such value to be ascertained by the oath of one or more witnesses not interested, which oath the person granting such replevin is to administer); conditioned for prosecuting the suit with effect, without delay, and for return of the goods, in case a return shall be awarded, before any deliverance be made of the distress, and such officer, taking such bond, shall, at the request and costs of the avowant, or persons making cognizance, assign such bond to the avowant, &c. by indorsing the same, and attesting it under his hand and seal, in the presence of two witnesses; which may be done without stamp, provided the assignment be stamped before any action brought thereon; and if the bond be forfeited, the avowant, &c. may bring an action thereupon in his own name, and the court may by rule give such relief to the parties on such bond, as may be agreeable to justice; and such rule shall have the effect of a defeasance.

A rent-charge is within the meaning of this clause of the statute, and on a replevin of a distress for such rent, the sheriff may take and assign a bond. 1 *Bos. & Pul.* 319.

In the construction of these statutes the following points have been ruled, and opinions holden.

Under *stat. Westm. 2. c. 2.* an action lies against the sheriff, if he omit to take pledges, or if he take those that are insufficient; and the party may have a *scire facias* against the pledges, where the suit is in any court of record; and though in the county-court, &c. a *scire facias* will not lie against the pledges, because these are not courts of record, and every *scire facias* ought to be grounded on a record, yet there the party may have a precept in nature of a *scire facias*, against the pledges. 1 *Ld. Raym.* 278; 1 *Comb.* 1, 2; *Com.* 593.

An action will lie against the sheriff not only for not taking a bond, but also for taking insufficient pledges. *Rous v. Patterson, Hil. 13 Geo. 2. B. R.* on a writ of error from *C. B.* 16 *Fin. Ab.* 399, pl. 4.; under the name of *Prowse v. Pattison, Bull. N. P.* 60. In such an action some evidence must be given by the plaintiff of the insufficiency of the pledges or sureties; but very slight evidence is sufficient to throw the proof upon the sheriff. *Samuels v. Darby, Westminster Sittings, Term 10 Geo. 3. C. B. Bull. N. P.* 60. Though there have been contradictory determinations respecting the extent of the sheriff's liability in such an action, the point seems now to be settled. In *Prowse v. Pattison*, the party recovered damages to the amount of the rent in arrear added to the costs of replevin; but the whole together did not exceed the value of the distress. 4 *T. R.* 434, n. So in the case of *Gibson v. Burnell*, 30 *Geo. 3., Gould, J.*, who tried the cause, was of opinion that the plaintiff was entitled to recover the costs in the replevin as well as the rent in arrear. But in *Yea v. Lethbridge, M. 32 Geo. 3.* the Court of *C. B.* on a question reserved at the trial for their opinion, held that the plaintiff could not recover beyond the value of the distress taken, which was not equal to the rent in arrear. 4 *T. R.* 433. And though this decision was afterwards questioned in the Court of *C. P.* (the court consisting of Lord Loughborough, *Ld. Ch. J.*, *Gould, J.*, *Heath, J.*, and *Wilson, J.*) in *Conner v. Lethbridge, L. 52 Geo. 3. 2 H. Bl.*

Rep. 36. where it was ruled after great consideration that the plaintiff might recover damages to the extent of the injury which he had sustained, though they exceeded double the value of the goods distrained; yet the authority of the case of *Yea v. Lethbridge* was again established in a subsequent case, *Evans v. Brander, Tr. 35 Geo. 3.* where the Court of Common Pleas (then consisting of *Eyre, Ld. C. J.*, *Buller, J.*, *Heath, J.*, *Rooke, J.*, three of the judges, being then changed) decided that the sheriff was not liable for more than double the value of the goods distrained. 2 *H. Bl.* 547. The foundation of the last decision, and of that of *Yea v. Lethbridge*, is this: that the sheriff is liable no further than the sureties would have been, if he had done his duty by taking a bond under the 11 *Geo. 2. c. 19.* and the sureties had been sufficient; and that the extent of their responsibility is limited by the statute to double the value of the goods distrained.

In an action against the sheriff for taking insufficient sureties in replevin, the assignee of the replevin-bond cannot recover as special damage (beyond the penalty of the replevin-bond) the expenses of a fruitless action against the pledges, unless he gave the sheriff notice of his intention to sue the pledges. 3 *Bingh.* 56.

In replevin for distraining cattle *damage feasant* it is sufficient if the sheriff take one pledge. Counts against the sheriff for taking insufficient pledges must show a *retorno habendo*. A count against him for not restoring the goods is bad. 1 *C. & M.* 58.

The remedy in case of insufficient pledges is by action only; and the Court of *C. P.* refused to make an order on an officer to pay costs recovered by a defendant in replevin. 1 *New Rep. C. P.* 292.

This action must be brought by the person making cognizance, where there is no avowance on the record, 1 *Bos. & Pul.* 378.

A replevin bond under 11 *Geo. 2. c. 19.* may be assigned to the avowant only, and he may bring his action without joining the party making cognizance. 1 *Bos. & Pul.* 381, note.

The avowant and person making cognizance may sue jointly on the bond after assignment, or it may be assigned to the avowant alone, and he may sue alone. 3 *M. & S.* 180.

It is no plea in debt on a replevin bond, that the bond purported to be entered into by the defendant and sureties, but was executed by the defendant only. 6 *Taunt.* 28.

If the sheriff returns insufficient pledges, he shall answer according to the statute; for insufficient pledges are no pledges in law; and such pledges must not only be sufficient in estate, viz. capable to answer in value, but likewise sufficient in law, and under no incapacity; therefore infants, feme coverts, persons outlawed, &c. are not to be taken as pledges, nor are persons politic, or bodies corporate. *Co. Litt.* 145; 2 *Inst.* 340; 10 *Co.* 102.

In replevin the sheriff did not return any pledges, and after issue joined and found, it was moved, if they could be put in by the court after verdict; and the court held they might, notwithstanding the statute of *Westm. 2.* as before that statute the court might take pledges on the omission of the sheriff; and a diversity was taken between pledges for prosecuting, which were at common law, and *pro retorno habendo* given by this statute; and the court held, that though on default of the sheriff he was subject to the action of the party, that yet the taking of pledges by the court did not make the judgment erroneous. *Noy*, 156. And that the omission of pledges of the first description is error; but the omission of pledges *de retorno habendo* does not vitiate the proceedings, but subjects the sheriff to an action. See 1 *Jon.* 439; *Cro. Car.* 594. And if the sheriff omit to take bond, pursuant to the 11 *Geo. 2. c. 19.* (see *ante*, 1. and *post*.) an attachment will not be granted, but the remedy is by action against him. 2 *T. R.* 617.

If a sheriff take a replevin bond with one surety, and

after judgment in replevin for a return, the return fail to be made, whereon the party distraining recovers in an action against the sheriff for taking insufficient pledges, it seems that the sheriff cannot recover against such single surety more than half the sum composed of the rent due, and the costs of the suit. And, query, whether such replevin-bond be assignable? 7 Taunt. 327.

A replevin by plaintiff was sued in the sheriff's court in London, and pledges were found *de retorno habendo, si, &c.*; this plaintiff was removed according to their custom into the mayor's court, and afterwards into the King's Bench by *certiorari*, and thereoyer of *certiorari* being demanded, the party declared in B. R. On this a return was awarded, and on an *elongat'* returned, a *scire facias* went against the pledges in the sheriff's court of London. On demurrer, the question was, whether this case being removed by *certiorari*, the pledges in the inferior court are discharged, or whether they remain liable to be charged by this *scire facias*? It was adjudged, that the pledges were not discharged. *Skin. 244*; 2 Show. 421; Comb. 1, 2; 3 Mod. 56. S. C.

The plaintiff declared, that he distrained for 7l. 10s. rent, reserved on a lease, and that the defendant delivered the cattle without taking pledges; to which the defendant pleaded, that the plaintiff in replevin delivered to him 3l. 10s. for pledges, which he accepted; and on demurrer the court held, that pledges being to be found to answer the party, if he had good cause of avowry, and to be answerable for amercement to the king, if nonsuited, or if it be found against him, the taking of money for a pledge was not lawful; and that although he might take money for pledges, yet he ought not to accept less than the plaintiff's demand: on which account the court likewise held the plea vicious; but they agreed, that if the defendant had taken but one pledge, (if he had been sufficient,) it had been well enough. *Cro. Car. 446*; 1 Jon. 378.

A bond taken by the sheriff, conditioned that if the party applying for the replevin should appear at the next county-court, &c. and prosecute his action with effect, and should make return of the thing replevied, if return should be adjudged, and save the sheriff harmless, &c. is good in law; and agreeable to the intent of the statute of *Marlbridge*, which requires pledges or sureties, of which nature the obligors are; and this method of taking bond instead of pledges was said to be of ancient usage; and that in the old books *plegii* signified the same as sureties; and that there being a proper remedy on such bond, it differed from the case of taking a deposit or sum of money; but the court agreed, that at common law this bond had been void, because it had been to save the sheriff harmless in making replevin by plaintiff, which he could not have done before the statute of *Marlbridge*. 1 *Ld. Raym. 278*; 2 *Lutw. 686*.

If in replevin in an inferior court, the condition of the bond is, if he prosecute his suit commenced with effect in the court of, &c. and make return, &c. if a return be adjudged by law, and it happens that the plaintiff hath judgment in the court below, which is afterwards reversed on a writ of error in B. R., in such case, unless the party make a return, he forfeits his bond; for though he had judgment in the court below, yet the words "if he prosecute his suit commenced, &c. extend to the prosecution of the writ of error, which is part of the suit commenced in the court below; and in this case, the taking such bond was held to be lawful, and said to be common practice. *Carth. 248*; 1 *Show. 400*; *Fitzg. 158*.

In debt on a replevin-bond taken by the sheriff, conditioned that if C. B. appear at the next county-court and prosecute with effect for taking, &c. and make return, &c. if return be adjudged, and save harmless the sheriff, &c. then, &c. the defendant after oyer pleaded that at the next county-court, held on such a day, he did appear, and prosecuted, &c. until

it was removed by *recordari*, and did save the sheriff harmless; but doth not say, that no *return habend'* was adjudged on demurrer, the court inclined for the plaintiff; for the defendant should have said, that no return was adjudged at all; and though he prosecuted to the *recordari*, yet *return habend'* might be adjudged afterwards; and the condition goes to any adjudication of return. *Comb. 228*.

The condition of a replevin-bond is not satisfied by a prosecution of the suit in the county-court, but that the plaintiff, if removed by the *recordari facias loquelam* into the superior court, must be prosecuted there with effect, and a return made, if adjudged there. 1 *Bos. & Pul. 410*.

An action was brought on a bond in replevin to prosecute his suit with effect, and also to make return, &c.; the defendant pleaded that E. G. did levy a plaintiff in replevin in the court before the steward of Westminster, and that afterwards, and before the suit was determined, viz. such a day, &c. E. G. died; *per quod* the suit abated: the plaintiff replied, that true it is that E. G. levied such a plaintiff against the defendant, who immediately afterwards exhibited an English bill in the exchequer against the plaintiff in that suit, and by injunction hindered the proceedings below until such a day, &c. on which E. G. died; so that he did not prosecute his suit with effect: on demurrer to this replication the defendant had judgment; for, *per Holt*, this was a prosecution with effect, because there was neither a nonsuit or verdict against E. G. *Carth. 519*.

In an action on a replevin-bond common bail shall be filed. 1 *Salk. 99*. See *Bail*.

The condition of the bond is twofold, and not alternative, viz. for prosecuting the suit with effect, and for duly returning the goods if a return is awarded; and the bond is forfeited by a breach in either respect. 2 *Bro. & B. 107*; 5 *B. & C. 284*; 3 *Maul. & S. 188*. Therefore, where the plaintiff in replevin is nonsuited, and the avowant, instead of proceeding at common law for a return, proceeds by writ of inquiry, and has judgment on the 17 *Car. 2. c. 17*. for the arrearages of rent and costs, he may still proceed against the pledges for the breach of the condition in the plaintiff's not prosecuting with effect; and not prosecuting with success is "not prosecuting with effect." If the action is forced, so as to work injustice, the surety has a plain remedy, under the last clause of the 23 *sect. 11 Geo. 2. c. 19*. by an application to the court for relief.

A defendant in replevin does not, by giving time to the plaintiff in replevin, discharge the sureties in replevin-bond. 6 *Taunt. 379*; 7 *Taunt. 97*.

But where parties in replevin submitted to arbitration without the privy of the sureties, it was held the latter were discharged. 4 *Bing. 464*, S. C.; 1 *M. & P. 285*.

However a mere enlargement of the time by an arbitrator, without the knowledge of the sureties, is no plea in an action against them. 10 *Bing. 5*.

2. The declaration in replevin ought to be certain in setting forth the numbers and kinds of cattle distrained: because, otherwise, the sheriff cannot tell how to make deliverance, if it should be necessary: yet an avowry may make that good, which would be bad on demurrer; both parties agreeing what the *quantum* and nature of the goods are. And the sheriff may require the defendant to show him the goods; and it would be a good return to say, "that no one came, on the part of the defendant, to show the goods and chattels." *Aleyn, 32*; *Stile, 71*.

A declaration in replevin for taking "divers goods and chattels" of the plaintiff, is bad for uncertainty: and although judgment pass by default for the plaintiff, the defect is not cured by the statute of *jeofails*. 4 *Ann. c. 16*. *Pope v. Tillman, T. R. Trin. 57 Geo. 3. 642*. But see 3 *M. & S. 180*.

The declaration ought to be not only of a taking in a ville or town, but also "in a certain place called," &c.; but if the

defendant would take advantage of this, he must demur to the declaration. *Hob. 16.*

A man may count of several takings, part at one day and place, and part at another; and if the plaintiff allege two places, and the defendant only answer one, i. e. if the plea begun only as an answer to part, and be in truth but an answer to part, it is a discontinuance; and the plaintiff must not demur, but must take his judgment for that by *nihil dicit*; for if he demur or plead over, the whole action is discontinued. But if a plea begin with an answer to the whole, but is in truth only an answer to part, the whole plea is nought, and the plaintiff may demur. *F. N. B. 68; Salk. 176.* Where the defendant avows at a different place, in order to have a return, he must traverse the place in the count, because his avowry is inconsistent with it; but where he does not insist upon a return, he may plead *nihil dicit*, and prove the taking to be at another place, for the place is material. *Sira. 507.* This is to be understood where the defendant never had the cattle in the place laid in the declaration at all; for if on the plea of *non cept* the plaintiff prove that the defendant had the cattle in the place laid in the declaration, he will have a verdict; and if the fact be, that the defendant took the cattle in another place, and only had them in the place mentioned in the declaration, in the way to the pound, he ought to plead that matter specially. *Bull. N. P. c. 4. p. 54.*

A declaration by P. and C., assignees of a replevin-bond, stating that they distrained the defendant's goods for rent due to P., is sufficient without naming C. bailiff. If the declaration state that the sheriff took the bond in double the value, conditioned for prosecuting, &c. and for making return of the goods in the condition mentioned, and thereupon the sheriff replevied the same, that shows the bond to be conditioned for a return of the goods distrained. And the declaration is not double, because it alleges that the defendant did not prosecute his suit with effect, and hath not made a return, but it is not necessary to allege both. *3 M. & S. 180; 5 B. & C. 284.*

Debt lies by the assignees of a replevin-bond against one of the sureties in the *distant* only. And where they declared that at the city of C., and within the jurisdiction of the mayor of the city, they distrained the goods of W. H. for rent, and that W. H. at the said city, made his plaint to the mayor, &c. and the proceedings accordingly; the Court of King's Bench held that it was no ground for special demurrer that the declaration did not show a custom for the mayor to grant replevin and take bond, nor that the plaint was made in court. *1 M. & S. 130.*

The general issue in replevin is *non cept*, upon which property cannot be given in evidence, for that ought to be pleaded; and if he plead property in himself, he may either plead it in bar or in abatement, but if he pleads it in a stranger, it ought strictly to be pleaded in abatement, though it may likewise be pleaded in bar. *2 T. R. 219; 1 Salk. 415; 2 T. R. 12.*

If the defendant plead property, whether it be in himself or a stranger, he shall have a return without making an avowry for it; but where the plea in abatement is of a collateral matter, such as *ceptum in alio loco*, he must make an avowry in order to have a return; for he must show a right to the property, or at least to the possession, to have a return; but the plaintiff ought not to traverse the matter of the continuance; and if he do, and demurrer be joined upon it, it is a discontinuance, and the defendant will have judgment. *Salk. 174; Bul. N. P. 54.*

The defendant may either avow the taking, or justify it; if he avow, it must be upon a right subsisting, such as rent arrears, &c., and then he entitles himself to a return; but where by matter subsequent he is not to have the thing for which the distress was taken, there he will not be entitled to a return, and therefore cannot avow, but must justify; as if a lord distrain for homage, and afterwards the tenant die, and

then his executor bring replevin. But a man may distrain for one thing, and avow for another. *3 Co. 26 a; Bul. N. P. 54, 55.*

By the 11 Geo. 2. c. 19. § 22. any person distraining for rent, relief, heriot, or other service, may in replevin avow or make cognizance generally, without setting out a title. But this does not extend to an avowry for a rent-charge. *1 New Rep. 56.*

If a defendant make cognizance as bailiff to J. S., the plaintiff may traverse his being bailiff, for this is different from trespass *quare clausum fregit*; for there if the defendant justify an entry by command, or as bailiff to one in whom he alleges the freehold to be, the plaintiff shall not traverse the command, because it would admit the truth of the rest of the plea, viz. that the freehold was in J. S., which would be sufficient to bar his action. But in trespass *de bonis asportatis*, e. g. for taking the plaintiff's sheep, if the defendant justify the taking them *damage feasant*, as servant to J. S., the plaintiff may traverse the command or authority; for though J. S. had a right to take the cattle, yet a stranger, who had no authority from him, would be liable. And there is a great difference between a justification in trespass, and an avowry in replevin, in another respect, e. g. for an amercement in a court leet; in the justification, it is necessary for the defendant to set forth a warrant or precept, &c., but not to aver the matter of the presentment, because his plea is only an excuse; but in avowry he ought to aver, in fact, that the plaintiff committed the crime for which he is amerced; because he is an actor, and is to recover, which must be upon the merits. *Bul. N. P. 55, cites 1 Salk. 107.*

If an avowry be made for rent, and it appear by the defendant's own showing that part of it is not yet due, yet the avowry will be good for the residue. In such case the avowant must abate his recovery, *quoad* the rent not due, and take judgment for the rest; but if it appear that he has title only to two undivided parts of the rent, the avowry shall abate. *1 Saund. 285; Moor, 281; Salk. 580.* So if the avowry be for part of a quarter or half a year's rent, he must show how the rest is satisfied, or it will be bad. *Hardw. 84; Comb. 316; 1 Saund. 191.* In avowry for rent, and a *nomine pence* together, without alleging any demand of rent, the avowry is good for the rent, though it will be ill for the penalty. *1 Saund. 286; Hob. 133.* Avowry for rent due at a latter day, is no bar to avowry for rent due at a former day; but an acquittal under seal is; if not under seal, contrary proof will be admitted. *Bul. N. P. 56.* See further, titles *Avowry, Distress, Rent.*

By 21 Hen. 8. c. 19. if the avowry, cognizance, or justification be found for the avowant, or the plaintiff be nonsuited, the defendant shall recover such damages and costs as the plaintiff would have had if he had recovered. But this act mentions only persons avowing or making cognizance for rent-service, customs, services, *damago feasant*, or for other rent or rents, so that it does not extend to an avowry for a *nomine pence*, or for an estray; and therefore if in such damages and costs were given, the judgment would be reversed. *1 Jon. 135; and see Bul. N. P. 57.*

The avowant or defendant in replevin, though not within the words, is plainly within the meaning of the 4 Ann. c. 16. (by which a plaintiff in replevin, which to certain purposes an avowant is, may plead as many pleas as he may think necessary.) And accordingly, where some issues in replevin are found for the plaintiff, which entitle him to judgment, and some for the defendant, the latter must be allowed the costs of the issues found for him, out of the general costs of the verdict, unless the judge certify that the plaintiff had a probable cause for pleading the matters on which those issues are joined. *2 T. R. 235.*

If issue be joined on the property, the defendant may give in evidence the plaintiff's having the cattle, in mitigation of damages. *Godb. 98.* If the plaintiff plead *riens arrears* in

bar to an avowry for rent, he cannot, upon such issue, give in evidence *non-tenure*. *Bul. N. P.* 59. In an avowry for rent, the plaintiff may plead a tender and refusal, without bringing the money into court; because, if the distress were not rightfully taken, the defendant must answer the plaintiff his damages. *Bul. N. P.* 60. See also as to payment into court in replevin, 1 *H. Bl.* 24; 1 *B. & P.* 382; 3 *B. & P.* 603.

A defendant in replevin is not entitled to move for judgment as in case of a nonsuit, under 14 *Geo. 2. c.* 17. § 1. 3 *T. R.* 661; 5 *T. R.* 400.

In debt on a replevin-bond, assigning for breach the not making a return of the goods distrained for rent, the plaintiff may, after signing judgment against the defendant for not returning the demurrer-book, tax the costs and issue execution for the costs, and the amount of the goods distrained, as indorsed on the replevin-bond, without executing a writ of inquiry. 3 *M. & S.* 155.

Proceedings in replevin were stayed by the Court of King's Bench after consuance and plea in bar, upon payment of costs of the action and distress and replevy, and delivering up the replevin-bond to be cancelled, there being no special damage. 3 *M. & S.* 525.

In an action on the bond, alleging a breach in not prosecuting the replevin suit according to the tenor and effect of the condition, it is a good plea that defendant did appear at the next county court, and there prosecute the suit, which was still undetermined and depending; and it is not sufficient for the plaintiff to reply that the defendant did not prosecute the suit as in the plea mentioned, but wholly abandoned the same, and that the said suit is not still depending,—the plaintiff must show a legal determination of it. 12 *East*, 585. Allowing two years to elapse without proceedings, is a breach of the condition, though judgment of *non pros* was signed in the county court. 4 *Bing.* 586.

To an action against a surety in the bond, averring a judgment for the plaintiff (defendant in replevin) for a return of the goods, and assigning a breach in no return having been made, the surety cannot plead that the judgment was obtained against his principal by fraud, viz. by the plaintiff, in collusion with the principal, procuring the principal to confess, and by the principal fraudulently confessing the replevin action: for this is no more than saying that the plaintiff and the principal fraudulently agreed together to defraud one another. But it seems that the plea might have been good, if it had averred that this agreement was for the purpose of defrauding the pledges in replevin. In this case it was held not a good plea for such surety that the plaintiff and defendant in replevin, without his knowledge, referred the matters in the suit to arbitration, and by mutual agreement suspended the proceedings in replevin during the reference. But the Court of Exchequer afterwards granted an injunction on this ground, restraining the proceedings on the bond, holding that the bond became *functus officio* by the agreement of reference. 7 *Taunt.* 97; 2 *Marsh.* 392; 6 *Taunt.* 379; 3 *Price*, 214; 4 *Bing.* 464, *acc.*

If the sheriff take a replevin-bond from one surety only, it is no plea to an action upon it that the bond, purporting to be entered into by two sureties, was in fact executed by the defendant and the principal only; but *quere* whether the surety might not avoid the bond by pleading that he only delivered it as an escrow till the other surety executed it. 7 *Taunt.* 28, 327; *S. C.* 1 *Moo.* 68.

The two sureties are only liable to the amount of the penalty of the bond, and the costs of the suit on the bond. 1 *Taunt.* 218.

And it has been more recently held, that the sureties in a replevin-bond are liable only for the value of the goods seized, and double costs; and if the value exceed the rent due, they are liable only to the amount of the rent. 2 *Dow. P. C.* 559; and see 2 *H. Bla.* 36, 547; 4 *T. R.* 435; 3 *Stark.* 168.

V. THE original writ of replevin issues out of Chancery, and neither it nor the *alias* replevin are returnable, but are only in nature of a *justicies* to empower the sheriff to hold plea in his county court, when a day is given the parties; but the *pluries* replevin is always with this clause, *vel causam nobis significes*, and it is a returnable process. *F. N. B.* 69, 70; *Doct. Pl.* 313, 314; 2 *Inst.* 139; *Salk.* 410. It is usual to take out the *alias* and *pluries* at the same time. *Dalt. Sh.* 273.

A *pluries* replevin returned in Michaelmas Term, the defendant claimed property, and nothing was afterwards done, nor any appearance nor continuance till Easter Term following, at which term they appeared and pleaded, and judgment was thereupon given; though no continuance was between Michaelmas and Easter, yet this was not any discontinuance, because there is not any continuance till appearance; for the parties have not any express day in court; and where there is not any continuance, there cannot be any discontinuance. 1 *Rob. Abr.* 485.

The *pluries* replevin supersedes the proceedings of the sheriff, and the proceedings are on that, and not on the plaint, as they are when that is removed by *recordari*, and though there is no summons in the writ, yet it gives a good day to the defendant to appear; and if he does not appear, then a *pone* issues and then a *capias*. 1 *Ld. Raym.* 617.

Capias and process of outlawry lies in replevin; for when on the *pluries replevium fac*, the sheriff returns *averia elongata*, then a *capias* in *withernam* issues; and on that being returned *nulla bona*, a *capias* issues; and so to outlawry. *Capias* and process of outlawry in replevin were given by 25 *Edw. 3. st. 5. c.* 17. 6 *Mod.* 84.

If on the *pluries* replevin the sheriff return that the cattle are eloiigned to places unknown, &c. so that he cannot deliver them to plaintiff, then shall issue a *withernam*, directed to the sheriff, commanding him to take the cattle or goods of the defendant, and detain them till the cattle or goods distrained are restored to the plaintiff; and if on the first *withernam* a *nil* be returned, there an *alias* and *pluries* replevin issue, and so to a *capias* and exigent. *F. N. B.* 73.

The writ of *withernam* ought to release the cause which the sheriff returns, for which he cannot replevy the cattle or goods, so that it does not lie on a bare suggestion that the beasts are eloiigned, &c. *F. N. B.* 69, 73. See *ante*, 111.

If on the *withernam* the cattle are restored to the party who eloiigned them, yet he shall pay a fine for his contempt. 2 *Leon.* 174.

Cattle taken in *withernam* may be worked; or, if cows, may be milked; for the party has them in lieu of his own. 1 *Leon.* 220; *Dyer*, 280.

And as the party is to have the use of the cattle, he is not to have any allowance made him for the expenses he has been at in maintaining them. *Owen*, 46; *Cro. Eliz.* 162; 3 *Leon.* 235.

Scire facias against an executor, reciting that where replevin was brought against his testator for a cow, and judgment against him *de retorno habendo*, which was not executed, that he should show cause why he should not have execution. The executor pleads *plene administravit*, upon which the plaintiff demurred; and *Wylde, Justice*, said, that upon the judgment the cow is in the custody of the law, therefore he ought to have execution; but the doubt is, because the replevin is determined by the death of the party (yet by him and *Rainsford* being only in court), the plaintiff shall have execution, for the defendant cannot be prejudiced; for if the sheriff return *averia elongata*, he shall not have a *withernam* but of the goods of the testator; or if there are no goods of the testator, the sheriff can take nothing, but shall return *nulla bona*, and then the plaintiff hath his ordinary way to charge the defendant if he hath made a *devastavit*; and it was adjudged for the plaintiff. *Pasch.* 20 *Car. 2.* in *B. R. Sucklin v. Green*.

W. sues a replevin, B. removes it by *recordari* into the King's Bench, the plaintiff does not declare, and on that a return awarded to H., upon which the sheriff returns *averia elongata*, and then a *withernam* was awarded and executed; and now the plaintiff comes and prays he may be admitted to declare, and prays a deliverance of the *withernam*; and it was testified by the clerks, that on the plaintiff's submission to a fine for not declaring, and that being imposed on him by the judges, he shall have deliverance of the *withernam*; and a fine of 3s. 4d. being accordingly imposed on the plaintiff, he then declared and had deliverance. *Noy*, 50. The course of B. R. is contrary to that of C. B.

If on an *elongata* returned, the sheriff's cattle are taken in *withernam*, yet on the defendant's appearance and pleading *non cepit*, on claiming property, the defendant shall have his cattle again; and if they are eloiigned, a *withernam* against the plaintiff; for if the property or taking be in question, there is no reason that the plaintiff should have the defendant's cattle. 1 *Ld. Raym.* 614.

The *withernam* is but mesne process, and cannot be on execution, because it is granted before judgment. 1 *Ld. Raym.* 614; and see *Comb.* 201; *Salk.* 382.

VI. The writ of *second deliverance* is a judicial writ depending upon the first original, and is given by *stat. Westm.* 2. 13 *Edw.* 1. c. 2, which recites, that after the return is awarded, the party distrained does replevy again, and so the judgments given in the King's courts take no effect; wherefore it enacts, that when return is awarded to the distrainer, the sheriff shall be commanded by a judicial writ to make return, in which it shall be expressed that the sheriff shall not deliver them without writ making mention of the judgment; and it further enacts, that if the party make default again, or for any other cause, return of the distress be awarded, now twice replevied, the distress shall remain irreplevisable. See *ante*, I.

If a defendant in replevin has return awarded on nonsuit of a plaintiff, on which he sues a writ of *retorno habendo*, upon which writ the sheriff returns *averia elongata per quendam*, and on this a *withernam* is awarded, and on the *withernam* the defendant has *tot catalla* to him delivered of the goods of the plaintiff, and thereupon the plaintiff sues a second deliverance; he shall sue it for the first distress taken, not for the *withernam*, and this by the nature and form of the writ of second deliverance. 2 *Roll. Abr.* 435.

If a *retorno habendo* be awarded to a plaintiff after a writ of second deliverance prayed by a defendant, this is a *superaddas* to the *retorno habendo*, and closes the sheriff's hand from making any return thereto; and if the sheriff will not execute the writ of second deliverance, the party has his remedy against him. *Dyer*, 41; *Dalt. Sh.* 275.

The statute of *Westm.* 2. gives the writ of second deliverance out of the same court where the first replevin was awarded, and a man cannot have it elsewhere; for if he may, then he shall vary from the place limited as to this by the statute. *Plowd.* 206.

In replevin a defendant avowed, that the plaintiff being awarded a writ of second deliverance; whereupon he is moved to stay the writ of inquiry of damages; and per curiam this is a *superaddas* to the *retorno habendo*, but not to the writ of inquiry of damages; for these damages are not for the thing avowed for, but are given by 21 *Hen.* 8. c. 19. as a compensation for the expense and trouble the avowant has been at. 1 *Salk.* 95. See *Palm.* 403; *Latch.* 72.

Error of judgment in C. B. in a second deliverance on demurrer in pleading, the error assigned was because there was not any writ of second deliverance certified; and in *nullo est error* being pleaded, it was moved not to be material, because it was awarded on the roll, and the parties had appeared and pleaded to it; but it was adjudged ill, and reversed for that cause; for there ought to be a writ, and if it vary from

the declaration in the replevin, it shall be abated. *Cro. Jac.* 424.

No second deliverance lies after a judgment on a demurrer, or after verdict, or confession of the avowry; but, in all these cases, the judgment must be entered with a return irreplevisable; but on a nonsuit, either before or after evidence, a second deliverance will lie, because there is no determination of the matter, and there a writ of second deliverance lies to bring the matter in question; but, in the case of demurrer and verdict, the matter is determined by confession of the party. 2 *Lill. Reg.* 457.

If the plaintiff's writ abates, he may have a new writ, and is not put to his writ of second deliverance. *Comm.* 122.

If the plaintiff in replevin be nonsuited for want of delivering a declaration, if it happened through sickness of the person employed to prosecute, the court will order the defendant to accept a declaration on payment of costs, otherwise plaintiff would be remediless, the writ of second deliverance being taken away by 17 *Car.* 2. c. 7. in case of distresses for rent arrear. See *ante*, I.

2. If the person taking the goods claims property, the sheriff cannot make replevin of them; for property must be tried by writ, and in this case the plaintiff may have the writ *de proprietate probanda* to the sheriff; and if it be found for the plaintiff, then the sheriff is to make replevin; if for the defendant, then he is to proceed no further; but as this is but an inquest of office, though the property be found in the defendant, yet the plaintiff is not concluded, for he may still have his action of replevin, or of trespass: but if in his action of replevin the defendant plead property, and it be found for him, the plaintiff is concluded: and if the sheriff return the claim of property, yet shall it proceed in C. B. where the property shall be put in issue, and finally tried. *Co. Litt.* 145 b; *F. N. B.* 77; *Dyer*, 173; *Comm.* 592; *Bull. N. P.*

None but he who is party to the replevin shall have the writ *de proprietate probanda*; so that if on a replevin the beasts of a stranger are delivered to the plaintiff, such stranger, being no party to the replevin, shall not have this writ. 14 *Hen.* 4. 25; 2 *Roll. Abr.* 431.

The sheriff is to return the claim of property on the *pluries*, before which time the writ *de proprietate probanda* does not issue, for it recites the *pluries*. *Reg.* 83; *Com.* 595.

The writ *de proprietate probanda* is an inquest of office, and the sheriff is to give notice to the parties of the time and place of executing it. *Dalt. Sh.* 274.

If the defendant claims property in replevin, the plaintiff may have the writ *de proprietate probanda* without continuance of the replevin, though it be two or three years after; because, by claim of property, the first suit is determined. *Moor*, 403.

If the plaintiff has property, and omits to claim it before the sheriff, he may notwithstanding plead property in himself or in a stranger, either in abatement or in bar; though it was formerly held, that property in a stranger could only be pleaded in abatement. *Cro. Eliz.* 475; *Winch.* 26; 1 *Show.* 402; *Salk.* 594; 6 *Mod.* 81.

In replevin the defendant in his avowry pleads, that the beasts taken belonged to a third person, and not to the plaintiff; therefore prays a return; to which the plaintiff demurs; for on the avowant's own showing he ought not to have return, having admitted the property of the beasts to be in another; but judgment was given for the defendant; for the prior possession was in him, and he hath a right against all others but the right owner, and the plaintiff by his demurrer hath admitted that he hath no property in them. *Com.* 477; See 6 *Mod.* 68. 139; 2 *Mod.* 242.

VII. The *retorno habendo* is a judicial writ, which lies for him who has avowed the distress, and proved the same to be lawfully taken; or where, on removal of the plaint into the courts above, the plaintiff, whose cattle were replevied, makes

default, or does not declare or prosecute his action, and thereby becomes nonsuited, &c.; and by this writ the sheriff is commanded to make a return of the cattle to the defendant in the replevin. 35 Hen. 6. 40; Dyer, 280; Co. Litt. 145. See *ante*, I.

A bailiff who makes conusance may have judgment of a return, and consequently a writ of *retorno habendo* grounded on such judgment. Co. Ent. 59.

If a defendant hath a return awarded him, and he sueth a writ of *retorno habendo*, and the sheriff return on the *pluries*, *quod averia elongata sunt*, &c. he shall have a *scire facias* against the pledges, &c. according to the statute of West. 2; and if they have nothing, then they shall have a *withernam* against the plaintiff of the plaintiff's own cattle. F. N. B. 172.

Since the 17 Car. 2. c. 7. (see *ante*, I.) it has been the custom, as it was before, to enter judgment for a *retorno habendo*: but, notwithstanding, the defendant may enter a suggestion on that statute, and a writ of second deliverance will be no *superseas* to such writ. The whole fact is to be proved, and may be litigated in the writ of inquiry, directed by that statute. Bull. N. P. 58. And if the jury, empanelled to try a cause in replevin, omit to inquire the value of the rent arrear, or of the distress, according to the directions of the said statute, it cannot be supplied by a writ of inquiry, because the statute confines the inquiry to the jury empanelled in the cause. Therefore, in such case, the defendant must take judgment of *retorno habendo* at common law: but it is not the same upon 21 Hen. 8. c. 19; (see *ante*, IV. 2.) nor upon 43 Eliz. c. 2. if the defendant avow as overseer for a distress for a poor's rate; because, if the jury had inquired, it had been as an inquest, on which no attain would have lain, and the statute does not tie it up to the same jury. And if the plaintiff, being nonsuited, bring a writ of second deliverance, though it will be a *superseas* to the writ of *retorno habendo*, yet it will be none to the writ of inquiry. Bull. N. P. 58.

By the 17 Car. 2. c. 7. the writ of second deliverance is in effect taken away, because the avowant may have judgment for his arrears and costs without any return; but if he takes judgment for a return, then the writ of second deliverance lies. Bac. Ab. Replevin E. 7th ed.

A judgment in replevin, "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury," &c. is good either as a judgment at common law, though the return be not judged irreplevisable, or as a judgment under 21 Hen. 8. c. 19. which entitles the defendant to damages and costs. 4 T. R. 509. See *ante*, IV. 2.

Return irreplevisable is a judicial writ, directed to the sheriff, for the final restitution or return of cattle unjustly taken by another, and so found by verdict, or after a nonsuit in a second deliverance. 2 Roll. Abr. 434.

If the plea be to the writ, or any other plea be tried by verdict, or judged on demurrer, return irreplevisable shall be awarded, and no new replevin shall be granted, nor any second deliverance by the stat. West. 2. but only on nonsuit. 2 Inst. 340; Dyer, 280. See I. V.

If, on issue joined in replevin, the plaintiff does not appear on the trial, being called for that purpose, yet return irreplevisable shall not be awarded, as in case of a verdict's being given, but the party may have a writ of second deliverance, as well as if it had been a nonsuit before declaration, or appearance. 3 Leon. 49. See *ante*, VI.

If a man has a return irreplevisable, and a beast die in the pound, he may distrain anew; so, if the beast die before judgment. Hob. 61.

If return irreplevisable be awarded, the owner of the cattle may offer the arrears; and if the defendant refuses to deliver the distress, the plaintiff may have his action of detinue, because the distress is only in nature of a pledge. 1 Ld. Raym. 720.

By the statute of Westm. 1. 3 E. 1. c. 17. if the party

who distrains, conveys the distress into any house, park, castle, or other place of strength, and refuses to suffer them to be replevied, the sheriff may take the *posse comitatus*, and on request and refusal, break open such house, castle, &c. and make deliverance; and this was a necessary law so soon after the irregular time of Henry III. 2 Inst. 193; 5 Co. 93; Dalt. Sh. 373.

If the sheriff returns, that the beasts are inclosed in a park among savages, or inclosed in a castle, &c. he shall be amerced, and another writ of replevin shall be awarded for he ought to have taken the *posse com.* for this was a denial. F. N. B. 257.

If the sheriff return, *quod mandavi ballivo libertatis*, &c. *qui nullum dedit mihi responsum*, or that the bailiff will not make deliverance of the cattle, these are not good returns; for by statute of West. 1. the sheriff, on such return made to him by the bailiff, ought presently to enter into the franchise, and make deliverance of the cattle taken. F. N. B. 157.

If a man sue a replevin in the county-court without writ, and the bailiff return to the sheriff, that he cannot have view of the cattle to deliver them, the sheriff, by inquest of office, ought to inquire into the truth thereof; and if it be found by a jury that the cattle are eloigned, &c. the sheriff in the county-court may award a *withernam* to take the defendant's cattle, and if the sheriff will not award a *withernam*, then the plaintiff may have a writ out of chancery, directed to the sheriff, rehearsing the whole matter, commanding him to award a *withernam*, &c.; and he may have an *alias*, and after a *pluries*, and an attachment against the sheriff, if he will not execute the king's command. F. N. B. 158.

If the sheriff return, *quod averia elongata ad locum incognitum*, this is a good return, and the party must pursue his writ of *withernam*; but if the sheriff return *averia elongata ad locum incognitum infra comitatum meum*, he shall be amerced, for the law intends that he may have notice in his county. Bro. Retur. de Br. pl. 100.

If in replevin the sheriff return, *quod averia mortua sunt*, that is a good return. Bro. Retur. de Br. pl. 125.

If the sheriff be shown a stranger's goods, and he takes them, an action of trespass lies against him, for otherwise he could have no remedy; for being a stranger he cannot have the writ of *proprietary proband*; and were he not entitled to this remedy, it would be in the power of the sheriff to strip a man's house of all his goods; but *Keilway* seems to hold, that the action lies more properly against the person who shows the goods. 2 Roll. Abr. 552; Com. 596.

The sheriff comes to make replevin of beasts impounded in another man's soil; if the place be inclosed, and has a gate open to the inclosure, he cannot break the inclosure, and enter thereby, when he may enter by the open gate; but if the owner hinders him so that he cannot go by the open gate for fear of death, he may break the inclosure, and enter there. 20 Hen. 6. 28; 2 Roll. Abr. 532.

The sheriff is to return, that the cattle are eloigned, or that no person came to show, &c. or a delivery; but he cannot return, that the defendant *non cepit* the cattle, because it is supposed in the writ, and is the ground of it, which the sheriff cannot falsify. Ld. Raym. 613; 1 Lutw. 581.

For further information on this subject, see Vin. Abr. Replevin; and Silbert on Replevin.

REPLEVISH. To let one to mainprise on surety. 9 Edw. 1. c. 11.

REPLICATION, *replicatio*.] An exception or answer made by a plaintiff to a defendant's plea. And it is also that which the complainant replies to the defendant's answer in Chancery, &c. West. Symb. par. 2. See further Ph. Angl. I. 2.; and as to replications in criminal cases, see Plead. 25, II.

REPORT, from Lat. *reportare*.] A public relation, or bringing again to memory, of cases judicially adjudged in courts of justice, with the reasons as delivered by the judges. Co. Litt. 293. See Law Books.

There are likewise reports, when the Court of Chancery, or other court, refer the stating some case, settling some account, &c. to a master of chancery, or other referee, his certificate therein is called a report. This report may be excepted to, disproved, or over-ruled; or otherwise it is confirmed and made absolute by order of the court. See 3 *Comm.* 453.

A master in chancery, having an order of reference, is to issue his summons for the parties to attend him at a certain time and place; when and where they may come with their counsel, clerk, or solicitor, to defend themselves, and maintain, or object against, his report or certificate, &c. And masters are to draw their reports briefly, and as succinctly as may be, preserving the matter clearly for the judgment of the court; without recital of the several points of the order of reference, or the debates of counsel before them; unless in cases doubtful, when they may shortly represent the reasons which induce them to what they do.

None shall take any money for report of an order, or cause, referred to them by any judges, on pain of 100*l.* &c. so as not to prohibit the clerk from taking 12*d.* for the first, and 2*d.* for every other sheet. 1 *Jac.* 1. c. 10. But by 13 *Car.* 2. st. 1. c. 12. masters in chancery may take for every report, or certificate, made on an order on hearing of a cause, 20*s.* And for any other report, &c. made on petition or motion, 10*s.* And their clerks shall have 5*s.* for writing every report. See *Reference*.

A report by a master in chancery is as a judgment of the court. 1 *P. Wms.* 653.

It is not usual to confirm reports of receivers' accounts by the Master of the Rolls. 2 *P. Wms.* 661.

There are also reports from committees of both or either Houses of Parliament. See *Parliament*.

As to printed reports of cases determined in the several courts of justice, see *Law Books*.

REPOSITION OF THE FOREST, *repositio forestæ*, i. e. a repositing to.] A statute, whereby certain forest-grounds, being made *purlicu*, on view, were, by a second view, put to the forest again. *Magn. par.* 1.

REPOSITION, or *Retraction*, the returning back of a right assigned from the assignee, to the person granting the right. *Scotch Dict.*

REPOSITORYUM, *Lat.*] A storehouse or place wherein things are kept; a warehouse. *Cro. Car.* 555.

REPRESENTATION, *representatio*.] The personating another: there is an heir by representation, where a father dies in the lifetime of the grandfather, leaving a son, who shall inherit his grandfather's estate, before the father's brother, &c. *Bro. Abr.* 303. Also, executors represent the person of the testator, to receive money and assets. *Co. Litt.* 209. See *Executor*, *Heir*, *Parliament*.

The term *representation* is also used to express the written pleading presented to a lord ordinary of the court of session in Scotland when his judgment is brought under review.

REPRIEVE, from the *Fr. repris*.] The taking back or suspending a prisoner from the execution and proceeding of law for that time. *Terms de Ley*. See *Execution of Criminals*.

REPRISAL, *reprisale, reprisalia*.] The taking one thing in satisfaction for another, derived from the *Fr. reprise*; and is all one in the common and civil law.

Reprisals are ordinary and extraordinary; ordinary reprisals are to arrest and take the goods of merchant-strangers within the realm; and the other is for satisfaction out of the realm, and is under the great seal, &c. *Lex Mercat.* 120.

If any person be killed, wounded, spoiled, or any ways damaged in a hostile manner, in the territories of any potentate, to whom letters of request are transmitted, and no satisfaction be made, there is no necessity to resort to the ordinary prosecution, but letters of reprisal issue forth; and the justice against whom the same are issued is obliged to

make satisfaction out of the estates of the persons committing the injuries; and in case of a deficiency there, it will then be adjudged a common debt on his country. But where misfortunes happen to persons or their goods residing in a foreign country in time of war, reprisals are not to be granted. In this case they must be contented to sit down under the loss, for they are at their liberty to relinquish the place on the approach of the enemy, when they foresee the country is subject to spoil; and if they continue, they must partake of the common calamity. *Lex Mercat.*

Reprisals may be granted on illegal prosecutions abroad, where wrong judgment is given in matters not doubtful, which might have been redressed either by the ordinary or extraordinary power of the country or place, and which was apparently denied, &c. See further, *tit. Letters of Marque*: and as to *Reprisal of Goods*, see *Recaption*.

REPRISES, *Fr. resumptiones*, taking back.] Is used for deductions and payments out of a manor or lands, as rent-charges, annuities, &c. Therefore, when we speak of the clear yearly value of a manor, or estate, or land, we say it is so much *per annum, ultra reprises*, besides all reprises.

REPROBATOR, action of. An action intended to convict a witness of perjury in Scotland, to which action the witness must be made a party. *Bell's Scotch Dict.*

REPUBLICATION OF WILLS. See *Will*.

REPUGNANT, *repugnans*.] What is contrary to any thing said before: repugnancy in deeds, grants, indictments, verdicts, &c. make them void. 3 *Nels.* 135. See *Deeds*, &c.

The common law abhors repugnances and all incongruities; but the former part of a deed, &c. shall stand, where the latter part is repugnant to it. *Jenk. Cent.* 251, 256.

Where contrarieties are in several parts of deeds or fines, the first part shall stand; in wills the last, if the several clauses are not reconcilable. *Jenk.* 96. pl. 86.

In contracts, gifts, verdicts, evidences, &c. where direct contrarieties are for the same thing at the same time, all is void. *Jenk.* 96. pl. 86.

A proviso good in the commencement may, by consequence, become repugnant, as grant of rent by deed for life, provided that it shall not charge his person; the proviso is good, but if the rent be arrear, and the grantee die, his executors shall charge the person of the grantor in debt; for otherwise they be remediless; and so it is now repugnant, by consequence void. 6 *Rep.* 41 b. See further, *tit. Condition*, *Proviso*.

REPUTATION, *reputatio*.] Is defined by *Coke* to be *vulgaris opinio ubi non est veritas*. 4 *Rep.* 104. That is not reputation which this or that man says; but that which generally hath been, and many men have said or thought. 1 *Leon.* 15.

A little time is sufficient for gaining reputation, which needs not a very ancient pedigree to establish it; for general acceptance will produce a reputation. *Cro. Jac.* 308. But it has been held that common reputation cannot be intended of an opinion which is conceived of four or five years' standing, but of long time. And some special matter must be averred to induce a reputation. 2 *Litt. Abr.* 464.

Land may be reputed parcel of a manor, though not really so. 1 *Vent.* 51; 2 *Mod.* 69; 3 *Nels.* *Abr.* 137. And there is a parish and office in reputation, &c.

With respect to the cases in which evidence of reputation is admissible, see *Evidence*, II. 3.

REPUTATION OR FAME. Is under the protection of the law, as all persons have an interest in their good name; and scandal and defamation are injurious to it, though defamatory words are not actionable, otherwise than as they are a damage to the estate of the person injured. *Wood's Inst.* 37. See *Libel*.

The security of reputation or good name from the arts of detraction and slander, are rights to which every man is entitled by reason and natural justice; since without these it is

impossible to have the perfect enjoyment of any other advantage or right. 1 *Comm.* 134. See *Liberty*.

REQUEST, of things to be done. Where one is to do a collateral thing, agreed on making a contract, there ought to be a request to do it. 2 *Litt. Abr.* 464. If a duty is due, it is payable without request: on promise to pay a duty precedent on request, there needs no actual request; but on a promise for a penalty, or a collateral sum, there should be an actual request before the action is brought. *Cro. Eliz.* 74; 1 *Saund.* 33; 1 *Lev.* 289.

If a debt is before a promise, a request is not necessary, for then a request is not any cause of the action; though upon a promise generally to pay on request, the action arises on request, and not before. *Cro. Jac.* 201; 1 *Lev.* 48. See *post*.

Action of debt for money due on a bond may be brought without alleging a special request. *Cro. Eliz.* 229, 523.

But if the money by the condition is payable only on demand, a demand must be shown, or the bond is not forfeited. 3 *Camp.* 459.

A man promises to re-deliver, on request, such goods as were delivered to him; if an action of detinue is brought, the plaintiff need not allege a special request, because the action is for the thing itself; but if an action on the case is had for these goods, then the request must be specially alleged; as it is not brought for the thing itself, but for damages. *Sid.* 66; 3 *Salk.* 309.

If a promise is made to pay money to the plaintiff on request, no special request is required; but where there are mutual promises between two persons to pay each other money on request, if they do not perform such an award, the request is to be specially alleged. And if there is a promise to pay money to a man on request, and he dies before any request made, it shall be paid to his executors, but not till request made. 3 *Salk.* 309; 3 *Bulst.* 259.

Where a person promises to pay a precedent duty, the general allegation is sufficient, because there was a duty without a promise; as, for instance, if one buys or borrows a horse, and promises to pay so much on request: but where the promise is collateral, as to pay the debt of a stranger on request, &c. the request is part of the agreement, and traversable, there being no duty before the promise made; and for that reason the request must be specially alleged, for bringing the action will not be a sufficient request. *Latch.* 93; 3 *Leon.* 200; 3 *Salk.* 308.

Where the thing is a duty before any request made, a request is only alleged to aggravate damages, and such request is not traversable; but if the request makes the duty, as in assumpsit to do such a thing on request, there the day, &c. of the request ought to be alleged, because it is traversable. *Palm.* 389.

If a request is to be specially made, the day and year when made should be specially alleged. 1 *Lutw.* 231; 2 *Litt. Abr.* 466; *Cro. Car.* 280. But where a person is not restrained to make the request by a time limited, if made at any time during his life, it has been held to be good. *Cro. Eliz.* 136. And a request at any other time than named may be given in evidence. *Sid.* 268.

If a debt or duty does not accrue on a promise until request made, the statute of limitations runs from the time of the request only, and not from the time of the precedent promise. *Cro. Car.* 98. See further, *Limitation of Actions*.

Unreasonable requests are not regarded in law; and there is no difference where a thing is to be done on request and reasonable request. *Dyer*, 218; *Cro. Car.* 176; 3 *Nels. Abr.* 140, 142.

In general, when a debt exists payable immediately, the law does not require any demand or request to pay it before the commencement of an action; 1 *Saund.* 33; *Cro. Eliz.* 548; and it is the legal duty of the debtor to find out and pay the creditor; and this doctrine extends even to a nego-

tiable bill of exchange, though the acceptor may not know who is the holder, and consequently an action may be commenced against him without even tendering the bill for payment. *Idem*, *ib.*; 1 *Str.* 222, *sed quære*. But when by the express terms of the contract a previous demand is necessary, it must be made; and, at all events, unless the debtor be about to abscond, the courts would censure the commencement of an action without previous request. 1 *Chitty's Gen. Pract.* 498.

Interest is now recoverable upon many debts where a demand in writing of payment is made, accompanied with a notice that interest will be claimed from the time of such demand. See *Interest*.

Also see *Action, Declaration, Pleading, Rent, &c.*

REQUISITION. In Scotch law a notarial demand of a debt made by a creditor, in consequence of a clause in the securities for debt previous to the Reformation, when a personal obligation was deemed illegal. *Bell's Scotch Dict.*

RESCUIT, or RESCEIT, receptio. An admission or receiving of a third person to plead his right in a cause formerly commenced between two other persons; as where an action is brought against tenant for life or years, or any other particular tenant, and he makes default, in such case he in the reversion may move that he may be received to defend his right, and to plead with demandant.

Resceit is likewise applied to the admittance of a plea, where the controversy is between the same two persons. *Broke*, 205; *Co. Litt.* 192; 3 *Nels. Abr.* 146.

He in reversion may come into court and pray to be received in a suit against his particular tenant; and after such resceit the business shall be hastened, as much as may be by law, without any delay of either side. 13 *Rich. 2. c.* 17. But resceit is admitted only for those who have estates depending on particular estates for life, tenants by the curtesy, or after possibility, &c. and not for him in remainder after an estate-tail, which is perdurable. 1 *And.* 133.

Husband and wife were tenants for life, remainder to another in fee: a *formedon* was brought against the husband, who made default; after default and thereupon the wife prayed that she might be received to defend her right; but it was denied by the court, because if defendant should recover against her husband, it would not bar her right if she survived him, therefore it would be to no purpose. Then he in remainder prayed to be received, which at first the court doubted, by reason if the husband should recover, he might falsify such recovery; and because his estate did not depend on the estate of the husband alone, but on the estate of the husband and wife; but at last he was received. 1 *Leon.* 86.

The Statute of Gloucester, 6 *Edm. 1. c.* 11. enacts, that a termor may be received to falsify, if he hath a deed, and comes before judgment; this is where he in reversion causeth himself to be impleaded by collusion to make the termor lose his term, &c. And by 20 *Edm. 1. st.* 3. if any stranger come in by a collateral title before he is received, he shall take surety to satisfy the demandant the value of the lands, if he recovers from that time till final judgment; and demandant recovering, he shall be grievously amerced, &c.

RESCUIT OF HOMAGE, receptio homagii. The lord's receiving homage of his tenant at his admission to the land. *Kitch.* 148. See *Homage*.

RESCISSORY ACTION. An action to rescind a contract; one of the principal divisions of actions in the law of Scotland, and includes all those by which deeds, &c. are declared void.

RESCOUS, or RESCUE.

See 4 *Comm.* 131, n. and tit. *ESCAPE*.

RESCUSSUS, from the Fr. *rescousse*, i. e. *liberatio*.] A resistance against lawful authority.

I. Of the different kinds of *Rescues*, &c.

II. Of the Offence of making Rescue; and how the Offenders are to be proceeded against and punished.

And see tit. Escape.

III. Of the Form of the Proceedings on a Rescue.

IV. In what cases the Sheriff may return a Rescue; of the Form of a Return, and for what Defects it may be quashed.

I. In the case of a distress, the goods being, from the first taking, considered as in the custody of the law, and not merely in that of the distrainer, the taking them back by force is looked upon as an atrocious injury, and denominated a *rescous*; for which the distrainer has a remedy in damages, either by writ of *rescous*, in case they were going to the pound, or by writ de *parco fracto*, or pound-breach, in case they were actually impounded. *F. N. B.* 100, 101. He may also, at his option, bring an action on the case for this injury, and shall therein, if the distress were taken for rent, recover treble damages. *2 W. & M. c. 5*; see post, II.; and tit. Distress, Pound-breach, Rent, Replevin.

The term *rescous* is likewise applied to the forcible delivery of a defendant, when arrested, from the officer who is carrying him to prison. In which circumstances the plaintiff has a similar remedy by action on the case, or of *rescous*; or if the sheriff makes a return of such *rescous* to the court out of which the process issued, the rescuer will be punished by attachment. *6 Mod.* 211; *Cro. Jac.* 419; *Salk.* 586. See *3 Comm. c. 9*; and post, II. III. IV.

If a bailiff or other officer on a writ arrest a man, and others by violence take him away, or procure his escape, this is a *rescous* in fact. So if one distrain beasts damage-tenant in his ground, as he drives them in the highway towards the pound, they enter into the owner's house, and he withholds them there, and will not deliver them on demand, this detainer is a *rescous* in law. *Co. Litt. lib. 2. c. 12, 161.* Cassanæus, in his book *De Consuetud. Burg. f.* 204, hath the same words coupled with *resistentia*.

In other terms, rescue is the taking away and setting at liberty, against law, any distress taken for rent, or services, or damage-tenant; but the more general notion of *rescous* is the forcible freeing another from an arrest, or some legal commitment, which, being an high offence, subjects the offender not only to an action at the suit of the party injured, but likewise to fine and imprisonment at the suit of the king. *Co. Litt.* 160; *F. N. B.* 226. See post, II.

But there can be no *rescous* but where the party has had the actual possession of the cattle, or other things whereof the *rescous* is supposed to be made; for if a man come to arrest another, or to distrain, and is disturbed, regularly his remedy is by action on the case. *Co. Litt.* 161 a; *Litt. Rep.* 296; *11. R.* 145; and see *5 Bing.* 490.

If the lord distrain for rent when none is due, the tenant may lawfully make *rescous*; so may a stranger, if his beasts be distrained when no rent is due. So if the tenant tender the rent when the lord comes to distrain, and yet he does distrain; or if he distrain any thing not distrainable, as beasts of the plough, when other sufficient distress may be taken, the tenant may make *rescous*; so if the lord distrain in the highway, or out of his fee. *Co. Litt.* 47, 160 b, 161 a.

But though there must be reason for the distress, and that otherwise the rescue cannot be unlawful, yet it hath been held, in a *parco fracto*, that a defendant cannot justify breaking the pound and taking out the cattle, though the distress was without cause, because they are now in the actual custody of the law. *Salk.* 247.

If on *fi. fa.* the sheriff seizes goods, which are taken away by a stranger, this is not properly a rescue; for by seizure of the goods, by virtue of the *fi. facias*, the sheriff has a property in them, and may maintain trespass or trover for them;

also the party injured may have an action on the case against the wrong-doer. *Hell.* 145; *Litt. Rep.* 296.

There is a difference between a man's being arrested by a warrant on record, and by a general authority in law; for if a *captias* be awarded to the sheriff to arrest a man for felony, though he be innocent, he cannot make rescue; but if the sheriff will, by the general authority committed to him by law, arrest any man for felony, if he be innocent he may rescue himself. *Co. Litt.* 161. See *5 Co.* 68; *6 Co.* 54; *Cro. Jac.* 486.

In an action on the case for a *rescous* on mesne process, the evidence was, the bailiff stood at the street door, and sent his follower up three pair of stairs in disguise, with the warrant, who laid hands on the party, and told him that he arrested him; but he, with the help of some woman, got from the follower, and ran down stairs, and the defendant, hearing a noise, ran up, and put the party into a room, locked the door, and would not suffer the bailiff to enter: Holt doubted whether this was a lawful arrest, being by the bailiff's servant, and not in his presence; but said that the plaintiff must prove his cause of action against the party; that he must prove the writ and warrant by producing sworn copies of them; he must prove the manner of arrest, that it may appear to the court to be legal; and, in point of damage, he must prove the loss of his debt, viz. that the party became insolvent, and could not be retaken. *6 Mod.* 211.

II. RESCUE is classed by Blackstone amongst offences against public justice; and is defined to be the forcibly and knowingly freeing another from an arrest or imprisonment: and it is generally the same offence in the stranger so rescuing as it would have been in a gaoler to have voluntarily permitted an escape. A rescue, therefore, of one apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor also. But here, likewise, as upon voluntary escapes, the principal must be first attainted, or receive judgment, before the rescuer can be punished; and for the same reason, because perhaps, in fact, it may turn out that there has been no offence committed. *4 Comm. c. 10. p. 131*; *1 Hal. P. C.* 607; *Fost.* 344. See *Escape*.

There are also various statutory enactments relating to the rescue of persons charged with criminal offences.

By the *25 Geo. 3. c. 37. § 9.* rescuing, or attempting to rescue, or set at liberty any person out of prison, committed for or found guilty of murder, or any person convicted of murder going to execution, or during execution, is a capital felony.

And *§ 10.* to rescue, or attempt to rescue, the body of a felon executed for murder, is single felony, punishable by transportation for seven years; and a like punishment is inflicted by *11 Geo. 2. c. 26.* and *24 Geo. 2. c. 40. § 28.* against persons assembling, to the number of five, or more, to rescue any unlawful retailers of spirituous liquors, or to assault the informers against them.

By *1 & 2 Geo. 4. c. 88. § 1.* if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough, or other person, any person charged with, or suspected of, or committed for, felony, or on suspicion thereof; then, if the person so offending shall be convicted of felony, and be entitled to clergy, and be liable to be imprisoned not exceeding one year, the court may order such person to be transported for seven years, or imprisoned no less than one nor exceeding three years.

By the *5 Geo. 4. c. 34.* if any person shall rescue any offender, sentenced to transportation, from the gaoler, or other person removing and conveying such offender, such offence shall be punishable in the same manner as if the offender had been confined in gaol.

As to the punishment of aiding prisoners to escape from prison, see further *Gaol.* III.

It seems agreed, that the rescuing a person imprisoned for

felony, is also felony by the common law. 1 Hal. P. C. 606.

Also it is agreed that a stranger who rescues a person committed for, and guilty of, high treason, knowing him to be so, is in all cases guilty of high treason. *Staufd. P. C.* 11; 1 Jon. 455. Whether he knew that the prisoners were so committed or not. *Cro. Car.* 583.

To make a rescue felony, it is necessary that the felon be in custody, or under arrest for felony; therefore if A. hinder an arrest, whereby the felon escapes, the township shall be amerced for the escape, and A. shall be fined for the hinderance of his taking: but it is not felony in A. because the felon was not taken. 1 Hal. P. C. 606; 3 Edw. 3. *Coron.* 333; *Staufd.* 31.

So, to make a rescue felony, the party rescued must be under custody for felony, or suspicion of felony; and it is all one whether he be in custody for that account by a private person, or by an officer, or warrant of a justice; for where the arrest of a felon is lawful, the rescue of him is felony; but it seems necessary that he should have knowledge that the person is under arrest for felony, if he be in the custody of a private person. 1 Hal. P. C. 606.

Wherever the imprisonment is so far groundless or irregular, or the breaking of a prison is occasioned by such a necessity, &c. that the party himself, breaking prison, is either by the common law, or by the statute *de frangentibus prisonam*, saved from the penalty of a capital offender, a stranger who rescues him from such imprisonment is, in like manner, also excused; *et sic è converso*. 2 *Hawk. P. C. c.* 21. § 6. See *Gaol*, III.

But if he be in the custody of an officer, there at his peril, he is to take notice of it; so if there be felons in a prison, and A. not knowing it, breaks the prison, and lets out the prisoners, though he knew not that there were felons there, it is felony. 1 Hal. P. C. 606; *Cro. Car.* 383.

A person committed for high treason, who breaks the prison, and escapes, is guilty of felony only; unless he lets others also escape, whom he knows to be committed for high treason; in which case he is guilty of high treason, not in respect of his own breaking of prison, but of the rescous of the other. 2 *Hawk. P. C. c.* 21. § 7.

If the person rescued were indicted or attainted of several felonies, yet the escape or rescue of such a person makes but one felony. 1 Hal. P. C. 599.

The rescuer of a prisoner for felony, though not within clergy, yet should have his clergy; 1 Hal. P. C. 607; unless where it was otherwise declared by statute. See now *Felony*.

The return of a rescue of a felon, by the sheriff against A., is not sufficient to put him to answer for it as a felony, without indictment or presentment, by the statute 25 Edw. 3. st. 5. c. 4. 1 Hal. P. C. 606.

In cases where the obstruction of process by the rescue of a party arrested is accompanied with circumstances of violence and assault upon the officer, the offence may be made the subject of proceeding by indictment; and the rescue, or attempt to rescue, a party arrested on a criminal charge is generally punished by that mode of proceeding. And the offence of rescuing a person arrested (in civil cases) on mesne process, or in execution after judgment, subjects the offender to a writ of rescous or a general action of trespass *vi et armis*, or an action on the case, in all which damages are recoverable. 6 *Bac. Abr. Rescous*, C.; 6 *Com. Dig. Rescous*, D. And it has also been the frequent practice of the court to grant an attachment against such wrong doers, it being the highest violence and contempt that can be offered to the process of the court. But, in order to ground an attachment for a rescue, it seems there must be a return of it by the sheriff. 2 *Hawk. P. C. c.* 22. § 34; 4 *Burr.* 2129; 1 *Ld. Raym.* 35, 589.

He who rescues a prisoner from any of the courts of Westminster Hall, without striking a blow, shall forfeit his goods and profits of his lands, and suffer imprisonment during life:

but not lose his hand, because he did not strike. 22 Edw. 3. 13; 3 *Inst.* 141; 1 *Hawk. P. C. c.* 21. § 5. See *Assault*, *Striking*.

In the case of *Lord Thanet and others*, B. R. Trin. 39 Geo. 3. the first three counts of the information set forth a special commission for the trial of A. O'Connor (and others) for high treason; and that after his acquittal, and before any order for his discharge, the defendants in open court, pending the sessions, made a great riot, and riotously attempted to rescue him out of the custody of the sheriff: and, the better to effect such rescue and escape, did, in the presence of the justices at such sessions, riotously make an assault on one J. R.; and did then and there "beat, bruise, wound," and ill treat the said J. R., and thereby impede and obstruct the said justices. There were two other counts in the information: the one for riotously interrupting and obstructing the justices in holding the session, and the other for a common riot. Two of the defendants having been found guilty generally, considerable doubt was intimated by the chief justice (Kenyon) whether the court were not bound to pass the judgment of amputation of the hand, forfeiture, and imprisonment, for the offence as laid in the first three counts. The matter stood over for consideration; and, before bringing up the defendants to receive judgment, the attorney-general informed the court that he had received the royal command and warrant to enter a *noli prosequi* as to those parts of the information on which the doubt had arisen, which was done accordingly, and the judgment of the court prayed on such charges as left the sentence in their discretion; on which the court gave judgment against the defendants of fine, imprisonment, and sureties. 1 *East, P. C. c.* 8. § 3. See *Striking*.

It is clearly agreed, that for a rescous on mesne process, the party injured may have either an action of trespass *vi et armis*, or an action on the case, in which he shall recover his debt and damages against the wrong doer; and the rather, because on mesne process he can have no remedy against the sheriff. *Cro. Jac.* 486; *Hob.* 180. See *post*, IV.

Also it hath been adjudged, that for rescous of a person in execution on a *ca. sa.* or *ca. utlag.* an action will lie against the rescuer, though the party injured hath his remedy against the sheriff, and the sheriff hath his remedy against the wrong doer; for perhaps the sheriff may be dead or insolvent: but herein it hath been held, that if he bring his action against the party who made the rescue, he may plead it in bar to an action brought by the sheriff; so, if against the sheriff, or his bail, they may plead that he had satisfaction from the party, so that if he recovers against one, the other is discharged. *Heil.* 23. *Cro. Car.* 109; *Hut.* 33; *Hob.* 180.

By 2 *Wm. & M. st.* 1. c. 5. § 5. on pound-breach, or rescous of goods distrained for rent, the person grieved shall, in a special action on the case, recover treble damages and costs against the offenders, or against the owner of the goods, if they come to his use.

In an action on the case for a rescous, on this statute, it hath been held, that the plaintiff shall recover treble costs as well as treble damages: for the damages are not given by the statute, but increased; an action on the case lying for a rescous at common law. 1 *Salk.* 205.

An attachment will be granted not only against a common person, but even against a peer of the realm, for rescuing a person arrested by due course of law: so that if the sheriff in any case return to the court, that a person arrested, or goods seized, or possession of lands delivered by him, by virtue of the king's writ, were rescued or violently taken from him, &c. they will award an attachment against the rescuers. *Dyer*, 212; 2 *Jon.* 39; *Salk.* 322.

But it seems to be the practice not to grant an attachment in any case for a rescous, unless the officer will return it, for it hath been found by experience, that officers will take on them to swear a rescous where they will not venture to return one. 2 *Hawk. P. C. c.* 22. § 34.

A distinction was taken where an attachment is prayed for

RESCUE, III.

a rescous in the first instance, and where a rule to show cause is only asked; in this affidavits of the fact are sufficient; in the other case, the sheriff's return is requisite. *Trin. 5 Geo. 2. in B. R. Young v. Payne.*

Where on the return of a rescue, an attachment is granted, and the party examined on interrogatories, upon answering them he shall be discharged; but if the rescous is returned to the filacer, and process of outlawry issues, and the rescuer is brought into court, he shall not be discharged on affidavits. *Salk. 586.*

III. As in case of an escape, so in case of a rescue, if the party rescued be imprisoned for felony, and rescued before indictment, the indictment must surmise a felony done, as well as an imprisonment for felony, or suspicion thereof; but if the party be indicted, and taken by a *capias*, and rescued, then there needs only a recital that he was indicted *prout*, and taken and rescued. *1 Hal. P. C. 607.*

Though the rescuer may be indicted before the principal is convicted and attainted, yet he shall not be arraigned or tried before the principal be attainted; but if the person rescued were imprisoned for high treason, the rescuer may immediately be arraigned, for in high treason all are principals: *sed quere.* But it seems that he may be immediately proceeded against for a misprision only, if the king please. *2 Hawk. P. C. c. 21. § 8.*

An indictment of a rescous ought to set forth the special circumstances of the fact, with such certainty as to enable defendant to make a proper defence. *Dyer, 164.* No defect can be aided by the verdict. *1 Roll. Abr. 781.*

Therefore, if an indictment lay the offence on an uncertain or impossible day, as where it lays it on a future day, or lays one and the same offence at different days, or lays it on such a day which makes the indictment repugnant to itself, it is void. *Moor, 555; Rast. Ent. 269.*

It has been adjudged, on exceptions taken to an indictment for a rescous, that it was not necessary to allege the place where the rescue was made, and that it should be intended that where the arrest was, there also was the rescue. *Cro. Jac. 345; 2 Bulst. 208.*

An exception was taken to an indictment of rescous, that it wanted the words *vi et armis*, or *manu forti*; but over-ruled, it being held by the court, that the word *rescussit* implies it to be done by force. *Cro. Jac. 345.* The same exception taken in *Cro. Jac. 473.* over-ruled, and there held, that though it were error at common law, yet it is made good by the *37 Hen. 8. c. 8.*

It is said, that an indictment of rescous is not within the statute of additions, and that naming the person indicted of such a parish, without giving him any title, is sufficient. *2 Inst. 665; 2 Show. 84.*

Note: on an indictment of rescous, if it were on an arrest upon mesne process, and the party has appeared, the court will be easily induced to quash it; so if it be on process out of an inferior court, though the party has not appeared, for no aid is given to inferior jurisdictions.

In an action for a rescue, the plaintiff must allege in his declaration all the material circumstances; as that such a writ issued, that he was arrested and in custody, and that he was rescued, &c. *Godb. 125; 1 Lutw. 130.*

The forcibly rescuing goods distrained, and the rescuing cattle by the breach of the pound in which they have been placed, have been considered as offences at common law, and made the subject of indictment. The civil remedy, however, given by *2 W. & M. st. 1. c. 5* in cases of a pound breach, or goods distrained for rent, will be found the most desirable remedy where the offenders are responsible persons. See ante, II.

FORM OF THE WRIT OF RESCOUS.

GEORGE the Third, &c. To the Sheriff of M. greeting:

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RESCUE, IV.

If A. B. shall make you secure, &c. then put C. D. &c. to show, wherefore, whereas the said A. B. at, &c. certain beasts of the said C. D. had taken and distrained for rent, &c. And those, there, according to the law and custom of our kingdom of England, would have impounded, the said C. D. the beasts aforesaid, with force and arms, rescued, and other enormities there did, to the contempt of us, and grievous damage of the said A. B. and against our peace, &c. Or thus:

Put E. F. and G. H. to answer, &c. wherefore, whereas the said A. B. according to the duty of his office, C. D. whom by our Sheriff of the county aforesaid, by writ to him directed, we commanded to be taken at L., by virtue of our said writ had taken, and him to our prison of, &c. there to abide, would have conveyed, the said E. F. and G. H. him the said C. D. at L. aforesaid, with force of arms, rescued, and other enormities, &c.

IV. THE distinction laid down in a variety of books and cases is, that on a rescue on mesne process the sheriff may return the rescue, and is subject to no action; for that on a mesne process he was not obliged to raise his *posse comitatus*, nor would it be convenient so to do on the execution of every mesne process. *Cro. Eliz. 868; 1 March, 1; 1 Jon. 201; 3 Bulst. 198; 2 Roll. Rep. 389; Noy, 40; Moor, 852; 2 Lev. 144; 6 Mod. 141; Lutw. 130, 131.* But the sheriff may, if he pleases, take his *posse* to arrest one on mesne process. *Noy, 40.*

But if the sheriff takes a man on an execution, as on a *ca. sa.*, and he is rescued from him before he can bring him to prison, though he returns the rescue, yet this shall not excuse him; for when judgment is passed, and he and his bail do not surrender him, nor pay the condemnation money, and then a *capias* issues, to which there can be no bail, there it is presumed that it will not be forthcoming, because neither he nor his bail have satisfied the judgment; therefore the sheriff ought to take the *posse comitatus*; consequently it cannot be a good return, that he took the body, but that it was rescued; and the party may have an action of escape against the sheriff on this return; and this is provided by the *stat. West. 2. 13 E. 1. st. 1. c. 30.* which was made to prevent sheriffs from returning rescues to the king's writs. *Cro. Jac. 419; 1 Roll. Rep. 388, 440; 3 Bulst. 198; Moor, 852.* Or on a *capias utlagatum* after judgment. *Cro. Jac. 419; 1 Roll. Rep. 389.*

In an action on the case against the sheriff for an escape on mesne process, the defendant pleaded a rescue, which on demurrer was held a good plea, though he did not show that the rescue was returned. *3 Lev. 46.*

But if one taken on mesne process be once in prison, the sheriff cannot return a rescous, for the law presumes that he hath a power to keep him there. *1 Roll. Rep. 441; 3 Bulst. 198; Cro. Jac. 419.* Unless the prison is broken by the king's enemies, which shall excuse the sheriff. *4 Co. 84; 1 Vent. 239.* But not if broken by rebels and traitors, for the sheriff or gaoler hath his remedy over against them. *4 Co. 84; Cro. Eliz. 815; 2 Mod. 28; 1 Vent. 239.*

If a felon be attainted, and in carrying him to execution he is rescued from the sheriff, the sheriff is punishable notwithstanding the rescue; for there is judgment given, and the sheriff should have taken sufficient power with him; therefore in that case the township is not finable. *1 Hal. P. C. 602;* and there said that a rescue is no excuse in felony.

It hath been adjudged that the return of a rescue by a sheriff must show the year and day on which it was made, such return being in lieu of an indictment. *3 H. 7. 11. pl. 3; Bro. Return de Brief, 97; Fitz. Cora. 45; Attach. 1.*

But it hath been held that the sheriff's return of a rescue on a *latitat*, without mentioning the day of the caption, was sufficient, all the clerks in court affirming the precedents to have been so. *Palm. 532.*

The sheriff's return of a rescue, without mentioning the

place where it was made, was held bad, and the party discharged. *Moor*, 422. *pl.* 585.

For if the prisoner escape through the negligence of the officer, this will not justify the return of a rescue. 1 *Holt*, 537.

It seems that a return that the defendant rescued himself is good without naming the rescuers, or stating them to be people of the county. *R. v. Sheriff of Middlesex*, 1 *Barn. & A.* 190.

But if the return do not state the arrest to have taken place in the county, it is bad, for if it were elsewhere the rescue was lawful. *Ibid.*

Where the sheriff returned *virtute brevis mihi direct' feci warrant' A. & B. ballivis meis, qui virtute inde ceperunt the defendant et in custodia mea habuerunt quousque such and such rescusserunt him ex custodia ballivorum meorum*; this return was on motion quashed; for *per Holt*, when bailiffs have arrested the party, he is in fact in their custody, but in law he is in custody of the sheriff; an answer either way is good, viz. that he was rescued out of the bailiff's custody, or that he was rescued out of the sheriff's custody; but to say that he was in the custody of the sheriff, and yet rescued out of the bailiff's, is repugnant. 2 *Salk.* 586.

It seems that anciently, when the sheriff returned a rescue, the party was admitted to plead to it as to an indictment; but the course of late has been not to admit any plea to it, but drive the party to his action against the sheriff in case the return were false; hence it is now settled that the return of a rescue is not traversable, but yet it hath been held that submission to the fine doth not conclude the party grieved from bringing his action for the false return, if it were so. *Cro. Eliz.* 781; *Dyer*, 212; 2 *Jon.* 29; 1 *Vent.* 224; 2 *Vent.* 175; *Comb.* 295.

If on a *feri facias* the sheriff returned that he had seized the goods, but that they were rescued by B. and C. &c. this is not a good return, but he shall be amerced; the party also at whose suit the execution issued may charge him by *scire facias* for the value of the goods. 1 *Vent.* 21; 2 *Saund.* 343; 1 *Shon.* 180.

The Court of K. B. set aside an attachment against a sheriff for not bringing in the body, with costs, upon an affidavit that the plaintiffs purposely prevented the defendant's being retaken after a rescue, and that the application was by the sheriff himself, but without negating the fact of his having an indemnity. 1 *B. & A.* 190.

RESCUOR. The party making a rescue.

RESSEISER, reseisire. The taking lands into the hands of the king, where a general livery or ouster *le mainc* was formerly misused. *Staundf. Prærog.*

RESERVATION, reservatio. A keeping aside, or providing; as when a man lets or parts with his land, but reserves or provides for himself a rent out of it for his own livelihood; sometimes it has the force of a saving or exception. *Co. Litt.* 148.

Exception is always of part of the thing granted, and of a thing in being; and a reservation is of a thing not in being, but is newly created out of the lands or tenements demised; though exception and reservation have been used promiscuously. *Co. Litt.* 47. The proper place for a reservation is next after the limitation of the estate; and reservation of rent may be every two, three, or more years; as well as yearly, half-yearly, quarterly, &c. *Co. Litt.* 47; 8 *Rep.* 71.

It must be out of a house or lands, and be made either by the words yielding and paying, &c. or the word covenant; which is of both lessor and lessee, therefore makes a reservation. *Roll. Rep.* 80.

The reservation of rent is good, although it is not reserved by apt and usual words, if the words are equivalent. *Plowd.* 120. But reservation of a rent *secundum ratam*, is a void reservation. 2 *Vent.* 272. See *Deed, Reddendum, Rent, &c.*

RESIANCE, resiantia. Residence; abode or continuance; whence comes the participle *resiant*, that is, continually dwelling or abiding in any place. *Old Nat. Br.* 85; *Kitch.* 33.

RESIANT ROLLS, i. e. rolls containing the resiants in a tithing, &c. which are to be called over by the steward on holding courts-leet. *Comp. Court Keep.*

RESIDENCE, residentia. Is peculiarly used both in the canon and common law, for the continuance of a parson or vicar on his benefice.

One of the great duties incumbent on clergymen is, that they be resident on their livings; and on the first erecting parochial churches, every clergyman was obliged to reside on his benefice, for reading of prayers, preaching, &c. by the laws and canons of the church; and by statute, the parson ought to abide on his rectory in the parsonage-house; for the statute is intended not only for serving the cure, and for hospitality, but to maintain the house in repair, and prevent dilapidations; though lawful imprisonment, sickness, &c. being things of necessity, are good cause of excuse for absence, and excepted out of the act by construction of law; and it is the same where a person is employed in some important business for the church or king; or is entertained in the king's service. 6 *Rep.* 21, *Cro. Lihz.* 580; *Gibb. Cod.* 887.

Residence was formerly regulated by 21 *Hen. 8. c.* 13. and afterwards in England by 43 *Geo. 3. c.* 84. and in Ireland by 48 *Geo. 3. c.* 66. the provisions of which acts were in this respect very similar.

Further amendments were made by 54 *Geo. 3. c.* 54 and 175. as to residence in England. These were temporary acts. At length by 57 *Geo. 3. c.* 99. "to consolidate and amend the laws relating to spiritual persons holding farms, and for enforcing the residence of spiritual persons on their benefices, and for the support of stipendiary curates in England," all former acts as to residence from 21 *Hen. 8. c.* 13 to 43 *Geo. 3. c.* 84. and also several acts as to curates, were repealed, and new regulations introduced of a very detailed and apparently complex nature; by this act bishops are empowered to grant licences for non-residence in cases of illness, &c.

Chaplains to his majesty, to peers of the realm and persons holding certain offices and dignities, are exempted from the penalties of non-residence. Archbishops and bishops are also exempted from such penalties.

Independent of the statutes, the bishop in his court may compel the residence of all the clergy who have the cure or care of souls within his diocese. 3 *Burn's Eccl. Law*, 281 *Gibb.* 887.

The article of residence in Ireland is now regulated by the 5 *Geo. 4. c.* 91.

Bishops are liable to ecclesiastical censures for non-residence on their bishopric; and the king may issue a mandatory writ to enforce their attendance, and compel them to it by seizing their temporalities; as King Henry III. did by the Bishop of Hereford. 2 *Inst.* 625.

See further *Churches, Clergy, Parson.*

RESIDUARY LEGATEE. Is he to whom the residuum of the estate is left by will. See *Executor, Legacy.*

RESIGNATION, resignatio. The yielding up a benefice into the hands of the ordinary, called by the canonists renunciation; and though it is all one in nature with the surrender, yet it is, by use, restrained to yielding up a spiritual living to the bishop; as surrender is the giving up of temporal land into the hands of the lord. And a resignation may now be made into the hands of the king as well as the diocesan, because he has *supremam auctoritatem ecclesiasticam*, as the pope had in ancient times; though it has been adjudged that a resignation ought to be made only to the bishop of the diocese, and not to the king, because the king is not bound to give notice of the resignation to the patron

as the ordinary is; nor can the king make a collation himself without presenting to the bishop. *Plomd.* 498; *Roll. Abr.* 358.

Every parson who resigns a benefice must make the resignation to his superior; as an incumbent to the bishop, a bishop to the archbishop, and an archbishop to the king, as supreme ordinary; a donative is to be resigned to the patron, not the ordinary, for in that case the clerk received his living immediately from the patron. 1 *Rep.* 137.

A common benefice is to be resigned to the ordinary, by whose admission and institution the clerk first came into the church; and the resignation must be made to that ordinary who hath power of institution; in whose discretion it is either to accept or refuse the resignation; as the law hath declared him the proper person to whom it ought to be made, it hath likewise empowered him to judge thereof. *Cro. Jac.* 64, 138.

The instrument of resignation is to be directed to the bishop; and when the bishop hath accepted of it the resignation is good to make void the church and not before, unless it be where there is no cure, when it is good without the acceptance of the bishop. A resignation may be made before a public notary, but without the bishop's acceptance it doth not make the church void; the notary can only attest the resignation, in order to its being presented, &c. *Cro. Jac.* 64, 138.

Before acceptance of the resignation by the bishop, no presentation can be had to the church; but, as soon as the acceptance is made, the patron may present to the benefice resigned; and when the clerk is instituted, the church is full against all men in case of a common person; though, before induction, such incumbent may make the church void again by resignation. *Count. Pars. Comp.* 106.

It seems to be clear that the bishop may refuse to accept a resignation upon a sufficient cause for his refusal; but whether he can, merely at his will and pleasure, refuse to accept a resignation without any cause, and who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept, are questions undecided. In the case of the *Bishop of London v. Elythe*, the Court of K. B. held that the ordinary could not refuse to admit a clerk to a rectory to which he was presented, because he had given a general bond to resign upon the request of his patron. 1 *East*, 487. But this judgment was reversed in the House of Lords, and the judges in general declined in that case to answer whether a bishop was compellable to accept a resignation; one thought he was compellable by *mandamus*, if he did not show sufficient cause; and another observed, that if he could not be compelled, he might prevent any incumbent from accepting an Irish bishopric, as no one can accept such bishopric till he has resigned all his benefices in England. But Lord *Thurlow* seemed to be of opinion that he could not be compelled, particularly by *mandamus*, from which there is no appeal on writ of error. 1 *Comm. c.* 11. p. 393, in n. See *Simony*.

A parsonage is not to be granted over by the incumbent, but it may be resigned; and resignations are to be absolute, and not conditional; for it is against the nature of a resignation to be conditional, being a judicial act. 3 *Nels. Abr.* 157.

If any incumbent corruptly resign his benefice, or take any reward for resigning the same, he shall forfeit double the value of the sum, &c. given, and the party giving it be incapable to hold the living. 31 *Eliz. c.* 8. § 8. But a man may bind himself by bond to resign, and it is not unlawful, let him be on good and valuable reasons; as, where he is obliged to resign if he take a second benefice, or if he be non-resident by the space of so many months, or to resign on request, if the patron shall present his son or kinsman, when he shall be of age capable to take the living, &c. *Cro. Jac.* 249, 274. Though bonds for resignation of benefices have no encouragement in Chancery; for on such bonds, gene-

rally, the incumbent is relieved, and not obliged to resign. 1 *Roll. Abr.* 443. On a debt upon bond to resign a benefice, the court would not let the defendant's counsel argue the validity of the bond, these bonds having been so often established even in a court of equity. 1 *Strange*, 227. But such a bond will not be allowed, where money has been paid on it. *Ibid.* 534.

Now, by the 9 *Geo. 4. c.* 94. bonds or agreements to resign a benefice are under certain restrictions valid. See further, *Simony*.

The Court of K. B. determined that a bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of his patron, was good at law: but equity will restrain any improper use of it by the patron. 1 *East*, 391. On error brought in this case in the exchequer chamber, that court thought it did not appear that it was a freehold office, and therefore affirmed the judgment without giving any opinion on the principal point. 3 *Bos. & Pul.* 231. See *Simony*.

A parson's refusal to pay his tenth, it is said, is a resignation, for which he may be deprived. *Owen*, 5. And where resignation is actually made *de cunctis* it extends to all the lands and possessions of the church. *Cro. Jac.* 63.

The usual words of a resignation are *renuncio, cedo, dimitto, and resigno*; and the word *resigno* is not a proper term alone. 2 *Roll.* 350.

As to resignation of fees in the Scotch law, see *Procuratory of Resignation*.

As to resignation of temporal offices.—Declaring, at an assembly of the corporation, that he would hold the place of alderman no longer, is a good resignation, especially since the corporation accepted it, and chose another in his place; but, till such election, he had power to waive his resignation, but not afterwards. 2 *Salk.* 433.

A burgess of a corporation, came to the mayor, and desired the mayor to remove and dismiss him from the place of burgess. On return of this, a *mandamus* was denied to restore him; for having resigned voluntarily, he is estopped to say, that the mayor had no power to remove him; and the case being sent to Hale, Ch. B., he agreed, and said, that a corporation, as such, have power to take such resignation. *Sid.* 14.

But giving consent to be removed, does not amount to a resignation. A man may resign an office by parol. *Holl's Rep.* 450.

Resignation by a common-council-man need not be by deed. *Lutw.* 405.

Where an alderman is a justice of peace for life, by force of the patent of the king, who created the corporation, he cannot resign his office of justice of the peace, because he cannot resign it but to a superior; *per Coke*, Ch. J.; *Roll. Rep.* 135, pl. 19.

So, if a man can have no title to the profits of an office, without the admission or confirmation of a superior, there the resignation of that office must be to him. 3 *Nels. Abr.* 158. See *Corporation, Mandamus, Quo Warranto*.

RESORT, *resortum*.] The authority or jurisdiction of a court. *Spelm.*

Dernier Resort, the last refuge. The House of Lords is the *dernier resort* in cases of appeal.

RESPECTU COMPUTI VICECOMITIS HABENDO, was a writ for respiting a sheriff's account, directed to the treasurer and barons of the Exchequer. *Reg. Orig.* 139. See *Sheriff*.

RESPIRE, *respectus*.] A delay, forbearance, or continuation of time. *Glanvil*, lib. 12. c. 9. See *Execution of Criminals*.

RESPIRE OF HOMAGE, *respectus homagii*.] The forbearance or delay of homage, which ought to be performed by tenants holding by homage, &c. It was most frequently in use for such as held by knight's-service, and in capite, who

formerly paid into the Exchequer, every fifth term, some small sum of money to be respited their homage: but this charge being incident to and arising from knight's-service, it is taken away by 12 Car. 2. c. 24. See *Homage, Tenures*.

RESPIRE OR JUR. See *Jury, Nisi Prius, Trial*.

RESPONDEAS, or RESPONDEAT OUSTER, *answer, or let him answer over.*] If a demurrer is joined on a plea to the jurisdiction, person, or writ, &c. and it be adjudged against the defendant, judgment is given that he shall answer over. See further, *Demurrer, Judgment*.

RESPONDEAT SUPERIOR, *let the superior answer.*] If sheriffs of London are insufficient, the mayor and commonalty must answer for them: and *per insufficiency del bailiff d'un liberty, respondeat dominus libertatis.* 4 Inst. 114; 44 Edw. 3. cap. 13.

If a coroner of a county is insufficient, the county, as his superior, shall answer for him. *Wood's Inst.* 83.

A gaoler constitutes another under him, and he permits an escape, if he be not sufficient *respondeat superior*; and superior officers must answer for their deputies in civil actions, if they are insufficient to answer damages. *Doct. & Stud.* c. 24. See *Deputy, Officer*.

RESPONDE-BOOK, in Exchequer. A book kept by the directors of Chancery, in Scotland, in which are kept the accounts of all non-entry and relief duties, payable by heirs, who take precepts from Chancery. *Bell's Scotch Dict.*

RESPONDENTIA. See *Bottomry, Insurance, IV*.

RESPONSALIS, qui responsum defert.] He who appears and answers for another in court at a day assigned. *Glan. lib. 12. c. 1.* Fleta makes a difference between *responsalem, attornatum, and essoniatorem*; he says that *responsalis* was for the tenant, not only to excuse his absence, but to signify what trial he meant to undergo, the combat or the country. *Fleta, lib. 6. c. 21.*

This word is made use of in the canon law for a proctor.

RESTITUTION, restitutio.] The restoring any thing unjustly taken from another. It signifies also the putting him in possession of lands or tenements, who had been unlawfully disseised of them. *Crompt. Just.* 144. And restitution is a writ, which lies where judgment is reversed, to restore and make good to the defendant what he hath lost. The court which reverses the judgment gives, on reversal, a judgment for restitution; whereon a *scire facias quare restitutionem habere non debet*, reciting the reversal of the judgment, and the writ of execution, &c. must issue forth. But the law doth often restore the possession to one without a writ of restitution, i. e. by writ of *habere facias possessionem, &c.* in the common proceeding of justice on a trial at law. 2 Lill. Abr. 472, 3. See *Execution*.

There is a restitution of the possession of lands in cases of forcible entry; a restitution of lands to an heir, on his ancestor's being attainted of treason or felony; and restitution of stolen goods, &c.

A writ of restitution is not properly to be granted but where the party cannot be restored by the ordinary course of law; and the nature of it is to restore the party to the possession of a freehold, or other matter of profit, from which he is illegally removed; and it extends to restitution on *mandamus* to any public office. 2 Lill. 472, 473.

Where a judgment for land is reversed in B. R. by writ of error, the court may grant a writ of restitution, to the sheriff to put the party in possession of the lands recovered from him by the erroneous judgment; though there ought to be no restitution granted of the possession of lands, where it cannot be grounded on some matter of record appearing to the court. *Hil. 22 Car.* And persons who are to restore, are to be parties to the record; or they must be made so by special *scire facias*. *Cro. Car.* 328; 2 Salk. 587.

If a lease is taken in execution on a *fi. fa.* and sold by the sheriff, and afterwards the judgment is reversed; the restitution must be of the money for which it was sold, not the

term. *Cro. Jac.* 246; *Moor*, 788. But where a sheriff extended goods and lands on an *elegit*, and returned that he took a lease for years, which he sold and delivered to the plaintiff, as *bona et catalla* of the defendant, for the debt, and afterwards the judgment was reversed for error; it was adjudged, that the party shall be restored to the lease, because the *elegit* gave the sheriff no authority to sell the term, therefore a writ of restitution was awarded. *Yelv.* 179. And there has been in this case a distinction made between compulsory and voluntary acts done in execution of justice; where the sheriff is commanded by the writ to sell the goods, and where he is not, when the goods are to be restored, &c. 8 Rep. 96.

If a plaintiff hath execution, and the money is levied and paid, and afterwards the judgment is reversed, there the party shall have restitution without a *scire facias*, for it appears on the record what the party hath lost and paid, but if the money was only levied, and not paid, then there must be a *scire facias* suggesting the sum levied, &c. And where the judgment is set aside after execution for an irregularity, there needs no *scire facias* for restitution, but an attachment of contempt, if, on the rule for restitution, the money is not restored. 2 Salk. 588.

In a *scire facias quare restitutionem, &c.* the defendant pleaded payment of the money mentioned in the *scire facias*, and it was held to be no plea. *Cro. Car.* 328. But now payment is a good plea to a *scire facias* by the 4 & 5 Ann. c. 16. § 12; 3 Lill. Abr. 479.

Upon a writ of *vi laici remorendi* a parson was put out of possession; and on a suggestion thereof, and affidavit made, restitution was ordered. *Cro. Eliz.* 465.

The justice of peace, before whom an indictment for forcible entry is found, must give the party restitution of his lands, &c. who was put out of possession by force. *Hen.* 6. c. 9. But where one is indicted for a forcible entry, and the party indicted traverses the indictment, there cannot be restitution before trial and a verdict, and judgment given for the party, though the indictment be erroneous; it being too late to move to quash the indictment after the traverse, which puts the matter on trial. 2 Lill. 473, 474. See *Forcible Entry, II*.

A person being attainted of treason, &c. he or his heirs may be restored to his lands, &c. by the king's charter of pardon; and the heir, by petition of right, may be restored if the ancestor is executed; but restitution of blood must be by act of parliament; and restitutions by parliament are some of blood only, some of blood, honour, inheritance, &c. The king may restore the party, or his heirs, to his lands, and the blood as to all issue begotten after the attainder. 3 Inst. 240; *Co. Litt.* 8, 391. See *Attainder, Forfeiture, &c.*

By the common law there was no restitution of goods upon an indictment, it being considered as at the suit of the king only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again. 3 Inst. 242. But it being considered, that the party prosecuting the offender by indictment deserves to the full as much encouragement as he who prosecuted by appeal; the statute 21 Hen. 8. c. 11. gave restitution to a party robbed of his goods, or the value of them out of the offender's goods. This statute is now repealed, and by the 7 & 8 Geo. 4. c. 20. § 37. it is enacted, that if any person guilty of any felony or misdemeanor (mentioned in the previous part of the act), in stealing, taking, obtaining, or converting, or knowingly receiving any chattel, money, valuable security, or other property, shall be indicted for such offence by or on the behalf of the owner, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the court shall have power to award writs of restitution for the said property, or to order restitution thereof in a summary way. But if it shall appear, before any award or order made, that any valuable security

shall have been *bond fide* paid, or discharged by some person or body corporate liable to the payment thereof, or (being a negotiable instrument) shall have been *bond fide* taken or received by transfer or delivery, for a just and valuable consideration, without any notice or reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security.

This exception was not contained in the 21 Hen. 8. c. 11; which moreover only extended to a felonious and not a fraudulent taking of goods. See 5 T. R. 175; where it was held under the old statute, that if the owner of goods lost them by a fraud, and not by a felony, and afterwards convicted the offender, he was not entitled to restitution; or to retain them, against a person (as a pawnbroker) who had fairly acquired a new right of property in them.

The necessity of prosecuting and convicting the felon, in order to have restitution, is only when the property is changed by some intermediate act. See *Kel.* 42; 2 *Hawk.* P. C. c. 28, s. 40.

As formerly upon appeals, so now upon indictments of larceny, the writ of restitution shall reach the goods so stolen, notwithstanding the property of them is endeavoured to be altered by sale in market overt. 1 *Hal. P. C.* 543. And though this may seem somewhat hard upon the buyer, yet the rule of law is, that *spoliatus debet, ante omnia, restitui*; especially when he has used all the diligence in his power to convict the felon. And, since the case is reduced to this hard necessity, that either the owner or the buyer must suffer, the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. See 2 *Inst.* 714; 3 *Inst.* 242; 5 *Rep.* 109.

Restitution, however, can only be had from the person in possession of the goods at the time of or after the felon's conviction; therefore the owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from a person who has purchased them, and sold them again, even with notice of the theft, before conviction. 2 T. R. 750. But the plaintiff has a right to the restitution of the goods in specie, and perhaps would be entitled to recover damages in trover against any person who is fixed with the goods after conviction, and refuses to deliver them, for then the goods are converted to the prejudice of the owner. *Per Kenyon, C. J.*

Previous to the 7 & 8 Geo. 4. c. 29, which allows the court to make a summary order, it was usual for the court, upon the conviction of a felon, to order (without any writ, no instance of the suing out of which has occurred for 300 years) immediate restitution of such goods as are brought into court, to be made to the several prosecutors.

Without any writ or order of restitution, the party may peaceably retake his goods, wherever he happens to find them, unless a new property be fairly acquired therein. Or, lastly, if the felon be convicted and pardoned, or (formerly were allowed his clergy), the party robbed may bring his action of trover against him for his goods, and recover a satisfaction in damages. But such action lies not before prosecution, for so felonies would be made up and healed. 1 *Hal. P. C.* 73. And also recaption is unlawful, if it be done with intention to smother or compound the larceny; it then becoming the heinous offence of *Theftbote*. See *vide Comm.* c. 27, p. 363.

Where a servant took gold from his master, and changed it into silver, the master had restitution of the silver by the 21 Hen. 8. c. 11; *Cro. Eliz.* 661, pl. 9.

A. stole cattle and sold them at Coventry, in an open market, and immediately he was apprehended by the sheriff of Coventry, and they seized the money; and afterward the thief

was arraigned and hanged at the suit of the owner of the cattle: and, by the court, the party shall have restitution of the money, notwithstanding the words of the 21 Hen. 8. c. 11. the goods stolen, &c. *Noy*, 128.

A bank-note of 50*l.* was stolen from Golightly by one Ferguson. He was apprehended, and several articles of silver plate, a bank-note of 50*l.*, and ten guineas in gold, which were found upon him, were produced at the trial, and placed in the custody of Reynolds, clerk of the arraigns. Golightly gave evidence against Ferguson at the Old Bailey and he was convicted of stealing the 50*l.* note. The owner demanded restitution from Reynolds of the goods found upon Ferguson; but as they were not the identical goods which Golightly had lost, Reynolds refused to restore them. But on trover being brought in B. R. they were ordered to be restored, they being the produce of the 50*l.* bank-note. *Laffr.* 90.

See further, tit. *Market*; and the 1 Jac. 1. c. 21. there noticed, by which the sale of goods, wrongfully taken, to a pawnbroker within London or two miles thereof, shall not alter the property. See also 36 Geo. 3. c. 87. § 10, and tit. *Pawnbrokers*, as to goods illegally pawned. As to stolen horses, see tit. *Horses*; and 31 Eliz. c. 12. whereby the owner may, within six months, on paying the buyer what he actually paid, recover his horse without prosecution.

RESTITUTION takes place when there hath been a writ of restitution before granted: and restitution is generally matter of duty; but re-restitution is matter of grace. *Raym.* 35.

A writ of re-restitution may be granted on motion, if the court see cause to grant it. And on quashing an indictment of forcible entry, the court of B. R. may grant a writ of re-restitution, &c. 2 *Lill. Abr.* 474. See *Forcible Entry*, II.

RESTITUTIONE EXTRACTI AB ECCLESIA. A writ to restore a man to the church, which he had recovered for his sanctuary, being suspected of felony. *Reg. Orig.* 69.

RESTITUTIONE TEMPORALIU. A writ directed to the sheriff, to restore the temporalities of a bishopric to the bishop elected and confirmed. *F. N. B.* 169; 1 *Roll. Abr.* 880.

RESTITUTION OF MINORS. In the Scotch law, a restoring them to rights lost by deeds executed during their minority. See *Quadrimum Utile*.

RESULTING USE. Whenever the use limited by a deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is styled a *resulting use*. As, if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of the first-born son in tail: here, till he marries, the use results back to himself; after marriage, it is executed in the wife for life; and if she dies without issue, the whole results back to him in fee. *Bacon of Uses*, 350; 1 *Rep.* 120. See *Uses*.

RESUMMONS, *resummonitio*.] A second summons or calling a man to answer an action, where the first summons is defeated by any occasion; and when, by death, &c. of the judges, they do not come on the day to which they were continued for trial of causes, such causes may be revived or recontinued by resummons. There was also a writ of resummons, which issued after parol demurrer. See *Parol Demurrer*, *Re-attachment*.

RESUMPTION, *resumptio*.] Is particularly used for taking again into the king's hands such lands or tenements, &c. as on false suggestion he had granted by letters-patent to any man. *Broke*, 298. It is said that the king cannot grant a prerogative of power so but that he may resume it; otherwise it is of a grant of an interest. *Skinner's Rep.* 236. Many acts have been heretofore passed for resuming improvident grants of the crown. See *Grant of the King*.

RETAINER, from the Latin *retinere*.] Signifies, in a legal sense, a servant, but not menial or familiar, that is, not continually dwelling in the house of his master, but only wearing his livery, and attending sometimes upon special occasions. This livery was wont to consist of hats, (or hoods,)

badges, or other suits of one garment by the year; and was many times given by great men, on design of maintenance and quarrels; and was therefore justly forbidden by several statutes; as by the 1 *Rich. 2. c. 7.* on pain of imprisonment and forfeiture to the King; and again, by the 16 *Rich. 2. c. 4*; 20 *Rich. 2. c. 1*; 1 *Hen. 4. c. 7.* by which the offender should make ransom at the king's will; and any knight or esquire thereby duly attainted should lose his livery, and forfeit his fee for ever, &c.: which statutes were further confirmed and explained by the 2 *Hen. 4. c. 21*; 7 *Hen. 4. c. 3*; 8 *Hen. 6. c. 4.* Yet this offence was so deeply rooted, that Edward the Fourth was necessitated to confirm the former statutes, and further to extend their meaning; as appears by the 8 *Edw. 4. c. 2.* adding a special penalty of five pounds on every man who gave such livery, and as much on every one so retained, either by writing, oath, or promise, for every month.

These were by the feudists called *affidati*, *sic enim dicuntur qui in alicujus fidem et tutelam recepti sunt.* And as our retainers were thus forbidden, so were those affidats in other countries. But most of the above-mentioned statutes were repealed by 3 *Car. 1. c. 1.* *Cowell.* And the provisions of these obsolete and expired laws are rendered useless by the alteration of manners. See further, *Maintenance.*

RETAINER OF DEBTS. By an executor or administrator, see *Executor, V. 6.*

RETAINING FEE, merces retinens.] The first fee given to any serjeant or counsellor at law; whereby to make him sure that he shall not be on the contrary part.

RETALIATION. See *Lex Talionis.*

RETENEMENTUM. Is a word used for detaining, withholding, or keeping back. And *sine ullo retenemento* was an usual expression in old deeds and conveyances of lands. *Cowell.*

RETENTION. The right of withholding a debt, or retaining property until a debt due to the person claiming the right of retention shall be paid. See *Lien.*

RETINENTIA. A retinue, or persons retained to a prince or nobleman. *Pat. 14 Rich. 2.*

RETORNO HABENDO. See *Retorno habendo, Replevin.*

RETOUR, in Scotch law. This name is given to an extract from the chancery of the service of an heir to his ancestor. The brief of inquest, after the jury have pronounced their sentence, is retourable to the chancery whence it issued; and it is the duty of the judge to whom it is directed to return it; nor is the service complete till this is done. The extract or copy from chancery is what is termed the retour. *Bell's Scotch Dict.*

RETOURED DUTY. Is the valuation, both new and old, of lands, expressed in the retour to the chancery, when any is returned, or served heir. *Scotch Dict.*

RETRACTUS AQUÆ. The ebb or return of a tide. *Plac. 30. Edw. 1.*

RETRACTUS FEUDALIS, in Scotch law. A power anciently claimed by the superior of an estate to pay off a debt adjudged, and to take a conveyance of the estate. *Bell's Scotch Dict.*

RETRAXIT, he hath withdrawn.] Is when a plaintiff cometh in person in court where his action is brought, and saith he will not proceed in it; and this is a bar to that action for ever. It is so called, because it was the emphatical word in the Latin entry. See *Tidd's Pract.* and tit. *Nonsuit, Nolle Prosequi.*

A retraxit must be always in person; if it is by attorney, it is error. 8 *Rep. 58*; 3 *Salk. 245.*

A retraxit is a bar to any action of equal nature, brought for the same cause or duty; but a nonsuit is not. 1 *Inst. 208.* See *Wils. 90.*

If a plaintiff says he will not appear, this is not a retraxit, but a nonsuit; but if the plaintiff says he will not sue, it is a retraxit. *Danv. Abr. 471.* And retraxit is always on the

part of the plaintiff or demandant; and it cannot be before a declaration, for before the declaration it is only a nonsuit. 3 *Leon. 47*; 2 *Lill. Abr. 476.*

If a plaintiff enter a retraxit against one joint-trespasser, it is a release to the other. *Cro. Eliz. 762. Sed qu.?* For if a retraxit were entered as to one appellee in appeal of murder, the suit might be continued against the rest; because the appellant was to have a several execution against every one of them. *H. P. C. 190.* In a prohibition by three, a retraxit of one shall not bar the other two plaintiffs. *Moor, 469*; *Nels. Abr. 165.* A retraxit in its operation is mostly similar to a *Nolle prosequi*, entered to the whole cause of action. See that title.

RETTE, Fr.] A charge or accusation. *Stat. West. 1. c. 2.* (repealed.) *Co. Litt. 173 b. and n.*

RETURN, returna, or retorna, from the Fr. retour, i. e. redditio, recursus.] Hath many applications in law; but is most commonly used for the return of writs, which is the certificate of the sheriff made to the court, of what he hath done touching the execution of any writ directed to him; and where a writ is executed, or the defendant cannot be found, &c. then this matter is indorsed on the back of the writ by the officer, and delivered into the court whence the writ issued, at the day of the return thereof, in order to be filed. *Stat. West. 2. 13 Edw. 1. c. 39. 2 Lill. Abr. 476.* See *Sheriff, Writ.*

The name of the sheriff must always be to return of writs; otherwise it doth not appear how they came into court: if a writ be returned by a person to whom it is not directed, the return is not good, it being the same as if there was no return on it. And after a return is filed, it cannot be amended; but before it may. *Cro. Eliz. 310.*

If the sheriff doth not make a return of a writ, the court will amerce him: so, if he makes an insufficient return; and if he makes a false return, the party grieved may have an action on the case against him. *Wood's Inst. 71.*

If a sheriff returned a vouchee summoned, where in truth he was dead, and there was no such person; or in a *præcipe quod reddat* that the tenant was dead, &c. there might be an averment against such returns, by the 14 *Edw. 3. c. 18.* *Jenk. Cent. 121, 122.*

Some returns are a kind of declaration of an accusation; as the return of a rescous, and the like; and these must be certain and perfect, or they will be ill. 11 *Rep. 40*; *Plow. 63. 117*; *Keilw. 65.*

Writs to do things in franchises are directed to and returned by the sheriff, to whom bailiffs make their returns, and an action will lie against a sheriff who takes the return of one who is no bailiff, and against him who makes it; and likewise against the bailiff of a franchise for negligence in execution, &c. 7 *Edw. 4. 14*; 12 *Edw. 4. 15*; *Moor, c. 606.*

There is also a return of juries by sheriffs; and returns of commissions by commissioners, &c. See the several appropriate titles.

RETURN-DAYS. Certain days in term for the return of writs. See *Essoin Day of the Term, Terms.*

RETORNO HABENDO. A writ which lies where cattle are distrained and replevied, and the person who took the distress justifies the taking, and proves it lawful; on which the cattle are to be returned to him.

This writ also lieth when the plaint in replevin is removed by *recordari* into the King's Bench or Common Pleas, and he whose cattle are distrained makes default, and doth not prosecute his suit. *F. N. B. 74.* See *Replevin.*

RETURNUM AVERIORUM. A judicial writ, the same with *Retorno habendo.* *Reg. Judic. 4.*

RETURNUM IRREPLEGIABILE. A writ judicial, directed to the sheriff for the final restitution or return of cattle to the owner when unjustly taken or distrained and so found by verdict; and it is granted after a nonsuit in a second deliverance. *Reg. Judic. 27.* See *Replevin.*

REVE, or *Greeve*, from the Saxon word *græfa*, *præfectus*. Lambard's explication of Saxon words, verb. *Præfectus*.] The bailiff of a franchise or manor, especially in the western part of England: hence shire-reve for sheriff. See *Kitchen*. 43.

An officer in parishes within forests who marks the commonable cattle.

REVELACH, rebellion, from *revellare*, to rebel. *Gale*. *Domesday*, tit. *Cestrescire*.

REVELAND, *terra Regis*. *Hæc terra fuit tempore Edwardi Regis Thimland, sed postea concessa est in Reveland. Et item dicant legati Regis, quod ipsa terra et census qui inde exit, furtim auferuntur à Rege.* *Domesd. Herefordso.*

The land here said to have been *Thaneland*, *T. E. R.* and after converted into *Reveland*, seems to have been such land as having reverted to the king after the death of his *Thane*, who had it for life, was not since granted out to any by the king, but rested in charge on the account of the reve or bailiff of the manor; who (as it seemeth) being in this lordship of *Hereford*, like the reeve in *Chaucer*, a false brother, concealed the land from the auditor, and kept the profit of it, till the surveyors, who are here called *legati Regis*, discovered this falsehood, and presented to the king that *furtim auferuntur à Rege*.

This passage from *Domesday-book* is imperfectly quoted by Sir *Edward Coke*, who from these words draws a false inference, that land holden by knight-service was called *Thimland*, and land holden by socage was called *Reveland*. *Comell*. See *Spelman*, of *Fiefs*, c. 24; 1 *Inst.* 80, a, and c.

Dutryph attempts to establish a distinction between *bockland* or *thimland* and *reveland*, also called *folkland*, and to show that the former was feudal, and the latter allodial. *Dutryph*, *Leod*, prop. 9. See *Bockland*, *Cupphold*, *Folkland*, *Tenures*.

RIVALS. Sports of dancing, masking, &c. formerly used in princes' courts, the inns of court, and noblemen's houses, commonly performed by night; there was an officer to order and supervise them, who was entitled Master of the Revels. *Comell*.

REVENUE, *Fr*] Properly the yearly rent which accrues to any man from his lands and possessions, and is generally used for the revenues or profits of the crown.

Whoever wishes to be informed of the fiscal prerogatives of the king, or such as regard his revenue, which the British constitution hath vested in the royal person, in order to support his dignity and maintain his power, will find them very curiously and learnedly treated of by *Blackstone*, in the 8th. chapter of the first volume of his *Commentaries*. And see titles *King*, *Taxes*.

REVERSAL OF JUDGMENT. Is the making it void for error; and when on the return of a writ of error it appears that the judgment is erroneous, then the court give judgment *quod judicium revocetur, annulletur et penitus pro nullum habeatur*. 2 *Lill. Abr.* 481.

The eldest judge of the court, or in his absence the next in seniority, always pronounces the reversal of an erroneous judgment openly in court, on the prayer of the party. Formerly it was the course to pronounce it in French, to this effect, *par les errors avandit, et auter errors manifest en le record, soit le judgment reverse*, &c. *Trim.* 22 *Car. B. R.* The judge now only says "Judgment affirmed" or "Judgment reversed," as the case happens.

Reversal of a judgment may be pronounced conditionally, i. e. that the judgment is reversed if the defendant in the writ of error doth not show good cause to the contrary at an appointed time; and this is called a *revocetur nisi*; and if no cause be then shown, it stands reversed without further motion. 2 *Lill. Abr.* 482.

By the statute of limitations, 21 *Jac.* 1. c. 16. § 4. where judgment is given for a plaintiff, and reversed by writ of error; or if judgment for a plaintiff be arrested, or if a de-

fendant in an action by original be outlawed, and the outlawry reversed, the plaintiff may commence a new action within twelve months after such reversal or arrest of judgment, or reversal of outlawry, though it be beyond the time of limitation directed by the statutes. See *Limitation of Actions*.

See further, *Attainder*, *Error*, *Judgment*, III.

REVERSER. Scotch law. A reversioner. See *Reversion*.

REVERSION, *reversio*, from *revertor*.] A returning again. 1 *Inst.* 142.

A reversion hath two significations; the one is an estate left, which continues during a particular estate in being; and the other is the returning of the land after the particular estate is ended. It is said to be an interest in the land when the possession shall fall, and so it is commonly taken; or it is when the estate which was parted with for a time, ceaseth and is determined in the persons of the alienees or grantees, &c. and returns to the grantor or donor, or their heirs, from whence derived. *Plowd.* 160; *Inst.* 142.

But the usual definition of a reversion is, that it is the residue of an estate left in the grantor after a particular estate granted away, continuing in him who granted the particular estate; and where the particular estate is derived out of his estate. Also a reversion takes place after a remainder, where a person makes a disposition of a less estate than that whereof he was seised at the time of making thereof. 1 *Inst.* 22, 142; *Wood's Inst.* 151.

The difference between a reversion and a remainder is, that a remainder is general, and may be to any man, except to him who granteth the land, for term of life or otherwise; and a reversion is to himself from whom the conveyances of the land proceeded, and is commonly perpetual, &c. Remainder is an estate, appointed over at the same time; but the reversion is not always at the same time appointed over. See *Remainder*.

Blackstone, with his usual accuracy and perspicuity, shortly defines a reversion thus: "The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him." *Coke* describes a reversion to be the returning of land to the grantor or his heirs, after the grant is over; as if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law; and so also the reversion, after an estate for life, years, or at will, continues in the lessor; for the fee-simple of all lands must abide somewhere; and if he who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him.

A reversion is never, therefore, created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates in *presenti*, though taking effect in *futuro*. 2 *Comm.* c. 11. cites 1 *Inst.* 22, 142.

The doctrine of reversions is plainly derived from the feudal constitution; for when a feud was granted to a man for life, or to him and his issue male, rendering either rent or other services, then on his death, or the failure of issue male, the feud was determined and resulted back to the lord or proprietor, to be again disposed of at his pleasure; and hence the usual incidents to reversions are said to be fealty and rent. When no rent is reserved on the particular estate, fealty, however, results of course, as an incident quite inseparable, and may be demanded as a badge of tenure or acknowledgment of superiority, being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion. 1 *Inst.* 143. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent by special words; but by a general grant of the reversion, the rent will pass with it as incident

thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *à converso*. 1 *Inst.* 151, 152.

These incidental rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them; for if one, seised of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion, to which rent and fealty shall be incident, and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done; for it is the old estate, which was originally in him, and never yet was out of him. But see now tit. *Descent*. And so likewise, if a man grants a lease for life to A., reserving rent, with reversion to B. and his heirs, B. hath a remainder descendible to his heirs general, and not a reversion to which the rent is incident; but the grantor shall be entitled to the rent during the continuance of A.'s estate. 2 *Comm.* c. 11. cites *Cro. Eliz.* 321; 3 *Lev.* 407; 1 *And.* 23.

When the particular estate determines, then the reversion comes into possession, and before it is separated from it; for he who hath the possession cannot have the reversion, because, by uniting them, the one is drowned in the other. 2 *Lil. Abr.* 484. See *Merger*.

The reversion of land when it falls, is the land itself; and the possession of the tenant preserves the reversion of the lands, with the rents, &c. in the donor or lessor. 1 *Inst.* 324.

A reversion of an estate of inheritance may be granted by bargain and sale inrolled, lease and release, &c. And by the grant of lands a reversion will pass; though by the grant of a reversion, land in possession will not pass. 6 *Rep.* 36; 5 *Rep.* 124; 10 *Rep.* 107.

If one have a reversion in fee, expectant on a lease for years, he may make a bargain and sale of his reversion for one year, and then make a release to the bargainee in fee, by which the reversion in fee will pass to the bargainee. 2 *Lil. Abr.* 483. And a reversioner may covenant to stand seised of a reversion to uses, &c. 11 *Rep.* 46.

Likewise a reversion may be devised by will; and a testator being seised in fee of lands which he had in possession, and of other lands in reversion, devised all his lands for payment of debts, adjudged that by the words "all his lands," the reversion as well as the possession passed. 2 *And.* 59; *Cro. Eliz.* 159.

A person devised a manor to A. B. for six years, and some other lands to C. D. and his heirs, and all the rest of his lands to his brother, and the heirs male of his body; and it was held that these words, "the rest of his lands," did not only extend to the lands which were not devised before, but to the reversion in fee of the manor, after the determination of the estate for years. *Allen*, 28. And by devise of all lands, tenements, and hereditaments, undisposed of before in a will, a reversion in fee will pass. 2 *Vent.* 285; 3 *Nels. Abr.* 166.

One seised of lands in fee devises part thereof to B. for life, and after, by the same will, gives to C. all his lands not before particularly disposed of; by this devise of "all lands," &c. the reversion of the part given for life passes to C. *Pre. Chan.* 202. See *Will*.

If tenant for life and he in reversion join in a lease for life, or gift in tail, rendering rent, it shall enure after the death of tenant for life, to him in reversion. 1 *Inst.* 214.

The particular estate for life or years, and the estate of him in reversion, are divers and distinct; therefore aid may be prayed of him in reversion, yet these estates have relation one to another. 3 *Shep. Abr.* 220.

Copyholder for life cannot by forfeiture or otherwise destroy the estate in reversion; and he who hath a reversion

cannot be put out of it unless the tenant be ousted of his possession also. 39 *Hen.* 6; *Plowd.* 162; *Yelo.* 1.

Reversions expectant on an estate-tail are not assets, or of any account in law, because they may be cut off; but it is otherwise of a reversion on an estate for life or years. 1 *Inst.* 173; 6 *Rep.* 38. See *Assets*.

No lease, rent-charge, or estate, &c. made by tenant in tail in remainder, shall charge the possession of the reversioner. 2 *Lil.* 448. But as no statute hath made any provision for those who have remainders or reversions on any estate-tail, they were, until recently, barred by a recovery. 10 *Rep.* 32. See now, titles *Recovery*, *Tail*.

There were no reversions or remainders on estates in tail at common law; and by the common law, no grantee of a reversion could take advantage of any condition or covenant broken by the lessees of the same land; but by statute, grantees of reversions may take advantage of conditions and covenants against lessees of the same lands, as fully as the lessors and their heirs; and the lessees may have the like remedies against the grantees of reversions, &c. 1 *Inst.* 327. See 32 *Hen.* 8. c. 34; and further, titles *Condition*, *Lease*.

In order to assist such persons as have any estate in remainder, reversion, or expectancy after the death of others, against fraudulent concealments of their death, the 6 *Ann.* c. 18. provides that all persons on whose lives any lands are holden, shall (on application to the Court of Chancery, and order made thereon), once in every year, if required, be produced to the court, or its commissioners; or upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements till the party shall appear to be living. See *Life Estate*.

A reversioner may bring an action on the case for spoiling trees; so for any injury to his reversion, he may have this action, but he cannot have trespass, which is founded on the possession. 3 *Lev.* 209, 233; 3 *Co.* 55.

The reversioner must show in his declaration, and prove, an injury to the reversion, or judgment will be arrested. 1 *M. & S.* 234. An action on the case for an injury to the inheritance lies by the reversioner pending the term against the tenant, for inclosing and cultivating waste included in the demise, and for continuing the grievance. 14 *East*, 489.

A. being possessed of a term of years, demised his whole interest to B., subject to a right of re-entry on the breach of a condition; the Court of King's Bench held, that A. might enter for the condition broken, although he had no reversion. 2 *B. & Ald.* 170.

Formerly he in reversion should have a writ of entry ad *communem legem*, where tenant for life, &c. aliened the lands; and writ of intrusion after their deaths, &c. *New Nat. Brev.* 431. These writs are now abolished. See *Limitation of Actions*, II.

For the provisions for the recent statute of limitations, with respect to reversions, see *Limitation of Actions*, II.; and for those affecting reversions, contained in the act abolishing fines and recoveries, (3 & 4 *W. 4.* c. 74.) see *Tail*, IV.

REVERSIONS IN OFFICES. See *Office*.

REVIEW, BILL OF, IN CHANCERY. The object of this is to procure an examination and reversal of a decree, made upon a former bill, and signed by the person holding the great seal, and inrolled. It may be brought upon error of law appearing in the body of the decree itself, or upon discovery of new matter. In the first case the decree can only be reversed upon the ground of the apparent error; as if an absolute decree be made against a person, who, upon the face of it, appears at the time to have been an infant. A bill of this nature may be brought without leave of the court previously given. But if it is sought to reverse a decree signed and inrolled, upon discovery of some new matter, the leave of the court must be first obtained; and this will not be granted but upon allegation, upon oath, that the new matter could not be produced or used by the party claiming, at the

time when the decree was made. If the court is satisfied that the new matter is relevant and material, and such as might probably have occasioned a different determination, it will permit a bill of review to be filed.

A bill of review, upon new matter discovered, has been permitted, even after an affirmance of the decree in parliament; but it may be doubted whether a bill of review, upon error in the decree itself, can be brought after such affirmance. If, upon a bill of review, a decree has been reversed, another bill of review may be brought upon the decree of reversal; but see 1 *Fera*, 417. But when twenty years have elapsed from the time of pronouncing a decree, which has been signed and enrolled, a bill of review cannot be brought; and after a demurrer to a bill of review has been allowed, a new bill of review on the same ground cannot be brought. It is a rule of the court, that the bringing a bill of review shall not prevent the execution of the decree impeached; and if money is directed to be paid, it ought regularly to be paid before the bill of review is filed, though it may afterwards be ordered to be refunded. *Miff. Treat. on Chancery Pleadings*, 79, 80. See *Chancery, Decree*.

In a bill of this nature it is necessary to state the former bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it; and the ground of law, or new matter discovered, upon which he seeks to impeach it; and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it, and the fact of the discovery; though it may be doubted whether a bill may pray simply that the decree may be reviewed, and reversed in the point complained of, if it has not been carried into execution. If a bill of review is presented, the plaintiff may copy the order of the court upon the bill, and copy the complaint of the former decree into the situation in which he would have been if that decree had not been executed. If the bill is brought to review the reversal of a former decree, he may pray that the original decree may stand. The bill may also, if the original decree has become abated, be at the same time a bill of revivor. See *Revivor*. A supplemental bill may likewise be added, if any event has happened which requires it; and particularly if any person, not a party to the original suit, becomes interested in the subject, he must be made a party to the bill of review by way of supplement. *Miff. Treat.*, 80, 81.

To render a bill of review necessary, the decree sought to be impeached must have been signed and enrolled. If, therefore, this has not been done, a decree may be examined and reversed upon a species of supplemental bill in nature of a bill of review, where any new matter has been discovered since the decree. As a decree not signed and enrolled may be altered upon a rehearing, without the assistance of a bill of review, if there is sufficient matter to reverse it appearing upon the former proceedings, the investigation of the decree must be brought on by a petition of rehearing, and the office of the supplemental bill, in nature of a bill of review, is to supply the defect which occasioned the decree upon the former bill. It is necessary to obtain the leave of the court to bring a supplemental bill of this nature; and the same affidavit is required for this purpose, as is necessary to obtain leave to bring a bill of review on discovery of new matter. The bill, in its frame, nearly resembles a bill of review; except that, instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard and reversed upon the new matter, made the subject of the supplemental bill, at the same time that it is reheard upon the former bill; and that the plaintiff may have such relief as the nature of the case made by the supplemental bill requires. *Miff. Treat.*, 81—83.

If a decree is made against a person who had no interest at all in the matter in dispute, or had not such an interest as

was sufficient to render the decree against him binding upon some person claiming the same, or a similar interest, relief may be obtained against error in the decree by a bill in the nature of a bill of review. Thus, if a decree is made against a tenant for life only, a remainder-man in tail or in fee cannot defeat the proceedings against the tenant for life, but by a bill showing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accruer of his own interest; and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose, that the other party may appear to and answer this new bill, and that the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without leave of the court. *Miff. Treat.*, 83.

REVIEW OF APPEAL OF DECISIONS. A commission granted by the king to certain commissioners, &c. See *Appeal to Rem.*

1. VILING CHURCH ORDINANCES. Is a positive law against religion that affects the established church; and the reviling the sacrament of the Lord's Supper is punished by the 1 *Edw.* 6. c. 1. and 1 *Eliz.* c. 1. with fine and imprisonment. And by the 1 *Eliz.* c. 2. if any minister shall speak any thing in derogation of the book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second. And if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second offence he shall be deprived, and suffer one year's imprisonment; and for the third shall, in like manner, be deprived, and suffer imprisonment for life. And if any person whatsoever shall, in plays, songs, or other open words, speak any thing in derogation, defaming, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be used in its stead, he shall forfeit for the first offence one hundred marks; for the second, four hundred; and for the third shall forfeit all his goods and chattels, and suffer imprisonment for life. The policy and propriety of these punishments, even at this distance from the Reformation, are well stated by *Blackstone*. 4 *Comm.* c. 4. p. 51.

REVIVING. A word metaphorically applied to rents and actions, and signifies renewing them after they are extinguished. Of which see many examples in *Broke*, title *Revivings of Rents, Actions, &c.* 23. See also 19 *Vin. Abr.* 228—230.

REVIVOR, BILL OF. When a bill has been exhibited in Chancery against one who answers, and before the cause is heard, or if heard, and the decree is not enrolled, either party dies, or a female plaintiff marries; in these cases a bill of revivor must be brought.

A bill of revivor must state the original bill, and the several proceedings thereon, and the abatement. It must show a title to revive, and charge that the cause ought to be revived, and stand in the same condition with respect to the parties in the bill of revivor as it was in with respect to the parties in the original bill at the time the abatement happened; and it must pray that the suit may be revived accordingly. It may likewise be necessary to pray that the defendant may answer the bill of revivor, as in the case of a requisite admission of assets by the representative of a deceased party. In this case, if the defendant does admit assets, the cause may proceed against him on an order of revivor merely; but if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estate of the deceased party, to answer the demands made against it by the suit; and the prayer of the bill, therefore, in such cases, usually is, not only that the suit may be revived, but also that in case the defendant shall not admit assets to answer the purposes of the suit, those accounts may be taken,

and so far the bill is in the nature of an original bill. If a defendant to an original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill, to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendants extend to, or the amendments remaining unanswered. See *Mif. Treat. on Pleadings in Chancery*, 70, 71, and the authorities there referred to.

Upon a bill of revivor the defendant must answer in eight days after appearance, and submit that the suit shall be revived, or show cause to the contrary; and in default, unless the defendant has obtained an order for further time to answer, the suit may be revived without answer by an order made upon motion as a matter of course. The ground for this is an allegation that the time allowed the defendant to answer by the course of the court is expired, and that no answer is put in; it is therefore presumed that the defendant can show no cause against reviving the suit in the manner prayed by the bill. *Mif. Treat.* 71, 72.

An order to revive may also be obtained, in like manner, if the defendant puts in answer submitting to the revivor; or even without that submission if he shows no cause against the revivor. Though the suit is revived of course in default of the defendant's answer within eight days, he must yet put in an answer if the bill requires it; as if the bill seeks an admission of assets, or calls for an answer to the original bill; the end of the order of revivor being only to put the suit and proceedings in the situation in which they stood at the time of the abatement, and to enable the plaintiff to proceed accordingly. And notwithstanding an order for revivor has been thus obtained, yet if the defendant conceives that the plaintiff is not entitled to revive the suit against him, he may take those steps which are necessary to prevent the further proceeding on the bill; and though these steps should not be taken, yet if the plaintiff does not show a title to revive, he cannot finally have the benefit of the suit when the determination of the court is called for on the subject. *Mif. Treat.* 72, 73.

After a decree, a defendant may file a bill of revivor, if the plaintiffs, or those standing in their right, neglect to do it. For then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and equally have a right to prosecute it. The bill of revivor, in this case therefore, merely substantiates the suit, and brings before the court the parties necessary to see to the execution of the decree, and to be the objects of its operation, rather than to litigate the claims made by the several parties in the original pleadings, except so far as they remain undecided. In the case of a bill by creditors, on behalf of themselves and other creditors, any creditor is entitled to revive. A suit, become entirely abated, may be revived as to part only of the matter in litigation; or as to part by one bill, and as to the other part by another. Thus, if the rights of a plaintiff in a suit, upon his death, become vested, part in his real and part in his personal representatives, the real representative may revive the suit so far as concerns his title, and the personal so far as his demand extends. *Mif. Treat.* 73, 74.

When the interest of a party dying is transmitted to another in such a manner that the transmission may be litigated in a court of equity, as in the case of a devise, the suit cannot be revived by or against the person to whom the interest is so transmitted; but such person, if he succeeds to the interest of a plaintiff, is entitled to the benefit of the former suit; and if he succeeds to the interest of a defendant, the plaintiff is entitled to the benefit of a former suit against him. This benefit is to be obtained by an original bill, in nature of a bill of revivor. A bill for this purpose must state the

original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party dead has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it. The bill is said to be original, merely for want of that privity of title between the party to the former and the party to the latter bill, though claiming the same interest, which would have permitted the continuance of the suit by bill of revivor. Therefore, when the validity of the alleged transmission of interest is established, the party to the new bill shall be equally bound by, or have advantage of, the proceedings on the original bill, as if such privity had actually existed. And the suit is considered as pending from the time of filing the original bill, so as to save the statute of limitations; to have the advantage of compelling the defendant to answer, before an answer can be compelled to a cross bill; and every other advantage which would have attended the institution of the suit by the original bill, if it could have been continued by bill of revivor merely. *Mif. Treat.* 88, 89.

If the interest of a plaintiff or defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person not claiming under him, the suit cannot be continued by a bill of revivor; nor can its defect be supplied by a supplemental bill, but the benefit of the former proceedings must be obtained by an original bill in the nature of a supplemental bill. *Mif. Treat.* 89, 90.

REVOCATION, *revocatio*.] The calling back of a thing granted; or a destroying or making void of some deed that had existence until the act of revocation made it void. *2 Lil. Abr.* 485. A revocation may be either general, of all acts and things done before; or special, to revoke a particular thing. And where any deed or thing is revoked, it is as if it never had been. *5 Rep.* 90; *Perk.* § 105. In voluntary deeds and conveyances there are frequently provisions containing power of revocation, which being coupled with an use, and tending to pass by raising of uses, according to the *27 Hen. 8. c. 10*, are allowed to be good, and not repugnant: as where one seised of an estate in fee, covenants to stand seised thereof to the use of himself for life, and after to the use of his son in tail, remainder over, &c., with proviso that he may revoke any of the said uses; now, if afterwards he revokes them, he is seised again in fee, without entry or claim. But in case of a feoffment or other conveyance, whereby the feoffee or grantee is in by the common law, such proviso would be merely repugnant and void. *1 Inst.* 237. See *Uses*.

Voluntary estates made with power of revocation, as to purchasers, are held in equal degree with conveyances made by fraud and covin to defraud purchasers, under the *27 Eliz. c. 4. § 3 Rep.* 82. See *Fraud*.

Where a power of revocation is reserved for a man to dispose of his own estate, it shall always have a favourable construction; but it shall be taken strictly when it is to charge the estate of another. *2 Vent.* 250.

If power is reserved to a man to revoke a deed by writing, subscribed and sealed in the presence of two or more credible witnesses; if he makes his will in writing, without making any express revocation, it will be a good revocation, and he will have a good execution of the power. *Hob.* 312; *Raym.* 293. But see *Power*.

If a person make a feoffment in fee, or levy a fine, &c. of the lands before the deed of revocation is executed, these amount to a revocation in law, and extinguish the power of revocation. *1 Vent.* 371; *1 Rep.* 111. Power of revocation may be released; and where a man has an entire power of revocation, and he suspends or extinguishes it as to part, he may revoke as to the residue, if the conveyance was by way of use, but not where a condition is annexed to the land. *1 Rep.* 174; *Moor.* 615.

Under a power of appointment, the donee may either appoint absolutely, or may reserve a power of revocation, al-

though not expressly authorized to do so by the deed creating the power. *Comp.* 651. And such a power may be reserved *toties quoties*. 3 *Keb.* 7. And the new power need not be attended with the same solemnities as the first power. See 2 *Keb.* 270, and 3 *Keb.* 7. See *Power*.

A will is revocable; and a last will revokes the former. And a new publication of the first will, if made in due form, will revoke the last. *Perk.* 479; 2 *Sid.* 2; 3 *Mod.* 207. See *Wills*.

Letters of attorney and other authorities (where not coupled with an interest) may be revoked by the persons giving the powers; and as they are revocable in their nature, it has been adjudged that they may be revoked though they are made irrevocable. 8 *Rep.* 82; *Wood's Inst.* 286.

These revocations of all powers regularly must be made after the same manner they are given; and there ought to be notice to the party, &c. But if once the power be executed, a revocation after will come too late. *Dyer*, 210.

As to the revocation of letters of administration, and presentation to benefices, see those titles.

REVOCATION' PARLIAMENTI. An ancient writ for recalling a parliament; anno 5 *Edw.* 3, the parliament being summoned, was recalled by such writ before it met. *Fry's Animad.* on 4 *Inst.* § 11. See *Parliament*.

REWARDS. In order to encourage the apprehending of certain felons, rewards and immunities were heretofore bestowed on such as brought them to justice by several statutes, most of which have been repealed.

By the 39 & 40 *Geo.* 3, c. 89, § 8, persons discovering, or apprehending any offender concealing or embezzling king's stores, or being guilty of any offence against that act, or the 9 & 10 *Wm.* 3, c. 41, not prosecuted in a summary way, shall, on conviction, receive a reward of 20*l.* over the share of penalty if not more than that sum.

The 7 *Geo.* 4, c. 64, § 28, enables the courts to order the sheriff of the county, in which certain enumerated offences have been committed, to pay to the person active in or towards the apprehension of persons charged with murder, felonies, shooting, or attempting to shoot, stabbing, cutting, or poisoning, or administering any thing to procure miscarriage, or with rape, burglary, felonious house-breaking, bullock stealing, or sheep stealing, or with being accessory before the fact to any of such offences, or to receiving (knowingly) any stolen property, such sum as to the court shall seem reasonable and sufficient to compensate such person for their expense, exertion, and loss of time. By § 29, such orders are directed to be paid by the sheriff, who shall be forthwith reimbursed by the Treasury. By § 30, if a man be killed in attempting to take such offenders, the court may order compensation to his wife or relatives.

By the 7 & 8 *Geo.* 4, c. 20, § 58, persons corruptly taking money or reward to help any person to any chattel, money, &c. stolen or unlawfully obtained, or converted (unless they bring the offender to justice), are guilty of felony, and may be transported for seven years or imprisoned, &c.

By § 59, advertising a reward for the restoration of stolen or lost goods, and using words purporting that no questions will be asked, &c., or printing or publishing such advertisement, incurs a penalty of 50*l.*, recoverable by action.

REWEY. A term among clothiers, signifying cloth unevenly wrought, or full of rewees. See 13 *Lit.* c. 10.

RHANDIR. A part in the division of Wales before the Conquest: every township comprehended four gavels, and every gavel had four rhandirs, and four houses or tenements constituted every rhandir. *Taylor's Hist. Gae.* p. 69.

RIAL, from the Span *real*, i. e. royal money, because it is stamped with the king's effigies. In England, a rial was a piece of gold coin, current for 10*s.* in the reign of King Henry VI., at which time there were half rials passing for 5*s.* and quarter rials, or rial farthings, going for 2*s.* 6*d.* In the beginning of Queen Elizabeth's reign, golden rials were

coined at 15*s.* a-piece; and 3 *Jac.* 1. there were rose rials of gold at 30*s.*, spur rials at 15*s.* *Lowndes' Essay on Coins*, p. 38.

RIBAUD, Fr. *ribauld*, *ribaldus*.] A rogue, vagrant, whoremonger, or person given to all manner of wickedness: anno 50 *Edw.* 3, there was a petition in parliament against ribauds and sturdy beggars.

RIDER-ROLL. A schedule, or small piece of parchment, often added to some part of a roll, record, or act of parliament.

RIDGE-WASHED KERSEY. Kersey cloth made of fleece wool, washed only on the sheep's back. See 35 *Eliz.* c. 10.

RIDING ARMED. See *Armour*, and *Arms*.

RIDING-CLERK. One of the six clerks in Chancery, who in his turn, for one year, keeps the controlment-books of all grants that pass the great seal. *Blount*.

RIDINGS, corrupted from *trithings*.] Are the names of the parts or divisions of Yorkshire, which are three, viz. East-Riding, West-Riding, and North-Riding, mentioned in 22 *Hen.* 8, c. 5. And, in indictments for offences in that county, the town and the riding must be expressed, &c. *West Symb.* p. 2. See 1 *Comm.* 116; and tit. *Rape*, *Registry of Deeds*.

RIENS ARREAR. A plea used in an action of debt for arrearages of account, whereby the defendant alleges that there is nothing in arrear. *Book Entr.* See *Account*, *Issue*, *Pleading*.

RIENS PASSE PER LE FAIT, nothing passes by the deed. The form of an exception taken in some cases to an action on a deed. *Broke.* See *Pleading*.

RIENS PER DESCENT, nothing by descent. The plea of an heir, where he is sued for his ancestor's debts, and hath no land from him by descent, or assets in his hands. 3 *Cro.* 151. In an action of debt against the heir, who pleads *riens per descent*, judgment may be had presently; and when assets descend, a *scire facias* lies against the heir, &c. 8 *Rep.* 184. See *Heir*, *Real Estate*.

RIER COUNTY, *retro comitatus*, from the Fr. *arrear*, *posterior*.] Is opposed to full and open country; and appears to have been some public place, which the sheriff appointed for receipt of the king's money, after the end of his county-court. See 2 *Edw.* 3, c. 5; and also *stat. Westm.* 2, 13 *Edw.* 1, c. 38; *Fleta*, l. 2, c. 67.

RIFFLARE, from the Saxon, *riefe*, *rapina*.] To take away any thing by force; from whence comes our English word *rifle*. *Leg. Hen.* 1, c. 57.

RIGHT, jus.] In general signification, includes not only a right for which a writ of right lay, but also any title or claim, either by virtue of a condition, mortgage, or the like, for which no action is given by law, but only an entry. *Co. Litt.* l. 3, c. 8, § 445.

There is *jus proprietatis*, a right of property; *jus possessionis*, a right of possession; and *jus proprietatis et possessionis*, a right both of property and possession; and this was anciently called *jus duplicatum*: for example, if a man were disseised of an acre of land, the disseisee had *jus proprietatis*, the disseisor had *jus possessionis*; and if the disseisee released to the disseisor, he had *jus proprietatis et possessionis*. *Co. Litt.* l. 3, § 447.

Jus est sextuplex. 1. *Jus recuperandi.* 2. *Intrandi.* 3. *Habendi.* 4. *Retinendi.* 5. *Percipiendi.* 6. *Et possidendi.* 8 *Co. Ed.* *Altham's case*.

The disseisor had only the naked possession, because the disseisee might have entered and evicted him; but against all other persons the disseisor had right, and in this respect only could be said to have the right of possession; for, in respect to the disseisee, he had no right at all. But when a descent was cast, the heir of the disseisor had *jus possessionis*, because the disseisee could not enter upon his possession, and evict him, but was put to his real action, being the freehold cast

upon the heir. The notions of the law made this title to him, that there might be a person in being to do the feudal duties, to fill the possession, and to answer the actions of all persons whatever; and since it was the law that gave him this right, and obliged him to these duties, antecedent to any act of his own, it defended such possession from the act of any other person whatever, till such possession were evicted by judgment, which being also the act of law might destroy the heir's title. *Gillb. Ten.* 18. See *Estate, Property, Release, Title*.

There was formerly also a present and future right; a *jus in re*, which might be granted to a stranger; and what was called a naked right, or *jus ad rem*, where an estate was turned to a right, on a discontinuance, &c. *Co. Litt.* 345.

Right doth also include an estate *in esse* in conveyances; and therefore if tenant in fee-simple makes a lease and release of all his right in the land to another, the whole estate in fee passes. *Wood's Inst.* 115, 116.

Sir Edward Coke tells us, that of such an high estimation is right, that the law preserveth it from death and destruction; trodden down it may be, but never trodden out: and there is such an extreme enmity between an estate gained by wrong and ancient right, that the right cannot possibly incorporate itself with the estate gained by wrong. *1 Inst.* 279; *6 Rep.* 70; *8 Rep.* 105. A right may sometimes sleep, though it never dies; a long possession, exceeding the memory of man, will make a right; and if two persons are in possession by divers titles, the law will adjudge the possession in him that hath the right. *Co. Litt.* 478; *6 Litt.* § 158. When there is no remedy, there is presumed to be no right by law. *Vaugh.* 38.

The former statutes of limitations only barred the remedy, but not the right; but now by the 3 & 4 Wm. 4. c. 27. § 34. when the remedy is taken away the right is also extinguished. See *Limitation of Actions*, II. 1.

RIGHT CLOSE, writ of. See *Recto, Writ of Right*.

RIGHT CLOSE, *secundum consuetudinem manerii*, according to the custom of the manor.] A writ which lay for tenants in ancient demesne, and others of a similar nature, to try the right of their lands and tenements in the court of the lord exclusively. (Abolished.) See *Writ*.

RIGHT IN COURT. See *Rectus in Curia*.

RIGHTS AND LIBERTIES. See *Liberty*.

RINE, Saxon, *ryne*] A water-course, or little stream, which rises high with floods.

RINGA. A military girdle; from the Saxon, *ring*, i. e. *annulus circulus*, because it was girt round the middle; but, according to Bracton, *ringa enim dicuntur quod renes circumdant, unde dicitur accingere gladio*. *Bract. lib.* 1. c. 8.

RINGHEAD. An engine used in stretching of cloth. See 43 *Eliz.* c. 10.

RINGILDRE. A kind of bailiff or serjeant; and such *rhungyl* signifies in *Welsh*. *Chart. Hen.* 7.

RIOT;

ROUT; AND UNLAWFUL ASSEMBLY.

RIOT, *riota*, and *riotum*, from the French *riotte*; *quod non solum rixam et jurgium significat, sed vinculum etiam, quo plura in unum, fasciculorum instar, colligantur*.] The forcible doing of an unlawful thing by three or more persons assembled together for that purpose. *West. Symbol. part 2. tit. Indictments*, § 65.

The distinction between these offences appears to be, that a riot is a tumultuous meeting of persons upon some purpose which they actually execute with violence; a rout is a similar meeting upon a purpose, which, if executed, would make them rioters, and which they actually make a motion to execute; an unlawful assembly is a mere assembly of persons upon a purpose, which, if executed, would make them rioters, but

which they do not execute, or make any motion to execute. *1 Hawk. P. C. c. 65. § 1, 8, 9; 3 Inst.* 176; *4 Comm. c. 11. p. 146*. See more at large under the following divisions:—

I. *What are considered as Riots, Routs, and unlawful Assemblies, at Common Law.*

II. *The Punishment of these Offences, and the Provisions against them, by statute Law.*

I. Holt, Ch. J., in delivering the opinion of the court, said, that the books are obscure in the definition of riots, and that he took it, that it is not necessary to say, they assembled for that purpose; but there must be an unlawful assembly; and as to what act will make a riot or trespass, such an act as will make a trespass will make a riot; as, if a number of men assemble with arms, *in terroron populi*, though no act is done; so if three come out of an alehouse and go armed. *11 Mod.* 116, 117; *Hob.* 91.

Hawkins says, a riot seems to be a tumultuous disturbance of the peace by three persons, or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature; and afterwards actually executing the same in a violent and turbulent manner to the terror of the people, whether the act intended was of itself lawful or unlawful. *1 Hawk. P. C. c. 65. § 1*.

A rout seems to be, according to the general opinion, a disturbance of the peace by persons assembling together with an intent to do a thing, which, if it be executed, will make them rioters, and actually making a motion towards the execution thereof; but by some books the notion of a riot is confined to such assemblies only as are occasioned by some grievance common to all the company, as the inclosure of land, in which they all claim a right of common, &c. However, inasmuch as it generally agrees with a riot, as to all the rest of the above-mentioned particulars, requisite to constitute a riot except only in this, that it may be a complete offence without the execution of the intended enterprise, it seems not to require any farther explication. *1 Hawk. P. C. c. 65. § 8*.

In every riot there must be some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people, as the show of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *in terror* of the people. *1 Hawk. P. C. c. 65. § 5*. But it is not necessary, in order to constitute this crime, that personal violence should have been committed. Per Mansfield, C. J. *Clifford v. Broad*, 2 *Camp.* 309.

An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons merely assembling together with an intention to do a thing which, if it was executed, would make them rioters, but neither actually executing it, nor making a motion toward the execution of it. (says Hawkins) this seems to be much too narrow a definition for any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly; as where great numbers, complaining of a common grievance, meet together armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly. *1 Hawk. P. C. c. 65. § 9*.

These offences are thus defined and distinguished by Blackstone: An unlawful assembly is when three or more do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren, or the game thereon, and part, without doing it, or making any motion towards it. *3 Inst.* 176. A rout is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way, and make some advances towards it. *Bro. Abr. tit. Riots*, 3, 5.

A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel; 3 Inst. 176; as if they beat a man, or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act, as removing a nuisance in a violent and tumultuous manner. 4 Comm. c. 11. p. 14.

If a man be in his house, and he hears that J. S. will come to his house to beat him, he may well make an assembly of people of his friends and neighbours to assist and aid him in safe keeping his person. Per Fincuz, Ch. Just. Br. Riots, pl. 1. cites 21 Hen. 7. 39.

But if a man be menaced or threatened that if he comes to the market of B. or to W. that he shall be beat, he cannot make an assembly of people to assist him to go there, and this in safeguard of his person; for he need not go there, and he may have remedy by surety of the peace; but the house of a man is to him his castle and his defence, and where he properly ought to be. Br. Riots, p. 1. c. 21. II. 7. 22.

Hawkins, citing the above case, remarks, that such violent methods cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace. Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence. See 1 Hawk. P. C. c. 65. § 10; Dalt. J. c. 137; 11 Mod. 116, 117.

If a number of people be assembled together in a lawful manner, and upon a lawful occasion, as for celebrating a marriage, or the like, and during the assembly a sudden affray happens, this will not make it a riot *ab initio*; but it is only a common affray. Id. Raym. 967.

If a number of people assemble in a riotous manner to do an unlawful act, and a person who was upon the place, upon a lawful occasion, and not privy to the occasion, comes and joins himself with them, he will be guilty of a riot equally with the rest. Id. Raym. Rep. 965; 1 Hawk. P. C. c. 65. § 3.

If several are assembled lawfully without any ill intent, and an affray happens, none are guilty but such as set it; but if the assembly was originally unlawful, the act of one is imputable to all. Per Holt, Ch. J. 2 Salk. 595.

It seems agreed, that if a number of persons, being met together at a fair or market, or church-ale, or any other lawful and innocent occasion, happen on a sudden quarrel to together by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly without any previous intention concerning it; yet it is said that if persons innocently assembled together do afterwards, upon a dispute between them, arise among them, form themselves into parties, with promise of mutual assistance, and then make affray, they are guilty of a riot; because, upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design; however, it seems clear that if, in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal shall be started of going together in a body to pull down a house or inclosure, or to do any other act of violence, to the disturbance of the public peace, and such motion be agreed to and executed accordingly, the persons concerned cannot but be rioters, because their associating themselves together for such a new purpose is no way extenuated by their having met at first upon another. 1 Hawk. P. C. c. 65. § 3.

Wherever there is a predetermined purpose of acting with violence and tumult, the conduct of the parties may be deemed riotous. Thus, although the audience in a public

theatre have a right to express the feelings excited at the moment by the performance, and therefore to applaud or hiss any piece which is represented, or any person who exhibits on the stage, yet where a number of persons, having come to a theatre with a predetermined purpose of interrupting the performance, made a great noise and disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual, or any injury to the house, it was held that they were guilty of a riot. Clifford v. Brandon, 2 Camp. 358.

If any person encourage or promote, or take part in a riot, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he himself is to be considered as a rioter, for in this case all are principals. 2 Campb. 370. The inciting persons to assemble in a riotous manner appears also to have been considered as an indictable offence. Cro. Circ. Comp.; 2 Chitty's Crim. Law, 506.

Women are punishable as rioters; and infants, if above the age of discretion. 1 Hawk. P. C. c. 65. § 14; 2 Lid. Raym. 1284.

II. The punishment of unlawful assemblies, if to the number of twelve, may, as hereafter fully noticed, be capital, according to the circumstances that attend them; but from the number of three to eleven, is by fine and imprisonment only. The same is the case in riots and routs by the common law, to which the pillory, in very enormous cases, was heretofore sometimes superadded. 4 Comm. c. 11. See further, tit. Pillory.

By the 34 Edw. 3. c. 1. justices of the peace have power to restrain rioters, &c., to arrest and imprison them, and cause them to be duly punished. By the 17 Rich. 2. c. 8. the sheriff and other the king's ministers generally have power to arrest rioters with force. And by the 13 Hen. 4. c. 7.

Two justices, together with the sheriff or under sheriff of the county, may come, with the posse comitatus, if need be, and suppress any riot, assembly, or rout, arrest the rioters, and record, upon the spot, the nature and circumstances of the whole transaction, which record alone shall be a sufficient conviction of the offenders. And if the offenders are departed, the said justices, &c. shall, within a month after, make inquiry thereof, and hear and determine the same; and if the truth cannot be found, then within a further month the justices and sheriffs are to certify to the king and council, &c., on default whereof the justices, &c. shall forfeit 100*l*.

These statutes are understood of great and notorious riots. And the record of the riot within the view of the justices by whom it is recorded, is such a conviction as cannot be traversed, the parties being concluded thereby; but they may take advantage of the insufficiency of the record, if the justices have not pursued the statute, &c. It is said that the offenders, being convicted upon the record of their offence in the presence of the justices, ought to be sent immediately to gaol till they pay a fine assessed by the same justices, which fine is to be estreated into the exchequer; or the justices may record such riot, and commit the offenders, and after certify the record into B. R. or to the assizes or sessions. If the offenders are gone, then the justices shall inquire by a jury; and the riot being found, they are to make a record of it, and fine them, or receive their traverse, to be sent by the justices to the next quarter sessions, or into the King's Bench, to be tried according to law. Dalt. 200, 201, 202.

It hath been adjudged that where rioters are convicted upon the view of two justices, the sheriff must be a party to the inquisition on the stat. 13 Hen. 4. c. 7. But if they disperse themselves before conviction, the sheriff need not be a party; for in such case the two justices may make the inquisition without them; and this is *pro domino rege*. And if the justices neglect to make an inquisition within a month after the riot, they are liable to the penalty for not doing it

within that time; but the lapse of the month doth not determine their authority to make an inquisition afterwards. 2 *Salk.* 592.

In the interpretation of the above *stat.* 13 *Hen.* 4. c. 7. it hath also been holden, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment. And that any battery, wounding or killing the rioters, that may happen in suppressing the riot, is justifiable. 1 *Hal. P. C.* 495; 1 *Hawk. P. C. c.* 65. § 20, 21.

On the above *Blackstone* remarks, that our ancient law seems pretty well to have guarded against any violent breach of the public peace, especially as any riotous assembly, on a public or general account, as to redress grievances, or pull down all inclosures, and also resisting the king's forces, if sent to keep the peace, may amount to overt acts of high treason, by levying war against the king. This observation will appear confirmed by a statement of the following statutes, also made on this subject. And see further, 1 *Hawk. P. C. c.* 65.

Rioters convicted on view of two justices, and of the sheriff of the county, are to be fined by the two justices and the sheriff; and if the sheriff do not join in setting the fine, it is error; for the statute requires that he should be joined with the justices in the whole proceedings. *Raym.* 386. By the 2 *Hen.* 5. st. 1. c. 8. if the justices make default in inquiring of a riot at the instance of the party grieved, the king's commission shall be issued to inquire as well of the riots as of the default, by sufficient and indifferent men of the county, at the discretion of the chancellor; and in case the sheriff is in default, the coroners shall make the panel of inquest upon the said commission, which is returnable into the Chancery, &c. and by this statute heinous rioters are to suffer one year's imprisonment.

The lord chancellor, having knowledge of a riot, may send the king's writ to the justices of peace, and to the sheriff of the county, &c. requiring them to put the statute in execution; and the chancellor, upon complaint made that a dangerous rioter is fled into places unknown, and on suggestion, under the seals of two justices of peace and the sheriff, that the common fame runneth in the county of the riot, may award a *capias* against the parties, returnable in Chancery upon a certain day, and afterwards a writ of proclamation, returnable in the King's Bench, &c. 2 *Hen.* 5. st. 1. c. 9; 8 *Hen.* 6. c. 14.

A mayor and alderman of a town making a riot are punishable in their natural capacities; but where they have countenanced dangerous riots within their precincts, their liberties have been seized, or the corporation fined. 3 *Cro.* 252; *Dalt.* 204, 326.

The riotous assembling of twelve persons or more, and not dispersing upon proclamation, was first made high treason by the 3 & 4 *Edw.* 6. c. 5, when the king was a minor, and a change in religion to be effected; but that statute was repealed by the 1 *Mar.* c. 1. among the other treasons created since the 25 *Edw.* 3; though the prohibition was in substance re-enacted, with an inferior degree of punishment, by the 1 *Mar.* st. 2. c. 12. which made the same offence a single felony. These statutes specified and particularized the nature of the riots they meant to suppress; as, for example, such as were set on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other specific purposes; in which cases, if the persons were commanded by proclamation to disperse, and they did not, it was by the statute of *Mary* made felony, but within the benefit of clergy; and the act also indemnified the peace-officers and their assistants, if they killed any of the mob in endeavouring to suppress such riot. This was thought a necessary security in that sanguinary reign, when popery was intended to be re-established, which was

like to produce great discontents; but at first it was made only for a year, and was afterwards continued for that queen's life. And by the 1 *Eliz.* c. 16. when a reformation in religion was to be once more attempted, it was revived and continued during her life also, and then expired. From the accession of James I. to the death of Queen Anne, it was never once thought expedient to revive it; but in the first year of George I. it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions.

For whereas the former acts expressly defined and specified what should be accounted a riot, the 1 *Geo.* 1. st. 2. c. 5. enacts, generally, that if any persons, to the number of twelve, are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town, shall think proper to command them by proclamation to disperse, if they contemn his orders, and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons without benefit of clergy; and all persons to whom such proclamation ought to have been made, and knowing of such hinderance, and not dispersing, are felons without benefit of clergy. There is in this act also an indemnifying clause, in case any of the mob be unfortunately killed in the endeavour to disperse them. Prosecutions on this act are to be commenced within one year after the offence. This statute, being wholly in the affirmative, doth not take away any authority in the suppressing a riot by common law or by other statutes. See 4 *Comm.* 125, 435.

The provisions of this act, 1 *Geo.* 1. c. 5. were introduced into Ireland by the Irish act, 27 *Geo.* 3. c. 15. which contains additional clauses for prevention of such riots; and in particular by § 9. imposes the penalty of felony without clergy, for printing and publishing notices, exciting or tending to excite any riot, &c.

A person present aiding and abetting rioters, is a principal in the second degree under this statute. 4 *Burr.* 2079.

A riot is not the less a riot, neither is an illegal meeting the less an illegal meeting, because the proclamation from the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but if the proclamation be not read, the parties are guilty of the common law offence, which is a misdemeanor; and all magistrates, constables, and even private individuals, are justified in dispersing the offenders; and if they cannot otherwise succeed in doing so, they may use force. Without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence. *Rex v. Furzey*, 6 C. & P. 81. A meeting called "to adopt preparatory measures for holding a national convention," is an illegal meeting. *Ibid.*

The clauses of the above act relating to the riotous demolition of buildings, were repealed by the 7 & 8 *Geo.* 4. c. 27. but were re-enacted and considerably enlarged by the 7 & 8 *Geo.* 4. c. 30. § 8. See *Malicious Injuries*, I.

Nearly related to this head of riots, is the offence of tumultuous petitioning, which was carried to an enormous height in the times preceding the grand rebellion. Wherefore by the 13 *Car.* 2. st. 1. c. 5. it is enacted, that not more than twenty names shall be signed to any petition to the king, or either house of parliament, for any alteration of matters, established by law, in church or state, unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assizes or quarter sessions; and in London by the lord mayor, aldermen, and common council; and that no petition shall be delivered by a company of more than ten persons, on pain in either

case of incurring a penalty not exceeding 100*l.* and three months imprisonment. See *Liberty, Petition*.

Proceedings of the same nature, and manifestly tending to the same end, as the tumultuous petitions above alluded to, had arrived to such a height in the year 1795, that the legislature found it necessary to interpose by a temporary act, 36 *Geo. 3. c. 8.* for more effectually preventing seditious meetings and assemblies. But this act, after being revived by 41 *Geo. 3. c. 30.* (for a short period), was allowed to expire.

The 57 *Geo. 3. c. 19.* for the more effectually preventing seditious meetings and assemblies, enacted, (by § 1—22, containing provisions declared to be temporary only, and which are now expired), that no meeting of more than fifty persons, except county meeting or meetings called by two justices, or by the grand jury, and meetings in corporate towns called by the mayors, &c. should be holden for the purpose, or on the pretext, of preparing any petition or address to the sovereign, or parliament, for alteration of matters established in church or state, or for the purpose, or under pretext, of deliberating on any grievance in church or state, unless called by advertisement signed by seven householders, &c. or by notices delivered by them to the clerk of the peace. Meetings called without such notice might be dispersed by proclamation of a justice, on like penalties as under the Riot Act, 1 *Geo. 1. st. 2. c. 5.* Meetings might be dispersed, though held under such notices, if the notices purported the alteration of matters established by law, otherwise than by the authority of the king and parliament, or if they contained any matter tending to incite the people to hatred or contempt of the king or government. By § 23. of that act (which section is permanent) no public meeting shall be held, within one mile of Westminster Hall, for the purpose or on pretext of petitioning, &c. on any day during the sittings of parliament or of the courts of justice there. This act does not extend to Ireland. But see 54 *Geo. 3. c. 131* (amended by 55 *Geo. 3. c. 13*), and a temporary act, 54 *Geo. 3. c. 181*. I further provision for the preventing tumultuous meetings or assemblies, were made (for five years) by the 60 *Geo. 3. c. 1*, now expired.

PROCLAMATION for RIOTERS to disperse, under 1 *Geo. 1. st. 2. c. 5. § 2.*

Our sovereign lord the king chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the act made in the 1st year of King George, for preventing tumult and riotous assemblies.

God save the king.

PROCLAMATION under 57 *Geo. 3. c. 19. § 6.*

Our sovereign lord the king chargeth and commandeth all persons here assembled, immediately to disperse themselves, and peaceably to depart to their habitations or to their lawful business, upon pain of death.

God save the king.

An indictment for a riot must show for what act the rioters assembled, that the court may judge whether it was lawful or not. 2 *Ld. Raym.* 1210. And there must not only be an unlawful act to be done, but an unlawful assembly of more than two persons. 2 *Salk.* 59. 511. When six persons were indicted for a riot, two died without being tried, two were acquitted, and the other two were found guilty, the court refused to arrest the judgment, on the ground that as the jury had found two guilty of a riot, it must have been several are indicted, and all but two acquitted, no judgment can be given against the two. 1 *Ld. Raym.* 484. But although an indictment will not lie against two persons

only for making a riot, yet an indictment against "W. R., for that he, together with divers other persons, to the jurors unknown, committed a riot, is good." 3 *Salk.* 317.

RIPARIA, from *ripa*, a bank of a river.] A river, or water running between the banks. *Magna Charta, c. 5; stat. Westm. 2. c. 47; 2 Inst.* 478. It has usually been translated a bank, but this seems erroneous. *Aqua vocata le Lee magna riparia existit*, is a great river. *Rot. Parl.*

RIPIERS, *riparii, à piscellò quò in devehendis piscibus utuntur, Anglicè, a rip.*] Those that bring fish from the sea-coast to the inner parts of the land. *Camd. Brit.* 234.

RIPPERS, reapers or cutters down of corn.] Hence *riponel* was a gratuity or reward given to customary tenants, when they had reaped their lord's corn. *Conell.*

RIVAGIUM, *rinage* or *riverage*.] A duty paid to the king on some rivers for the passage of boats or vessels. *Quieti sint ab omni lastagio, passagio, tallagio, rivagio, &c. Placit. temp. Edw. 1.*

RIVEARE. To have the liberty of a river for fishing and fowling. *Pat. 2 Edw. 1.*

RIVERS. A navigable river is, with respect to the right of the public to pass along it, for the conveyance of themselves or their goods and merchandizes from one destination to another, in the nature of a public highway, and is so considered by *Callis* and by most legal writers. 1 *Hawk. c. 76. § 1; 3 Com. Dig.* 23. In some respects, however, it differs from a highway; for if a highway be foundered and out of repair, the public have a right to go on the adjoining land; but if a river should happen to be choked up with mud, that would not give the public a right to cut another passage through the adjoining lands. And upon this principle it was decided, that the public are not entitled, at common law, but only by custom, to tow on the banks of a navigable river. 3 *T. R.* 263. But as a highway may be changed by the act of God, so, on the same principle, if an ancient navigable river, by degrees, change its course, and go over different ground from that wherein it used to run, the right of passage then continues in the new channel in the same manner as in the old. 1 *Hawk. c. 76. § 4; 1 Rol. Abr.* 390. A navigable river also differs from a public highway in this respect, that whereas the freehold of the soil of the highway belongs to the lord of the manor or the owners of the adjoining lands on each side the way; 2 *Inst.* 75; 1 *Burr.* 149; 2 *T. R.* 232; yet the soil of a navigable river, *primò facie*, though not necessarily, belongs to the king, and is not, by presumption of law, in the owners of the adjoining lands. *Doug.* 441.

All navigable rivers, as well above the flowing of the sea as below, are public rivers, *juris publici*, and therefore all nuisances and impediments of boats and vessels, though in the private soil of any person, may be punished by indictment. *Hale, de Jure Maris, part 1. c. 3. p. 9.*

It is a common nuisance to divert a part of a public navigable river, whereby the current of it is weakened and made unable to carry vessels of the same burden as it could before. 1 *Hawk. c. 75. § 11.*

The erections of weirs across public rivers was reprobated in the earliest periods of our law, and was always considered as a public nuisance, for *Magna Charta* directs "that all weirs from henceforth shall be utterly pulled by Thames and Medway, and through all England, but only by the sea coast." *Magna Charta, c. 23.* And the 12 *Edw. 4. c. 7.* and other subsequent acts, forbid the erections of new weirs, and the enhancing, straightening, or enlarging those which aforesaid existed. Therefore where a brushwood weir across a public river was converted into a stone one, by which the fish were prevented from passing except in flood times; this was considered to be a public nuisance, although two-thirds of the weir had been so converted for forty years without interruption. 7 *East.* 198. So in another case it was considered, that an obstruction to the navigation of a river, though continued for a period of twenty years, was no bar to the right

of the public. 2 B. & A. 662. For no length of time will legitimate a public nuisance. 3 Campb. 227. See further, Nuisance, I.

As to annoyances in rivers, either positively by actual obstructions, or negatively, by want of reparations, the persons so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last,) the parish at large may be indicted, distrained to repair and amend them, and in some cases fined. 4 Comm. 167. And see the provisions of the recent statute, tit. Sewers.

By the statute of West. 2. c. 47. the king may grant commissions to persons to take care of rivers and the fishery therein. The lord mayor of London is to have the conservation in breaches and ground overflowed as far as the water ebbs and flows in the river Thames. 4 Hen. 7. c. 15. Persons annoying the river Thames, making shelves there, casting dung therein, or taking away stakes, boards, timber-work, &c. off the banks, incurred a forfeiture of 5*l.* under the 27 Hen. 8. c. 18. Commissioners appointed to prevent exactions of the occupiers of locks, weirs, &c. upon the river Thames westward from the city of London, to Cricklade, in the county of Wilts, and for ascertaining the rates of water-carriage, on the said river, &c. 6 & 7 Wm. 3. c. 16; which statute was revived, with authority for the commissioners to make orders and constitutions to be observed, under penalties, &c. 3 Geo. 2. c. 11; 24 Geo. 2. c. 8.

An ancient towing-path on the bank of a river is not within the jurisdiction of commissioners, under the general terms of an inclosure act. 2 Bos. & Pul. 296.

The owner of land through which a river runs cannot, by enlarging a channel of certain dimensions, through which the water had been used to flow, before any appropriation of it by another, divert more of it to the prejudice of any other landowner lower down the river, who had at any time, before such enlargement, appropriated to himself the surplus water which did not escape by the former channel. 6 East, 209.

By the 7 & 8 Geo. 4. c. 29. § 17. to steal goods in any vessel, barge, or boat, upon any river, &c., or any dock, wharf, &c. adjacent thereto, is punishable with transportation for life, &c. See further, Malicious Injuries.

ROBE, a robe, coat, or garment. Walsing. 267. See Retainer.

ROBBERY, *robaria*.] A felonious taking away of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear, and of purpose to steal the same. West's Symbol. part 2. title Indictments, § 60; 2 East's P. C. c. 16. § 124; 1 Hawk. P. C. c. 34; 1 Hale, P. C. 132; 3 Inst. 68.

This offence was called robbery, either because they bereaved the true man of some of his robes or garments, or because his money or goods were taken out of some part of his garment or robe about his person. Co. 3 Inst. c. 16. This is sometimes called violent theft. West, Symbol., ubi sup. Kitchin. fol. 16, 22; Lib. Ass. 39. See Skene de Verborum Signif. verb. Reif; and Cromp. Justice of Peace, fol. 30. What is or amounts to a Robbery in respect of the Manner, or the Person from whom any thing is taken.—

Open and violent larceny from the person, or robbery, is the felonious and forcible taking, from the person of another, of goods or money to any value, by violence, or putting him in fear. 1 Hawk. P. C. c. 34.

1st, There must be a taking, otherwise it is no robbery.

If the thief, having once taken a purse, return it, still it is a robbery: and so it is, whether the taking be strictly from the person of another, or in his presence only: as, where a robber, by menaces and violence, puts a man in fear, and drives away his sheep or his cattle before his face. 1 Hal. P. C. 533. But if the taking be not either directly from his person, or in his presence, it is no robbery. Com. 478; Stra. 10, 15.

2dly, It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery. 1 Hawk. P. C. c. 34. § 5.

But the property taken must be of some value. Therefore, in a case where the prisoner (a woman) had obtained a note of hand from a gentleman, by threatening him with a knife, held to his throat, to take away his life, and it appeared that she had furnished the paper and ink with which it was written, and that the paper was never out of her possession, this was holden not to be a robbery: the judges being of opinion that the note was of no value to the prosecutor, and not within the proviso of 2 Geo. 2. c. 5 § 2, which made the stealing a chose in action felony. Phipps's case, 2 Leach, 673.

Lastly, The taking must be by force, or a previous putting in fear; which makes the violation of the person more atrocious than privately stealing. This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcenies. For if one privately steal from the person of another, and afterwards keep it by putting him in fear, this is no robbery, for the fear is subsequent: neither was it formerly capital, as privately stealing, being under the value of twelve pence. 1 Hal. P. C. 534. Not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by putting in fear; it is sufficient if laid to be done by violence, and against the will of him robbed. Foster, 128; 2 East's P. C. c. 16. § 127. And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: it is enough that so much force, or threatening word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without or against his consent. Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be put in fear, yet this is undoubtedly a robbery. Or, if a person, with a sword drawn, begs an alms, and I give it him through mistrust and apprehension of violence, this is a felony as robbery. 1 Hawk. P. C. c. 45. § 6. So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted, whether the forcing a higgler, or other chapman to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery. 2 Hawk. P. C. c. 34. § 7. See 1 East, 615; 2 East, 712.

The circumstance of putting one in fear, makes the difference between a robbery and a cut-purse; both taken it from the person, but this takes it *clam et secretè* without assault or putting in fear, and the robber by violent assault and putting in fear. 3 Inst. 68. c. 16.

Wherever a person assaults another, with such circumstances of terror, as put him in fear, and causes him, by reason of such fear, to part with his money, the taking thereof is adjudged robbery; whether there were any weapon drawn or not, or whether the person assaulted delivered his money upon the other's command, or afterwards gave it to him upon his ceasing to use force, and begging an alms; for he was put into fear by his assault, and gives him his money to get rid of him. 1 Hawk. P. C. c. 34. § 9.

So in cases of extortion of money by threats of a mob, to injure the person's house or property. 2 East's P. C. c. 16. § 128.

If the fact appear upon the evidence to have been attended with those circumstances of violence or terror which, in common experience, are likely to induce a man to part with his property against his consent, either for the safety of his person, or for the preservation of his character and good name, it will amount to a robbery; and this, though no express demand of money is made. Thus if an officer feloniously take money from a prisoner, not to take him to gaol, under colour of authority; or if one obtain property by

threatening to accuse another of having been guilty of an unnatural crime, (see *post*,) these acts, particularly the latter, on the solemn opinion of all the judges, have been held acts sufficient to raise, in the mind of the party menaced, such a terror and apprehension of mischief, as to constitute the offence of robbery, by putting him in fear. 1 *Hawk. P. C. c. 34. § 6*; 2 *Leach. 731*; 2 *East's P. C. c. 16. § 130*.

But these latter cases of terror are to be considered as in some measure qualified and restrained: for in a case where the prosecutor had parted with his property for the purpose of convicting the offender, and after apprehension of injury to his character had ceased, this was held not to be a robbery; 2 *East's P. C. c. 16. § 132*; and in another case it was held, by a majority of the judges, that, in order to constitute robbery, in cases of this kind, the property must be taken on an immediate apprehension of present danger upon the charge being made, and not after the parties have separated, and there has been time to deliberate and procure assistance, and a friend has been consulted on the transaction. *Jackson and Shipley's case*, 1 *East's P. C. Add. xxi*.

The following distinction has been frequently admitted in prosecutions for robbery, *viz.* That if any thing is snatched suddenly from the head, hand, or person of any one without any struggle on the part of the owner, or without any evidence of force or violence being exerted by the thief, it does not amount to robbery. But if any thing is broken or torn in consequence of the sudden seizure, it would be evidence of such force as would constitute a robbery: as where part of a lady's hair was torn away by snatching a diamond pin from her head, and an ear was torn by pulling of an ear-ring, each of these cases was determined to be a robbery. 4 *Comm. c. 17. p. 244. n. cites Leach, 238*.

The words of the indictment, "forcibly and feloniously did take," must be understood to imply that there is either an actual taking in deed, or a taking in law, and the latter may be when a thief receives, &c. For example: if thieves rob a true man, and finding but little about him, take it, this is an actual taking; and by threats of death compel him to swear upon a book to fetch them a greater sum, which he does, and delivers it to them, which they receive, this is a taking in law by them, and adjudged robbery; for fear made him take the oath, and the oath and fear continuing, made him bring the money, which amounts to a taking in law; and so it is, if a purse, &c. is delivered to the thief through fear. 3 *Inst. 68. c. 16*.

See 1 *Hawk. P. C. c. 34. § 4*. That the thief must be in possession of the things stolen, or otherwise he is not guilty of robbery. 3 *Inst. 69. c. 16. S. P.*

If a man having a purse fastened to his girdle be assaulted by a thief, who, the more easily to take the purse, cuts the girdle, and the purse falls to the ground, this has been held no taking. 3 *Inst. 99*; 1 *Hale, 533*. But if the thief take up the purse, and afterwards let it fall, this is a sufficient taking; *Id. ib.*; for it is not necessary that the property, if once taken, should continue in the possession of the thief; for, where the robbery is once actually committed, it cannot be purged by any subsequent redelivery for any purpose. *Peat's case*, 1 *Leach, 228*; 1 *Hawk. P. C. c. 34. § 2*.

The words of the indictment are from the person, &c. If the true man seeking to escape, for the safeguard of his money casts it into a bush, which the thief perceiving, takes it; this is a taking in law from the person, because it is done at one time. 3 *Inst. 69. c. 16*. And so, if one drive my cattle, in my presence, out of my pasture, or takes my hat, which fall from my head, he may be indicted as taking taken things from my person. 1 *Hawk. P. C. c. 34. § 8*. See also 3 *Inst. 69. c. 16*; and 116 *pt. 161*; *Sty. 156*.

Also taking cattle from A, which he is driving on the highway, is a taking from his person, and so a robbery; 2 *Salk. 641*.

And if a man-servant be robbed of his master's goods, in

his master's sight, this shall he taken for a robbing of the master. *Sty. 156*.

In some cases, a man may be said to rob me, where in truth he never actually had any of my goods in his possession; as where I am robbed by several in one gang, and one of them takes my money; in which case, in judgment of law, every one of the company shall be said to take it, in respect of that encouragement which they give to another through the hopes of mutual assistance in their enterprise: nay, though they miss of their first intended prize, and one of them afterwards rides from the rest, and robs a third person in the same highway, without their knowledge, out of their view, and then returns to them, all are guilty of robbery; for they came together with an intent to rob, and to assist one another in so doing. 1 *Hawk. P. C. c. 34. § 7*.

But where a gang of poachers attacked a gamekeeper, and left him senseless on the ground, and one of them returned and stole his money, it was held that one alone could be convicted of the robbery, as it was not perpetrated in pursuance of any common intent. 3 *C. & P. 392*.

This offence of robbery is an aggravated species of larceny, and has long been liable to capital punishment; having been excluded from clergy by the old statutes, all of which have been repealed.

Now, by the 7 & 8 *Geo. 4. c. 29. § 6*, if any person shall rob any other person of any chattel, money, or valuable security, he shall suffer death as a felon.

A mere attempt to rob was indeed held to be felony so late as Henry the Fourth's time. 1 *Hal. P. C. 532*. But afterwards it was taken to be only a misdemeanor, and punishable with fine and imprisonment; till the 7 *Geo. 2. c. 21*, which first made it a felony, (transportable for seven years,) unlawfully and maliciously to assault another, with any offensive weapon or instrument; or by menaces, or by other forcible or violent manner, to demand any money or goods with a felonious intent to rob.

Now, by the 7 & 8 *Geo. 4. c. 29. § 6*, if any person shall assault any other person, with intent to rob him, or shall, with menaces, or by force, demand any such property of any other person, with intent to steal the same, he is guilty of felony, punishable with transportation for life or years, or imprisonment not exceeding four years, and whipping. See 6 *C. & P. 515, 521*.

By § 7. of the same statute it is declared, that to accuse, or threaten to accuse, a person of any infamous crime, and thereby, by intimidating such person, extorting money, chattel, or any valuable security, shall be deemed robbery.

As to stealing from the person without violence, and other thefts, see *Larceny*.

ROBBERSMEN, or ROBBERDSMEN. A sort of great thieves, mentioned in the statutes 5 *Edm. 3. c. 14*; 7 *R. 2. c. 6*; of whom *Coke* says, that Robin Hood lived in the reign of King Richard I. on the borders of England and Scotland, by robbery, burning of houses, rapine and spoil, &c. and that these robberdsmen took name from him. 3 *Inst. 197*.

ROCHET. That linen garment which is worn by bishops gathered at the wrists. It differs from a surplice, for that hath open sleeves hanging down, but a rochet hath close sleeves. *Lindemede, lib. 3. tit. 27*.

ROD, rada terræ.] A measure of sixteen feet and a half long, otherwise called a perch.

ROD KNIGHTS, from the Sax. *rad, equitatio*, and *cnyl, famulus, quasi ministri equitantes.*] Certain servitors who held their land by serving their lords on horseback. *Bract. lib. 1. c. 1*.

ROGATION-WEEK, *Dies Rogationum; Robigalia.*] A time so called because of the special devotion of prayer and fasting then enjoined by the church for a preparative to the joyful remembrance of Christ's ascension. *Cowell*.

ROGUE, Fr.] An idle sturdy beggar, who, by ancient statutes, for the first offence, was called a rogue of the first

degree, and punished by whipping and boring through the gristle of the right ear with a hot iron; and for the second offence he was termed a rogue of the second degree, and executed as a felon if he were above eighteen years old; 27 H. 8. c. 25; 14 Eliz. c. 5; but repealed by 35 Eliz. c. 7. § 24, as related to vagabonds of the second degree.

All former statutes relative to rogues and vagabonds were repealed by the 5 Geo. 4. c. 83. See *Vagrants*.

ROGUS, Lat.] A funeral pile. A great fire wherein dead bodies were burned; and sometimes it is taken simply for a pile of wood. *Claus. 5 Hen. 3.*

ROLL, rotulus.] A schedule of parchment that may be turned up with the hand in the form of a pipe. *Staudf. P. C. 11.* Rolls are parchments on which all the pleadings, memorials, and acts of courts are entered and filed with the proper officer, and then they become records of the court. 2 *Lill. Abr.* 491. By a rule made by the Court of King's Bench, every attorney is to bring in his rolls into the office fairly engrossed by the times thereby limited, viz. The rolls of Trinity, Michaelmas, and Hilary terms, before the essoin day of every subsequent term; and the rolls of Easter term before the first day of Trinity term; and no attorney at law, or any other person, shall file any rolls, &c. but the clerks of the chief clerks of this court. *Ord. B. R. Mich. 1705.* If rolls are not brought into the office in time, it has been ordered that they shall not be received without a particular rule of court for that purpose. *Mich. 9 W. 3.* See *Practice, Pleadings*.

ROLL OF COURT, rotulus curie.] The court-roll in a manor, wherein the business of the court, the admissions, surrenders, names, rents, and services of the tenants are copied and inrolled. See *Copyhold*.

ROLLS OFFICE OF THE CHANCERY. An office in Chancery Lane, London, which contains rolls and records of the High Court of Chancery, the master whereof is the second person in the chancery, &c. Among these are the inrollments of acts of parliament, &c. See *Chancery, Master of the Rolls*.

ROLLS OF THE EXCHEQUER. Are of several kinds, as the great wardrobe roll, the cofferer's roll, the subsidy roll, &c. See *Exchequer*.

ROLLS OF PARLIAMENT. The manuscript registers of the proceedings of our old parliament; in these rolls are likewise a great many decisions of difficult points in law, which were frequently in former times referred to the determination of this supreme court by the judges of both benches, &c. *Nicholson, Hist. Libr. part 3. cap. 3. edit. 1714.* The inrollments in chancery of the acts of parliament, transmitted or certified from the parliament office, are sometimes termed parliament rolls, and sometimes statute rolls. See *Statutes. Also Records*.

ROLLS OF THE TEMPLE. In the two Temples is a roll called the calves-head roll, wherein every bench, barrister, and student, is taxed yearly at so much to the cook and other officers of the houses, in consideration of a dinner of calves-head provided in Easter term. *Orig. Jurid. 199.*

ROMAN CATHOLICS. The penal laws against the catholics, although for the most part not expressly repealed, have been superseded by the provisions of modern statutes, and particularly by the 10 Geo. 4. c. 7.

By the 18 Geo. 3. c. 60. the 11 & 12 W. 3. c. 4. was repealed in favour of such papists as should duly take the oath therein prescribed: of allegiance to his majesty, abjuration of the pretender, renunciation of the pope's civil power, and abhorrence of the doctrine imputed to them of destroying and not keeping faith with heretics, and deposing or murdering princes excommunicated by authority of the See of Rome,—so far as it disabled them from purchasing or inheriting, or authorised the apprehending or prosecuting the popish clergy, or subjected to imprisonment either them or any teachers of youth.

By the 31 Geo. 3. c. 32. also, all the severe restrictions and

penalties of the former laws were removed from those Roman Catholics who should make and subscribe a declaration of their professing the Roman Catholic religion, and also take the oath required by the last statute.

But by § 5. their places of worship are required to be certified to the quarter sessions, and there recorded; and no minister can officiate in any place of worship until his name and description are also recorded at the sessions, under the penalty of being deprived of all benefit of the act.

By § 6. their places of worship are prohibited from being locked or fastened.

By § 10. if any person shall wilfully, and on purpose, maliciously and contemptuously come into any congregation or assembly of their religious worship and disturb the same, or misuse any priest, minister, preacher, or teacher therein, on proof by two witnesses before one justice, he may be required to find two sureties in 50*l.* to appear at the next sessions, and upon conviction is liable to a penalty of 20*l.*

By § 11. a Roman Catholic minister is prohibited from officiating in any place of worship having a steeple and bell, or at any funeral in a church or church-yard, or from wearing the habits of his order, except in a place allowed by the statute, or in a private house where there shall not be more than five persons besides the family.

By § 13. 14. 15. 16. no person, who shall take the appointed oath, shall be prosecuted for teaching youth as a tutor or schoolmaster, except in any college or school of royal foundation, or any other endowed college or school, or except in any school in either of the two universities; but no Catholic schoolmaster can receive into his school for education the child of any Protestant father; nor is he permitted to keep a school until his name and description shall have been recorded at the sessions. See *post*.

But the great measure of relief to the Catholics was the 10 Geo. 4. c. 7. whereby the restrictions which prevented them from sitting in either Houses of Parliament, and holding many offices and franchises, were removed.

After reciting that "by various acts of parliament certain restraints and disabilities are imposed on the Roman Catholic subjects of his majesty, to which other subjects of his majesty are not liable; and that it is expedient that such restraints and disabilities shall be from henceforth discontinued; and that by various acts certain oaths and certain declarations, commonly called the declaration against transubstantiation, and the declaration against transubstantiation and the invocation of saints and the sacrifice of the mass, as practised in the church of Rome, are or may be required to be taken, made, and subscribed by the subjects of his majesty, as qualifications for sitting and voting in parliament, and for the enjoyment of certain offices, franchises, and civil rights:"

It is by § 1. enacted, that all such parts of the said acts as require the said declarations, or either of them, to be made or subscribed by any of his majesty's subjects, as a qualification for sitting and voting in parliament, or for the exercise or enjoyment of any office, franchise or civil right, be (save as hereinafter excepted) repealed.

By § 2. Roman Catholics may sit and vote in either Houses of Parliament on taking the oath therein contained, instead of the oaths of allegiance, supremacy, and abjuration.

By § 5. Roman Catholics may vote at elections of members to serve in parliament for England and for Ireland, and also vote at the elections of representative peers of Scotland and of Ireland, and may be elected such representative peers, being in all other respects duly qualified, upon taking and subscribing the oath thereinbefore set forth, and upon taking also such other oath or oaths as may be lawfully tendered to persons offering to vote at such elections.

By § 8. so much of any acts as require the formula contained in 8 & 9 W. 3. c. 3. (S.) to be tendered or taken, is repealed. Roman Catholics may elect and be elected mem-

bers of parliament for Scotland, and enrolled as free-holders, &c. on taking the appointed oath.

By § 9. no Roman Catholic priest is to sit in the House of Commons.

By § 10. Roman Catholics may hold and enjoy all civil and military offices and places of trust or profit under his majesty, and exercise any other franchise or civil right, except as hereinafter excepted, upon taking and subscribing the oath thereinbefore appointed.

But by § 11. nothing therein contained shall exempt any person professing the Roman Catholic religion from taking any oaths, or making any declaration, not thereinbefore mentioned, or required to be taken or subscribed by any person on his admission into any such office or place of trust or profit as aforesaid.

§ 12. Provided that nothing therein contained shall enable Roman Catholics to hold or exercise the office of guardians and justices of the United Kingdom, or of regent of the United Kingdom, under whatever name, style or title such office may be constituted; or to enable any person, otherwise than as he is now by law enabled, to hold or enjoy the office of lord high chancellor, lord keeper or lord commissioner of the great seal of Great Britain or Ireland; or the office of lord lieutenant, or lord deputy, or other chief governor or governors of Ireland; or his majesty's high commissioners to the general assembly of the church of Scotland.

By § 14. Roman Catholics may be members of any lay body corporate, and hold any civil office or place of trust or profit therein, and do any corporate act, or vote in any corporate election or other proceeding, upon taking and subscribing the oath thereby appointed; and upon taking also such other oaths as may by law be required to be taken by any person becoming members of such lay body corporate, or being admitted to hold any office or place of trust or profit within the same.

But by § 15. such members of corporations not to vote in ecclesiastical appointments.

By § 16. the act is not to extend to offices, &c. in the established church, or ecclesiastical courts, universities, colleges, or schools: Provided also, that nothing therein contained shall extend to enable any person, otherwise than as he is now by law enabled, to exercise any right of presentation to any ecclesiastical benefice whatsoever; or to repeal, vary, or alter in any manner the laws now in force in respect to the right of presentation to any ecclesiastical benefice.

§ 17. Provided that where any right of presentation to any ecclesiastical benefice shall belong to any office in the gift or appointment of his majesty, his heirs or successors, and such office shall be held by a person professing the Roman Catholic religion, the right of presentation shall devolve upon and be exercised by the Archbishop of Canterbury for the time being.

By § 18. no Roman Catholic, directly or indirectly, shall advise his majesty, or any person or persons holding or exercising the office of guardians of the United Kingdom, or of regent of the United Kingdom, under whatever name, style or title such office may be constituted, or the lord lieutenant, or lord deputy, or other chief governor or governors of Ireland, touching the appointment to any office or preferment in the united church of England and Ireland, or in the church of Scotland; and if any such person shall offend in the premises, he shall, being thereof convicted by due course of law, be deemed guilty of a high misdemeanor, and disabled for ever from holding any office, civil or military, under the crown.

§ 19. Every person professing the Roman Catholic religion, placed, elected, or chosen in or to the office of mayor, provost, alderman, recorder, bailiff, town clerk, magistrate, councillor, or common councilman, or in or to any office of magistracy or place of trust or employment relating

to the government of any city, corporation, borough, burgh, or district within the United Kingdom of Great Britain and Ireland, shall, within one calendar month next before or upon his admission into any of the same respectively, take and subscribe the oath thereinbefore appointed and set forth, in the presence of such person or persons respectively as by the charters or usages of the said respective cities, corporations, burghs, boroughs, or districts ought to administer the oath for due execution of the said offices or places respectively; and in default of such, in the presence of two justices of the peace, councillors or magistrates of the said cities, &c. if such there be; or otherwise, in the presence of two justices of the peace of the respective counties, ridings, divisions, or franchises wherein the said cities, &c. are; which said oath shall either be entered in a book, roll, or other record to be kept for that purpose, or shall be filed amongst the records of the city, &c.

§ 20. Every person professing the Roman Catholic religion, appointed to any office or place of trust or profit under his majesty, his heirs or successors, shall within three calendar months next before such appointment, or otherwise shall, before he acts in such office or place, take and subscribe the oath thereinbefore appointed and set forth, either in the Court of Chancery, or the Courts of King's Bench, Common Pleas, or Exchequer, at Westminster or Dublin; or before any judge of assize, or in any court of general or quarter sessions of the peace in Great Britain or Ireland, for the county or place where the person so taking and subscribing the oath shall reside; or in any of his majesty's courts of session, judiciary, exchequer, or jury court, or in any sheriff or steward court, or in any burgh court, or before the magistrates and councillors of any royal burgh in Scotland, between the hours of nine in the morning and four in the afternoon; and the proper officer of the court in which such oath shall be so taken and subscribed shall cause the same to be preserved amongst the records of the court.

§ 21. If any person professing the Roman Catholic religion shall enter upon the exercise of any office or place of trust or profit under his majesty, or of any other office or franchise, not having taken and subscribed the oath thereinbefore appointed, such person shall forfeit to his majesty two hundred pounds; and the appointment of such person to the office, &c. so by him held shall become void.

§ 22. Provided that the oath thereinbefore appointed shall be taken by the officers in his majesty's land and sea service, professing the Roman Catholic religion, at the same times and in the same manner as the oaths and declarations now required by law are directed to be taken, and not otherwise.

By § 24. titles to sees, &c. are not to be assumed by Roman Catholics.

And by § 25. judicial or other officers are not to attend with insignia of office at any place of worship other than the established church, under a penalty of one hundred pounds.

And by § 26. a penalty of fifty pounds is imposed on Roman Catholic ecclesiastics officiating except in their usual places of worship.

For the provisions of the act with respect to Jesuits, see that title.

By the 2 & 3 Wm. 4. c. 115. it is enacted, that Roman Catholics in respect to their schools, places of religious worship, education, and charitable purposes in Great Britain, and the property held therewith, and the persons employed about the same, shall be subject to the same laws as the Protestant Dissenters are subject to in England in respect of their schools, &c.

By § 2. Roman Catholic schoolmasters are in all cases, when required by law, as a legal qualification for their employments, to take the oath prescribed by the 10 Geo. 4. c. 7. in lieu of all other oaths, or declarations, or tests.

By § 4. the act is not to repeal the provisions of the 10

Geo. 4. c. 7. respecting the suppression or prohibition of the religious orders of the church of Rome bound by monastic laws.

And it is provided by § 5. that all property acquired or held for the purposes of religious worship, education, and charitable purposes in England and Wales, shall be subject to the provisions of the Mortmain Act, 9 *Geo. 2. c. 36.* and to the same laws as the Protestant Dissenters are subject to in England in respect of acquiring or holding such property.

For two recent statutes relating to marriages by Roman Catholic clergymen in Scotland and Ireland, see *Marriage*.

ROMA-PEDITÆ. Pilgrims that travelled to Rome on foot. *Mat. Paris, anno 1250.*

ROME, Church of. Its encroachments of power here, and how suppressed, see *Pope, Præmunire*.

ROME-SCOT. See *Peter-Pence*.

ROMNEY-MARSH. A large tract of land in the county of Kent, containing 24,000 acres, which is governed by certain ancient and equitable laws of sewers composed by Henry de Bathe, a venerable judge in the reign of King Henry III.; from which laws all commissioners of sewers in England may receive light and direction. 4 *Inst.* 276. King Henry III. granted a charter to Romney-Marsh, empowering twenty-four men thereunto chosen to make distresses equally upon all those who have lands and tenements in the said marsh, to repair the walls and water-gates of the same against the dangers of the sea. There are also several laws and customs observed in the said marsh, established by ordinance of justices thereto appointed in 42 *Hen. 3*; 16 *E. 1*; 33 *E. 3*; &c. The commissioners of sewers, in other parts of England, might formerly have acted according to the laws and customs of Romney-Marsh, or otherwise at their own discretion. See *Sewers*.

ROOD, or Holy Rood, Holy Cross.

ROOD OF LAND, *rodata terræ*.] The fourth part of an acre.

ROOKERY. An action on the case will not lie for disturbing a rookery, on the ground that rooks are a species of bird *feræ naturæ*, of a destructive nature, not known as an article of food, and not protected by any statute; and therefore a person cannot have any property in them, or establish any legal right to cause them to resort to his trees. 2 *B. & C.* 934; 5 *C. 4 D. & R.* 518.

ROOTS. See *Gardens*.

ROPE-DANCERS, &c. are public nuisances, and may, upon indictment, be suppressed and fined. 1 *Hawk. P. C.* 75, § 6. See *Nuisance, Play-Houses*.

ROS. A kind of rushes, which some tenants were obliged by their tenures to furnish their lords withal. *Brady*.

ROSETUM. A low watery place of reeds and rushes; and hence the covering of houses with a thatch made of reeds was so called. *Cartular. Glaston. MSS.* 107.

ROSLAND, *Brit. rhos*.] Heathy land, or ground full of ling; also watery and moorish land. 1 *Inst.* 5.

ROTHER-BEASTS. Under this name are comprehended oxen, cows, steers, heifers, and such like horned beasts. See 3 & 4 *Ed. 6. c.* 19.

ROTULUS WINTONIÆ, *The Roll of Winton*.] Was an exact survey of all England, *per Comitatus, Centurias, et Decurias*, made by King Alfred, not unlike that of Domesday; and it was so called, for that it was of old kept at Winchester among other records of the kingdom; but this roll time hath consumed. *Ingulph. Hist.* 516.

ROUT, *Fr. route*, i. e. a company or number. In a legal sense, signifies an assembly of persons going forcibly to commit an unlawful act, though they do not do it. *West. Symb. par. 2.* A rout is the same which the Germans call *rot*, meaning a band or great company of men gathered together, and going to execute, or indeed executing, any riot or unlawful act. See *Riot*.

ROYAL ASSENT, *regius assensus*.] That assent which

the king gives to a thing formerly done by others, as to the election of a bishop by dean and chapter; which given, then he sends a special writ for the taking of fealty. See *F. N. B. fol. 170.* When the royal assent is given to an act of parliament, it is written in the proper terms upon the act. See *Parliament, 7*; *Statutes*.

ROYAL BURGHS. Incorporations in Scotland created by royal charter, giving jurisdiction to the magistrates within certain bounds, and vesting certain privileges in the inhabitants and burgesses. A burgh is called a royal burgh if it holds of his majesty; if it holds of a subject, it is termed a burgh of barony. *Bell's Scotch Dictionary*.

By the 3 & 4 *W. 4. c.* 46. burghs in Scotland are enabled to establish a general system of police.

By the 3 & 4 *W. 4. c.* 77. (explained by the 4 & 5 *Wm. 4. c.* 87.) the laws for the election of the magistrates and councils of royal burghs are altered and amended; and by *c.* 78. (explained by the 4 & 5 *Wm. 4. c.* 86.) provisions are made for the appointment and election of magistrates and councillors for burghs and towns returning, or contributing to return, members under the Reform Act, and which are not royal burghs.

ROYAL FAMILY. See *King, Queen, Prince*.

ROYALTIES, *regalitates*.] See *King*. Those royalties which concern government in a high degree, the king may not grant or dispose of. *Jenk. Cent.* 79.

ROYNES. Streams, currents, or other usual passages of rivers and running waters. *Cowell*.

RUBRICAS, *a rubro colore*, because anciently written in red letters. Constitutions of the church, founded upon the statutes of uniformity and public prayer, viz. 5 & 6 *Ed. 6. c.* 1; 1 *Eliz. c.* 2; 13 & 14 *Car. 2. c.* 4. See *Nonconformists, Religion, &c.*

RUBRIC OF A STATUTE is its title, which was anciently written in red letters. It may serve to show the object of the legislature, and thence affords the means of interpreting the body of the act. Hence the phrase of an argument, *a rubro ad nigrum*. *Scotch Dict.*

RUDMAS-DAY, from the Sax. *rode, crus*, and *mass-day*.] The feast of the Holy Cross: there are two of these feasts, one on the 3d of May, the invention of the cross, and the other the 14th of September, called Holy Rood-day, the exaltation of the cross.

RULE OF COURT. An order made either between parties to a suit on motion, or to regulate the practice of the court. See *Motion in Court, Practice*.

Where a defendant, consenting to a judge's order, obtains a benefit under it, the Court of C. P. will, upon the order being afterwards made a rule of court, enforce by attachment the defendant's performance of such terms of the rule as are beneficial to the plaintiff, or to the crown in a *qui tam* action. 7 *Taunt.* 43.

A variety of general rules have recently been made by the judges, regulating and assimilating the practice of the courts at Westminster, altering the mode of pleading, &c. in pursuance of the authority given to them by various statutes, which are shortly noticed under the head *Judges*.

A rule of court is also granted to prisoners in the King's Bench or Fleet prisons, every day the court sits, to go at large, if such prisoner have business in law of his own to follow. But by rule of court of K. B. Easter term, 30 *Geo. 3.* on this subject, every prisoner within the King's Bench prison, or the rules thereof, having a day rule, shall return within the walls or rules before nine o'clock in the evening. 3 *T. R.* 584.

The rules of the King's Bench prison are certain limits without the walls, within which prisoners in custody are allowed to live, on giving security to the marshal not to escape. The benefit of these rules may be had by one in custody in an *excom. cap.* but is never granted to a prisoner in execution on a criminal account, or for a contempt. See *Tidd's Pract.*

For the limits of the rules of the King's Bench prison, see *R. E.* 30 *Geo. 3. K. B. 3 T. R.* 583; *R. E.* 35 *Geo. 3. K. B. 6 T. R.* 305; 36 *Geo. 3. K. B. 6 T. R.* 778.

RUMNEY-MARSH. See *Romney-Marsh*.

RUNCARIA, from *runca*.] Land full of brambles and briars. 1 *Inst.* 5 a.

RUNCILUS; RUNCINUS; is issued in Domesday (says Spelman) for a load-horse, *equus operarius colonicus*; or a sumpter-horse, and sometimes for a cart-house, which Chaucer, in the *Seaman's Tale*, calls a *Rowney*. *Cowell*.

RUNDLET; RUNLET. A measure of wine, oil, &c. containing eighteen gallons and a half. 1 *R. 3. c.* 13

RUNNERS or FOREIGN GOODS. See *Customs on Merchandize, Smuggling*.

RUNRIG-LANDS. In Scotland, lands where the ridges of a field belong alternately to different proprietors. Anciently this kind of possession was advantageous in giving an united interest to tenants to resist inroads. By the act 1695, c. 23, a division of these lands was authorized, with the exception of lands belonging to corporations.

RUPTARII. Soldiers, or rather robbers, called also *rutarii*; and *rutia* was a company of robbers. *Mat. Paris*, anno 1250. *Articuli Magne Carte Johannis*.

RUPTURA. Arable land or ground broke up. A term used in ancient charters.

RURAL DEANS. See *Dean*.

RURAL DEANERY. As every diocese is divided into archdeaconries, (of which there are sixty,) so each archdeaconry is divided into rural deaneries, which are the circuit of the archdeacon's and rural dean's jurisdiction. And every deanery is divided into parishes. 1 *Comm.* 111.

RUSCA. A tub or barrel of butter, which in Ireland is called a *ruskin*. *Rusca apium* signifies a hive of bees. *Mon. Ang.* ii. 986.

RUSCATIA. The place where kneeholm or broom grows. *Co. Leth.* 5.

RUSSIA COMPANY, (or, as it has sometimes been termed, *The Muscovy Company*,) subsisted by virtue of a

charter granted by Philip and Mary in the first and second year of their reign, which was confirmed by a private statute passed in the eighth of Elizabeth. The charter was granted to them under the style of "The Merchants Adventurers of England for the Discovery of Lands, Territories, Isles, Dominions, and Seigniories unknown, and not, before their late Adventure or Enterprise, by Seas or Navigation commonly frequented." In the statute they were described by the name of "The Fellowship of English Merchants for the Discovery of New Trades." The extent of their rights under the statute was the sole privilege of trading to and from the dominions and territories of the Emperor of Russia, lying northward, north-eastward, and north-westward from London, as also to the countries of Armenia Major, or Minor, Media, Arcania, Persia, or the Caspian Sea. It was said in 10 & 11 *W. 3. c.* 6. to be commonly called "The Russia Company."

In the reign of King William III. it was thought this trade might be considerably enlarged, if the admission of persons into the company was made more easy; and that it would be very proper to ascertain the fee of admission, which had not been done either by the charter or the statute [of Elizabeth.] It was accordingly enacted by the 10 & 11 *W. 3. c.* 6. § 1. 2. that every subject of this realm might be admitted into the company on payment of 5*l.* only.

Every individual admitted into the company conducts his business entirely as a private adventurer, or as he would do were the company abolished.

For the charter and other matters relating to this company, see *Hackluyt*, vol. 1. p. 258—274. And for the particulars as to the trade to Persia, through Russia, see *Reeve's Law of Shipping and Navigation*.

RUSTICI. The churls, clowns, or inferior country tenants, who held cottages and lands by the services of ploughing and other labours of agriculture for the lord. The land of such ignoble tenure was called by the Saxons *gafalland*, as afterwards *soccage tenure*, and was sometimes distinguished by the name of *terra rusticorum*. *Paroch. Antiq.* 136. See *Tenures*.

RYE. One of the cinque ports. See *Cinque Ports*.

S.

SAC

SABBATH-BREAKING. The profanation of the Lord's Day. See *Sunday*.

SABBATUM. The sabbath, or day of rest; the seventh day from the creation: it is used for peace in the book of Domesday.

SABALLINÆ PELLIS. Sable furs mentioned in *Hoved.* p. 578; *Brompt.* anno. 1188.

SABBULONARIUM. A gravel pit: or liberty to dig gravel and sand; also the money paid for the same. *Pet. Parl. temp. Edw. 3.*

SAC. See *Soke*.

SACA. In the Saxon is properly synonymous with *causa* in Latin, whence we in England still retain the expression, for whose sake, i. e. for whose cause, &c.

SACABURTH, SACABERE, SAKABERE. He that is robbed, or by theft deprived of his money or goods, and puts in surety, to prosecute the felon with fresh suit. *Brit. c. 15 & 29*; with whom agrees *Bracton*, l. 3. c. 32. The Scots term it *sikerborgh*, that is, *certum vel securum plegium vel pignus*; for with them *siker* signifies *securus*, and *borgh* *legius*. *Spelm.*

SACCINI. Monks so called, because they wore next their skins a garment of goats' hair; and *saccus* is applied to coarse cloth made of such hair. *Walsing.*

SACCIS. *Frates de saccis*, the sackcloth brethren, or the penitential order. *Placit. 8 Edw. 2.*

SACCUS CUM BROCHIA. A service or tenure of finding a sack and a broach (pitcher) to the king, for the use of his army. *Bracton*, lib. 2. c. 16. See *Brochia*.

SACK OF WOOL. A quantity of twenty-six stone of sheep's wool; and of cotton wool, from one hundred and a half to four hundred. *14 Edw. 3. st. 1. c. 2.*

SACRAMENT, sacramentum.] Usually applied to the Holy Sacrament of the Lord's Supper. By the rubric there must be three at the least to communicate, and a minister is not without lawful cause to deny it to any who shall devoutly and humbly desire it: but notorious sinners are not to be admitted to it till they have repented; nor those who maliciously contend, until they are reconciled, &c.; also the sacrament is not to be administered to such who refuse to be present at the prayers of the church, or to strangers; for a minister is not obliged to give it to any but those of his own parish; and the partakers of the holy sacrament ought to signify their names to the curate at least a day before it is administered. *Can. 27.*

If a minister refuse to give the sacrament to any one, being required by the bishop, he is to certify the cause of such refusal; and a parson refusing to administer the sacrament to any without just cause, is liable to be sued in action on the case: because a man may have a temporal loss by such refusal. *1 Sid. 34.*

In every parish church the sacrament is to be administered three times in the year, (whereof the feast of Easter to be one,) and every layman is bound to receive it thrice every year, &c. In colleges and halls of the universities the sacraments are

SAC

to be administered the first or second Sunday of every month; and in cathedral churches, upon all principal feast days. *Canon. 21, 22, 23.*

The churchwardens, as well as the minister, are to take notice whether the parishioners came so often to the sacrament as they ought; and on a churchwarden's presenting a man for not receiving the sacrament, he may be libelled in the ecclesiastical court and excommunicated, &c. Reviling the sacrament of the Lord's Supper is punishable under *1 Eliz. c. 1*; *1 Edw. 6. c. 1.* with fine and imprisonment.

The acts commonly called the Test and Corporation Acts, requiring persons to take the sacrament as a qualification for office, have been repealed. See *Nonconformists*.

SACRAMENTUM. An oath: the common form of all inquisitions might in Latin, by a jury, run thus: *qui dicunt supra sacramentum suum, &c.*; whence possibly the proverbial offering to take the sacrament of the truth of a thing, was first meant by attesting upon oath.

SACRAMENTUM ALTARIS. The sacrifice of the mass, or what is now called the sacrament of the Lord's Supper. *Paroch. Antiq. 488.*

SACRILEGE, sacrilegium.] Church robbery, or a taking of things out of a holy place; as where a person steals any vessels, ornament, or goods of the church: and it is said to be a robbery of God, at least of what is dedicated to his service. *3 Cro. 153.* If any thing belonging to private persons, left in a church, be stolen, it is only common theft, not sacrilege: but the canon law determines that also to be sacrilege; as likewise the stealing of a thing known to be consecrated, in a place not consecrated. *Treat. Laws, 360.*

By the civil law sacrilege is punished with greater severity than other thefts; and the common law distinguished this crime from other robberies; for it denied the benefit of the clergy to the offenders, which it did not do to other felons but by statute it is put upon a footing with other felonies, by making it felony excluded of clergy, as most other felonies are. *2 Inst. 250.*

All the old statutes on the subject are repealed, and now by the *7 & 8 Geo. 4. c. 29. § 10.* persons breaking and entering any church or chapel and stealing therein any chattel, or having stolen any chattel therein, breaking out of the same, are guilty of felony and shall suffer death.

A dissenting chapel is not within the above statute. *6 C. & P. 335.* See further *Accessory, Burglary*.

The term sacrilege was also anciently applied to the alienation to laymen, and to profane or common purposes, of what was given to religious persons and to pious uses: this was a guilt which our forefathers were very tender of incurring; and therefore when the order of the knights templars was dissolved, their lands were, under this pretext, afterwards violated, given to the knights hospitallers of Jerusalem, for this reason: *ne in pios usus erogata, contra donatorum voluntatem in alios usus distraherentur.* *Paroch. Antiq. 390.*

SACRISTA, Latin.] A sexton belonging to a church; in old times called *sagerson*, and *sagiston*.

SADBERGE. A denomination of part of the county palatine of Durham. See 11 Geo. 4. c. 11; *Domesday, Bolden-Book*, 577; *Camden's Britannia*; *Brigantes*, p. 744, ed. 1637.

SAFE-CONDUCT, *salvus conductus*.] A security given by the prince, under the great seal, to a stranger, for his safe coming into, and passing out of, the realm; the form whereof is in *Reg. Orig.* 25.

The royal prerogative of granting safe-conducts is considered by Blackstone as nearly related to, and plainly derived from, that of making war. See *King*, V. 3.

Great tenderness is shown by our laws, not only to foreigners in distress, (see *Wreck*,) but with regard also to the admission of strangers who come spontaneously; for as long as their nation continues at peace with ours, and they behave themselves peaceably, they are under the king's protection, though liable to be sent home whenever the king sees occasion. But no subject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods and merchandise from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which by divers ancient statutes must be granted under the king's great seal, and enrolled in Chancery, or else are of no effect; the king being supposed the best judge of such emergencies, as may deserve exception from the general law of arms. But passports under the king's sign-manual, or licences from his ambassadors abroad, are now more usually obtained, and are allowed to be of equal validity. 1 *Comm.* c. 7. p. 259, 260. See 15 *Hen.* 6. c. 3; 18 *Hen.* 6. c. 8; 20 *Hen.* 6. c. 1; and *tit. Alien*.

Indeed the law of England, as a commercial country, pays a very particular regard to foreign merchants in innumerable instances. One is highly proper to be mentioned in this place. By *Magna Charta*, c. 30. it is provided, that all merchants (unless publicly prohibited beforehand) shall have safe-conduct to depart from, to come into, to tarry in, and to go through England, for the exercise of merchandise, without any unreasonable imposts, except in time of war; and, if a war breaks out between us and their country, they shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and, if ours be secure in that land, they shall be secure in ours. See 1 *Comm.* p. 260; *Montesq. Sp. L.* xx. 13.

The violation of safe-conducts or passports, or the committing acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct, are breaches of public faith; without the preservation of which there can be no intercourse or commerce between one nation and another; and they are considered as one just ground of national war. And as, during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law; and, more especially, as we have seen that it is one of the articles of *Magna Charta*, that foreign merchants should be entitled to safe-conduct and security throughout the kingdom; there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honour is more particularly engaged in supporting his own safe-conduct. And when this malicious rapacity was not confined to private individuals, but broke out into general hostilities, by 2 *Hen.* 5. c. 1. c. 6. the breaking of truce and safe-conducts, or abetting and receiving the truce-breakers, was (in affirmation and support of the law of nations) declared to be high treason against the crown and dignity of the king; and conservators of truce and safe-conducts were appointed in every port, and empowered to hear and determine such treasons (when committed at sea) according to the ancient marine law, then practised in the admiral's court; and, together with two men learned in the law of the land, to hear and deter-

mine according to that law the same treasons, when committed within the body of any county. Which statute, so far as it made these offences amount to treason, was suspended by 14 *Hen.* 6. c. 8. and repealed by 20 *Hen.* 6. c. 11. but revived by 29 *Hen.* 6. c. 2. which gave the same powers to the lord chancellor, associated with either of the chief justices, as belonged to the conservators of truce and their assessors; and enacted that, notwithstanding the party be convicted of treason, the injured stranger should have restitution out of his effects, prior to any claim of the crown. And it is farther enacted by 31 *Hen.* 6. c. 4. that if any of the king's subjects attempt or offend upon the sea, or in any port within the king's obedience, against any stranger in amity, league, or truce, or under safe-conduct; and especially by attaching his person, or spoiling him, or robbing him of his goods; the lord chancellor, with any of the justices of either the King's Bench or Common Pleas may cause full restitution and amends to be made to the party injured.

It is observed that the suspending and repealing acts of 14 & 20 *Hen.* 6. and also the reviving act of 29 *Hen.* 6. were only temporary; so that it should seem that, after the expiration of them all, the 2 *Hen.* 5. continued in full force; but yet it is considered as extinct by the 11 *Edw.* 1. c. 4. which revives and confirms all statutes and ordinances, made before the accession of the House of York, against breakers of amities, truces, leagues, and safe-conducts, with an express exception to the 2 *Hen.* 5. But (however that may be) it seems to have been finally repealed by the general statutes of Edward VI. and Queen Mary, for abolishing new created treasons; though Hale seems to question it as to treasons committed on the sea. 1 *Hal. P. C.* 267. But certainly the 31 *Hen.* 6. remains in full force to this day. 4 *Comm.* c. 5. p. 69, 70.

SAFEGUARD, *salva guardia*.] A protection of the king to one, who is a stranger, that fears violence from some of his subjects, for seeking his right by course of law. *Reg. Orig.* 26.

SAFE-PLEDGE, *salvus plegius*.] A surety given for a man's appearance at a day assigned. *Bract. lib.* 4. cap. 2. See *Pledge*.

SAGAMAN, from Saxon *saga, fabula*.] A tale-teller; or secret accuser. *Leg. Hen.* 1. cap. 63.

SAGIBARO, **SACHBARO**, *justiciarius*, a judge. *Leg. Inq.* c. 6.

SAGITTA BARBATA. A bearded arrow. *Blount*.

SAGITTARII. A sort of small ships or vessels, with oars and sails. *R. de Dicto*, anno 1176.

SAIL-CLOTH. For encouraging the manufacture of sail-cloth, any person may import into this kingdom undressed flax, without paying any duty for the same, so as a due entry be made thereof at the custom-house, &c. No drawback is to be allowed on re-exportation of foreign sail-cloth: but an allowance shall be made of 1*d.* per ell for British sail-cloth exported, &c. All foreign sail-cloth imported, from which duties are granted, shall be stamped, expressing from whence imported, &c. Manufacturers of sail-cloth in this kingdom are to affix to every piece by them made, a stamp containing their names and places of abode; or exposing it to sale shall forfeit 10*l.* If any persons cut off or obliterate such stamps, they incur a forfeiture of 5*l.* upon conviction before one or more justices, to be levied by distress, &c. 4 *Geo.* 2. c. 27.

Under the provisions of the 9 *Geo.* 4. c. 76. § 16. the bounties formerly allowed on the exportation of sail-cloth are discontinued.

Ships built, on first setting out to sea, to have one complete set of sails manufactured here, on pain of 50*l.* No sail-maker may work up into sails foreign sail-cloth not stamped, under 20*l.* penalty: sail-cloth made in Great Britain, the pieces being made of certain lengths and breadths, shall weigh so many pounds each bolt, and the warp wrought of double

yarn, &c. Flax yarn used in British sail-cloth not to be whitened with lime, on forfeiture of 6*d.* a yard. Sail-makers, &c. are to cause this act to be put up in their shops and workhouses, under the penalty of 40*s.* 9 *Geo.* 2. c. 37.

So much of the last-mentioned act as relates to the materials to be used in the manufacture of British sail-cloth, and the manner of manufacturing the same, was repealed by the 1 *Geo.* 4. c. 25.

Masters of ships are to make entry of all foreign made sails on board, under the penalty of 50*l.* and pay duty for the same, unless they choose to deliver up the sails as forfeited: sails brought from the East Indies were exempted from duty; [but this is repealed by 54 *Geo.* 3. c. 66. § 2.] Foreign-made sail-cloth imported, is to be stamped at the landing: forger of stamps, &c. shall forfeit 50*l.* A sail-maker making foreign sail-cloth unstamped into sails, shall forfeit 50*l.* A sail-maker shall not repair or amend the same under the penalty of 20*l.* 19 *Geo.* 2. c. 27.

Now, by the 9 *Geo.* 4. c. 76. § 12. foreign sails when imported by, and fit and necessary for, and in the actual use of any British ship, are exempted from duty; but when otherwise disposed of, they pay an *ad valorem* duty of 20 per cent.

SAINT MARTIN LE GRAND, court of.] The chief of the several courts in London are the sheriff's courts, holden before their steward or judge; from which a writ of error lies to the court of hustings, before the mayor, recorder, and sheriffs; and from thence to justices appointed by the king's commission who used to sit in the church of Saint Martin le Grand; and from the judgment of those justices, a writ of error lies immediately to the House of Lords. 3 *Comm.* 80. n. cites *F. N. B.* 32.

SAIO. A tipstaff, or serjeant-at-arms; derived from the Saxon, *sagol*, *fustis*, because they used to carry a rod or staff. *Spelm.*

SAKE. See *Sac*, *Soke*.

SALARY, *salarium*.] A recompense or consideration made to a person for his pains and industry in another man's business: the word is used in the 23 *Edw.* 3. c. 1.

It is so called, as *Pliny* saith in the thirty-first book of his *Natural History*, c. 7. because it is as necessary for a man as salt; and makes his labour relish, as salt doth his meat. *Termes de la Ley*.

Salarium at first signified the rents or profits of a *sala*, hall or house; (and in *Gascoigne* they now call the seats of the gentry *salas*, as we do halls;) but afterwards it was taken for any wages, stipend, or annual allowance. *Cowell*.

SALE, *venditio*.] The transferring the property of goods from one to another, upon valuable consideration: if a bargain is that another shall give me 5*l.* for such a thing, and he gives me earnest which I accept, this is a perfect sale. *Wood's Inst.* 316. On sale of goods if earnest be taken to the seller, and part of them are taken away by the buyer, he must pay the residue of the money upon fetching away the rest, because no other time is appointed; and the earnest given binds the bargain, and gives the buyer a right to demand the goods; but a demand without paying the money is void: and it has been held that, after the earnest is taken, the seller cannot dispose of the goods to another, unless there is some default in the buyer; therefore if he doth not take away the goods and pay the money, the seller ought to require him so to do; and then if he doth not do it in convenient time, the bargain and sale is dissolved, and the seller may dispose of them to any other person. 1 *Salk.* 113. A seller of a thing is to keep it a reasonable time, for delivery; but where no time is appointed for delivery of things sold, or for payment of the money, it is generally implied that the delivery be made immediately, and payment on the delivery. 3 *Salk.* 61. Where one agrees for wares sold, the buyer must not carry them away before paid for; except a day of payment is allowed him by the seller. *Noy*, 87.

A sale may be of any living or dead goods in a fair or

market, be they whose they will, or however the seller come by them, if made by the cautions required by law: but if one sell my goods unduly, I may have them again. *Doct. & Stud.* 328; *Perk.* § 93. If a man affirm a thing sold is of such a value when it is not, this is not actionable; but if he actually warrants it, at the time of the sale, and not afterwards, it will bear an action, being part of the contract. 2 *Cro.* 5. 386. 630; 1 *Roll. Abr.* 97.

Where the seller of goods, upon the buyer's refusal to accept them, requested the buyer to sell them for him, which the buyer agreed to do, if he could, but did not: the court of *K. B.* held that, in an action by the seller for the price, the jury, in considering whether the request made by the seller was a waiver of the contract of sale, could not take into their consideration whether such request was made under an ignorance of the law, and an impression that his remedy was gone. 3 *M. & S.* 378.

A., by letter, offered to sell to *B.* certain specified goods, receiving an answer by return of post: the offerer's letter being misdirected, the answer, notifying the acceptance, arrived two days later than it would otherwise have done, and *A.* had then sold the goods: the court of *K. B.* held that *B.* was entitled to recover against *A.* in an action for not completing his contract, the default in the return of the answer resulting from *A.*'s mistake, and that there was a contract binding the parties from the moment the offer was accepted. 1 *B. & A.* 681.

A., a foreign merchant, employs *B.* to purchase goods on commission: the vendors (with the knowledge that the purchases were made on account of *A.*) make out the invoice to *B.*, and take in payment his acceptances, payable at six months: held, 1st, that there was no contract of sale as between *A.* and *B.*; and, 2dly, that *B.* could not, at all events, maintain any action against *A.* before the six months expired. 1 *B. & A.* 14.

By the common law, a parol contract for the sale of goods was valid; but by the statute of frauds, a memorandum or note in writing, is requisite where the price of the goods amounts to 10*l.* unless the buyer accept and actually receive part of the goods, or give something in earnest to bind the bargain or in part of payment. See *Agreement*.

The statute of frauds was held not to apply to certain executory contracts, which were nevertheless within the mischief thereby intended to be remedied; but by the 9 *Geo.* 4. c. 14. § 7. its enactments were extended to all contracts for the sale of goods of the value of 10*l.* "notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

See further, *Agreement*, *Bailment*, *Consideration*, *Contract*, *Fraud*, *Market*, *Stoppage in Transit*, &c.

SALET, from *Fr.* *salut*, *salus*.] A head piece; a sallet or scull of iron, &c. See 20 *Rich.* 2. c. 1.

SALICETUM. An osier bed. 1 *Inst.* 4.

SALINA. A salt-pit, or place wherein salt is made. And *salina* is sometimes wrote for *salma*, i. e. a pound weight. *Chart.* 7 *Edw.* 2.

SALIQUE LAW, *Lex Salica*.] A law by which males only are allowed to inherit. It was an ancient law made by Pharamond, king of the Franks, part of which seems to have been borrowed by our Henry I in compiling his laws. *Quod hoc fecerit, secundum legem Salicam moriatur*, &c. cap. 89.

SALMON. No person may take salmon in rivers, between the 1st of August and the 11th of November; and salmon are not to be taken under eighteen inches long, &c. under penalties. 13 *Edw.* 1. c. 47; 1 *Eliz.* c. 17. See 25 to salmon in the Teign, Dart, and Plym rivers, 43 *Geo.* 3. c. 61. and as to those in the rivers of Carmarthenshire, 43 *Geo.* 3. c. 33. Salmon not to be taken in the Thames between 24th

August and 11th November. 9 *Ann. c. 26.* Fishmongers prohibited to buy salmon under six pounds weight. 1 *Geo. 1. c. 18.* Salmon may be taken in the Ribble between 1st January and 15th September. 23 *Geo. 2. c. 26.*

By 58 *Geo. 3. c. 43.* for preventing the destruction of the breed of salmon, and fish of salmon kind, in the rivers of England, the justices at quarter sessions are authorized to appoint conservators or overseers of rivers; and to fix the periods, not exceeding 150 days in each year, to be *Fence-days* during which such fish, or the brood or fry thereof shall not be taken. Penalties are imposed on persons illegally destroying the fish, or brood or fry, by poisoning or spoiling the water, &c. or having in their possession fish, &c. at unreasonable times.

The Scotch salmon fisheries are now regulated by the 9 *Geo. 4. c. 39.* See further, *Fish.*

SALTATORIUM. A deer-leap: *Quod habeat unum Saltatorium in parco de B. Pat. 1 Edw. 3.*

SALT. A considerable revenue, amounting at one time to 1,500,000*l.* a year, was formerly raised by duties on this article, which kept increasing until they reached the sum of 15*s.* a bushel, but all of which were repealed by the 6 *Geo. 4. c. 65.*

SALT-DUTY in London. There is a custom duty in the city of London called *Granage*, payable to the lord mayor, &c. for salt brought to the port of London being the twentieth part. *Cit. Lib. 125.*

SALT-PETRE. What quantity to be delivered yearly into the royal stores, *Ann. st. 1. c. 12. § 113.* See *Gunpowder.*

SALT-SILVER. One penny paid at the feast day of St. Martin, by the tenants of some manors, as a commutation for the service of carrying their lord's salt from market to his larder. *Paroch. Antiq. 496.*

SALTUS. A high thick wood or forest. See *Boscus.*

SALVA-GARDA. See *Safeguard.*

SALVAGE. See *Insurance, II. 6; Seamen, Wreck.*

SALUTE, Salus. A coin made by King *Hen. V.* after his conquests in France, whereon the arms of France and England were stamped and quartered. *Stowe's Chron. 589.*

SAMPLE. A small quantity of a commodity exhibited at public or private sales as a specimen. Where goods are warehoused, certain small specified quantities are, by the regulations at the Custom-house, allowed to be taken out as samples without payment of duty.

SANCTA. The reliques of the saints; *parati super sancta* was to make oath on those reliques. *L. g. Cant. c. 57.*

SANCTUARY. *Sanctuarium.* A place privileged for the safeguard of offenders' lives, being founded upon the law of mercy, and the great reverence and devotion which the prince bears to the place whereunto he grants such privilege. Sanctuaries were first granted by King *Lucius* to our churches and their prelates; and among all other nations, our ancient kings of England seem to have attributed most to those sanctuaries, permitting them to shelter such as had committed heinous crimes and treasons, so as within forty days they acknowledged their fault, and submitted themselves to banishment, during which space, if any layman expelled them, he was excommunicated; and if a clerk, he was made irregular. *Mut. West. Ann. 187, 1 P. C. II. 2. cap. 38; Fleta, lib. 1. c. 29.*

St. John's of Beverly in Yorkshire had an eminent sanctuary belonging to it in the time of the Saxons; and St. Burgo in Cornwall had the like granted by King *Athelstan*, *Ann. 965*; so had Westminster granted by King *Edward the Confessor*; and St. Martin le Grand in London, 21 *Hen. 8. &c.*

In Scotland the abbey of Holyrood house, the ancient palace of the Scottish kings, still possesses the privilege of giving sanctuary to a debtor. To retire to the abbey, is by statute one of the circumstances which, joined to insolvency, constitutes legal bankruptcy. The bounds of the abbey are

extensive, and the whole is placed under the direction of a bailie appointed by the Duke of Hamilton, as heritable keeper of the palace. When a person retires to this sanctuary, he is secured against arrest from the instant he passes the confines, and this security continues for twenty-four hours: to enjoy it beyond that period he must enter his name in books kept by the bailie of the abbey. This sanctuary gives no protection to a criminal nor to a crown debtor, nor fraudulent debtor, nor to a person under an obligation to do an act within his own power; nor does it secure the debtor against such debts as he may contract during his residence in sanctuary, for the personal execution of which debts there is a prison within the bounds. Where a person claims the sanctuary who has no title to it, he may be arrested, with the concurrence of the bailie. *Bell's Scotch Law Dict.*

Sanctuaries, it has been observed, did not gain the name of such till they had the pope's bull, though they had full privilege of exemption from temporal courts by the king's grant only; but no sanctuary granted by general words extended to high treason; though it extended to all felonies, except sacrilege, and to all inferior crimes, not committed by a sanctuary man; and it never was a protection against any action civil, any farther than to save the defendant from execution of his body, &c. 2 *Hawk. P. C. c. 32.*

While this protection against justice remained in force, if a person accused of any crime (except treason, wherein the crown, and sacrilege, wherein the church was too nearly concerned) had fled to any church or churchyard and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence; and thereupon took the oath in that case provided, viz. that he abjured the realm, and would depart from thence forthwith, at the port that should be assigned him; and would never return without leave from the king; he by this means saved his life, if he observed the conditions of the oath, by going with a cross in his hand, and with all convenient speed, to the port assigned, and embarking. For if, during this forty days' privilege of sanctuary, or in his road to the sea-side, he was apprehended and arraigned in any court, for this felony, he might plead the privilege of sanctuary, and had a right to be remanded, if taken out against his will. But by this abjuration his blood was attainted, and he forfeited all his goods and chattels. The immunity of these privileged places was very much abridged by the 27 *Hen. 8. c. 19*; 32 *Hen. 8. c. 12.* And now, by the 21 *Jac. 1. c. 28.* all privilege of sanctuary, and abjuration consequent thereupon, is utterly taken away and abolished.

There were several statutes made relative to sanctuaries, whilst they existed, viz. *Art. Cler. 9 Edw. 1. st. 1. c. 10, 15*; 2 *Rich. 1. st. 2. c. 3*; 4 *Hen. 8. c. 2*; 21 *Hen. 8. c. 2*; 22 *Hen. 8. c. 2. § 14.* By 26 *Hen. 8. c. 13.* sanctuary was taken from offenders in high treason. See further, *Abjuration, Arrest, Privilege, I.*

SANDAL. A merchandise brought into England, and a kind of red-bearded wheat. See 2 *Rich. 2. c. 1.*

SAND-GAVEL. A payment due to the lord of the manor of Rodley, in the county of Gloucester, for liberty granted to the tenants to dig sand for their common use. *Tayl. Hist. Gavel. 113.*

SANE MEMORY, i. e. perfect and sound mind and memory to do any lawful act, &c. See *Idiots and Lunatics.*

SANGUINEM EMERE. Was where villains were bound to buy or redeem their blood or tenure, and make themselves freemen. *Lib. Niger Heref.*

SANGUIS. Is taken for that right or power which the chief lord of the fee had to judge and determine cases where blood was shed. *Mun. Angl. tom. 1. p. 1021.*

SANG, SANC, Old French] Blood.

SARABARA. A covering for the head. *Mat. Westm. anno 1295.*

SARCLIN-TIME, from the French *sarcler*; Latin *sarclare*.] The time or season when husbandmen weed their corn. *Cowell.*

SARCULATURA. Weeding of corn. *Una sarculatura*, the tenant's service of one year's weeding for the lord. *Paroch. Antiq. 403.*

SARK, ISLE OF. See *Jersey.*

SARKELLUS. An unlawful net or engine for destroying fish. *Inquisit. Justic. anno 1254.*

SARPLER or WOOL. *Serplera lanæ*, otherwise called a pocket.] Half a sack containing 80 stone of 14lbs.; the sack, containing 80 tod, each tod being two stone. *Fleta, lib. 2. c. 12; Termes de la Ley.*

SART, assart.] A piece of woodland turned into arable. See *Assart.*

SARUM, Salisbury.] There was a form of church-service called *secundum usum Sarum*, composed by Osmond the second bishop of Sarum, in the time of William the Conqueror. *Hollingshed, p. 17. col. B.*

SASSE. A kind of weir with flood-gates, most commonly in navigable and cut rivers, for the damming and shutting up and loosing the stream of water, as occasion requires, for the better passing of boats and barges. This in the west of England is called a lock, and in some places a sluice. *Cowell.*

SASSONS. The corruption of Saxons, a name of contempt formerly given to the English, while they affected to be called Angles; they are still so called by the Welch.

SATISFACTION. Is the giving of recompense for an injury done, or the payment of money due on bond, judgment, &c.; in which last case it must be entered on record. *2 Lil. Abr. 495. See Payment.*

Where money given one by will shall be held to be in satisfaction of a debt, and where not, see *Legacy.*

That satisfaction means legal compensation, and not any arbitrary recompense, see *3 B. & P. 55.*

As to pleading satisfaction in cases of trespass, see titles *Justices, Sheriff, Trespass, &c.*

SATURDAY'S STOP. A space of time from even-song on Saturday till sun-rising on Monday, in which it was not lawful to take salmon in Scotland and the northern parts of England. *MS. Cowell.*

SAVER DEFAULT. Is a law term signifying to excuse; as when a man having made default by not appearing in court, &c. comes afterwards and alleges good cause for it, viz. imprisonment at the time, or the like. *Termes de la Ley. See Default.*

SAVINGS BANKS. Admirable institutions, which have of late years been established throughout the united kingdom, for encouraging economy among the labouring class of people, by providing for the investiture of their savings in government securities, &c.

By the 9 Geo. 4. c. 92. (amended by the 3 & 4 Wm. 4. c. 14.) the laws relating to savings banks in England and Ireland, were consolidated, and all former statutes repealed.

§ 2. declares what institutions shall be entitled to the privileges and benefits of the act; but banks are not to be formed in future unless approved by the justices at sessions and the commissioners of the national debt.

By § 3. the rules of each institution are to be entered in a book, and be open to the inspection of depositors; and a copy thereof is to be deposited with the clerk of the peace.

§ 4. the rules and regulations before being deposited with clerk of the peace, are to be submitted to a barrister. Justices at sessions may reject any rules of institutions.

§ 5. rules, when entered and deposited, are to be binding on members and depositors; and a copy thereof is to be received as evidence.

By § 6. no treasurer, trustee, or manager, &c. shall derive any benefit from the institution.

§ 7. the treasurer and other officers intrusted with receipt or custody of money to give security.

§ 8. the effects of each institution to be vested in trustees for time being.

§ 9. no trustee or manager shall be personally liable, except for his own acts, or for any thing done by him in virtue of his office, except where he shall be guilty of wilful neglect or default.

§ 10. treasurer and trustees, &c. to account and deliver up effects when required.

§ 11. trustees of savings banks shall invest all money in the Bank of England or Ireland, and not in any other security; and are not to prevent depositors from withdrawing their money from savings banks. They are empowered to pay into the Banks of England or Ireland any sum not less than 50*l.*, to the account of the commissioners for the reduction of the national debt; but previous to payments, an order of two trustees must be produced.

§ 12. provided that nothing in the act contained shall prevent the trustees of any savings banks already or to be established, receiving sums of money from any depositor for any purpose except to be paid into the bank; and such trustees may apply such sums in any other manner for the benefit of the several depositors, according to the rules of such savings banks respectively.

§ 13. central banks may invest the money of branch banks.

§ 14. if any order or declaration produced to the said officer for the purpose of paying monies into the Banks of England or Ireland, to the account of the said commissioners as aforesaid, shall contain any matter false or untrue, then the sum so paid shall be forfeited to the commissioners.

§ 15. monies paid in on savings bank account are to be invested in bank annuities or exchequer bills.

§ 16. on payment of money into the bank to the account of national debt commissioners, their officer shall give a receipt for the same, carrying interest at 2*½*d. per cent. per diem.

And by § 17. interest due on money mentioned in receipt to be calculated half-yearly up to 20th November and 20th May, and carried to account of savings bank as additional principal. Interest arising to depositors may be calculated yearly or twice a year, and carried to their credit as principal.

§ 18. before drawing for money, trustees shall sign an appointment of an agent to receive the same, which appointment shall be deposited with the commissioners. Appointments may be revoked, and others granted, from time to time.

§ 19. trustees may draw for the whole or any part of any sum placed to their account, by drafts on commissioners, which shall be indorsed by their officer, with the interest added thereto, and paid by cashiers of the bank.

§ 20. drafts exceeding 5000*l.* to be signed by four trustees, and attested by separate witnesses. Drafts for 10,000*l.* not to be paid until after fourteen days.

§ 21. officer not to issue in any one day orders for more than 10,000*l.* for the same bank. Trustees appearing in person may receive payments of drafts instead of their agents.

§ 22. trustees, &c. to ascertain amount of surplus fund, and distribute or appropriate the same.

§ 23. from 20th November, 1828, surplus to be paid over to commissioners for reduction of national debt.

§ 24. after the 20th November, 1828, interest is not to exceed 2*½*d. per cent. per diem.

§ 25. savings of minors may be invested, and their receipt shall be a sufficient discharge.

§ 26. after reciting that deposits in savings banks may have been made and may be made by married women, with-

out notice that they are married women, and deposits may have been made and may be made by women who may have afterwards married, enacts, that the trustees in any savings bank may pay any sum of money in respect of any such deposit to any such woman, unless the husband of such woman, or his representatives, shall give to such trustees notice of such marriage, and shall require payment to be made to him or them.

§ 27. charitable societies may invest sums not exceeding 100*l.* per annum, or 300*l.* in the whole.

§ 28. friendly societies may subscribe any portion of their funds into savings banks, not exceeding 300*l.*

§ 29. the receipt of treasurer, &c. of friendly society or charitable institution deemed sufficient discharge.

§ 32. no sum to be subscribed without the name and profession, &c. of the depositor.

But by § 33. persons are to be allowed to subscribe as trustees on behalf of others.

§ 34. subscribers to one savings bank shall not subscribe to any other, and to make a declaration at the time of subscription. Penalty on false declaration, forfeiture of deposit to the sinking fund.

§ 35. Trustees not to receive from any one depositor more than 30*l.* in any one year, nor more than 150*l.* in the whole. When deposit and interest amount to 200*l.*, interest to cease.

§ 39. deposits may be withdrawn from one savings bank to be placed in another.

§ 40. a depositor dying leaving any sum exceeding 50*l.*, the same not to be paid until after administration. No duty to be paid on probate where the estate is under 50*l.* Certificate of amount and value of depositor's interest to be produced on claiming probate, &c.

§ 41. administration bonds, &c. for effects under 50*l.*, exempted from a stamp duty; and where the effects of a person dying intestate shall not exceed 50*l.*, the same may be divided according to the rules of the institution, &c.

§ 42. payment to persons appearing to be next of kin, declared valid.

§ 43. payments under probates of wills, &c. appearing to be in force, shall be valid.

§ 44. powers of attorney, &c. given by trustees or depositors, not liable to stamp duty.

§ 45. where disputes arise, same to be referred to arbitrators; and in case of their not agreeing, to be settled by a barrister.

§ 46. trustees of banks shall make up annual accounts of their progress, &c. and transmit the same to the commissioners for reduction of the national debt; and if trustees neglect to transmit such accounts, or to obey any orders, commissioners may close their accounts, &c.

And by the 3 & 4 Wm. 4. c. 14. § 30. if the above annual returns are not made, the names of the savings banks neglecting to make them shall be published in the gazette.

By the 9 Geo. 4. c. 92. § 47. a duplicate of such accounts shall be affixed in the office of the savings bank.

§ 48. accounts to be annually laid before parliament by commissioners for the reduction of the national debt.

By the 3 & 4 Wm. 4. c. 14. the trustees of savings banks may receive money from depositors, for the purchase of immediate or deferred life annuities, or of immediate or deferred annuities for a certain limited term of years, to be chargeable on the consolidated fund.

By § 16. annuities granted under the act are not transferable except in case of bankruptcy or insolvency; and by § 17 are not liable to any taxes, and shall be deemed personal estate.

By § 27. in parishes where there is no savings bank, any persons therein may establish a society for carrying the act into execution, provided that the minister of the parish or a resident justice shall be one of the trustees of such society.

Savings banks in Scotland are regulated by the 59 Geo. 3. c. 62.

SAUNKEFIN, French *sang*, i. e. *sanguis*, *fin*, *finis*.] The determination or final end of the lineal race and descent of kindred. *Britton*, c. 119.

SAURUS. A hawk of a year old. *Bract. lib. 5. tr. 1. c. 2. part 1.*

SAXON-LAGE, Saxon *laga*, *lex Saxonum*.] The law of the West Saxons, by which they were governed. See *Merchenlege*. 4 *Comm. c. 33.*

The reason why so many traces of the Saxon laws, language, and customs are to be found in England, are thus stated: *Robertson*, in his *History of the Emperor Charles V.*, says, the Saxons carried on the conquest of that country with the same destructive spirit which distinguished the other barbarous nations. The ancient inhabitants of Britain were either exterminated or forced to take shelter among the mountains of Wales, or reduced into servitude. The Saxon government, laws, manners, and language were of consequence introduced into Britain, and were so perfectly established, that all memory of the institutions previous to their conquest, was abolished. *Robertson*, vol. i. p. 197. note IV. As to the laws of the Saxons for putting an end to private wars, see *id.* 285.

SCABINI. A word used for wardens at Lynn, in Norfolk. *Norf. Chart. Hen. 8.*

SCALAM, *ad scalam*, at the scale.] The old way of paying money into the exchequer. The sheriff, &c. is to make payment *ad scalam*, i. e. *solvere, præter quamlibet numeratum librum, sex denarios*. *Stat. Westm. 1.* And at that time sixpence superadded to the pound made up the full weight, and nearly the intrinsic value. This was agreed upon as a medium to be the common estimate for the defective weight of money, thereby to avoid the trouble of weighing it when brought to the exchequer. *Lowndes's History of Coin*, p. 4; *Hale's Sher. Accounts*, p. 21. See *Pensam*.

SCALINGA. A quarry or pit of stones, or rather slates, for covering houses: French *escaliers*, whence scaling of houses, &c. *Mon. Angl. tom. 2. p. 130.*

SCANDAL. A report or rumour, or an action whereby one is affronted in public. See *Libel*.

SCANDAL OR IMPERTINENCE IN BILLS IN EQUITY. If a bill in equity contain matter either scandalous or impertinent, the defendant may refuse to answer it till such scandal or impertinence is expunged, which is done upon an order to refer it to one of the masters. 3 *Comm. 442.* See *Chancery, Libel, I.*

SCANDALUM MAGNATUM.

Words spoken in derogation of a peer, a judge, or other great officer of the realm. These, though they would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury, which is redressed by an action on the case, founded on the ancient statutes, as well on behalf of the crown to inflict the punishment of imprisonment on the offender, as on behalf of the party to recover damages for the injury sustained. 3 *Comm. c. 8. p. 124.*

The law on which this action is grounded is *stat. Westm. 1. 3 Edm. 1. c. 34.* which, after speaking of "devisors of false news and horrible lies of prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or of the other, and other great officers of the realm," enacts, "that none contrive or tell any false news, whereby discord or slander may grow between the king and his people, or contrive to tell any false things of prelates, lords, and of others aforesaid, whereof discord or slander might rise within, or any scandal to the realm; and he who doth the same shall be imprisoned

till he have brought him forth that did speak the same." This statute is recited by 12 Rich. 2. c. 11. and thereby it is further provided, that the offender not producing his author shall be punished by the advice of the council. 4 Inst. 51; 4 Co. 12 b. See also 1 & 2 P. & M. c. 3. and 1 Eliz. c. 6.

At the time of making the law on which this action is founded, the constitution of this kingdom was martial, and given to arms; the very tenures were military, and so were the services, as knight-service, castle-guard, and escuage; so that all provocations by vilifying words were revenged by the sword, which often created factions in the commonwealth, and endangered the government itself; for in this kind of quarrels the great men, or peers of the realm, usually engaged their vassals, tenants, and friends, so that the laws were then made against wearing of liveries or badges, and against riding armed; therefore it is that the stat. Westm. 2. appoints that the offender shall suffer imprisonment until he produces the author of a false report. 2 Mod. 156.

This action or public prosecution for *scan. mag.* is totally different from the action of slander in the case of common persons. The *scandalum magnatum* is reduced to no rule or certain definition, but it may be whatever the courts in their discretion shall judge to be derogatory to the high character of the person of whom it is spoken; as to say of a peer, "that he was no more to be valued than a dog;" which words would have been perfectly harmless, if uttered of an inferior person. *Bul. N. P.* 4.

Though this action is now seldom or ever resorted to, it may be matter of some utility, as well as curiosity, to peruse the following determinations on the subject:

I. Who may bring this Action, and for what Words it lies.

II. Of the Proceedings in this Action.

I. It hath been held that the king is not included in the words "great men of the realm," as the statute begins with an enumeration of persons of an inferior rank, as prelates, dukes, &c. *Crompt. Juris.* 19, 35.

Scandalizing the marriage of King Henry VIII. with Anne Bullein, was declared treason by 25 Hen. 8. c. 22.

Also it is held, that a woman noble by birth is not entitled to this action. *Crompt. Juris.* 34.

It hath been adjudged, that though there was no viscount at the time of making this statute (the first viscount being John Beaumont, who was created viscount 18 Henry VI.) yet when created noble, though by a new title, he was entitled to his action on this statute. *Cro. Car.* 136; *Palm.* 563; *Viscount Say and Sele v. Stephens.*

Also it hath been adjudged, that since the Union a peer of Scotland may have an action on this statute, and that it is not necessary for him to allege that he hath a seat and voice in parliament; for by 5 Ann. c. 8. art. 23. all peers of Scotland, after the Union, shall be peers of Great Britain, and have rank and precedence, &c. be tried, &c. and enjoy all privileges of peers, as the peers of England now do or hereafter may enjoy, except the right and privilege of sitting in the House of Lords, and the privilege depending thereon. *Com.* 439, *Lord Falkland v. Phipps.*

It hath been contended, that no words of slander are punishable by this statute, unless they are actionable at common law, and that they are only aggravated by the statute, which in this respect is like the king's proclamation. 2 Mod. 161; *Freem.* 222.

But the contrary hereof seems to have been holden in most of the cases on this head, and not without reason, as it would be to no purpose to make a law, and thereby to give a peer an action for such words as a common person might have before the making of the statute, and for which the peer himself had equally a remedy by the common law, and therefore the design of the statute must be, not only to punish such things as import a great scandal in themselves, or such

for which an action lay at the common law, but also such things as savoured of any contempt of the persons of the peers or great men, and brought them into disgrace with the commons, whereby they took occasion of provocation and revenge. 2 Mod. 156.

It hath been observed, that no action was brought on this statute till 100 years after the making thereof, the lords still continuing the military way of revenge to which they had been accustomed. 2 Mod. 156.

The first case on this statute said to be reported, is in *Kielm.*, where the Lord Beauchamp brought an action of *scan. mag.* against Sir Richard Crofts, for that the said Richard had sued out a writ of forgery of false deeds against him; and it was held, that the taking out the writ, being done in a legal way, and in a course of justice, the action did not lie. *Kielm.* 26, 27; 3 Mod. 164, cited.

Scan. mag. brought for saying of a judge, "You are a corrupt judge," and held actionable. *Crompt. Juris.* 35, *Lord Chief Justice Dyer's case.* So for these words, "He imprisoned me till I gave him a release." 3 Leon. 376, *Lord Winchester's case*, cited *Freem.* 221. So these words, "You have writ a letter to me, which I have to show, which is against the word of God, against the queen's authority, and to the maintenance of superstition, and that I will stand to prove against you," were held actionable, and 500 marks damages given. *Cro. Eliz.* 1, *Bishop of Norwich v. Pricke.* So of these words, "My Lord Mordaunt did know that Prude robbed Shotbolt, and bid me compound with Shotbolt for the same, and said he would see me satisfied for the same, though it cost him 100*l.*, which I did for him, being my master, otherwise the evidence I could have given would have hanged Prude." *Cro. Eliz.* 67. For these words written in a letter, "I have heard that your lordship hath sought by uncharitable means to bereft of my life, lands, and liberty," an action lies. *Moor.* 142; *Lord Lumley v. Fox*, 4 Co. 16. That the action as well lies for words written as those spoken, see 2 Show. 505.

An action of *scan. mag.* was brought for these words: "There are more Jesuits come into England since the Earl of Northampton was lord of the Cinque Ports than ever there were before," and held actionable. 12 Co. 132. In *scan. mag.* for these words, spoken by a parson in the pulpit, "The Lord of Leicester is a wicked and cruel man, and an enemy to the reformation in England," adjudged actionable, and 500*l.* damages given. 2 Sid. 21.

So these words, "The Earl of Pembroke is of so little esteem in the country, that no man of reputation hath any esteem for him, and no man will take his word for two-pence, and no man of reputation values him more than I do the dirt under my feet," were held actionable, though said they would not be so in the case of a common person. *Freem.* 49.

If one says, "I met J. S. whom I do not know, but my Lord P. sent after me to take my purse," an action of *scandalum magnatum* lies, though not positively said my Lord P. sent him, or that it was to take the purse feloniously, which last, in case of an action by a common person, might be a good exception. 1 Lev. 277; 1 Sid. 434; 2 Keb. 537; *Earl of Peterborough v. Sir John Mordant*, see 1 Sid. 133; 1 Keb. 813; 1 Lev. 148, *Marquis of Dorchester v. Proby.* If one says of a peer, "He is an unworthy man, and acts against law and reason," an action of *scan. mag.* lies, notwithstanding the words are general, and charge him with nothing certain; and so adjudged by North, Wyndham, and Stoughton, against the opinion of Atkins, who said the statute extended not to words of so small and trivial a nature, but to such only which were of greater magnitude, by which discord might arise, &c. and therefore the words "horrible lies" were inserted in the statute. Note.—The rule laid down by the court in this case was, that words should not be construed either in a rigid or mild sense, but according to the general and natural meaning, and agreeable to the common under-

standing of all men. 2 Mod. 151, &c.; 1 Mod. 232; *Freem.* 220; *Lord Townshend v. Dr. Hughes*, which was the last action of *scandalum magnatum*.

II. It is now clearly agreed, that though there be no express words in the statute which give an action, yet the party injured may maintain one on this principle of law, that when a statute prohibits the doing of a thing which, if done, might be prejudicial to another, in such a case he may have an action on that very statute for his damages. 2 Mod. 152.

Though the action is to be brought *tam pro domino rege quam pro seipso*, yet the party is to recover all the damages. 1 P. Wms. 690. If the words are actionable at common law, the peer hath his election to proceed on the statute, or at common law. *Freem.* 49. It hath been held, that this being a general law, the plaintiff need not recite it particularly; and that if he sets forth so much thereof as shows his case to be within the statute, it is sufficient. *Cro. Car.* 139; 2 Sid. 21; *Freem.* 425. It is now settled that no new trial is to be granted in *scan. mag.* for excessive damages, which point seems to have been first determined in the case of *Lord Townshend v. Dr. Hughes*, where the jury gave 4000*l.* damages. 2 Mod. 151; 1 Mod. 231.

It has been ruled, that in *scan. mag.* the defendant cannot justify, let the words be ever so true, because the action is brought *qui tam*, in which the king is concerned; but it hath been held, that the defendant may explain the words by showing the occasion of speaking of them, and thereby extenuate the meaning of them, as was done in *Lord Cromwell's case*, 4 Co. 14; 2 Mod. 166; *Freem.* 220; *Poph.* 67.

In *scan. mag.* the court will never change the venue on the common affidavit that the words were spoken in another county, because a scandal raised on a peer of the realm reflects on him through the whole kingdom, and he is a person of so great notoriety that there is no necessity of his being tied down to try his cause among his neighbourhood. *Cuth.* 460; 2 Sulk. 668. See 1 Lev. 56; 1 Kcd. 514; 1 Sid. 185; 2 Mod. 216.

But in the case of *Lord Shaftesbury v. Graham*, the court, in *scan. mag.* on a special affidavit of the plaintiff's power and interest in the county where the action was laid, made a rule for changing the venue; but note, that the books which report and cite this case, mention it as a case of the times, and that it was owing to the great influence that lord had in the city of London that the court varied from the general rule, and which rule hath ever since, notwithstanding this case, been adhered to. 2 Jo. 198; 1 Vent. 383; *Skin.* 40; 2 Show. 200.

It hath been held that the 27 Eliz. c. 8. giving the writ of error in the Exchequer-chamber, does not extend to *scan. mag.* *Cro. Car.* 286, 385; 1 Sid. 143. That in an action of *scan. mag.* special bail is not required. 3 Mod. 41; *Holt's Rep.* 640. That no costs are to be given the plaintiff on his obtaining a verdict. 2 Show. 506.

SCAVAGE, SCEVAGE, or SCHEWAGE, from the Sax. *schawian*, i. e. ostendit. A kind of toll or custom exacted by mayors, sheriffs, &c. of merchant-straungers for wares showed or exposed to sale within their liberties; prohibited by the 19 Hen. 7. c. 8. But the city of London retained this ancient custom to a good yearly profit until a very recent period, when it was purchased by the Treasury and abolished. See *Package*.

SCAVIDUS. The officer who collected the scavage-money, which was sometimes done with great extortion. *Cowell*.

SCAVENGERS, from the Belg. *schueren* to scrape or carry away. Persons who are appointed to sweep the streets, and carry the dirt and filth thereof away. In Easter week yearly two ratmen in every parish within the weekly bills of

mortality must be elected scavengers by the constables, churchwardens, and other inhabitants, who are to take upon them the office in seven days, under the penalty of 10*l.* These scavengers, every day, except Sundays or holidays, are to bring their carts into the streets, and give notice by a bell, or otherwise, of carrying away dirt, and to stay a convenient time, or shall forfeit 40*s.*; and justices of the peace in their petit sessions may give scavengers liberty to lodge their dirt in vacant places near the streets, satisfying the owner for the damage, &c. All persons within the weekly bills are to sweep the streets before their doors every Wednesday and Saturday, on pain of forfeiting 1*s.* 4*d.* Persons laying dirt or ashes before their houses, incur a forfeiture of 5*s.* Inhabitants and owners of houses are also to pave the streets before their own houses, on the penalty of 20*s.* for every perch. And constables, churchwardens, &c. may make a scavenger's tax, being allowed by two justices of the peace, not exceeding 4*d.* in the pound, &c. 2 W. & M. st. 2. c. 8; and see 3 W. & M. c. 12; 8 & 9 W. 3. c. 37; 6 Geo. 1. c. 6; 18 Geo. 2. c. 33. § 2, 3; and *ante*, tit. *Police*.

A scavenger's rate cannot be made for a division in which there is no churchwarden or overseer resident. 1 *Str.* 630.

SCEAT, Sax.] A small coin among the Saxons equal to four farthings.

SCEITHMAN, Sax.] A pirate or thief. *LL. Ethelredi apud Brompton*.

SCEPPA SALIS. An ancient measure of salt, the quantity now not known: *sceppa*, or *scapp*, was likewise a measure of corn, from the Lat. *scapha*; baskets, which were formerly the common standard of measure, being called *ships* or *skips* in the south parts of England, where a bee-hive is termed a *bee-skip*. *Mon. Ang.* p. 284; *Paroch. Antig.* 604.

SCHIAVA. A sheaf, as *schiffa sagittarum*, a sheaf of arrows. See *Skene de verbor. signif. cod. verbo*.

SCHARPENNY. A small duty or compensation: and some customary tenants were obliged to pen up their cattle at night in the pound or yard of the lord for the benefit of their dung; or if they did not so, they paid a small compensation called sharpenny or sharpenny, i. e. dung penny, or money in lieu of dung; the Scotch earn signifying muck or dung. In some parts of the north they still call cow-dung by the name of cow-skern; and in Westmoreland a skarney houghs is a nasty dirty dunghill-wench. *Cowell*.

SCHEDULE. A little roll, or long piece of paper or parchment, in which are contained particulars of goods in a house let by lease, &c. See *Lease*.

Schedules are likewise frequently annexed to answers in a Court of Equity or to acts of parliament, containing an account of estates or effects, monies, debts, &c. received or disposed of, or expended by the person putting in the answer, or being the subject of the act. Schedule is a term frequently used instead of inventory.

SCHETES. An ancient term for usury; and the Commons prayed that order might be taken against this horrible vice, practised by the clergy as well as the laity. *Rot. Parl.* 14 Rich. 2. *Cowell*.

SCHILLA. A little bell used in monasteries, mentioned in our histories. *Faithner lib.* 1. c. 8.

SCHIREMAN, Sax. *scir-man*.] A sheriff. *LL. Ine Regis apud Brompton*. The ancient name for an earl. See *Piers of the Realm*, I; *Shireman*; *Sheriff*.

SCHIRRENS-GELD, *shirgeld*.] A tax paid to sheriffs for keeping the shire or county court. *Cartular. Abbat.* St. Edmund, 37.

SCHISM, *schisma*.] A rent or division in the church. *H. 1.*

SCHOOLS. By the 51 Geo. 3. c. 33. tenants in tail or for life, and ecclesiastical persons, are empowered to grant land for endowing schools in Ireland. By the 53 Geo. 3. c. 107. commissioners are appointed for the regulation of endowed schools of public and private foundation in Ireland.

By 58 Geo. 3. c. 91. commissioners were appointed to inquire concerning charities in England for the education of the poor. By 59 Geo. 3. c. 81 and 91. the powers of these commissioners were extended to all charitable foundations in England and Wales, for whatever purpose (with the exception of the universities, &c.), and remedies provided for redress of abuses in all such charities.

The powers of the commissioners under the above acts were continued by several subsequent statutes, and lastly by the 1 & 2 Wm. 4. c. 34. until the end of the session of parliament in 1834, when they were suffered to expire.

See further, *Charitable Uses, Uses.*

SCHOOLMASTER. No person shall keep or maintain a schoolmaster who does not constantly go to church, or is not allowed by the ordinary, on pain of 10*l.* a month; and the schoolmaster shall be disabled, and suffer a year's imprisonment. 23 Eliz. c. 1. Recusants are not to be schoolmasters in any public grammar-school, nor any other, unless licensed by the bishop, under the penalty of forfeiting 40*s.* a day. 1 Jac. c. 6. Every schoolmaster keeping any public or private school, and every tutor in any private family, shall subscribe the declaration that he will conform to the liturgy of the Church of England as by law established, and be licensed by the ordinary, or he shall for the first offence suffer three months' imprisonment, &c. 13 & 14 Car. 2. c. 4. But see now, *Dissenters, Roman Catholics.*

The 12 Ann. st. 2. c. 7. which imposed the penalty of three months' imprisonment on persons keeping school without a licence from the bishop, was repealed by the 5 Geo. 1. c. 3.

By the canons, no man shall teach in a public school or private house but such as is examined and allowed by the bishop, and of sober life: and all schoolmasters are to teach the catechism of the church in English or Latin, and bring their scholars to church, and afterwards examine them how they are benefited by sermons, &c. Can. 77, 79. Though the Act of Uniformity obliges schoolmasters only to assent to and subscribe the declaration, yet it adds, according to the laws and statutes of this realm, which presupposes some necessary qualification. And therefore a bishop may take time to inquire into the character of an elected schoolmaster before he licenses him. 2 Strange, 1023.

Masters of grammar-schools must be licensed by the ordinary, who may examine the party applying for a licence as to his learning, morality, and religion. 6 T. R. 490.

As to the power of a schoolmaster in correcting his scholars, see *Homicide*, II. 1.

For regulating and making better provision for schoolmasters in Scotland, see *Scotch Acts*, 1693, c. 22; 1696. c. 26; and the 43 Geo. 3. c. 54.

SCILICET. An adverb signifying that is to say, to wit.

Hobart, in his exposition of this word, says, it is not a direct and separate clause, nor a direct and entire clause, in a conveyance, but *intermedia*; neither is it a substantive clause of itself, but it is rather to usher in the sentence of another, and to particularize that which was too general before, or distribute that which was too gross, or to explain that which was doubtful and obscure; and it must neither increase nor diminish the premises or *habendum*, for it gives nothing of itself; but it may make a restriction where the precedent words are not so very express but that they may be restrained. Hob 171, 172. See also 1 P. Wms 18; and the case of a bond to two with a scilicet, severing the money between them. Dy. 350. The word scilicet in a declaration shall not make any alteration of that which went before. Poph. 201, 204. And yet in some cases the scilicet which introduces a subsequent shall not be rejected. 2 Cro. 618.

Though where an allegation is material and necessary, it cannot be rendered immaterial by being laid under a scilicet, yet in some cases an allegation will become a material point of a scilicet, which could not have been so if it had been laid under one. See *Bac. Ab. Pleas.* (2d ed.)

SCIRE FACIAS.

A writ judicial, most commonly to call a man to show cause to the court whence it issues, why execution of judgment passed should not be made out. This writ is not granted until a year and a day be elapsed after judgment given. *Old Nat. Brev. fol. 151.* *Scire facias* upon a fine lay not but within the same time after the fine levied, otherwise it was the same with the writ of *habere facias seisinam*. *West. Symbol. part 2. tit. Fines, § 137.* See 25 Edw. 3. st. 5. cap. 2; 39 Eliz. c. 7.

Other diversities of this writ are in the table of the *Register Judicial and Original*. See also *Rastall's Entries*, verb. *Scire facias*. *Cowell.* And *post*, tit. *Scire Facias* against Bail; *Ad audiendum errores*; *In detinue*, &c.

All writs of execution must be sued out within a year and a day after the judgment is entered, otherwise the court concludes *prima facie* that the judgment is satisfied and extinct. But the court will grant a writ of *scire facias* in pursuance of *Stat. Westm. 2. 13 Edw. 1. c. 45.* for the defendant to show cause why the judgment should not be revived, and execution had against him; to which the defendant may plead such matter as he has to allege, in order to show why process of execution should not be issued. 3 Comm. 421.

- I. Of the Nature of the Writ, and in what Cases it is a proper Remedy.
- II. Of the *Scire Facias* to revive Judgment, and after what time necessary.
- III. Of the *Scire Facias* on Recognizances and Statutes.
- IV. Of the Pleadings and Proceedings on a *Scire Facias*, and herein of *Ter-tenants*. See *ante*, I.

I. A *SCIRE FACIAS* is deemed a judicial writ, (or action, 2 T. R. 46, 267,) and founded on some matter of record, as judgments for debt or damages where the party recovering the same hath not sued out execution within the year and day; or on recognizances and letters patent, on which it lies to enforce the execution of them, or to vacate or set them aside; and though it be a judicial writ of execution, yet it is so far in nature of an original, that the defendant may plead to it, and is in that respect considered as an action; and therefore it is held, that a release of all actions, or a release of all executions, is a good bar to a *scire facias*. *Lut. § 505*; *Co. Litt. 290, b*; 291, a; *F. N. B. 267*; *Termes de la Ley*.

But though it be held that a *scire facias* is in nature of an original, yet it hath been adjudged, that no writ of error lies into the Exchequer chamber on a judgment given in B. R. on a *scire facias*; the 27 Eliz. c. 8. which gives the writ of error, mentioning only suits or actions of debt, detinue, covenant, account, actions upon the case, *ejectiones firmarum*, or trespass. *Cro. Car. 286, 300, 464*; 1 Roll. Rep. 264; 1 Vent. 38; 1 Salk. 263.

If a bill of exceptions be tendered to a judge, and he signs it, and dies, a *scire facias* lies against his executors or administrators to certify it. 4 Inst. 438. See 2 Inst. 428.

A *scire facias* lies against a sheriff who levies money on a *fi. fa.* and retains it in his hands. *Holt, 32*; *Cro. Jac. 514*; 1 And. 247; *Godb. 276*.

So a *scire facias* will lie for a fine assessed on the party at the justice seat of a forest. *Cro. Car. 409*. It lies to have execution of damages recovered in an appeal. *Cro. Jac. 519*.

Upon an *elongavit* returned by the sheriff, a *scire facias* lies against the pledges in replevin, by the plaintiff in the sheriff's court, transmitted to the hustings, and so to B. R. by *certiorari*. *Comb. 1*. And a *scire facias* lies against the sheriff for taking insufficient pledges in replevin. *Hutt. 77*.

If one hath judgment in a *quare impedit*, and afterwards, before execution, the party is outlawed, the king may have a *scire facias* to execute the judgment; the king having

privity enough in this case to show execution, because the thing, as it was in the plaintiff, vested in the king. *Moor*, 241, *Cro. Plaz.* 41, 35. Where having the thing gives a sufficient privity to maintain a *scire facias*, see *K. br.* 108, 169.

On a motion to discharge an outlawry which was pardoned by the act of oblivion, the court held that it could not be done on motion, but that the party must bring a *scire facias* on the act. *Stil.* 348. See *Outlawry*, IV.

Where one obtained judgment, and after had judgment on a *scire facias* thereupon, and then became a bankrupt, and the original judgment was assigned by the commissioners to S. S. upon motion, it was entered to entitle him to the benefit of the judgment on the *scire facias* without bringing a new one. 3 *Mod.* 88.

A *scire facias* brought by the successor of a president of the College of Physicians, in London, (upon a judgment in debt obtained by him upon the 14 & 15 Hen. 8. c. 5. against practising physic in London without a licence,) who died before execution; it was objected on demurrer, that the *scire facias* ought to have been brought by the executor or administrator of him who recovered. But without argument the court held, that the successor might well maintain the action; for the suit is given to the college by a private statute and the suit is to be brought by the president for the time being; and he having recovered in right of the corporation, the law shall transfer that duty to the successor of him who recovered. *Cro. Jac.* 159.

A *scire facias* was brought in the Court of C. B. to reverse a fine in ancient demesne; and it was ruled, that no such writ lay, but that the party ought to bring his writ of deceit. *Salk.* 210; 3 *Salk.* 35; 3 *Lev.* 419; 1 *Ld. Raym.* 177.

Where either party dies, between the verdict and the judgment, it is enacted, by the 17 Car. 2. c. 8. "that his death shall not be alleged for error, so as the judgment be entered within two terms after the verdict." In the construction of this statute, it has been holden that the death of either party before the assizes is not remedied; but if the party die after the assizes begin, though before the trial, that is within the remedy of the statute: for the assizes are considered but as one day in law, and this is a remedial act, which shall be construed favourably. The judgment upon this statute is entered by or against the party, as though he were alive; and it should be entered, or at least signed, within two terms after the verdict. But there must be a *scire facias* to revive it, before execution can be taken out: and such *scire facias* pursuing the form of the judgment should be general, as on a judgment recovered by or against the party himself. *Tidd's Pract. K. B.*, and the authorities there cited.

By the 8 & 9 Wm. 3. c. 11. "in all actions to be commenced in any court of record, if the plaintiff or defendant happen to die after interlocutory and before final judgment, the action shall not abate by reason thereof, if such action may have been originally prosecuted or maintained, by or against the executors or administrators of the party dying; but the plaintiff, or if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a *scire facias* against the defendant, if living after such interlocutory judgment, or if he died after, then against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by him or them. And if such defendant, his executors or administrators, shall appear at the return of such writ, and not show or plead any matter sufficient to arrest the final judgment, or being returned warned, or, upon two writs of *scire facias*, it being returned that the defendant, his executors or administrators, had nothing whereby to be summoned, or could not be found in the county, shall make default, that thereupon a writ of inquiry of damages shall be awarded; which being

executed and returned, judgment shall be given for the said plaintiff, his executors or administrators, prosecuting such writ or writs of *scire facias*, against such defendant, his executors or administrators, respectively." This statute has been held not to extend to cases, where the party dies before interlocutory judgment; though it be after the expiration of the rule to plead. 1 *Wils.* 315.

Where either party dies, after interlocutory judgment, and before the execution of the writ of inquiry, the *scire facias* upon this statute ought to be, for the defendant, or his executors or administrators, to show cause why the damages should not be assessed and recovered against them, and to bear the judgment of the court thereupon. *Lill. Ent.* 647; 6 *Mod.* 144. But where the death happens after the writ of inquiry is executed, and before the return, the *scire facias* must be to show cause why the damages assessed by the jury should not be adjudged to the plaintiff, or his executors or administrators. 1 *Wils.* 243. See 1 *T. R.* 388. And where the plaintiff dies, after interlocutory, and before final judgment, in an action against the executor, the defendant cannot plead to the *scire facias* a judgment upon bond against his testator, and no assets *ultra*; for the statute never intended that the executor should be in a better situation as to the assessing of damages upon the inquiry, than his testator, who could have pleaded nothing but a release, or other matter in bar, arising *pais darrein continuance*. 1 *Salk.* 315; 6 *Mod.* 142.

The judgment upon this statute is not entered by or against the party himself, as upon the 17 Car. 2. c. 8. but by or against his executors or administrators. 1 *Salk.* 42. And where the defendant dies after interlocutory and before final judgment, two writs of *scire facias* must be sued out by the plaintiff before he can have execution: one before the final judgment is signed, in order to make the executors or administrators parties to the record: the other after final judgment is signed, in order to give them an opportunity of pleading no assets, or any other matter in their defence; for it would be unreasonable that the executors or administrators should be in a worse situation, where their testator or intestate died before the final judgment was signed, than they would have been in if they had died afterwards. *Say.* 266. See *Abatement*, I. 6. c.

II. THERE have been different opinions, whether a *scire facias* lay at common law or not; but this doubt, says Coke, arose for want of distinguishing between personal and real actions. At common law, if after judgment given, or recognizance acknowledged, the plaintiff did not sue out execution within the year, the plaintiff, or his consuee, was driven to his original upon the judgment; and the *scire facias* in personal actions was given by the statute of *Westm.* 2. c. 45. But in real actions, or upon a fine, though no execution was sued out within a year after the judgment given, or fine levied; yet after the year a *scire facias* lay for the land, &c. because no new original lay upon the judgment or fine. 2 *Inst.* 469, 470.

A *scire facias* lay as well in mixed as real actions, and upon a judgment in assise. So it lay upon a judgment in a writ of annuity. *Salk.* 258, 600.

It hath been adjudged, that if there be judgment in ejectment, and no execution sued thereon in a year and a day, an *habere facias possessionem* cannot be sued out after, without a *scire facias*; and *Holt*, Ch. J. said, that as to the possession of the land an ejectment was real, and the only remedy a termor for years had, and that a recovery therein bound the right of inheritance. *Salk.* 258, 600; *Comb.* 250; 7 *Mod.* 64; and see 1 *Sid.* 307, 351; 2 *Keb.* 307; *Skin.* 161; 3 *Lev.* 100; *Lutw.* 1268.

But though, after a year and a day, there can be no execution of a judgment without a *scire facias*, yet if the plaintiff hath been delayed by a writ of error, he may take out

execution within a year and a day after the judgment affirmed. 5 Co. 80; Moor, 566, pl. 772; Cro. Eliz. 706; Godb. 372; Palm. 44. See 1 Roll. Abr. 899; Lan. 20; Dennis v. Drake; Cro. Eliz. 416.

So, if after the year after the recovery the defendant brings a writ of error, and the judgment is affirmed, though before the writ of error brought the recoveror was put to his *scire facias*, yet this affirmation is a new judgment, and the recoveror may have, within the year after the affirmation, a *feri facias*, or *capias* without a *scire facias*. 1 Roll. Abr. 899. And see Palm. 449; Latch. 193.

So, if he be nonsuit in the writ of error, or if the writ of error be discontinued; for though in these cases there is not any new judgment given, yet the bringing of the writ of error revives the first judgment. Cro. Jac. 364; 1 Roll. Rep. 104, 113. Vide 1 Roll. Abr. 899.

If upon a judgment there be a *cesset executio* for a year after the judgment, the plaintiff within the subsequent year may take out execution without a *scire facias*. 6 Mod. 288; 7 Mod. 64.

Also it hath been held, that where execution hath been taken out after the year and day, it is not void, but voidable only. 3 Leon. 404; Salk. 273.

If the execution is staid by injunction, though the act of the defendant, yet the court will not take notice thereof. See *Execution*.

In such case there must be a *scire facias*; the staying the proceedings by injunction does not appear to the court by any record of its own: nor is the filing a bill in equity any revival of the judgment, as in the case of a writ of error. 6 Mod. 288; Salk. 322. See *Injunction*. But where it appeared that the whole delay had arisen, on the part of the defendant, by bills in Chancery for injunctions, and by obtaining time for payment, &c. the court were unanimous that this rule of reviving a judgment above a year old, by *scire facias* before execution, which was intended to prevent a surprise upon the defendant, ought not to be taken advantage of by one, who was so far from being surprised by the delay, that he himself had been trying all manner of methods, whereby he might delay the plaintiff, and therefore they discharge the rule for setting aside the execution, with costs. 2 Burr. 660.

If judgment be given in debt, and no execution sued out within the year, yet the plaintiff may, after an award of an *elegit* on the judgment roll, as of the same term with the judgment, continue it from thence by *vicecomes non misit breve*; so held on a motion to set aside the execution; and though the court said that an *elegit* ought to be actually taken out within the year, yet being informed by the clerks of the court, that it had been the practice for many years to make such entry, &c. it was said to be the law of the court, and they ordered the execution to stand. Carth. 283; 2 Show. 235; Comb. 232.

If the demandant, or plaintiff, taketh his process of execution within the year, though it be not served within the year, yet if he continue the same, he may have execution at any time after the year. 2 Inst. 471; Co. Litt. 290, b; and see 2 Leon. 77, 78, 87; 3 Leon. 259; 4 Leon. 44; 1 Sid. 59; 1 Keb. 159; 6 Mod. 288.

If the plaintiff delay the executing of a writ of inquiry till a year after the interlocutory judgment, he cannot execute it after without a *scire facias*.

In the case of the king there need not be any *scire facias* after the year and day. 2 Salk. 603.

After a judgment, if the plaintiff within a year sues a *scire facias*, he cannot have a *capias*, within the year, until he hath a new judgment on the *scire facias*. 1 Roll. Abr. 900; 3 Danv. 333, Q. p. 1.

Where there is any change or alteration of parties, a *scire facias* is in general necessary to warrant an execution, as in case of death, &c. Where there are two or more plaintiffs

or defendants in a personal action, and one of them dies before judgment, his death should regularly be suggested on the roll, and judgment entered for or against the survivors. But where one of two plaintiffs died before interlocutory judgment, and the first notwithstanding went on to execution in the name of both; on a motion to set aside the proceedings for this irregularity, the court permitted the plaintiff to suggest the death of the other before interlocutory judgment on the roll, and to amend the *ca. sa.* without paying costs. And where one of several plaintiffs dies after judgment, execution may be had for or against the survivors, without a *scire facias*; but the execution in such case should be taken out in the joint names of all the plaintiffs or defendants, otherwise it will not be warranted by the judgment. Tidd's Pract. K. B. c. 41. and the authorities there cited. If proceedings are removed out of the county-court or other courts, not of record, by writ of false judgment, and the plaintiff is nonprossed, the execution shall issue out of the court above, and a *scire facias* seems to be necessary for this purpose. Tidd's Pract. K. B. c. 41. And see further, *Abatement*.

A *scire facias* seems necessary under the Lords' Act, 32 Geo. 2. c. 28. § 20, which gives execution against the future goods of an insolvent debtor taking the benefit of that act. 1 T. R. 80.

When a prisoner is charged in execution, the execution is considered as executed: and therefore though the plaintiff afterwards die, his executors are not bound to revive the judgment by *scire facias*, or even to charge the defendant in execution *de novo*. Tidd's Pract. K. B. 211, cites *King v. Millet*, Hil. 22 Geo. 3.

Judgment being entered on a bond to secure the quarterly payment of an annuity, and a *fi. fa.* having issued for the arrears of the last half year, a second *fi. fa.* may be taken out for the next quarter without reviving the judgment by *scire facias*. 1 H. Blackst. 297.

By one of the general rules of H. T. 2 Wm. 4. § 79. "a *scire facias* to revive a judgment more than ten years old shall not be allowed, without a motion for that purpose in term, or a judge's order in vacation; nor if more than fifteen without a rule to show cause."

III. RECOGNIZANCES and statutes are considered as judgments, being obligations solemnly acknowledged, and entered of record, and the *scire facias* on those is the judicial writ and proper remedy which the conusee hath; but herein we must distinguish between recognizances at common law and statutes-merchants, &c. for, upon the former, if the conusee did not take out execution within a year after the day of payment assigned in the recognizance, he was obliged to commence the suit again by original; the law presuming the debt might have been paid, if execution was not sued within the year after the money became payable; but this law is altered by stat. Westm. 2. c. 45. by which the conusee hath a *scire facias* given him to revive the judgment, and put it in execution; if the conusor cannot stop it by pleading such matter as the law judges sufficient for that end, such as a release, &c. But the conusee of a statute-merchant, &c. may at any time sue execution on them without the delay or charge of a *scire facias*. Lit. Rep. 89. That a *capias* lies not on a recognizance, but only a *scire facias*, see 1 Br. and 33; Co. Litt. 291; 2 Inst. 469; F. N. B. 296; Bro. Recog. 17.

Also as to recognizances at common law, and statutes and recognizances introduced by statute law, we must further distinguish, that if on the first the conusee dies before execution sued, his executor shall not sue it, even within the year, without bringing a *scire facias* against the conusor; the reason is, because the law presumes the debt might have been paid to the testator, and therefore will not suffer the debtor to be molested, unless it appear that he hath omitted to perform the judgment; and this is to be done by *scire*

facias brought by the executor, for the alteration of the person altereth the process at common law; but this tending to delay, the *scire facias* is taken away in statutes and recognizances by statute law, by the several acts of parliament which introduced them; and therefore upon the death of the conusee of a statute-merchant, &c. his executors may come into chancery, and upon their producing the testament and the statute, shall have execution without a *scire facias*, as the testator himself might. 3 Inst. 395, 471; Bro. Stat. Merch. 16, 48, 50.

If a man be bound in a recognizance to the king, upon condition to be of good behaviour, &c. he cannot be indicted for breach of the good behaviour, by which he forfeits his recognizance, without a *scire facias*, for if a *scire facias* had been brought, he might have pleaded some matter in discharge thereof. 4 Inst. 181; 1 Rol. Abr. 900. What shall be said a breach, see Cro. Car. 498; and how to be assigned, see 3 Bulst. 220; Cro. Jac. 415; Stil. 369; and tit. Surety of the Peace.

If a man acknowledges a recognizance, to be paid at a day within the year after the date of the recognizance, in this case he may have execution by *fi. facias* or *elegit* within the year after the day of payment, though the year be past from the date of the recognizance. 21 Edw. 3. 22, b; 1 Rol. Abr. 899, 900; 2 Inst. 471. See 2 Rol. Abr. 468; Co. Lit. 292.

If a man recovers an annuity, he shall have execution for every time that occurs after by *fi. facias* or *elegit* within the year after the time incurred; though the year be past from the judgment; but not after the year without a *scire facias*. 1 Rol. Abr. 900; 2 Inst. 471; Salk. 258, 600.

If two acknowledge a recognizance of 100*l.* jointly and severally, the conusee may sue several *scire facias* against the conusors upon this recognizance. 2 Inst. 395.

Scire facias upon a recognizance in chancery may be sued out to extend lands, &c. If, upon a *scire facias* upon a recognizance in chancery, the record be transmitted into B. R. to try the issue, and the plaintiff is nonsuit, he may bring a new *scire facias* in B. R. upon the record there. 2 Saund. 27. Where a statute is acknowledged, and the cognisor afterwards confesseth a judgment, and the land is extended thereon; in this case the cognisee shall have a *scire facias* to avoid the extent of the lands; but if the judgment be on goods, it is otherwise. 1 Brownl. 37; 3 Nels. Abr. 186. *Scire facias* lies on recognizance of the peace, &c. removed into B. R. See Surety of the Peace.

IV. A *scire facias* on a judgment must pursue the terms of the judgment. 6 T. R. 1.

A *scire facias* may be pleaded to, before judgment given upon it; afterwards it is too late: though a writ of error may be brought to reverse the judgment on the *scire facias*, if that be not good on which the judgment was grounded. 2 Inst. 508. Payment was no plea at common law to a *scire facias* upon a judgment; because it is a debt upon record. 3 Lev. 120. But this was altered by 4 Ann. c. 16, § 12, which gives the defendant liberty to plead such payment.

Whatever is pleadable to the original action in abatement, shall not be pleaded to disable the plaintiff from having execution on a *scire facias*; because the defendant had admitted him able to have judgment. 1 Salk. 2. If a judgment be brought against an executor, and afterwards a *scire facias* is brought against him upon that judgment, he cannot plead a judgment recovered against his testator and that he hath not assets *ultra*, &c. because he might have pleaded it to the first action; for it is a settled rule that if a defendant hath a matter proper for his defence, and he neglects to plead it in bar to the action at the time he may, he shall never take advantage of it after. 2 Strange, 732.

Where an executor pleads *plene administravit*, and the plaintiff does not take issue on it, but takes a judgment of assets *quando acciderint*, the *scire facias* on that judgment

must only pray execution of such assets as have come to the executor's hands since the former judgment; and if it pray execution of assets generally, without confining it to that time, it cannot be supported. 6 T. R. 1.

In *scire facias* on a judgment in debt, or other personal action, the defendant cannot plead non-tenure of the land generally, where it is contrary to the return of the sheriff: though he may plead a special non-tenure: but on a *scire facias* to have execution in a real action, the defendant may plead non-tenure generally, because the freehold is in question, and that is favoured in law; and the *ter-tenants* may plead there are other *ter-tenants* not named, and pray judgment if they ought to answer till the others are summoned, &c. though it would be otherwise if the *scire facias* had been against particular tenants by name. 2 Salk. 601.

On a *scire facias* to have execution upon a judgment in action of debt, every *ter-tenant* is to be contributory; and therefore one shall not answer, as long as he can show that another is liable and not warned: *contra* on a *scire facias* upon a judgment in a real action; for every tenant is to answer for that which he hath, and one may be contributory and the other not. 2 Cro. 507.

On a *scire facias* against the heir and *ter-tenants* to reverse a common recovery of lands, the *scire facias* is to issue against all the *ter-tenants*, for they are to gain or lose by the judgment in the recovery. Raym. 16; 3 Mod. 274. A *scire facias* to have execution of a fine shall not be sued against lessee for years; but against him who hath the freehold, who may have some matter to bar the execution. Cro. Eliz. 471; 2 Brownl. 144. In ejectment, it was adjudged, that a *scire facias* might be brought by the lessee, though he was but nominal, and that it may be had by the lessor himself: as either of them may have a writ of error on the judgment: and that it might be brought against those who were strangers to the judgment, and against the executors of the defendant, &c. 2 Lutw. 1267.

In the King's Bench, and in all cases, there must be either one *scire facias*, with a *scire feci* returned, or two *scire facias* with *nihil*. 2 Inst. 272; 2 Mod. 227. But in C. B. whenever the *scire facias* is to revive a judgment against the same defendant, who was party and privy to the judgment, one *scire facias* is sufficient, though a *nihil* be returned thereto. Dy. 186; Salk. 599. But not so where the defendant is not party to the record. The time, however, between the *teste* and return, in both courts, is in effect the same: for in C. B. the one *scire facias* must have fifteen days between the *teste* and return; whereas, in K. B. there must be fifteen days between the *teste* of the first and the return of the second *scire facias*. So, in C. B., where two *scire facias* are necessary. If only one *scire facias* and a *scire feci* in K. B. such *scire facias* should have fifteen days between the *teste* and return. So must every *scire facias* when the proceeding is by original: but if inclusive both of *teste* and return, it is good. Sellon's Pract.

Although the intent of the *scire facias* is to give the party, against whom execution is about to issue, notice or warning thereof, yet by the general practice it is wholly defeated, for the defendant may be summoned or not, as the party thinks fit: and, indeed, the usual way is to revive the judgment without giving the party any notice. Sellon's Pract. And it seems that the party may always search the office, and on finding a *scire facias* left there for a return, he may appear though he is not warned or summoned. A *scire facias* must lie in the sheriff's office the last four days before the return. 4 T. R. 583.

No *alias scire facias* must issue till the first writ of *scire facias* is returnable. R. T. 8 Hm. 3. And in C. B. not until the appearance day of the return of the first. The *alias* shall bear *teste* the day of the return of the first; Salk. 599. and in C. B. on the appearance day, as must the *alias scire facias* by original. Sellon's Pract.

A defendant being summoned upon a *scire facias*, and the summons returned, if he doth not appear, but lets judgment go by default, he is for ever barred. 1 *Lev.* 41, 42. If the sheriff hath returned him warned, he shall not have *audita querela* on a release, &c. for the defendant might have pleaded the same on the return of the *scire facias*; but if the sheriff return *nihil*, on which an execution is awarded, he shall have *audita querela*. *New Nat. Br.* 230. In the first case, he might have appeared and pleaded; in the other, not being warned, he was not bound to appear. Where there has been no *scire feci*, and only two *nihils*, the court will often relieve upon motion, and not put the party to an *audita querela*. *Salk.* 93, 264; 2 *Strange*, 1075.

Now by a rule of H. T. 2 *Wm.* 4. § 81. "no judgment shall be signed for non-appearance to a *scire facias*, without leave of the court or a judge, unless the defendant has been summoned; but such judgment may be signed by leave, after eight days from the return of one *scire facias*."

Where the plaintiff in the judgment releaseth the defendant of all judgments and executions, &c. the defendant may, upon his release, sue out a writ of *scire facias* against the plaintiff in the judgment *ad cognoscendum scriptum suum relaxationis*, and he need not sue out his *audita querela*. *Hil.* 5 *W. & M. B. R.*

Damages are not recoverable in a *scire facias*. 3 *Burr.* 1791. And it was formerly held that the plaintiff could not in a *scire facias* recover costs; but this is now remedied by 8 & 9 *Wm.* 3. c. 11. *Dut.* 95; 3 *Bulst.* 322.

But until recently the plaintiff was not entitled to costs unless the defendant had appeared and pleaded: and no costs were payable by the plaintiff, on moving to quash his own writ before plea, nor after a plea in abatement. *Cas. Pract.* C. B. 74; 1 *Str.* 638.

Now by a rule of H. T. 2 *Wm.* 4. § 18. a plaintiff shall not be allowed a rule to quash his own writ of *scire facias* after a defendant has appeared, except on payment of costs.

And by the 3 and 4 *Wm.* 4. c. 42. § 34. "in all writs of *scire facias*, the plaintiff obtaining judgment or an award of execution, shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined."

As to the time within which a *scire facias* must be brought, see *Limitation of Actions*, II. 3.

For more learning on this subject, see 4 *New Abr.* 19; *Vin. Abr.* tit. *scire facias*; *Wilson's Rep.* par. 1. 98. 243; par. 2. 61. 572; the books of practice, and tit. *Error, Execution, Judgment, &c.*

SCIRE FACIAS AGAINST BAIL. If a *capias ad satisfaciendum* (see that title, and title *Execution*) is sued out against a defendant, and a *non est inventus* is returned thereon, the plaintiff may sue out a process against the bail (where bail were given); for they stipulate, in this triple alternative, that the defendant shall, if condemned in the suit, satisfy the plaintiff his debt and costs; or, that, he shall surrender himself a prisoner; or, that they will pay it for him. As therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place. In order to which a writ of *scire facias* may be sued out against the bail, commanding the sheriff to make known to them the judgment, and that they show cause why the plaintiff should not have execution against them for his debt and damages: and in such writ, if they show no sufficient cause, or the defendant does not surrender himself on the day of the return, or of showing cause, (for afterwards it is not sufficient,) the plaintiff may have judgment against the bail, and take out a writ of *ca. sa.* or other process of execution against them. 3 *Comm. c.* 26. p. 416. See *Bail*, I.

There is no attempt, in point of fact, to find the principal on this *ca. sa.* but it is merely as a warning that the plaintiff means to proceed against the bail; or rather, the *ca. sa.* against the principal, being left in the sheriff's office, is as

notice to the bail, that the plaintiff will proceed against the person, and it is incumbent on the bail to search whether any *ca. sa.* is left in the office. 4 *Burr.* 1360.

In order to fix bail it is ordered by the general rule H. T. 2 *Wm.* 4. § 77. "that in actions commenced by bill a *ca. sa.* to fix bail shall have eight days between the *teste* and return; and in actions commenced by original fifteen; and must in London and Middlesex be entered four clear days in the public book at the sheriff's office."

By Reg. Gen. of Trinity Vacation, 17th June, 1833, it is ordered that "where the plaintiff proceeds by action of debt on the recognizance of bail in any of the courts at Westminster, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of process upon them, but not at any later period; and that upon such render being duly made, and notice thereof given, the proceedings shall be stayed upon the payment of the costs of the writ and service thereof only."

A writ of error is a *supersedeas* of execution from the time of its allowance, provided bail, when requisite, be put in thereon in due time. But it does not prevent the plaintiff from proceeding by action of debt, or *scire facias* on the judgment against the principal, or by *scire facias*, or action of debt on the recognizance, against the bail. In such cases, however, if the writ of error be not evidently brought for the mere purpose of delay, the court will stay the proceedings upon terms, pending the writ of error. But this is not a matter of course; and if it be apparent to the court, that the writ of error is brought merely for delay, they will not stay the proceedings. *Tidd's Pract. K. B.*

In order to stay the proceedings in an action of debt or *scire facias* on a judgment pending a writ of error, it is necessary that the defendant should be first in court by putting in bail. And where an action is brought upon a judgment of the Court of Common Pleas, the Court of K. B. will not stay proceedings, pending a writ of error, without the defendant's giving judgment in the second action, and undertaking not to bring a writ of error upon that judgment. But if the action be brought upon a judgment of the Court of K. B. these terms make no part of the rule, because, in general, actions on judgments are vexatious, and the plaintiff might have his execution on the first judgment. *Tidd's Pract. K. B.* and the authorities there cited.

On a *scire facias*, or action of debt on recognizance, against bail, when a writ of error is allowed, and the bail apply within their time for surrendering the principal, the court will stay the proceedings until the writ of error is determined, the bail undertaking to pay the condemnation money, or surrender the defendant into the custody of the marshal, within four days next after the determination of the writ of error, in case the same shall be determined in favour of the defendant in error. And in one case, where the writ of error was allowed before the time was expired for surrendering the principal, though notice of such allowance was not given to the plaintiff's attorney, nor the application consequently made, till after the expiration of that time, the court gave the bail the same terms as are usual when they apply within the time granted, by the course of the court, for surrendering the principal. In a subsequent case proceedings were stayed, the bail undertaking to pay the condemnation-money and the costs on the *scire facias* in four days after affirmance; but in this case, there being no bail on the writ of error, the court made the bail also undertake to pay the costs on the writ of error, in case the judgment was affirmed; and said, it was a favour they were asking, and they would make them submit to equitable terms. 1 *Str.* 443; 2 *Str.* 887.

Now by a rule of H. T. 2 *Will.* 4. "to entitle bail to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out."

By the affirmance of the judgment, in these cases, is meant the final affirmance of it; and therefore, where the judgment

on a writ of error was affirmed in the Exchequer-chamber, and afterwards another writ of error was brought, returnable in parliament, the proceedings against the bail were further staid till the determination of the second writ of error. 5 Burr. 2819.

Before judgment against the bail on the *scire facias* can be signed, there must be a rule to appear. By a rule of H. T. 2 Will. 4. "a notice in writing to the plaintiff or his attorney or agent shall be a sufficient appearance by the defendant on a *scire facias*."

The plaintiff got judgment on the *scire facias* against bail, pending error by the principal, and took them in execution; and on their moving to be discharged, the court said, though they might have applied, and had the proceedings staid, yet the court would not set them aside. 1 Stra. 526; Barnes, 202. But see 4 Burr. 2454; 3 T. R. 643; *sem. contra*.

There must be a particular warrant of attorney to a *scire facias* against the bail, for a warrant in the principal action is no warrant to the *scire facias*, because these are distinct actions; and the particular warrant is to be entered when the suit commences which is when the writ is returned. 2 Salk. 605. When a *scire facias* is brought against the bail, it must be *in hac parte*, and where it is brought against the defendant in the principal action, it is to be *in hac parte*. 2 Salk. 599.

In *scire facias* to have execution for damages and costs recovered against J. B. upon a recognizance of bail, conditioned in case the said J. B. and G. K. should be condemned, that J. B. and G. K. should pay, &c. or render themselves, the plaintiffs alleged that J. B. and G. K. had not paid, &c. or rendered themselves according to the form of the recognizance: the court of K. B. held, on special demurrer, the breach ill assigned; for *non constat* but that J. B. who was condemned had paid or rendered. 4 M. & S. 33. See further, *Bail, Error, &c.*

SCIRE FACIAS AD AUDIENDUM ERRORES, *To hear the Errors assigned*. Formerly when a writ of error was brought, as soon as the transcript was entered on record, and the plaintiff had also assigned his errors, and entered the same on record, if the defendant did not immediately plead or join in error, the plaintiff might have staid out this *scire facias*; and if the defendant in error did not come in, and plead or join to the assignment of errors, upon the return of this writ the plaintiff might have had an *alias scire facias*, and upon default thereto the plaintiff must have proceeded to argument, and was heard *ex parte*. But this writ of *scire facias* was seldom sued out, as the defendant usually appeared gratis: or the plaintiff in error, after his assignment of errors, took out a rule for defendant to appear thereto, and served a copy on the defendant. *Curth. 40*. And now this writ is no longer necessary, unless in case of a change of parties. See *Error IV*.

SCIRE FACIAS IN DETINUE. In detinue, after judgment, the plaintiff shall have a *distress* to compel the defendant to deliver the goods by repeated distress of his chattels; or else a *scire facias* against any third person in whose hands they may happen to be, to show cause why they should not be delivered. 3 Comm. 413. See *ante*, tit. *Execution*.

SCIRE FACIAS TO REMOVE AN USURPER'S CLERK. On a *quare impedit* in a *parsonage*, if the bishop, after receipt of the latter writ, admit any person, even though the parson's right may have been found in a *jure patronatus*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by writ of *scire facias*. 2 Comm. 218. See *Quare Impedit, Quam Incurat*.

SCIRE FACIAS TO REPEAL LETTERS-PATENT AND GRANTS. Where the crown hath unadvisedly granted any thing by letters-patent which ought not to be granted, or where the patentee hath done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of *scire facias* in Chancery. This may be brought either on the part of the

king, in order to resume the thing granted, or if the grant be injurious to a subject, the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in a *scire facias*. And so, also, if upon an office untruly found for the king, he grants the land over to another, he who is grieved thereby, and traverses the office itself, is entitled, before issue joined, to a *scire facias* against the patentee, in order to record the grant. 3 Comm. c. 17. p. 260, 261. See *Grant of the King, Inquest of Office*.

A *scire facias* to repeal a patent may be brought where the record is, which is in Chancery; and there are to be two of these writs sued out of the Petty Bag Office directed to the sheriff of Middlesex, who, by a letter under the seal of his office, must send notice to the corporation, or person whose concern the patent is, that there is a *scire facias* issued out, returnable at such a time, and remaining with him, for the revocation of such a patent, and that if they do not appear thereunto, judgment will be had against them by default; and this letter to be delivered to the corporation, or person interested in such patent, by some person who can make oath thereof. *Dalton's Sheriff*. On a *scire facias* out of Chancery returnable in B. R. to repeal letters-patent, it was held, that if the letters-patent are granted to the prejudice of any person, as if a fair is granted to the damage of the fair of another, &c. he may have a *scire facias* on the enrolment of such grant in Chancery, as well as the king in other cases; but it may be a question, whether a *scire facias* upon a record in Chancery is returnable in B. R. though after it is made returnable into B. R. that court, and not the Chancery, hath the jurisdiction of it. *Mod. Cas. 229*.

A *scire facias* to repeal a patent may also be sued out in the Court of King's Bench. 4 Inst. 72.

In all cases at common law, where the king's title accrues by a judicial record, and he grants his estate over, the party grieved could not have a *scire facias* against the patentee, but was forced to his petition to the king; otherwise it is when his title is by conveyance on record, which is not judicial. 4 Rep. 59. The king hath a right to repeal a patent by *scire facias*, where he was deceived in his grant, or it is to the injury of the subject. 3 Lev. 220. And where a common person is obliged to bring his action, there, upon an inquisition or office found, the king is put to his *scire facias*, &c. 9 Rep. 96. A *scire facias* to repeal letters-patent doth not abate by the demise of the crown. 1 Strange, 43. See further, *Patents for Inventions*.

SCIRE FACIAS have issued to repeal the grants of offices, for conditions broken, non-attendance, &c. For disability, or in case of forfeiture, the offices may be seized without *scire facias*. 3 Nels. Abr. 201, 202. See *Office, IV*.

SCIRE FEE is the return of the sheriff on a *scire facias*, that he hath caused notice to be given to the party against whom the *scire facias* issued. See *Scire Facias*.

SCIREWYTE. The annual tax or prestation paid to the sheriff for holding the assizes or county courts. *Paroch. Antig. p. 573*.

SCITE, *situs*.] The setting or standing of any place; the seat or situation of a capital messuage, or the ground whereon it stood. *Mon. Ang. tom. 2. fol. 278*. The word in this sense is mentioned in the 32 Hen. 8. c. 20; 22 Car. 2. c. 11.

SCORNERS. See *Sorners*.

SCOLDS. In a legal sense, are troublesome and angry women, who, by their brawling and wrangling amongst their neighbours, break the public peace, increase discord, and become a public nuisance to the neighbourhood. They are indictable in the sheriff's tourn, and punished by the cucking-stool, &c. *Kitch. 13*; 6 Mod. 213. See *Castigatory*.

SCOT AND LOT, Sax. *scot*, pars, and *lot*, i. e. *sors*.] Signifies a customary contribution laid upon all subjects according to their ability. *Spelm*. Nor are these old words grown obsolete, for whoever in like manner (though not by equal proportion) are assessed to any contribution, are gene-

rally said to pay scot and lot. 33 Hen. 8. c. 9. See also 11 Geo. 1. c. 18. as to elections in London.

SCOTAL, or SCOTALE. An extortion prohibited by the Charter of the Forest, c. 7. It is where any officer of a forest keeps an alehouse within the forest by colour of his office, causing people to come to his house and there spend their money for fear of his displeasure. It is compounded of *scot* and *ale*, which, by transposition of the words, is otherwise called an *aleshot*. *Manwood*, 216. The chief justice in eyre of the forests used to grant licenses to keep alehouses within the forests.

SCOTTARE. Those tenants are said *scottare* whose lands are subject to pay *scot*. *Mon. Ang.* i. 875.

SCOTLAND.

THE KINGDOM OF SCOTLAND, notwithstanding the union of the crowns on the accession of their king, James VI. to that of England, continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected; which was judged to be the more easy to be done, as both kingdoms were anciently under the same government, and still retained a very great resemblance, though far from an identity, in their laws. By an act of parliament, 1 Jac. 1. c. 1, it was declared that these two mighty, famous, and ancient kingdoms, were formerly one. And Sir Edward Coke observes, how marvellous a conformity there was, not only in the religion and language of the two nations, but also in their ancient laws, the descent of the crown, their parliaments, their titles of nobility, their offices of state and of justice, their writs, their customs, and even the language of their laws. Upon which account he supposes the common law of each to have been originally the same, especially as their most ancient and authentic book, called *Regiam Majestatem*, and containing the rules of their ancient common law, is extremely similar to that of *Glanvil*, which contains the principles of ours, as it stood in the reign of Henry II. 4 *Inst.* 345. The many diversities now subsisting between the two laws at present may be well enough accounted for from a diversity of practice in two large and uncommunicating jurisdictions, and from the acts of two distinct and independent parliaments, which have in many points altered and abrogated the old common law of both kingdoms. See 1 *Comm. Intro.* § 4. p. 95. and the note there.

In the reigns of King James II. and King Charles II. commissioners were appointed to treat with commissioners of Scotland concerning an union; but the bringing about this great work was reserved for the reign of Queen Anne. The 1 *Ann. st.* 1. c. 14. ordained articles to be settled by commissioners for the union of the two kingdoms, &c.; and by the 5 *Ann. c.* 8. the union was effected.

It has been said that the union ultimately effected was the first instance in history of the kind; for there never was, at any time, in any place, an example of two sovereign kingdoms incorporating themselves in such a manner. *Lord Halifax's Letter to the Electress Sophia*, 15th Oct. 1706. *Macpherson's Original Papers relating to the Secret History of Great Britain*.

By the above statute, 5 *Ann. c.* 8. the *Twenty-five Articles of Union*, agreed to by the parliaments of both nations, were ratified and confirmed; the purport of the most considerable being as follows:—

1. That on the first of May, 1707, and for ever after, the kingdoms of England and Scotland shall be united into one kingdom by the name of GREAT BRITAIN.

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England.

3. The United Kingdom shall be represented by one parliament.

4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.

9. When England raises 2,000,000*l.* (accurately 1,997,763*l.* 8*s.* 4*d.*) by a land-tax, Scotland shall raise 48,000*l.*

16, 17. The standards of the coin, of weights, and of measures, shall be reduced to those of England throughout the united kingdoms.

18. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England. But all the other laws of Scotland shall remain in force; though alterable by the parliament of Great Britain. Yet with this caution, that laws relating to public policy are alterable at the discretion of the parliament; laws relating to private right are not to be altered, but for the evident utility of the people of Scotland.

22. Sixteen peers are to be chosen to represent the peerage of Scotland in parliament, and forty-five members to sit in the House of Commons. See *post*.

23. The sixteen peers of Scotland shall have all privileges of parliament. And all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the Union, and shall have all privileges of peers, except sitting in the House of Lords, and voting on the trial of a peer.

25. All laws and statutes in either kingdom, so far as they are contrary to these articles, shall cease and become void.

In the 5 *Ann. c.* 8. two acts of parliament were also recited; the one of Scotland, whereby the church of Scotland, and also the four universities of that kingdom, are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England, 5 *Ann. c.* 6. whereby the acts of uniformity of 13 *Eliz.* and 13 *Car. 2.* (except as the same had been altered by parliament at that time) and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated, that every subsequent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick upon Tweed. And it is enacted, that these two acts "shall for ever be observed as fundamental and essential conditions of the Union."

Upon these articles and act of union, it is to be observed, 1st, That the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be fundamental and essential conditions of the Union. 2dly, That whatever else may be deemed fundamental and essential conditions, the preservation of the two churches, of England and Scotland, in the same state that they were in at the time of the Union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be. 3dly, That therefore any alteration in the constitution of either of those churches, or the liturgy of the church of England, (unless with the consent of the respective churches, collectively or representatively given,) would be an infringement of these fundamental and essential conditions, and greatly endanger the Union. 4thly, That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and, as the parliament has not yet thought proper, except in a few instances, to alter them, they still (with regard to the particulars unaltered) continue in full force. Wherefore the municipal or common laws of England are, generally speaking, of no force or validity in Scotland. See 1 *Comm.* 97, 98, and the note there.

At the time of the Union it was agreed, that the mode of the election of the peers and commons should be settled by an act passed in the parliament of Scotland; which was afterwards recited, ratified, and made part of the act of Union. As to the election of the sixteen peers, see 6 *Ann. c.* 23. It was formerly resolved by the House of Lords, that a

peer of Scotland claiming to sit in the British house of peers, by virtue of a patent, passed under the great seal of Great Britain, had no right to vote in the election of the sixteen Scotch peers; and that no patent of honour granted to any peer of Great Britain, who was a peer of Scotland at the time of the Union, should entitle him to sit in parliament. But in 1782, on the claim of the Duke of Hamilton to sit as Duke of Brandon, the question being referred to the judges, they were unanimously of opinion, that the peers of Scotland were not disabled from receiving, subsequently to the Union, a patent of peerage of Great Britain, with all the privileges usually incident thereto; and the house accordingly admitted the Duke of Hamilton to sit as Duke of Brandon. No objection was ever made to an English peer's taking a Scotch peerage by descent, and therefore, formerly, when it was designed to confer an English title on a noble family of Scotland, the eldest son of the Scotch peer was created in his father's lifetime an English peer, and this creation was not affected by the annexation by inheritance of the Scotch peerage. It seems now to be settled, that a Scotch peer, made a peer of Great Britain, has a right to vote in the election of the sixteen Scotch peers; and that if any of the sixteen Scotch peers are created peers of Great Britain, they thereby cease to sit as representatives of the Scotch peerage; and new Scotch peers must be elected in their room. See 1 *Comm.* 97. n. 7.

By the 2 & 3 *Wm.* 4. c. 63. peers of Scotland, being in Ireland, may take the oaths required to qualify them to vote in the election of the Scottish representative peers in certain courts in that country.

With respect to the forty-five commoners, it was, by an act of the Scotch parliament, (and see 6 *Ann.* c. 6.) enacted, that of the forty-five, thirty should be elected by the shires, and fifteen by the boroughs; that the city of Edinburgh should elect one; and that the other royal boroughs should be divided into fourteen districts, and that each district should return one.

Now, by the Reform Act, the number of members for Scotland is increased to fifty-three. See *Parliament*, VI. (B.) I.

It was also provided by the above act of the Scotch parliament, that no person should elect or be elected one of the forty-five but who would have been capable of electing, or of being elected, a representative of a shire or borough to the parliament of Scotland: hence the eldest son of any Scotch peer could not be elected one of the forty-five; such eldest son being incapable, prior to the Union, of sitting in the Scotch parliament. Neither could such eldest son be entitled to be enrolled and vote as a freeholder for any commissioner of a shire, though otherwise qualified; as determined by the House of Peers in Lord Dairs case, 17th J. However, by the Scotch Reform Act, the restriction preventing the eldest sons of Scotch peers from being returned to parliament for places in Scotland, has been removed. The eldest sons of Scotch peers might, previous to the Reform Act, represent any place in England, as many did. 2 *Hats. Pr.* c. 19.

The two stats. 9 *Ann.* c. 5. 33 *Geo.* 2. c. 20. requiring knights of shires and members for boroughs to have respectively 400*l.* and 100*l.* a-year, are expressly confined to England; but a commissioner of a shire must be a freeholder; and it is a general rule, that none can be elected but those who can elect. And it was formerly supposed, that it was necessary that every representative of a borough should be admitted a burgess of one of the boroughs which he represented; till the contrary was determined by a committee of the House of Commons in the case of the borough of W. town. 2 *D. & R.* 131.

The provisions of the Scotch Reform Act (2 & 3 *Wm.* 4. c. 45.) which has been amended with respect to the registration of electors by the 4 & 5 *Wm.* 4. c. 88, have already been shortly noticed under the head *Parliament*, VI. (B.) I.

Acts of parliament, in general, passed since the Union, extend to Scotland; but where a statute is not applicable to Scotland, and where Scotland is not intended to be included, the method is to declare by *proviso*, that it does not extend to Scotland. 3 *Burr.* 853. As to Berwick, see that title.

Several acts of parliament have been passed, from time to time, for the internal regulation of various concerns of this part of the kingdom; the following acts are of public and general importance,

By 6 *Ann.* c. 26. a Court of Exchequer was erected in Scotland, to be a Court of Record, revenue, and judicature, for ever; and barons of the said court appointed, who should be judges there.

By the 1 *Wm.* 4. c. 69. the judges of the said Court of Exchequer were to be reduced as vacancies occurred, until they should consist of the chief baron, and one baron only. And by the 2 *Wm.* 4. c. 54. it is enacted that no successors shall be appointed to the present barons; but after the retirement or death of the last baron, the duties of the court shall be discharged by a judge of the Court of Session.

By 3 & 4 *Wm.* 4. c. 13. the powers and duties of the barons of the Exchequer in Scotland, as heretofore exercised with reference to the public revenue, &c. are vested in the commissioners for the Treasury; and the collection and management of the assessed taxes and the land tax are transferred to the commissioners for the affairs of taxes. See also 2 & 3 *Wm.* 4. c. 103, 112.

An act for disarming the Highlands of Scotland; and requiring bail of persons for their loyal and peaceable behaviour, &c. 1 *Geo.* 1. st. 2. c. 54. Persons summoned were to bring in and deliver up their arms, or, refusing to do it, should be taken as listed soldiers to serve his majesty beyond the seas; and concealing their arms, were liable to penalties; also the lord-lieutenants, or justices of the peace, might appoint persons to search houses for arms, &c. 11 *Geo.* 1. c. 26.

By the 19 *Geo.* 2. c. 39; 20 *Geo.* 2. c. 51; 21 *Geo.* 2. c. 34; 26 *Geo.* 2. c. 29; 33 *Geo.* 2. c. 26. provisions were further made for disarming the Highlands, and restraining the use of the Highland dress; and the masters and teachers of private schools, chaplains, tutors, and governors of youth and children, were to take the oaths to his majesty.

By 20 *Geo.* 2. c. 43. the heritable jurisdictions are taken away and restored to the crown, and more effectual provision is made for the administration of justice by the king's courts and judges there; and all persons acting as procurators, writers or agents in the law, are to take the oaths. By 54 *Geo.* 3. c. 67. § 5. appeals to the Court of Justiciary are allowed in civil cases where the value does not exceed 25*l.* sterling.

By 20 *Geo.* 2. c. 50. the tenure of ward-holding is taken away, and converted into blanch and feu-holding. The casualties of single and liferent escheats, incurred by hording and denunciation for civil causes, are taken away. A summary process is given to heirs and successors against superiors. The attendance of vassals at head courts is discharged. Heirs and possessors of tailzied estates are empowered to sell to the crown.

By 25 *Geo.* 2. c. 20. certain doubts were obviated, that had arisen with regard to the admission of the vassals of the principality of Scotland, and payment of their rents and duties.

By 25 *Geo.* 2. c. 41. forfeited estates in Scotland were annexed to the crown inalienably, and satisfaction made to the lawful creditors thereupon; and the rents thereof applied for the better civilizing the Highlands.

Peers of Scotland, and all officers, civil and military, &c. are to take the oath of abjuration, &c. A peer committing high treason or felony in Scotland may be tried by commission under the great seal, constituting justices to inquire, &c. in Scotland; and the king may grant commissions ofoyer

and terminer in Scotland, to determine such treason, &c. 6 *Ann. c. 14*; 7 *Ann. c. 21*.

By the 6 *Geo. 4. c. 66*, the 6 *Ann. c. 23*, so far as relates to the trial of peers for offences committed in Scotland, was explained and amended.

Persons having lands in Scotland, guilty of high treason by corresponding with, assisting, or remitting money, &c. to the Pretender, on conviction, were to be liable to the pains of treason; and their vassals, continuing in dutiful allegiance, should hold the said lands of his majesty in fee and heritage for ever, where the lands were so held of the crown by the offender; and tenants continuing peaceable, and occupying land, were to hold the same two years, rent-free. 1 *Geo. 1. st. 2. c. 20*.

By 21 *Geo. 2. c. 19*, offences of high treason, committed in the shire of Dumbarton, Stirling, Perth, Kincardine, Aberdeen, Inverness, Nairn, Cromartie, Argyll, Forfar, Bamf, Sutherland, Caithness, Elgine, and Ross, or the shire or stewartry of Orkney, may be inquired of in any shire in Scotland, as shall be assigned by the king. Jurors may come out of adjoining counties. The practice of taking down evidence in writing, in crimes not affecting life or member, abrogated.

By the 22 *Geo. 2. c. 48*, the court before whom any indictment for high treason, or misprision of high treason, in Scotland, shall be found, may issue writs of *capias*, proclamation, and *exigent* against the party, if not in custody; whereon the defendant not appearing, shall be deemed outlawed and attainted of high treason, or misprision of high treason; persons out of the kingdom, and returning within a year, may traverse the indictment.

By 19 *Geo. 2. c. 9*, every juror for trial of high treason, or misprision of treason, shall be possessed in his own or his wife's right of lands, &c. as proprietor or life renter within the shire, &c. of the yearly value of 40*s.* sterling at least, or valued at 30*s.* sterling *per ann.* in the tax-roll.

By the 6 *Geo. 4. c. 22*, (amended by the 7 *Geo. 4. c. 8*.) regulations were made respecting the qualification and manner of enrolling jurors in Scotland, and for choosing jurors on criminal trials, and uniting counties for the purposes of trial in cases of high treason.

By 33 *Geo. 3. c. 74*, (continued by several subsequent acts,) regulations were made for rendering the payment of creditors in Scotland more equal and expeditious. This was more effectually provided for by 54 *Geo. 3. c. 137*, (made for seven years,) and which is further continued by 4 & 5 *Wm. 4. c. 74*.

By 35 *Geo. 3. c. 128*, regulations were made for the more easy and expeditious recovery of debts not exceeding 5*l.* sterling, and determining of causes to that amount, throughout Scotland, by the intervention of two justices of peace within their respective jurisdictions.

By 39 *Geo. 3. c. 49*, the magistrates and judges in Scotland are empowered to extend the amount of bail to be given in criminal cases to 1200*l.* sterling for a nobleman; 600*l.* for a landed gentleman; 300*l.* for any other gentleman, burgess, or householder, and 60*l.* for any inferior person. And on charges of sedition any judge of the Court of Justiciary, on application in the name of the king's advocate, may extend the bail beyond those sums.

By 39 & 40 *Geo. 3. c. 55*, and other acts, (see 50 *Geo. 3. c. 31*; 54 *Geo. 3. c. 94*.) the salaries of the judges were increased; and by 48 *Geo. 3. c. 145*, (see also 2 *Wm. 4. c. 54*.) his majesty is empowered to grant annuities to the judges on their resignation.

By 50 *Geo. 3. c. 111*, the amount of pensions out of the civil list of Scotland is limited to 800*l.* a year; no single pension to exceed 300*l.* and the surplus of the civil list of Scotland is to be applied in aid of the civil list of England.

By 55 *Geo. 3. c. 97*, fixed salaries are granted to the judges

of the Commissary Court at Edinburgh in lieu of all former salaries, payments, and fees.

By 57 *Geo. 3. c. 64*, for abolishing certain offices, and regulating others in Scotland, the salary of the keeper of the great seal is limited in future to 2000*l.* a-year, and of the privy seal to 1200*l.* The duties of the office of keeper of the signet are to be discharged by the lord register, with a salary of 1200*l.* The office of cashier and receiver general of excise is to be exercised in person, with a salary of 1000*l.* The salaries of knight marshal, or vice-admiral, are abolished. The following offices are required to be exercised in person, under regulations to be made by the lords of the Treasury, viz. the office of auditor, king's remembrancer, lord treasurer's remembrancer, and presenter of signatures in the Exchequer, keeper of the general register of sessions, clerk to the admission of notaries, director of the Chancery, clerk of the Chancery, and clerk of the Admiralty. The following offices are to be abolished, viz. one of the clerks of the pipe, clerk assistant to inspectors and surveyors of taxes, comptroller general of the customs, receiver of bishop's rents, inspectors of wheel carriages, gazette writer, and inspector general of the roads.

By 57 *Geo. 3. c. 67*, § 4. 5. the offices of governor of the mint, and other officers of the mint in Scotland, are abolished, (on the termination of the existing interests,) and the treasury are empowered to direct the mint buildings to be sold, with a view to the consolidation with the English mint.

By the 4 and 5 *Will. 4. c. 16*, the office of recorder of the great roll, or clerk of the pipe in the exchequer in Scotland, is abolished: the powers heretofore exercised by him rested in the lord treasurer's remembrancer.

By 43 *Geo. 3. c. 80*, and other acts sums have been granted out of the British exchequer for the purpose of building and repairing bridges and making and repairing roads in the Highlands; and see 50 *Geo. 3. c. 43*; 53 *Geo. 3. c. 117*, (as to floating timber through bridges,) 54 *Geo. 3. c. 104*; 55 *Geo. 3. c. 121*. These two latter acts are repealed, and more effectual provision made by the 59 *Geo. 3. c. 135*, the title of which refers also to the regulation of ferries; but which are not noticed in the act, unless included in the provision of § 20. Public grants have also been made for the Caledonian and other canals. See 43 *Geo. 3. c. 102*. See also 46 *Geo. 3. c. 155, 156*, applying produce of forfeited estates in making canals and harbours, and in other public purposes, such as the fisheries, Lunatic Asylum, &c.

By 43 *Geo. 3. c. 54*, provision is made for the better support of parochial schoolmasters and for better governing the parish schools in Scotland.

When any ordinary place is vacant in the Court of Sessions in Scotland, the king may nominate a person, who is to be examined by the lords of the session, and then admitted, &c. 10 *Geo. 1. c. 18*.

By 30 *Geo. 3. c. 17*, regulations were made for altering the summer session in the Court of Session, the Whitsuntide and Lammas terms in the Court of Exchequer, and the spring circuits of the Court of Justiciary. By this act also, § 4. complaints were allowed to be presented to the Lord Ordinary in time of vacation, in the same manner as to the Court of Session while sitting.

By 48 *Geo. 3. c. 151*, some important regulations were made as to the internal regulation of the Court of Session (see *Session, Court of*.) and concerning appeals to the House of Lords. By this last act his majesty was empowered to appoint commissioners to inquire into the forms of process in the Court of Session, and to report in what cases trial by jury in civil cases might be usefully established in Scotland. By the 49 *Geo. 3. c. 119*, further time was allowed to these commissioners to make their report.

By 55 *Geo. 3. c. 42* the trial by jury in civil causes was at length established, and further regulated by 59 *Geo. 3. c. 35*; 3 *Geo. 4. c. 85*; 6 *Geo. 4. c. 22*; 7 *Geo. 4. c. 8*; 1 *Will. 4.*

c. 69. From the reports made to parliament by the commissioners, and from the publication of the proceedings on several causes under these acts, the beneficial consequences of this measure are fully ascertained. See *Session, Court of*.

By 54 Geo. 3. c. 67. verdicts in criminal cases before the High Court of Justiciary and Circuit Courts are allowed to be returned *vivd voce*, instead of in writing according to ancient custom.

By the 9 Geo. 4. c. 29. additional Circuit Courts were authorized to be holden, and criminal trials facilitated; and this act was amended by the 11 Geo. 4. and 1 Will. 4. c. 57. which latter statute abridged the period previously required between the sentence and execution in capital cases.

By 50 Geo. 3. c. 24. provision is made for augmenting the stipends of parochial ministers: these stipends by 52 Geo. 3. c. 131. are exempted from the annual duty on offices; and see 52 Geo. 3. c. 56.

By the 4 and 5 Will. 4. c. 41. the appointment of ministers to churches in Scotland erected by voluntary contribution, is regulated.

By 55 Geo. 3. c. 71. the licensing of hawkers and pedlars in Scotland is regulated under the direction of the lord provost of Edinburgh, and other commissioners.

By 59 Geo. 3. c. 62. provisions are made for the protection of parish banks, or banks for savings in Scotland.

By 59 Geo. 3. c. 70. two acts, one of Jac. 6. Part 6. c. 12 the other of Will. Parl. 1. c. 35 respecting duelling, were repealed.

By 59 Geo. 3. c. 61. counties and stewartries in Scotland were enabled to aid royal burghs in improving, enlarging or rebuilding their gaols; and also to improve, &c. the gaols of the counties and stewartries.

By the 1 and 2 Will. 4. c. 43. the laws concerning turnpike roads in Scotland were amended.

By the 2 and 3 Will. 4. c. 65. provision was made for the more effectual prevention of trespasses upon property by persons in pursuit of game in Scotland.

By the 3 and 4 Will. 4. c. 76. (amended by the 4 and 5 Will. 4. c. 87.) important alterations were made in the laws for the election of the magistrates and councils in the royal burghs.

And by the 3 and 4 Will. 4. c. 77. (amended by the 4 and 5 Will. 4. c. 86.) provisions were made for the appointment and election of magistrates and councillors for the several burghs and towns of Scotland which now return or contribute to return members to parliament, and are not royal burghs.

Also by the 3 and 4 Will. 4. c. 46. burghs in Scotland were enabled to establish a general system of police.

SCOTIS. Assessments by commissioners of sewers are so called.

SCRIPTURE. All profane scoffing of the Holy Scripture, or exposing any part thereof to contempt and ridicule, is punished by fine and imprisonment. 1 Hawk. P. C. See *Reading, &c.*

SCRIVENERS. Are mentioned in the statute against usury and excessive interest of money. 12 Ann. st. 2. c. 16.

Money scriveners were understood to be those who received money to place it out at interest, and who supplied those who wanted to raise money on security; thus rendering themselves useful to, and receiving a profit from both parties. If a scrivener is entrusted with a bond, he may receive the interest; and if he fails, the obligee shall bear the loss; and so it is if he receive the principal, and deliver up the bond, for being entrusted with the security itself, it shall be presumed he is trusted with power to receive the principal and interest; and the giving up the bond on payment of the money is a discharge thereof. But if a scrivener be entrusted with a mortgage deed, he hath only authority to receive the interest, not the principal; the giving up the deed in this case not being sufficient to restore the estate, but there must be a reconveyance, &c. 1 Salk. 157. It is held, where a

scrivener puts out his client's money on a bad security, which on inquiry might have been easily found so, yet he cannot be charged in equity to answer the money; for no one would venture to put out money of another upon a security, if he were obliged to warrant and make it good, in case a loss should happen, without any fraud in him. *Preced. Chanc.* 146. 149. See 19 Vin. Abr. 289—292.

When an attorney is the general depositary of money of his clients, and other persons who employ him, not simply in his character of attorney, but as a money agent to invest their money on securities at his discretion, allowing him procuration fees for any sum laid out on bond or mortgage as well as a fee or charge for preparing of the deeds: Mr. Baron Wood held that such a course of dealing was substantially the business of a scrivener. 1 Holt. 507; and see 3 Camp. 539. The last regular scrivener is said to have been a person of the name of Jack Ellis, a contemporary of Dr. Johnson, who is mentioned by him in *Boswell's Life*, vol. 3. p. 20. See further, *Attorney, Bond, Mortgage, Trustee, &c.*

SCULPTURE. By 54 Geo. 3. c. 56. every person who shall make any new and original sculpture or model, or copy or cast of the human figure, or of any bust or part of the human figure clothed in drapery or otherwise, or of any animal or part of any animal combined with the human figure or otherwise, or any subject being matter of invention in sculpture, or of any alto or basso relievo, or any cast from nature, of man, or animals, whether separate or combined, &c. shall have the sole right and property of the whole of such new and original sculpture, &c. for fourteen years, putting their name and date thereon; and this term is extended to models, &c. protected by a former act 38 Geo. 3. c. 71. Persons (not having purchased the property in the original,) making, importing, or selling pirated copies or casts of such sculptures, are made liable to damages in an action on the case. An additional term of fourteen years is given to the proprietor, if living, and not having assigned his property. These provisions are in analogy to the acts for protecting *Literary Property*. See that title.

SCUTAGE, *scutagium*, Sax. *scutpenig*. Was a tax or contribution, raised by those that held lands by knight's-service, towards furnishing the king's army, at one, two, or three marks for every knight's fee. Henry the Third, for his voyage to the Holy Land, had a tenth granted by the clergy, and scutage, three marks of every knight's fee, by the laity. *Baronag. Angliæ*, part 1. fol. 211, b. This was also levied by Henry II., Richard I., and King John. See *Taxes, Tenures* H. 8.

SCUTAGIO HABENDO. A writ that anciently lay against tenants by knight's service, to serve in the wars, or send sufficient persons, or to pay a certain sum, &c. *F. N. B.* 83. See *Taxes, Tenures*.

SCUTE. A French gold coin of 3s. 4d. In the reign of King Henry V., Catharine queen of England had an assurance made her of sundry castles, manors, lands, &c. valued at the sum of forty thousand scutes, every two whereof were worth a noble. *Rot. Parl.* 1 Hen. 6.

SCUTELLA, from *scutum*, Sax. *scutel*.] A scuttle; any thing of a flat and broad shape, like a shield.

SCUTELLA ELEEMOSYNARIA. An alms basket, or scuttle. *Paroch. Antiq.*

SCUTUM ARMORUM. A shield or coat of arms. See *Seal*.

SCYLDWIT, Sax. A mulct for any fault; from the Saxon *scild*, i. e. *delictum*, and *wito*, *pœna*. *Leg. Hen.* 1.

SCYRA. A fine imposed upon such as neglected to attend the *scyre-gemot* courts, which all tenants were bound to do. *Mon. Ang.* i. 52.

SCYRE-GEMOT, Sax. *shiremote*.] A court held by the Saxons twice every year by the bishop of the diocese and the earldorman, in shires that had earldormen; and by the bishop and sheriff where the counties were committed to the

sheriff, &c. wherein both the ecclesiastical and temporal laws were given in charge to the county. *Seld. Titles Hon.* 628. This court was held three times in the year, in the reign of King Canute the Dane. *Leg. Canut. c.* 38. And Edward the Confessor appointed it to be held twelve times in a year. *Leg. Edw. Conf. c.* 35. See *Term*.

SEA, Mare.] By the 18 *Edw. 3. c.* 3. the sea is to be open to all merchants. The main sea, beneath the low water mark, and round England, is part of England; for the admiral hath jurisdiction. 1 *Inst.* 260; 5 *Rep.* 207. The seas which environ England are within the jurisdiction of the King of England. 1 *Roll. Abr.* 528. As to the sovereignty of the sea, see *Navy*.

SEA-BANKS, or walls. The 15 *Geo. 2. c.* 33. imposes penalties on persons cutting or pulling up star or bent on the sand hills on the north-west coast of England. See further, *Malicious Injuries*.

SEA-GREENS. Grounds overflowed by the sea in spring tides. These, on the idea that the sea-shore is that over which the tide flows, have been supposed to be *inter Regalia*. But by the custom of Scotland the sea-shore is not held to extend further than to that point which the sea reaches in common tides, and therefore sea-greens are held to be private property. *Bell's Scotch Law Dict.* See further, *Alluvion*.

SEAL, sigillum.] Is taken either for wax impressed with a device, and attached to deeds, &c. or for the instrument with which the wax is impressed. In law the former is the most usual sense. The first sealed charter we find extant in England is that of King Edward the Confessor upon his foundation of Westminster Abbey. *Dugdale's Warwickshire*, fol. 138, b. Yet we read of a seal in the manuscript history of Offa, king of the Mercians. And that seals were in use in the Saxons' time, see *Taylor's History of Gavelkind*, fol. 73. It was usual in the time of Henry II. and before, to seal all grants with the sign of the cross, made in gold, on the parchment. *Monast. iii.* fol. 7; *Ordericus Vitalis*, lib. 4. That most of the charters of the English Saxon kings were thus signed appears by *Ingulphus*, and in the *Monasticon*. But it was not so much used after the Conquest. *Cowell*.

The royal seal was most frequently in green, to signify (as it has been quaintly expressed *rem in perpetuo vigore permansuram*). Coats of arms on seals were introduced about the year 1218. We read of a charter sealed with the royal tooth, called his *wang-tooth*. Wang is the jaw. *Chaucer*. See *Deed*, II. 6; and see further as to the Great and Privy Seal, tit. *Forgery*, *Grant of the King*, *Privy Seal*, *Quarter Seal*, *Signet*, *Treason*, &c. As to seals of Corporation, see that title.

Writs touching the common law not to go out under any of the petty seals. 28 *Edw. 1. st.* 3. c. 6. See *Writs*.

SEA-LAWS. Laws relating to the sea; as the laws of *Oleron*, &c. See *Oleron Laws*.

SEALER, sigillator.] An officer in Chancery appointed by the lord chancellor, or lord keeper of the great seal of England, to seal the writs and instruments there made in his presence.

SEA-MARKS. See *Beacons*.

SEAMEN. With respect to the seamen in the Royal Navy, see *Navy*, particularly under Division II.

By 33 *Geo. 3. c.* 67. § 1. (made perpetual by a subsequent act) if any seamen or other persons, riotously assembled together to the number of three or more, shall unlawfully and with force prevent, hinder, or obstruct the loading or unloading or the sailing or the navigating of any ship or other vessel; or shall unlawfully and with force board any vessel, with intent to prevent, hinder, or obstruct the loading or unloading or the sailing or navigating of such vessel; the offenders are liable to be imprisoned to hard labour for any term not exceeding twelve calendar months. By § 8. the prosecution must be commenced within twelve calendar months after the commission of the offence.

By the 9 *Geo. 4. c.* 31. § 1. so much of the last-mentioned act as relates to assaults on seamen, is repealed. And by § 26. if any person shall unlawfully and with force prevent or obstruct any seaman, keelman, or caster, from exercising his lawful trade, business, or occupation, or shall beat, wound, or use any other violence to him, with intent to deter or hinder him from exercising the same, the offender is liable to imprisonment to hard labour for any term not exceeding twelve calendar months.

For the protection of sailors in the merchant-service, and to facilitate the settlement of disputes between them and masters of vessels, a summary jurisdiction is given by various statutes to justices of peace. Thus by the 2 *Geo. 2. c.* 26. § 1. (made perpetual by the 2 *Geo. 3. c.* 31.) masters of ships are prohibited from carrying any seaman, except their apprentices, to sea, without first coming to an agreement in writing as to what wages each seaman is to have during the voyage, and expressing the voyage to be performed, under the penalty of 5*l.* to Greenwich Hospital, recoverable on the oath of one witness before one justice, who may issue his warrant to bring the master before him. The penalty may be levied by distress, which, if not sufficient, the master may be committed till he pay the same.

By § 4. if a mariner desert or absent himself after signing such agreement, on application to any justice from the master, owner, or other person having charge of the ship, the justice may cause him to be apprehended; and if he refuse without sufficient reason to proceed on the voyage, he may be committed to hard labour not exceeding thirty days, nor less than fourteen. And a similar provision is made by the 31 *Geo. 3. c.* 39. § 3. and by the 45 *Geo. 3. c.* 81. as to the masters and mariners of vessels in the coasting trade.

By the 37 *Geo. 3. c.* 78. § 1. every seaman, mariner, or other person, who shall desert during the voyage, either out or home, from any British merchant-ship trading to or from his majesty's colonies in the West Indies, shall (over and above all other punishments and penalties) forfeit all the wages he may be entitled to from the master or owner of the ship on board of which he shall enter immediately after such desertion. And by § 2. every master of a ship who shall engage such person, knowing him to have deserted, incurs a penalty of 100*l.*

By § 3. no master shall hire any seaman or other person in any port of the said colonies at more than double the monthly wages contracted for with the other seamen hired to serve on board such ship at the time of her last departure from Great Britain—being in the same degree and station with the seaman so hired in the colonial port—unless authorized by the governor, chief magistrate, collector or controller of such port, under the penalty of 100*l.*

By § 4. masters of vessels are liable to a penalty of 10*l.* for not inrolling their apprentices' indentures at the custom-house.

By the 59 *Geo. 3. c.* 58. (continued for seven years by the 3 & 4 *Wm. 4. c.* 88.) justices are empowered, on the complaint of seamen in the merchant-service, to hear and settle disputes relative to wages not exceeding 20*l.* and may examine witnesses on oath. On a refusal for two days to pay the sums ordered by the justices, the amount, with costs, may be levied by a warrant under the hand and seal of such justice on the ship or any of the tackle, &c. thereof. The determination of the justice is final, unless an appeal is made to the admiralty within seven days.

By the 4 & 5 *Wm. 4. c.* 34. the statutes requiring a contribution out of the wages of merchant-seamen towards the support of the Royal Naval Hospital at Greenwich, were repealed, and in lieu thereof an annual sum of 20,000*l.* was made payable out of the consolidated fund.

The 4 & 5 *Wm. 4. c.* 52. was passed to amend the provisions of an act of the 20 *Geo. 2. c.* 38. whereby a body corporate and politic was created by the name of "The Pres-

sident and Governors for the Relief and Support of sick, maimed, and disabled Seamen, and of the Widows and Children of such as shall be killed, slain, or drowned in the Merchants' Service."

The following is an outline of its principal clauses:—

By § 2. the president and governors are empowered to relieve disabled seamen and their widows and children. Seamen are to produce certificate of the hurt they have received. Parties signing the certificate are to make oath of the truth thereof. Certificates to be produced by seamen disabled by sickness, and by widows and children of seamen. But decrepit seamen are not entitled to the benefit of this act unless they have served five years, and contributed monthly.

§ 3. Persons forging, &c. certificates are liable to be punished as incorrigible rogues.

By § 5. all masters and owners of merchant-ships or vessels, &c. are to pay 2s. per month.

And by § 6. all seamen or other persons serving on board such ships or vessels are to pay 1s. per month.

§ 7. Masters of ships are to keep in their hands 1s. per month out of seamen's pay, and pay over the same to the receiver of the duties.

§ 8. Receivers to be appointed for the port of London and the outports, who are to collect and pay over the duties according to instructions.

§ 9. Masters to keep muster-roll of ship's company, and deliver duplicates thereof to the collectors. Receivers are to transmit duplicates of vessels not belonging to their port. Penalty for neglect by masters, &c. 5l.

§ 10. Masters of vessels to deduct penalties from wages of seamen, and deliver a verified account thereof to the officers of the president and governors, under a penalty of 20l.

§ 11. Collectors may summon masters of vessels, and examine them upon oath as to the truth of the muster-rolls. Masters refusing to appear or to answer, to forfeit 10l.

§ 12. Secretaries, &c. of public offices to give in a list of ships employed in their service. Treasurers, &c. of such offices to pay no wages or freight to any master, &c. until he produce an acquittance signed by the receiver of duties.

§ 13. Duties to be paid at the port where any ship or vessel shall unload her cargo. But the master or owner may enter into an agreement with the trustees and collectors for half-yearly payments.

§ 14. If masters fail to produce proper certificates, tidesmen to be continued on board at their expense.

§ 15. Penalties imposed by the act are recoverable before a magistrate.

§ 16. Owners and masters of ships of any of the outports are empowered to meet and appoint trustees for the said duties, who are to continue till the 20th December in each year. New trustees to be chosen yearly, and instrument of election to be confirmed by the president, &c. Five trustees to be a quorum, with power to make bye laws and appoint officers. Instrument of trust to be forwarded to the president and governors within sixty days after every 20th of December.

§ 18. Trustees heretofore appointed at the several outports to be subject to the provisions of the act.

By § 19 the Corporation of The Merchants Venturers of Bristol are appointed trustees for the duties, &c. received there, and empowered to hold lands for the purposes of the act.

§ 20. The Guild of the Trinity House of Kingston-upon-Hull are appointed trustees for the duties, &c. received there.

§ 21. The ports of Glasgow, Greenock, and Port Glasgow, &c. are to be deemed one united port, and masters of ships belonging thereto are to elect trustees for collecting duties, &c.

§ 22. Trustees of outports are to transmit an account of

the yearly receipts and expenditure to the president and governors

§ 23. Collectors appointed by the trustees or corporations aforesaid are not to send duplicate of muster-rolls to the president and assistants.

§ 24. No seaman to have the benefit of the act unless he pays the duty.

§ 25. enacts that those who have served longest are to be first provided for.

§ 26. Maimed seamen are to be provided for at the port where the accident happens.

§ 27. Disabled seamen having served and paid five years are to be provided for where they have contributed most.

§ 28. Seamen who have been shipwrecked, or made prisoners by the enemy, may be relieved.

§ 29. Where regular certificates cannot be obtained, others may be admitted.

§ 30. Wages of deceased seamen are to be paid to the trustees of the port on the ship's arrival to the use of the ex-cutor, &c.

§ 31. If not demanded in three years by the representatives, then to the use of the president and governors, or the trustees of the respective ports.

§ 32. President and governors to pay five per cent. out of the duties received by them from seamen in the port of London to the Seamen's Hospital Society in that port.

By the 3 & 4 Wm. 4. c. 9. the members of a society instituted in 1821 for the relief of sick and distressed seamen of all nations in the port of London, and commonly called "The Seamen's Hospital Society," were incorporated, and were enabled to possess property and receive bequests, and further empowered to purchase lands to the value of 12,000l. per annum.

As to the desertion of sailors on a foreign shore by masters of vessels, see *Kidnapping*. See also *Impressing*.

SEAMEN'S WAGES are one proper object of the admiralty jurisdiction, even though the contract be made for them upon the land. 11 Ventr. 146. Yet the courts of common law have jurisdiction; and an action may be maintained for work and labour. See the preceding article, and further, tit. *Admiral and Admiralty*.

SEAN-FISH. Seems to be that sort of fish which is taken with a large and long net, called a sean. 3 Jac. 1. c. 12.

SEARCHER. An officer of the customs, whose business it is to search and examine ships outward-bound if they have any prohibited or uncustomed goods on board, &c. This officer is mentioned in the (expired) 12 Car. 2. c. 8. And there were formerly searchers concerned in alnage duties, of leather, and in divers other cases.

SEA-REEVE, *In villis maritimis est qui maritimum Domini jurisdictionem curat, litus lustrat, et ejectum maris (quod wreck appellatur) Domina colligit. Spelm.* An officer in maritime towns and places who takes care of the maritime rights of the lord of the manor, watches the shore, and collects the wreck for the lord.

SEA-ROVERS. Pirates and robbers at sea. See *Prates*. SECONDARY, *secundarius*.] An officer who is second, or next to the chief officer; as the secondaries to the prothonotaries of the courts of B. R. and C. B., the secondary of the remembrancer in the Exchequer, secondary of the Compter, &c. 2 Litt. Abr. 506. Secondary of the King's Bench may have clerks. 2 Geo. 2. c. 23.

SECONDARY OF THE OFFICE OF PRIVY SEAL, is taken notice of in the old statute 1 Edw. 4. c. 1.

SECONDARY CONVEYANCES. Those which presuppose some other conveyance precedent, and only serve to confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. See *Conveyance, Deed, IV.*

SECONDARY USE. A use, though executed, may change from one to another by circumstances *ex post facto*; as if A.

makes a feoffment to the use of his intended wife and her eldest son for their lives, upon the marriage the wife takes the whole use in severalty; and upon the birth of a son, the use is executed jointly in them both. This is sometimes called a secondary, sometimes a shifting use. See *Use*.

SECOND DELIVERANCE, *secundâ deliberatione*.] Is a judicial writ that lies, after a nonsuit of the plaintiff in replevin, and a *retorno habendo* of the cattle replevied, adjudged to him that distrained them, commanding the sheriff to replevy the same cattle again, upon security given by the plaintiff in the replevin for the re-delivery of them, if the distress be justified. It is a second writ of replevin. *F. N. B.* 68. See *Replevin*.

SECOND SURCHARGE, Writ of. If after admeasurement of common, upon a writ of admeasurement of pasture, the same defendant surcharges the common again, the plaintiff may have this writ of second surcharge *de secundâ superoneratione*, which is given by the *Stat. Westm. 2. 13 Edw. 1. c. 8.* See *Common, III.*

SECRETARY, *Secretarius, à Secretis*.] A title given to him that is *ab epistolis et scriptis secretis*; as to the secretaries of state, &c. The secretaries of state have an extraordinary trust which renders them very considerable in the eyes of the king, and of the subject also, whose requests and petitions are for the most part lodged in their hands to be represented to his majesty, and to make despatches thereupon pursuant to his majesty's directions. They are privy councillors, and a council is seldom or never held without the presence of one of them; they wait by turns, and one of these secretaries always attends the court, and by the king's warrant prepares all bills or letters for the king to sign, not being matter of law. And depending on them is the office called the Paper Office, which contains all the public writings of state, negotiations, and despatches, all matters of state and council, &c.; and they have the keeping of the king's seal, called the signet, because the king's private letters are signed with it.

There was but one secretary of state in this kingdom till about the end of the reign of King Henry VIII. But then that great and weighty office was thought proper to be discharged by two persons, both of equal authority, and styled principal secretaries of state. There are now three principal secretaries of state; namely, for the home department, for foreign affairs, and for the colonies.

The chief secretary to the lord lieutenant of Ireland acts as secretary of state there, but under the principal secretary of state for the home department of the United Kingdom.

As to the power of secretaries of state, see *Bail, Commitment, Justices, Privy Council, &c.* Blackstone states shortly, that they are allowed the power of commitment in order to bring offenders to trial; and cites 1 *Leon. 70*; 2 *Leon. 175*; *Comb. 143*; 5 *Mod. 84*; *Salk. 347*; *Carth. 291*.

SECTA, or **SUIT**, *à sequendo*.] By this word was anciently understood the witnesses or followers of the plaintiff. See *Pleading, I. 1.*

SECTA AD CURIAM. Is a writ that lies against him who refuses to perform his suit either to the county-court or court-baron. *F. N. B.* 158. See further, *Suit of Court*.

SECTA AD JUSTICIAM FACIENDAM. A service which a man is bound to perform by his fee. *Bracton, lib. 2. c. 16. num. 6.*

SECTA CURIAE. Suit and service done by tenants at the court of their lord. *Paroch. Antiq. p. 3.* See *Suit of Court*.

SECTA FACIENDA PER ILLAM QUÆ HABET ENICIAM PARTEM. Is a writ to compel the heir, who hath the elder's part of the coheirs, to perform suit and service for all the coparceners. *Reg. Orig. fol. 177.*

SECTA AD MOLENDINUM. A writ that lay where a man by usage, time out of mind, &c. had ground his corn at the mill of a certain person, and afterwards went to another mill with his corn, thereby withdrawing his suit to the former. And this writ lay especially for the lord against his tenant, who

held of him to do suit at his mill. *Reg. Orig. 153*, *F. N. B.* 122. The count in this writ might be on the tenure of the land, or upon prescription, viz. that the tenant, and all those who held those lands, had used to do their suit at the plaintiff's mill, &c. *New Nat. Br. 272.* *Secta ad molendinum*, like assizes of nuisance, and many other old suits, have in modern times given way to actions of the case, to repair the party injured in damages, and are now abolished by the 8 & 4 *W. 4. c. 27. § 36.* See 3 *Comm. c. 15. p. 235.*

SECTA REGALIS, *Suit Royal*.] A service or suit by which all persons were bound twice in a year to attend the sheriff's tourn. It was called *Regalis*, because the sheriff's tourn was the king's leet, wherein the people were to be obliged by oath to bear true allegiance to the king, &c.

SECTA UNICA TANTUM FACIENDA PRO PLURIBUS HEREDITARIIS. A writ for an heir who was distrained by the lord to do more suits than one, that he should be allowed to do one suit only in respect of the land of divers heirs descended to him. *Reg. Orig.*

SECTIS NON FACIENDIS. A writ for a woman, who, for her dower, ought not to perform suit of court. *Reg. Orig. fol. 174.* It lay also for one in wardship to be freed of all suits of court during his wardship. *Reg. Orig. fol. 173*; but see 12 *Car. 2. c. 24.*

SECUNDA SUPERONERATIONE PASTURÆ. See *Second Surcharge, Writ of*.

SECURITATEM INVENIENDI *quod se non divertat ad partes externas sine licentiâ Regis*; for finding surety that he shall not go to foreign parts without the king's licence.] An ancient writ lying for the king against any of his subjects, to stay them from going out of this kingdom to foreign parts; the ground whereof is, that every man is bound to serve and defend the commonwealth as the king shall think fit. *F. N. B.* 85. See *Ne exeat Regno*.

SECURITATIS PACIS, *Surety of the Peace*.] Is a writ that lies for one who is threatened with death or bodily harm by another against him which so threatens, and is issued out of the chancery directed to the sheriff, &c. *Reg. Orig. 68.* See *Supplicavit, Surety of the Peace*.

SECURITY FOR GOOD BEHAVIOUR, the **PEACE**, and of **PERSON**, &c. See *Surety of the Peace*.

SE DEFENDENDO. A plea for him that is charged with the death of another person, by allying that he was driven unto what he did in his own defence; and the other so assaulting him that if he had not done as he did, he must have been in danger of his own life; which danger ought to be so great, as that it appears to have been otherwise inevitable. *Staudf. P. C. lib. 1. c. 7.* See *Homicide, II.*

SEDERUNT, Acts of. Ordinances of the court of session in Scotland under authority of the statute 1540, c. 3; by which authority is given to the court to make such regulations as may be necessary for the ordering of processes and the expediting of justice. *Bell's Scotch Law Dictionary*.

SEDITION is understood to comprise within its meaning all offences against the king and the government, which are not capital, and do not amount to the crime of treason. Thus, where there is no actual design against the king or the government in contemplation, a charge of sedition against the king or of exciting sedition, or of speaking, writing, or doing any thing seditiously, will not amount to a charge of treason. Therefore, in the case of Mr. Selden, who, with other persons in the reign of Charles I, was committed by the privy council for stirring up sedition against the king, the prisoners were bailed in the Court of King's Bench, because this amounted to no charge of treason; for sedition, in its true legal signification, does not import treason. 1 *Hale, 77*; *Rushworth's Collections, vol. i. p. 679*; *Appendix, p. 18*; *Selden Opera, vol. 6. p. 1938*.

By the civil law, however, sedition was ranked as treason. *Dig. Lib. 48. tit. 4*; *Ad Leg. Jul. Majestatis, l. 1. tit. 10. De perniis, l. 38. § 2.* and also in many of our ancient common

law writers, treason is sometimes expressed by the name of sedition. *Bract. lib. 3. c. 2; Hengham, c. 2; Glanvil. lib. 1. c. 2.* So when law proceedings were in Latin, *seditio* continued to be the technical word used in indictments for treason, until the terms *proditio* and *proditore* prevailed in its room; which last word is now indispensable in every indictment for treason. *3 Co. Inst. 4, 12, 15; 1 Hale, 77, n. (a)*

Sedition includes all offences of the like tendency with treason, but without any such direct intent or overt act of the party formed or executed, so as to bring it within the more serious offence. All contempts against the king and his government, and riotous assemblies for political purposes, may be ranked under the head of sedition; though it has been held, that where the object of the riot is to redress a general grievance, as to pull down all inclosures, or to reform religion or the like; it may then amount to an overt act of treason, being in the nature of a levying of war against the king. And in general it may suffice to remark, that all contemptuous, indecent, or malicious observations upon the person of the king or his government, whether by writing or speaking, or by tokens, calculated to lessen him in the esteem of his subjects, to weaken his government, or to raise jealousies of him amongst the people, will fall under the notion of sedition; as well as all direct or indirect acts or threats tending to overcome his measures, or disturb the course of his government, not amounting to overt acts of high treason. All these contempts are highly criminal at common law, and are punishable by fine and imprisonment. *4 Bla. Com. 147; 1 Hawk. c. 65, § 6; 1 East's P. C. 76; 2 Deacon's Crim. Law, 1169.*

There are some particular acts of sedition which are made more highly penal by the statute law. See the next title.

As to seditious papers, see *Printers*.

SEDITION, in the Scotch law, is defined to consist in attempts made by meetings, or by speeches or publications, to disturb the tranquillity of the state; and it is distinguished from leasing-making, which has in view to diminish or affect the king's private character. Sedition is stated to be punishable in Scotland by an arbitrary punishment. *Bell's Scotch Law Dict.*

SEDITIONOUS SOCIETIES. By *7 Geo. 3. c. 79*, for the more effectual suppression of societies established for seditious and treasonable purposes, and for better preventing treasonable and seditious practices, certain societies, called Corresponding Societies, were suppressed, and it was enacted that all societies shall be deemed unlawful, the members whereof shall be required to take any oath declared unlawful by *97 Geo. 3. c. 123*. (made expressly to prevent the administering or taking unlawful oaths,) or to take any oath or test not authorized by law; or which shall have any members, committees, &c. not known to the society at large; or the names of all the members whereof shall not be entered in regular books; or which shall act in separate or distinct branches. And all members of such societies, and all persons corresponding with or supporting them, are declared guilty of unlawful combination and confederacy; any persons convicted of such offence shall on conviction before a justice of peace forfeit 20*l.* or suffer three months' imprisonment, and if convicted on indictment, may be transported for seven years. Regular lodges of freemasons are excepted from the act under certain regulations, which required them to be registered with the clerk of the peace, subject to the discretion of the justices in session. Places for lecturing, debating, &c. are deemed disorderly houses, as under *36 Geo. 3. c. 8*. (but which is expired) unless previously licensed. Justices may demand admittance into all such places; and may refuse licenses to such as are of an immoral or seditious tendency.

By *57 Geo. 3. c. 19*, for more effectually preventing seditious meetings and assemblies, § 14, &c. the regulations of *54 Geo. 3. c. 8*, as to places for lectures, &c. were re-enacted; but these provisions were also temporary. By § 24, of the

same act (*57 Geo. 3.*) certain clubs or societies, calling themselves Spenceans, or Spencean Philanthropists, who professed for their object the confiscation and division of the land, and the extinction of the funded property of the kingdom, and all other societies or clubs holding or professing such doctrines, are suppressed and prohibited as unlawful combinations and confederacies against the government of the king, and the peace and security of the subjects. And the penalties of *39 Geo. 3. c. 79*, are enforced against all clubs taking unlawful oaths (contrary to the acts *37 Geo. 3. c. 123*, and *52 Geo. 3. c. 104*.) or appointing committees or delegates to meet other clubs, &c. There are special exemptions for freemasons, quakers, and charitable or religious societies. See further, *Oaths, Printers, Riots, Treason*.

For the execution of the laws in Ireland, and the prevention of all illegal and seditious meetings and assemblies, see *54 Geo. 3. c. 131*. (amended by *55 Geo. 3. c. 13*.) authorizing the occasional appointment of superintending magistrates and constables in counties; and *54 Geo. 3. c. 180*, which latter was only a temporary act, and contained severer measures, which were never carried into execution.

SEDITIONOUS MEETINGS and ASSEMBLIES. See *Riots*.

SEED-COD, from the Sax. *seed*, seed, and *codde*, a purse, or sack, like a continent. A basket or other vessel of wood, carried on one arm of the husbandman or sower of ground, to bear the seed or grain which he sows, and spreads abroad with the other hand. In Westmoreland, a bolster or pillow is called a cod; and in other northern parts a pincushion is termed a pin-cod. *Pro uno seed-cod empto 4*d.* Paroch. Antiq. 549; Kennett's Gloss.*

SEEDER. A seedsman, or one who sows the land. *Blount*.

SEIGNIOR, *Fr. Seigneur, i. e. Dominus*.] Is in general signification as much as lord; but particularly used for the lord of the fee, or of a manor, as *Seigneur* among the Feudists is he who grants a fee or benefit out of the land to another; and the reason is, because, having granted away the use and profit of the land, the property or dominium he still retains in himself. *Hotom. ; F. N. B. 23.*

SEIGNIOR, IN GROSS. Seemeth to be one that is a lord, but of no manor, and therefore can keep no court. *F. N. B. fol. 3.* See *Seignory*.

SEIGNIORAGE. A royalty or prerogative of the king, whereby he claims an allowance of gold and silver brought in the mass to be exchanged for coin. As seigniorage, out of every pound weight of gold, the king had for his coin 5*s.* of which he paid to the master of the mint for his work sometimes 1*s.* and sometimes 1*s.* 6*d.* Upon every pound weight of silver, the seigniorage answered to the king, in the time of Edward III. was eighteen penny-weights, which then amounted to about 1*s.*, out of which he sometimes paid 8*d.* at others 9*d.* to the master. In the reign of king Henry V. the king's seigniorage of every pound of silver was 15*d.* &c. *Stat. Antiq. 9 Hen. 5. c. 1; Hale's Sher. Ac. p. 3.*

SEIGNIORY, *Dominium*, from the French *seigneurie*, i. e. *dominatus, imperium, principatus*.] A manor or lordship, *Seignory de Bokemans, Kitchin, fol. 80.* Seignory in gross seems to be the title of him who is not lord by means of any manor, but immediately in his own person; as *tenure in capite*, whereby one holds of the king as of his crown, is seignory in gross. *Kitchin, fol. 206.* See *Seignior*.

SEISIN, *Fr. seisine, Lat. seisin*.] In the common law signifies possession. To seise is to take possession of a thing; and primer seisin is the first possession. *Co. Litt. 152.* There is a seisin in deed or in fact, and a seisin in law; a seisin in deed is when an actual possession is taken, and seisin in law is where lands descend, and one hath not actually entered on them, &c. *Inst. 31.* Seisin in law is a right to lands and tenements, though the owner is by wrong disseised of them. And he who hath an heir's actual possession quietly taken, hath *seisin de droit et de claim*, whereof no man

may disseise him, but must be driven to his action. *Perk.* 457, 458. A seisin in law is sufficient to avow upon; but, to the bringing an assize, actual seisin was required, &c. 4 *Rep.* 9. Seisin of a superior service is seisin of all inferior services which are incident thereto. And seisin of homage is a seisin of all other services, because in the doing thereof the tenant takes upon himself to do all services. 4 *Rep.* 80; 1 *Danv. Abr.* 647. The seisin of rent, or other annual service, is a sufficient seisin of casual services. 4 *Rep.* 80. But seisin of one annual service is not seisin of another annual service; as if there be lord or tenant by fealty, ten shillings rent, and three days' work in the year; in this case seisin of the rent is no seisin of the work, nor is seisin of the rent seisin of the suit of court, which is annual. 4 *Rep.* 9; 1 *Danv. Abr.* 647; 2 *Litt.* 507. The seisin of the father held not sufficient for the heir; though if a fine were levied to one for life, the remainder to another in tail, and the tenant for life took seisin of the services, this was a good seisin for him in remainder; and the seisin of a lessee for years is sufficient for him in reversion. 2 *Hen.* 6. 7: 45 *Ed.* 3. 26; 1 *Danv.* 646, 805.

A. B. seised of lands in fee simple, (which at the time of her death were in the possession of a tenant from year to year,) died, leaving C. D. her heir at law. No rent was ever paid to him, it being supposed that the lands passed to a devisee under the will of A. B. After the death of C. D. his son and heir at law brought ejectment and recovered the lands. In debt against the son, as heir of C. D., on a bond given by C. D., the son pleaded "no assets by descent from his father." It was held that the father was seised in fact of the lands in question, that they descended to him from his son, and were therefore assets in the hands of the latter liable to the bond-debt. *Bushby v. Dixon*, 3 B. & C. 290.

Actual seisin is now no longer requisite to make a person the root or stock from which the inheritance is to be derived. See *Descent*.

Where a man is seised of a reversion, depending upon an estate for life, the pleading of it is that he was seised of it *ut de feodo*, leaving out the word *dominio*; but if it be a reversion in fee, expectant upon the determination of a lease for years, there he may plead that he was seised of it in *dominio suo ut de feodo*. *Dyer*, 185, 257; 1 *Rep.* 20, 27; 4 *Rep.* 62.

Seisin is never to be alleged but where it is traversable; and when a defendant allegeth a seisin in fee in any one under whom he claims, the plaintiff cannot allege a seisin in another, without traversing, confessing, or avoiding of the seisin alleged by the defendant. *Cro. El.* 30; 1 *Brownl.* 70. If a seisin in fee is alleged, it shall be intended a lawful seisin till the contrary appears. 2 *Lutw.* 1337. See further *Livery of Seisin*, *Disseisin*, *Estate*, &c.

In Scotland actual seisin, and the evidence thereof by a notarial instrument, is still absolutely necessary for the transmission of landed property.

SEISINA HABENDA, *quia Rex habuit Annum, Diem et Fastum*. A writ for delivery of seisin to the lord of lands or tenements, after the king, in right of his prerogative, hath had the year, day, and waste, on a felony committed, &c. *Reg. Orig.* 185.

SEISING or HERIOTS. Is the seising of the best beasts, &c. (where an heriot is due) on the death of the tenant. It is a species of self-remedy, not much unlike that of taking of cattle or goods in distress; only in the latter case they are seised as a pledge, in the former as the property of the person for whom seised. 3 *Comm.* c. 1. VI. See title *Heriot*.

SEISIN-OX. A perquisite formerly due to the sheriff in Scotland, when he gave infestment to an heir holding crown lands. It is now converted into a payment in money proportioned to the value of the estate.

SEISURE OF GOODS FOR OFFENCES. No goods of

a felon or other offender can be seised to the use of the king, before forfeited. And there are two seizures, one verbal only, to make an inventory, and charge the town or place when the owner is indicted for the offence; and the other actual, which is the taking of them away afterwards on conviction, &c. 3 *Inst.* 103. See *Forfeiture*.

SEL. Denotes the bigness of a thing to which it is added, as *Selwood* is a great wood.

SELDA, from the Saxon *selde*, a seat or stool.] A shop, shed, or stall in a market. *Assis.* 9 *Rich.* 1. It is also made to signify a wood of willows or willows. And Sir *Edward Coke* takes *selda* for a salt-pit. *Co. Lit.* 4.

SELF-BANE, Saxon *self-bana*.] Self-murder. See *Homicide*, III. 1.

SELF-DEFENCE. See *Homicide*, II.

SELF-MURDER. See *Homicide*, III. 1.

SELF-PRESERVATION. See *Homicide*, I. 3., II.

SELION OF LAND, *selio terræ*, from the French *seillon*.] A ridge of ground rising between two furrows, containing no certain quantity, but sometimes more and sometimes less. Therefore *Crompton* says, that a selion of land cannot be in demand, because it is a thing uncertain. *Crompt. Juris.* 221. *Termes de la Ley*.

SEME, Saxon *seam*, i. e. *onus*.] A horse load or eight bushels of corn. *Blount*. A seme of glass is twenty-four stone, each stone five pounds weight.

SEMEBOLE. A pipe or half a ton of wine. *Merch Dict.*

SEMINARIES, POPISH. See *Roman Catholics*.

SENAGE, *senagium*, from *senatus*, sometimes used for *synod*.] Money paid for *synodals*.

SENATOR, Latin.] A member of parliament. In the laws of King Edward the Confessor, we are told that the Britons called those senators whom the Saxons afterwards termed aldermen and borough-masters, though not for their age but their wisdom, for some of them were young men, but very well skilled in the laws. Kenulph, king of it: Mercians, granted a charter, which ran thus, viz. *Consilio et consensu episcoporum et senatorum gentis suæ largitus fuit dicto monasterio*, &c. *Staundf. P. C.* cap. 18. The judges of the court of session in Scotland are entitled Senators of the College of Justice. Act 1540, c. 93.

SENDAL. A kind of thin fine silk, mentioned in the repealed stat. 2 *Rich.* 2. c. 1.

SENESCHAL, *seneschallus*, from the German *sen*, a house or place, and *schale*, an officer.] A steward, and signifies one who hath the dispensing of justice, in some particular cases; as the high seneschal or steward of England, *seneschal de la hotel de roy*, steward of the king's household, seneschal or steward of courts, &c. *Co. Lit.* 61. *Croke's Jurisd.* 102; *Kitch.* 83. See *Steward*.

SENESCHALLO ET MARSHALLO QUOD NON TENENT PLACITA DE LIBERO TENEMENTO. A writ directed to the steward and marshal of England, inhibiting them to take cognizance of an action in their court that concerns freehold. *Reg. Orig.* 185, 191.

SENEUCIA, widowhood. If a widow, having dower after the death of her husband, shall marry, *vel filiam esse filiam in seneucui peperit*, she shall forfeit and lose her dower in what place soever in Kent. *Tenen. in Gavellkind.* *Pinc. Trin.* 17 *Edw.* 3.

SENEY-DAYS. Play-days or times of pleasure and diversion. *Regist. Eccl. Ebor.* anno 1562.

SENTENCE OF A COURT. A definitive judgment pronounced in a cause or criminal proceeding.

SEPARATISTS. By the 3 & 4 *Wm.* 4. c. 82, after reciting that "there are in various places in Ireland, and in some parts of England, and elsewhere, certain dissenters from the United Church of England and Ireland, and from the Church of Scotland, commonly called Separatists, the members of which class or sect of dissenters, from conscientious scruples

refuse to take an oath in courts of justice and other places, and in consequence thereof are exposed to great losses and inconveniences in their trades and concerns, and are subject to fines and to imprisonment for contempt of court, and the community at large are deprived of the benefit of their testimony, it is enacted, that every person for the time being belonging to the said sect called Separatists, who shall be required upon any lawful occasion to take an oath in any case where by law an oath is or may be required, shall, instead of the usual form, be permitted to make his or her solemn affirmation or declaration in these words following, viz.

"I, A. B. do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare that I am a member of the religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also in the same solemn manner affirm and declare"

Which affirmation shall have the effect of an oath.

By § 2. persons making a false affirmation are subjected to the same punishment as for perjury.

SEPARIA, separaria. Several, or severed and divided from a larger ground. *Paroch. Antiq.* 336.

SEPARATION, separatio. Is the living asunder of man and wife. See *Bar. and Em. Decree*.

SEPTUAGESIMA. The third Sunday before *Quinquagesima* Sunday or Lent. It is called *Septuagesima*, because it is about the seventieth day before Easter, as *Sexagesima* and *Quinquagesima*, are thus denominated from their being the one about sixty, and the other about fifty days, before the same feast, which are all of these days appropriated by the church to acts of penance and mortification, preparatory to the days of Lent. *Idem Septuagesima* Sunday until the Octaves after Easter, the solemnizing of marriages forbidden by the canon law; and the laws of King Canutus ordained a vacancy from *Septuagesima* from *pluagesima* to *Quinquagesima* Pasche. See *stat. Westm.* 1. 3 *Edw.* 1. c. 51.

SEPTUAGINTI. The seventy interpreters of the Bible, who were in truth seventy-two, viz. six for every one of the twelve tribes. *Lat. Diet.*

SEPTUM. An inclosure; so called because it is encompassed *cum spe et fossa*, with a hedge and ditch, at least with a fence, and it signifies any place paled in.

SEPULCHRE, sepulchrum. The place where any body lies buried; but a monument is set up for the memorial of the deceased, though the corpse lie not there. *Cowell.*

SEPULTURA. An offering made to the priest for the burial of a dead body. *Bracton.* See *Mon. Angl.*

SEQUESTRATION SUB SCO PERICULO. Awarded to a person where a *summons ad warrantandum* is awarded, and the sheriff returns that the party hath nothing whereby he may be summoned; then goes forth an *alias* and a *pluries*; and if he come not in on the *pluries*, this writ shall issue. *Old Nat. Brer.* 163.

SEQUELA CAUSE. The process and depending issue of a cause for trial.

SEQUELA MOLENDINA. See *Secta ad Molendinum*.

SEQUELA CURIE. Suit of court. *Mon. Angl.* tom. 2. p. 253.

SEQUELA VILLANORUM. The family retinue and appurtenances to the goods and chattels of villeins, which were at the absolute disposal of the lord. In former times, when any lord sold his villein, it was said *dedi B. nativum meum cum tota sequela sua*, which included all the villein's offspring. *Paroch. Antiq.* 216, 288.

SEQUELS. Small allowances of meal or manufactured victuals made to the servants at a mill, where corn was ground, by the miller, in Scotland, for their work. See *Thirlage*.

SEQUENDUM ET PROSEQUENDUM. To follow a person, as where a guardian is admitted *ad prosequendum* for an infant, &c. 1 *Vent.* 74.

SEQUESTER, sequestrare. A term used in the civil

and ecclesiastical law for renouncing; as when a widow comes into court, and disclaims having any thing to do, or to intermeddle with her husband's estate who is deceased, she is said to sequester. Now more usually to renounce. See *Executor*.

SEQUESTRATION,

SEQUESTRATIO. Signifies the separating or setting aside of a thing in controversy, from the possession of both the parties that contend for it; and it is two-fold, voluntary and necessary; voluntary is that which is done by consent of each party; necessary is what the judge of his authority doth, whether the party will or not. *Fortes. c.* 50; *Dyer*, 232, 256.

There is also a sequestration, in the nature of a distress infinite, on a person's standing out all the processes of contempt for non-appearance in Chancery, upon a bill exhibited; so where obedience is not yielded to a decree, the court will grant a sequestration of the lands of the party, &c.

A sequestration is also a kind of execution for debt, especially in the case of a beneficed clerk, of the profits of the benefice, to be paid over to him that hath judgment, till the debt is satisfied. 2 *Inst.* 472; 2 *Roll. Abr.* 474. See *Execution, introductory part, Div.* 3. But the most usual sequestration of a benefice is upon a vacancy, for the gathering up the fruits of the benefice to the use of the next incumbent. The profits of the church, being in abeyance, are to be received by the churchwardens by appointment of the bishop, to make provision for the cure during the vacancy, &c. 28 *Hen.* 8. c. 11.

Sequestration is also the act of the ordinary, disposing of the goods of one that is dead, whose estate no man will meddle with. See *Kneel's Glossary in v. Sequestrare*.

Sequestration in the Court of Chancery is a commission usually directed to seven persons therein named, and empowering them to seize the defendant's real and personal estate into their hands (or it may be some particular part or parcel of his lands), and to receive and sequester the rents and profits thereof, until the defendant shall have answered the plaintiff's bill, or performed some other matter which has been ordered and enjoined him by the court, for not doing whereof he is in contempt. *Curs. Cance.* 89.

If upon a commission of rebellion (see that title), a *non est inventus* is returned, the Court of Chancery sends a serjeant at arms in quest of the defendant; and if he eludes the search of the serjeant, a sequestration issues. 3 *Comm.* c. 27.

It appears that there were great struggles between the common law courts and courts of equity, before this process came to be established, the former holding that a court of conscience could only give remedy *in personam*, and not *in rem*; that sequestrators were trespassers, against whom an action lay; and in the case of *Colston v. Gardiner*, the chancellor cites a case where they ruled, that if a man killed a sequestrator in the execution of such process, it was no murder. *Cro. Eliz.* 651; *Brograve v. Watts*, 1 *Mod.* 259.

But these were such bloody and desperate resolutions, and so much against common justice and honesty, which requires that the decrees of this court, which preserved men from deceit, should not be rendered illusory, that they could not long stand; but this process got the better of these resolutions on this ground, 1st, that the extraordinary jurisdiction might punish contempts by the loss of estate as well as the imprisonment of the person, because that liberty being a greater benefit than property, if they had a power to commit the person, they might take from him his estate till he had answered his contempts. 2dly, to say that a court should have power to decree about things, and yet should have no jurisdiction *in rem*, is a perfect solecism in the constitution of the court itself. 2 *P. Wms.* (21); 2 *Cha. Ca.* 44.

And see 2 *Mod.* 258, that the chancellor having issued such sequestration, it will be as binding as any other process, according to the rules of the common law. 2 *Cha. Ca.* 44.

It has been said, that the first instance of a sequestration after a decree, was *Sir Thomas Read's case*, in Lord Coventry's time; and that it was afterwards awarded in chancery, in the case of *Hyde v. Pitt*, 1668, and affirmed in parliament; and by the Court of Exchequer, *Graves v. Fountaine*, 1687, and since, without scruple. The doubt formerly was, that lands were not liable to execution before the *stat. West. 2. 13 Edw. 1. st. 1. c. 18*; 1 *Cha. Ca.* 92; 2 *Cha. Ca.* 44.

Sequestrations were first introduced (according to the *Commentaries*) by Sir Nicholas Bacon, lord keeper, in the reign of Queen Elizabeth, before which, the court found some difficulty in enforcing its process and decrees. See 1 *Vern.* 421, 423. After an order for sequestration issued, the plaintiff's bill is to be taken *pro confesso*, and a decree to be made accordingly; so that this sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree. 3 *Comm.* 444.

I. In what cases a Sequestration is to be awarded by the Court of Chancery.

II. The Power and Duty of the Sequestrators, and when a Sequestration is determined.

I. A sequestration *nisi* is the first process against a peer or member of the House of Commons. 2 *P. Wms.* 385; 1 *Cha. Ca.* 61, 138. A sequestration is also the first process against the menial servant of a peer, within the words and meaning of the 12 & 13 *Wm. 3. c. 3.* for that otherwise such servant would have greater privilege than his lord. 1 *P. Wms.* 535. If there be a sequestration *nisi* against a peer for want of an answer, and the peer puts in an answer that is insufficient; yet the order for a sequestration shall not be absolute, but a new sequestration *nisi*. 2 *P. Wms.* 385. See *Privilege*, III.

Notwithstanding the superintendent power formerly possessed by the courts in this kingdom over those in Ireland, and what is said in some of our books, it seems to have always been the better opinion that the Court of Chancery here could not award a sequestration against lands in Ireland. 1 *Vern.* 76; 2 *Cha. Ca.* 189; 2 *P. Wms.* 261.

It was said that such process had been awarded to the governor of North Carolina; but herein it was doubted whether such sequestration should not be directed by the king's council, to which alone an appeal lies from the decrees in the plantations. 2 *P. Wms.* 261.

Copyholds may be sequestered, though not extendible at common law, or under the *stat. Westm. 2.* for courts of equity have *potestatem extraordin. et absolutam*; but it seems a doubt whether such a sequestration can be revived against the heir of a copyholder; which arises from the difficulty of obliging the lord to admit, and depriving the lord of his fine, upon the death of his tenant. 2 *Cha. Ca.* 46. Vide 1 *Barn. C.* 431.

A sequestration out of chancery is more effectual than an execution by *feri facias* at law, for a sequestration may lie against the goods, though the party is in custody upon the attachment; whereas in law, if a *capias ad satisfaciendum* is executed, there can be no *fi. fa.* issue. *Cases in Lord Talbot's time*, 222.

Where the sequestrators seize the real estate of the party, any tenant or other person who claims title to the estate so sequestered, either by mortgage, judgment, lease, or otherwise, who hath a title paramount to the sequestration, shall not be obliged to bring a bill to contest such a title; but he shall be let in to contest such a title in a summary way. He may move by his counsel, as of course, to be examined *pro interesse suo*; and in this case the plaintiff is to exhibit interrogatories, in order to examine him for a discovery of his title to the estate, and he must be examined upon such interrogatories accordingly; and the master must state the matter to the court; and the parties may enter into proof touching

the title to the estate in question; and when the master hath stated the whole matter, the court proceeds to give judgment therein upon the report; and if it appears that the party who is examined *pro interesse suo* hath a plain title to the estate, and is not affected with the sequestration, then it is to be discharged as against him, with or without costs, as the court shall determine upon the circumstances of the case, and so *vice versâ*. See *Comm.* 712; 1 *P. Wms.* 308.

The sequestration binds from the time of awarding the commission, and not only from the time of executing it and its being laid on by the commissioners; for if that should be admitted, then the inferior officer would have *legandi et non legandi potestatem*. 1 *Vern.* 58.

And the sequestration is not affected by the statute of frauds, and therefore is like an execution at common law, which bound from the teste. 4 *East*, 523.

A sequestration obtained by the assignees of an insolvent incumbent operates only from the time of publication, and does not entitle them to the arrears of composition for tithes due before publication. And lodging a writ of *levari facias* with the registrar of the diocese, does not bind the property of the incumbent from the time of lodging it. 1 *C., M. & R.* 507; 3 *Dowl. P. C.* 234; and see 1 *Ad. & E.* 171.

II. The sequestrators are officers of the court, and as such are amenable to the court, and are to act from time to time in the execution of their office as the court shall direct; they are to account for what comes to their hands, and are to bring the money into court as the court shall direct, to be put out at interest, or otherwise, as shall be found necessary; but this money is not usually paid to the plaintiff, but is to remain in court until the defendant hath appeared or answered, and cleared his contempt, and then whatsoever hath been seized shall be accounted for and paid over to him; however, the court hath the whole under their power, and may do therein as they please, and as shall be most agreeable to the justice and equity of the case. *Dicit*.

The plaintiff's counsel may move and obtain an order for tenants to attorn and pay their rents to the sequestrators, or for the sequestrators to sell and dispose of the goods of the party, and to keep the money in their hands, or to bring it into court, as shall be most advisable and discretionary, and fitting for the court to do. *Dicit*.

Sequestrators on mesne process are accountable for all the profits, and can retain only so far as to satisfy for contempt. 1 *Vern.* 248.

If sequestrators, having power to sell timber, dispose of 7000*l.* worth, and only bring 2000*l.* to account, they, as officers and agents of the court, are responsible, and not the plaintiff. 1 *Vern.* 161.

A sequestration is in nature of a *levari* at common law, and the party sequestering has neither *jus in rem*, *vel in re*; the legal estate of the premises remaining in every respect as before. 1 *P. Wms.* 307.

Sequestrators being in possession of a great house in St. James's Square, which was the defendant's for life, the court ordered that the master allow a tenant for the house, and the sequestrators to make a lease, and the tenant to enjoy 3 *Ch. Rep.* 87.

It was moved, that the irregularity of a sequestration might be referred to the deputy, which was taken out against the defendant for not appearing, by reason of its being taken out sooner than by the course of the court it could, and yet the sequestrators had taken the goods off the premises, and threatened to sell them; the chief baron said, that as to the carrying the goods off the premises, it was clear the sequestrators could do that, because a sequestration upon mesne process answers to a *distringas* at law; but, however, as to selling them, the court agreed in the present case it could not be lawful, and said it had lately been settled on debate; and observed further, that courts of equity could not authorize

sequestrators to sell goods, even upon decree, until *Lord Stamford's case*, which makes decrees in this respect equivalent to a judgment; and even now, the counsel said, sequestrators cannot sell but by leave of the court; however, the court said this was a matter proper for them to consider upon another occasion, and therefore only referred the irregularity of the sequestration as to the point of time to the deputy. *1 Barn. Rep. in Scacc. 212.*

But if the party at whose suit the sequestration issues takes no measure to compel its execution in due time, and the sequestrators never, in fact, possess themselves of the goods, the party issuing it loses the advantage of it by laches. And if a *fi. fa.* against the goods of the defendant in Chancery is delivered to the sheriff, after the sequestration has been suffered to remain dormant for a considerable time, (as eighteen months,) without being laid on, and the sheriff on seizing under the *fi. fa.* is informed of the sequestration, he is still bound to levy, and if he returns *nil in bonis*, he is liable to an action for a false return. When the sequestrator, however, is in possession, he cannot be disturbed without leave of the court. *9 Ves. 336; 1 Jac. & Walk. 178.*

Irregularity in a sequestration may be waived by the party against whom it is issued, permitting the sequestrator to deal with the property. *2 Russ. 161.*

A defendant has no right to have a writ of *levari facias de bonis ecclesiasticis* returned, but may have a return of the amount of profits received by the sequestrator. *Dowl. 1 P. R. 434.*

A sequestration that issues as a mesne process of the court will be discontinued and determined by the death of the party; but where a sequestration issues in pursuance of a decree, and to compel the execution of it, there, though the same be for a personal duty, it shall not be determined by the death of the party. *1 Vern. 58.*

A sequestration was against the father, who appeared to be only a tenant for life, and on his death a sequestration was discharged. *1 Ch. Ca. 241; 2 Ch. Ca. 46.*

SEQUESTRATION, IN LONDON, is made upon an action of debt; and the course of proceeding in it is thus: the action being entered, the officer goes to the shop or warehouse of the defendant, when there is no body within, and takes a padlock and hangs it upon the door, &c. using these words, viz. "I do sequester this warehouse, and the goods and merchandizes therein of the defendant in the action, to the use of the plaintiff, &c. and so puts on his seal, and makes return thereof at the Compter; then four court days being past, the next court after the plaintiff may have judgment to open the doors of the shop or warehouse, and to appraise the goods taken by a serjeant, who takes a bill of appraisement, having two freemen to appraise them, for which they are to be sworn at the next court holden for that Compter; and then the officer puts his hand to the bill of appraisement, and the court giveth judgment: though the defendant in the action may put in bail before satisfaction, and so dissolve the sequestration, and after satisfaction, may put in bail *ad disprobandum debitum*, &c. *Pract. Scacc. 129.*

SEQUESTRATION in the Scotch law, is two-fold; viz. the sequestration of landed estates, and the sequestration in a mercantile bankruptcy of the whole estate, both heritable and moveable of a bankrupt; the former is intended to preserve a disputed property for the right owner, the latter to distribute the estate equally among the creditors of the bankrupt. *See Scotch Law Dict.*

SEQUESTRATIO HABENDO. A writ granted for the discharging a sequestration of the profits of a church benefice granted by the bishop at the king's command, thereby to compel the parson to appear at the suit of another; upon his appearance, the parson may have this writ for the release of the sequestration. *Reg. Judic. 36. See Execution; Sequestration.*

SERJEANT, or SERGEANT, Lat. *Serviens*.] A word

diversely used in our law, and applied to sundry offices and callings. First, a serjeant at law (*serviens ad legem*), otherwise called serjeant counter, or of the coif, is the highest degree in the common law, as a doctor is in the civil law; but, according to *Spelman*, a doctor of law is superior to a serjeant, for the very name of a doctor is magisterial, but that of a serjeant is only ministerial. To these serjeants, as men best learned and experienced in the law and practice of the courts, one court is severed to plead in, by themselves, that of the Common Pleas (see *post*), where the common law of England, is most strictly observed; yet they are not so limited as to be restrained from pleading in any other court, where the judges call them brothers, and hear them with great respect; and of which one or more are styled the king's serjeants, being commonly chosen out of the rest, in respect of their great learning, to plead for the king in all his causes, especially upon indictments for treason, &c. In other kingdoms the king's serjeant is called *advocatus regis*; and here in England, in the time of King Edward the Sixth, Serjeant *Benloe* wrote himself *solus serviens ad legem*, there being for some time none but himself; and in Ireland at this day there is only a king's serjeant. Serjeants at law are made by the king's writ, directed unto such as are called, commanding them to take upon them that degree by a certain day; and by the writ or patent of creation it appears, that the honour of serjeant at law is a state and dignity of great respect: in conferring these degrees, much ceremony was anciently used; and the serjeants now make presents to the judges, &c. of gold rings to a considerable value, &c. *Portescue, c. 50; 3 Cro. 1; Dyer, 72; 2 Inst. 213, 214.* As to their privilege of being impleaded in C. B. &c. see *Privilege*.

In old times, it was necessary that serjeants should have been barristers for sixteen years previously to their being called to be serjeants, but it seems that no precise time is now necessary to qualify them. Serjeants at law are bound by a solemn oath to do their duty to their clients. *2 Inst. 214.* And by custom, the judges of the courts of Westminster are always admitted into this venerable order before they are advanced to the bench; the original of which was probably to qualify the *puisse* barons of the exchequer to become justices of assize according to the exigence of the *14 Edw. 3. c. 16; 3 Comm. 27; and see Barrister; Precedence.*

Cases out of Chancery, to be argued in the Court of Common Pleas, cannot be set down or heard there, unless they are signed by a serjeant, *7 Taunt. 85.*

By the *6 Geo. 4. c. 95.* his majesty, during any vacation, may cause a writ to be issued out of Chancery, directed to any barrister, commanding him to appear in the said court, and take upon him the dignity of serjeant, and such person appearing and taking the oaths shall be, without further ceremony, a serjeant at law.

The monopoly enjoyed by the serjeants in the Court of Common Pleas, during term time, has been recently abolished, and the court thrown open to the bar generally.

SERJEANTS AT ARMS. Their office is to attend the person of the king; to arrest persons of condition offending, and give attendance on the lord high steward of England, sitting in judgment on any traitor, &c. There may not be above thirty serjeants at arms in the realm, who shall not oppress the people, on pain to lose their offices, and be fined. *13 R. 2. st. 1. c. 6.* Two of these, by the king's allowance, do attend on the two houses of parliament; the office of him in the house of commons is, the keeping of the doors, and the execution of such commands touching the apprehension and taking into custody of any offender, as that house shall enjoin him. Another of them attends on the lord chancellor in the Chancery; and one on the lord treasurer of England. Also one upon the lord mayor of London on extraordinary solemnities, &c. They are in the

old books called *virgatories*, because they carried silver rods gilt with gold, as they now do maces, before the king. *Crompt. Jur.* 9; *Fleta, lib. 2. c. 38.*

SERJEANTS, OF A MORE INFERIOR KIND, are serjeants of the mace, whereof there is a great band in the city of London, and other corporate towns, that attend the mayor, or other head-officer, chiefly for matters of justice, &c. *Kitch.* 143. Formerly all the justices in eyre had certain officers attending them called serjeants, who were in the nature of tipstaves. See stat. *Westm.* 1, 3 *Edw.* 1. c. 30. And the word serjeant is used in *Britton* for an officer belonging to the county; which is the same with what *Bracton* calls serjeant of the hundred, being no more than bailiff of the hundred. *Bract. lib. 5. c. 4.* And we read of serjeants of manors, of the peace, &c.

SERJEANTS OF THE HOUSEHOLD, officers who execute several functions within the king's household, mentioned in the 33 *Hen.* 8. c. 12.

SERJEANTY, *serjeantia*.] A service that cannot be due from a tenant to any lord but to the king only; and this is either grand serjeanty, or petit; the first is a tenure whereby one holds his lands of the king by such services as he ought to do in person to the king at his coronation; and may also concern matters military, or services of honour in peace, as to be the king's butler, carver, &c. Petit serjeanty is where a man holds lands of the king, to furnish him yearly with some small things towards his wars, and in effect payable as rent. Though all tenures are turned into socage by 12 *Car.* 2. c. 24. yet the honorary services of grand serjeanty still remain, being therein excepted. *Litt.* § 153. 159; 1 *Inst.* 105, 108.

Knight-service proper, (see *Tenures*, III. 2.) consisted in attending the king in his wars. There were also some other species of knight-service, so called, though improperly, because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-service proper; and because they were attended with similar fruits and consequences. Such was the tenure by grand serjeanty, *per magnum servitium*: whereby the tenant was bound, instead of serving the king generally in his wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer, at his coronation. *Litt.* § 153. It was in most other respects like knight-service, only he was not bound to pay aid or escuage; and when tenant by knight-service paid *al* for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little. *Litt.* § 154. 158; 2 *Inst.* 233. Tenure by cornage, which was to wind a horn, when the Scots or other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature) a species of grand serjeanty. *Litt.* § 156. See 2 *Comm.* c. 5.

Generally the service of grand serjeanty was of such a kind as necessarily to be within the realm; but some services which amount to grand serjeanty might be due out of the realm as well as within, and both *Littleton* and *Coke* give instances of such reservations. See 1 *Inst.* 105, b. to 108, b; and the notes there.

Petit serjeanty bears a great resemblance to grand serjeanty; for as that is a personal service, so this is a rent or render, both tending to some purpose relative to the king's person. Petit serjeanty, as defined by *Littleton*, consists in holding lands of the king, by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. *Litt.* § 159. This, he says, (§ 160,) is but socage in effect, for it is no personal service but a certain rent; and it may be added, (says *Blackstone*,) it is clearly no predial service, or service of the plough, but in all respects *liberum et commune socagium*; only, being held of the king, it is by way of eminence dignified with the

title of *parvum servitium regis*, or petit serjeanty. And *Magna Carta* respected it in this light, when, by c. 27, it enacted, that no wardship of the lands or body should be claimed by the king, in virtue of a tenure by petit serjeanty. 2 *Comm.* c. 6. p. 81, 82.

See further, *Socage*; *Tenures*.

SERMONIUM. Was an interlude or historical play, acted by the inferior orders of the clergy, assisted by youths, in the body of the church, suitable to the solemnity of some high procession day; and, before the improvements of the stage, these ruder sorts of performances were even a part of the unreformed religion.

SERVAGE. [Mentioned in 1 *Rich.* 2. c. 6.] That is, when each tenant, besides payment of a certain rent, finds one or more workmen for his lord's service. See *Service*. King John brought the crown of England in servage to the see of Rome. 2 *Inst.* 174.

SERVANTS.

Persons employed by men of trades and professions, under them, to assist them in their particular callings; or such persons as others retain to perform the work and business of their families, which comprehends both men and women. and servants are menial, or not so; menial, being domestics, living within the walls of the house. *Wood's Inst.* 51.

The first sort of servants acknowledged by the law of England, (to which slaves are unknown, see that title,) are menial servants; so called from their being *infra manum* or domestics. The contract between them and their masters arises upon the hiring; if the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not: but the contract may be made for any longer or shorter period. 1 *Comm.* 42; See *Poor*, IV. 8.

All single men between twelve years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible live shoon, are compellable, by two justices, to go out to service in husbandry, or certain specific trades, for the promotion of honest industry: and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning, unless upon reasonable cause, to be allowed by a justice of the peace: but they may part by consent, or make a special bargain. See the 5 *Eliz.* c. 4. from which the following are extracts.

Every person under the age of thirty years, that has been brought up in handicraft trades, and hath not lands of inheritance, or for life, of the yearly value of forty shillings, or is not worth ten pounds in goods, and so allowed by two justices of peace; and not being retained with any person in husbandry, or in the said arts, not being lawfully hired as a servant with any nobleman or gentleman, or having any farm or other holding whereupon he may employ his labour, shall upon request made by any person using the mystery wherein such person hath been exercised, be obliged to serve him as a servant therein, on pain of imprisonment.

By the same statute, persons are compellable to serve in husbandry, by the year, with any person that keepeth or useth husbandry, and who will require any proper person to serve; and the justices of peace have authority hereon, and to assess the wages of such servants in husbandry, order payment, &c. Also two justices, and mayors or head officers of any city or town, may appoint any poor woman of the age of twelve years, and under forty, unmarried, to go to service by the year, &c. for such wages and in such manner as they think fit: and if any such woman shall refuse to go abroad as a servant, then the said justices, &c. may commit such woman

until she is bound to service. If any master shall give more wages than assessed by the justice; or any servant takes more, or refuses to serve for the statute wages, they are punishable; but a master may reward his servant as he pleases, so as it be not by way of contract on the retainer: and a master cannot put away a servant, nor a servant depart before the end of his term, without some reasonable cause, to be allowed by one justice; nor after the end of the term, without a quarter's warning given before witnesses; if a master discharges a servant otherwise, he is liable to a penalty of forty shillings: and where servants quit their service, testimonials are to be given by two constables and two householders, &c. declaring their lawful departure; and a servant not producing such a testimonial to the constable where he designs to dwell, is to be imprisoned till he gets one; and in default thereof, he is whipped as a vagabond; masters retaining them without such a testimonial, shall forfeit five pounds. 5 *Eliz. c. 4.* and see *Labourers*.

So much of the above statute and of the 1 *Jac. 1. c. 6.* as authorized magistrates to fix the price of wages was repealed by the 53 *Geo. 3. c. 40.*

It was long doubted whether the 5 *Eliz. c. 4.* gave magistrates jurisdiction generally over servants or restricted their authority to those employed in husbandry; but it has been decided that the act extends only to the latter. 6 *T. R. 583.*

By the 4 *Geo. 1. c. 34.* the powers given to justices of the peace by the 20 *Geo. 3. c. 19*; 6 *Geo. 3. c. 25.* (for these statutes see *Labourers*) and the 4 *Geo. 4. c. 29.* are extended to all apprentices and servants in husbandry, handicraft manufactures, and mining.

By the 5 *Geo. 4. c. 96.* for the consolidation of the laws relative to arbitration of disputes between master and servant, it is enacted (§ 2.), that certain subjects of dispute arising between masters and workmen, or between workmen and those employed by them in any trade or manufacture, may be settled and adjusted by the justices in the manner therein-after mentioned.

But nothing is to authorize justices to establish a rate of wages or price of labour, or workmanship, unless with the mutual consent of both master and workmen.

All complaints by any workman as to bad materials must be made within three weeks of his receiving the same, and as to any matter within six days after the cause of complaint.

By the 1 & 2 *Wm. 4. c. 36.* all former acts prohibiting the payment of wages in goods were abolished, with a view to a consolidation of their provisions under the 1 & 3 *Wm. 4. c. 37.* which enacts, that contracts for the hiring of artificers must be made in the current coin of the realm, and (§ 2.) must not contain any stipulations as to the manner in which the wages shall be expended.

By § 3. all wages must be paid to workmen in coin, or in bank notes if the latter consent, and payment in goods is declared legal; and § 1. artificers may recover their wages if not paid in coin.

§ 5. in an action brought for wages no set off shall be allowed for goods supplied by the employer, or by any shop in which the employer is interested; and (§ 6.) no employer shall have an action against his artificer for goods supplied to him on account of his wages.

The act imposes certain penalties for any infraction of its provisions, which may be recovered by distress. § 10. specifies the trades to which the statute applies; and by § 20, it is not to extend to domestic servants, or servants in husbandry.

Servants of another sort are called apprentices, as to whom see this Dictionary under that title.

A third species of servants are labourers, who are only regulated by the day or the week, and do not live *intra muros* as part of the family, concerning whom the statutes have made many very good regulations: 1. directing that all persons who have no visible effects may be compelled to work: 2. defining how long they must continue at work in summer

and in winter: 3. punishing such as leave or desert their work: 4. empowering the justices at sessions, or the sheriff of the county, to settle their wages: and, 5. inflicting penalties on such as either give, or exact, more wages than are so settled. 1 *Comm. c. 14.* See *Labourers*.

There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial capacity; such as stewards, factors, and bailiffs, whom however the law considers as servants *pro tempore*, with regard to such of their acts as affect their master's or employer's property. This leads to the consideration of the manner in which this relation of service affects either the master or servant. And, first, by hiring and service for a year, or apprenticeship under indentures, a person until recently gained a settlement in that parish wherein he last served forty days. See *Poor, IV.* In the next place, persons serving seven years as apprentices to any trade, had, by 5 *Eliz. c. 4. § 31.* an exclusive right to exercise that trade in any part of England. This law, with regard to the exclusive part of it, has by turns been looked upon as a hard law, or as a beneficial one, according to the prevailing humour of the times, which occasioned a great variety of resolutions in the courts of law concerning it, and at length it was repealed by 54 *Geo. 3. c. 96.* See *Apprentice, III.*

A master may by law correct his apprentice for negligence or other misbehaviour, so it be done with moderation: though if the master or master's wife beats any other servant of full age, it is good cause of departure; or at least of complaint to a magistrate, in order to be discharged. 5 *Eliz. c. 4.*

It has been held that a master is not liable on an implied *assumpsit* to pay for medical attendance on a servant, who has met with an accident in his service. 3 *Bos. & Pul. 247.*

Next as to frauds or robberies committed by servants.

Where a servant damages goods of his master, action lies against him; and being employed to sell goods in his master's shop, if the servant carries away and converts them to his own use, action of trespass may be brought by the master against the servant; for the servant cannot meddle with them in any other manner than to sell them. 5 *Rep. 14*; 1 *Leon. 88*; *Moor, 244.* But if a servant be robbed, without his default, &c. he shall be excused, and allowed it in his account. 1 *Inst. 9.*

By the common law it was not larceny in any servant to run away with the goods committed him to keep, but only a breach of civil trust. 4 *Comm. c. 17. p. 230.* But if the servant had not the possession, but only the care and oversight of the goods, as the butler of the plate, the shepherd of the sheep, and the like, the embezzling of them was felony, even at the common law. 1 *Hal. P. C. 506.* And it seems that now the judges, in every case, determine that the property of the master, delivered by him into the custody of the servant, still remains in the possession of the master; and if it is embezzled by the servant, or converted to his use, he is guilty of felony. And when servants are convicted of robbing their masters, as the security of families so much depends on their honesty, and as the violation of the confidence reposed in them is a high aggravation of the crime, they are always punished with the utmost rigour which the law admits. 4 *Comm. c. 17. p. 230. n.*

It was thought reasonable and consistent to consider the statute 21 *Hen. 8. c. 7.* (now repealed) as in the nature of a declaratory law: and this view of it seemed to be confirmed by the doctrines that, notwithstanding the exception contained in it as to apprentices and servants under eighteen, yet such persons taking their master's goods, delivered to them by way of charge, were guilty of felony at common law. 1 *Hale, 667, 668.*

Where a banker's clerk informed a customer of the house that he had paid in money to his credit, and thereby induced the customer to give him a check for the amount, which the clerk received, and then to prevent a discovery made fic-

tutious entries in the books; this was holden to be larceny. *Hammond's case*, O. B. 1812; 2 *Leach*, 1083; 4 *Taunt.* 304.

By the 7 & 8 Geo. 4. c. 29. § 46. any clerk or servant stealing any chattel, money, or valuable security belonging to or in the possession or power of his master, may be transported not exceeding fourteen years, or be imprisoned, &c.

For the clauses of this act relating to embezzlements by clerks or servants, see *Embezzlement*. And see further *Larceny*.

If a servant receive money in the county of A. and being called upon to account in B. and there deny the receipt, he may be indicted for the embezzlement in the latter county. 3 *Bos. & Pul.* 596.

The repealed statute 29 Geo. 3. c. 86. was held to apply to the case of a servant embezzling money received from a person to whom the master gave marked money to be laid out in his shop, for the express purpose of trying the honesty of the servant. *Whittingham's case*, O. B. 1801, 2 *Leach*, 912. and more solemnly determined by the judges in *Hedge's case*, O. B. 1809, 2 *Leach*, 1033. But when the property taken has been delivered to the servant by the master himself, the embezzlement of it was not punishable under that act. *Peck's case*, MS. cited in *Russell on Crimes*, lib. 4. c. 15. where it is added, that it is usual in indictments on this statute to add a count for larceny at common law: that such counts may be joined in the same indictment, see *R. v. Johnson*, 3 *Maul. & Selw.* 549. the statute having made the embezzlement a larceny.

By 15 Geo. 2. c. 13. § 12. any officer or servant of the Bank of England, intrusted with or having any note, bill, dividend warrant or security, money or effects of the bank, or of any person lodged with the bank, and who shall secrete or embezzle the same, is declared guilty of felony without clergy. Paid notes on the file seem to be effects within this act. 2 *Leach*, 943. Exchequer bills, actually purchased by the bank, though informally signed by a person not duly authorized, are also effects within the meaning of this act. *Aslett's case*, 2 *Leach*, 958.

By 50 Geo. 3. c. 59. (amended and rendered more effectual by the 2 *Wm.* 4. c. 4.) for preventing the embezzlement of money or securities belonging to the public, by any collector, receiver, or other person intrusted with the receipt, care, or management thereof, all such persons misapplying any such money, or giving in false statements or returns, are punishable as for misdemeanors.

The embezzlement and stealing of letters or their contents (either whole or half bank notes, &c.) by servants of the post-office, is made felony without benefit of clergy by the 5 Geo. 3. c. 25. § 17; 7 Geo. 3. c. 50. § 1; 42 Geo. 3. c. 81. § 1; and 52 Geo. 3. c. 143. § 2; and their aiders and abettors by 52 Geo. 3. c. 143. § 4. are punishable in like manner, and may be tried either before or after the principal felon. By 5 Geo. 3. c. 25. § 19. and 7 Geo. 3. c. 50. § 3. Servants of the post-office receiving letters and money for postage, and destroying the letters, or taking more than due postage to their own use, are made guilty of single felony.

Several acts have been passed for punishing persons employed in manufactures embezzling materials entrusted to them to work up, the principal of which are shortly noticed under the title *Manufactures*.

Lastly, we come to consider how strangers may be affected by this relation of master and servant, or how a master may behave towards others on behalf of his servant, and what a servant may do on behalf of his master.

And first, the master may maintain, that is, abet and assist his servant in any action at law against a stranger; whereas in general it is an offence against public justice to encourage suits and animosities, by helping to bear the expense of them, and is called in law maintenance. 2 *Roll. Abr.* 115. A master may also bring an action against any man for beating, confining, or disabling his servant; but in such case he must

assign, as a special reason for so doing, his own damage by the loss of his service; and this loss must be proved upon the trial. 9 *Rep.* 113.

This is an action on the case, generally called a *per quod servitium amisit*; and the servant may also maintain his action of battery or imprisonment against the aggressor. See 1 *Comm.* 429; 3 *Comm.* 142.

This action by a master for assault, &c. on his servant, has been contrived, by a species of fiction, to be extended to a parent, to enable him to recover a pecuniary compensation, under some circumstances, for the seduction of his daughter. See 3 *Comm.* 142, n.

A master likewise may justify an assault in defence of his servant, and a servant in defence of his master; the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master. 2 *Roll. Abr.* 546.

Also if any person do hire or retain any servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them; but if the new master did not know that he is my servant, no action lies, unless he afterwards refuse to restore him upon information and demand. *F. N. B.* 167, 168; *Winch*, 51.

In case an action is brought for enticing away, or retaining or employing a servant, it is advisable to give notice to the intended defendant, that the party is servant to the plaintiff, and to demand him; and proving such notice and a subsequent employment during the time for which the plaintiff hired, retained, took, and engaged the servant, will entitle the plaintiff to a verdict. To this proof must be added proof of the contract between the plaintiff and the servant, and that the time was not expired. But if a man do retain another's servant, not knowing that he was in the service of the other, he shall not be punished for so doing, if he do not retain him after notice of his first service; and if a person do retain one to serve him forty days, and another do afterwards retain him to serve for a year, the first covenant is avoided, because the retainer was not according to the statute. *New Nat. Brev.* 314, 375.

An action will lie for continuing to employ the servant of another after notice, though the employer did not procure the servant to leave his master, or knew when he first employed him that he was the servant of another. 6 *T. R.* 221.

The master of an apprentice seduced to work for another may either sue in *tort* for the seduction, or may bring assumpsit for work and labour done by the apprentice for a person who seduced and employed him. 1 *Taunt.* 112; 3 *M. & S.* 191; 4 *Taunt.* 876.

The reason and foundation upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics, acquired by the contract of hiring, and purchased by giving them wages. 1 *Comm.* 429.

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given or implied, *nam qui facit per alium, facit per se.* 4 *Inst.* 109. Therefore if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. If an inn-keeper's servant rob his guests, the master is bound to restitution; for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery, *nam qui non prohibet, cum prohibere possit, jubet.* See *Inns.* So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master.

for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all, is implied a general command. 1 *Comm.* 430.

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it. If I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm without the owner's knowledge, the owner must stand to the bargain, for this is the steward's business. A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants, and the principal must answer for their conduct; for the law implies that they act under a general command, and without such a doctrine as this, no mutual intercourse between man and man could subsist with any tolerable convenience. If I casually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant. But if I casually sell him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority. 1 *Comm.* 430.

If a man has a servant known to be such, and he send him to fairs and markets to buy or sell, his master shall be charged if the thing come to his use; though if the servant makes a contract in his master's name, the contract will not be binding unless it were by the master's command or assent; and where a servant borrows money in his master's name, without order, that does not bind the master. *Doct. & Stud. dial.* 2. c. 42. A servant buys things in his own name, the master shall not be charged, except the things bought come to his use, and he have notice of it. *Kitch.* 371.

A master used to give his servant money every Saturday, to defray the charges of the foregoing week, and the servant kept the money; *per Holt, C. J.*, the master is here chargeable; for the master at his per. ought to take care what servant he employs; and it is more reasonable that he should suffer for the debts of his servants, than strangers and tradesmen who do not employ them. 3 *Salk.* 234. Where a servant usually buys goods for his master upon tick, and takes up things in his master's name, but for his own use, the master is liable; but it is not so where the master usually gives him ready money. If the master gives the servant money to buy goods for him, and he converts the money to his own use, and buys the goods upon tick, yet the master is answerable if the goods come to his use, otherwise he is not. Also a note under the hand of an apprentice shall bind his master, where he is allowed to deliver out notes, though the money is never applied to the master's use; but if he be not allowed or accustomed to deliver out notes, his note shall not bind the master, if the money be not applied to the use of the master. 3 *Salk.* 234, 235.

The act of a servant shall not bind the master, unless he acts by authority of his master; and therefore if a master sends his servant to receive money, and the servant instead of money takes a bill, and the master as soon as told thereof disavows it, he is not bound by his payment; but acquiescence, or any small matter, will be proof of his master's consent, and that will make the act of the servant the act of his master. 2 *Salk.* 442. For what is within the compass of a servant's business the master shall be generally chargeable, and also have advantage of the same against others. *Noy's Max.* An assent of the servant, by order and appointment of the master, shall bind his master; and a promise to my servant is good to me. If my bailiff buy cattle to stock my ground, I shall be chargeable in debt for the money, and

if he sell corn for me, I may have action in my own name against the buyer. *Bro. 24; Godb.* 360. If one owe me money, and I send my servant for it, and he pay it to him, this is a good payment and discharge, though the servant do not bring the same to me; but if I send him not, it is otherwise. *Doct. & Stud.* 138.

If a servant is cozened of his master's money, the master may have action on the case against the person that cozened him. 9 *Rep.* 113; 10 *Rep.* 130; 1 *Roll. Abr.* 98.

If a servant, lastly, by his negligence, does any damage to a stranger, the master shall answer for his neglect; if a smith's servant lames a horse while he is shoeing him, an action lies against the master and not against the servant. But in these cases the damage must be done while he is actually employed in the master's service, otherwise the servant shall answer for his own misbehaviour. Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master, because this negligence happened in his service; otherwise, if the servant going along the street with a torch, by negligence set fire to a house, for there he is not in his master's immediate service, and must himself answer the damage personally. But now the common law is, in the former case, altered by the 6 *Ann. c. 31.* which ordains that no action shall be maintained against any in whose house or chamber any fire shall accidentally begin, for their own loss is sufficient punishment for their own or their servant's carelessness. See *Waste*. But if such fire happens through negligence of any servant (whose loss is commonly very little), such servant shall forfeit 100*l.* to be distributed among the sufferers; and in default of payment shall be committed to some gaol or house of correction, and there kept to hard labour for eighteen months. See 14 *Geo. 3. c. 78.* and title *Fire*.

A master is also chargeable if any of his family layeth or casteth any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his majesty's liege people, for the master hath the superintendence and charge of all his household. 1 *Comm.* 431. See *Nuisance*.

A. having a house by the road-side, contracted with B. to repair it for a stipulated sum; B. contracted with C. to do the work, and C. with D. to furnish the materials; D.'s servant brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned: held that A. was answerable for the damage sustained. 1 *B. & P.* 404.

No action lies against a steward or agent for damage done by the negligence of those employed by him in the service of his principal; but the principal is liable. 6 *T. R.* 411. For in such cases the intermediate agents are not liable; the action must be brought either against the hand committing the injury, or against the superior for whom the act is done. See 4 *Taunt.* 649; 3 *Camp.* 402; 3 *Taunt.* 314.

A master is answerable for the actions and trespasses of his servant in many cases, but not for trespass of battery, &c. nor in criminal cases, unless done by his command. *Noy's Maxims.* 99. And if the master order his servant to distrain another man's cattle, and after he hath distrained he kills or abuses the distress, the master shall not answer it. *Noy.* 111.

An action of trespass, and not on the case, is the proper remedy for an injury done by the wilful act of a servant in driving his master's carriage against that of another; on the contrary, case, and not trespass, is the remedy when such act is done negligently; but if it be done wilfully, without the assent or knowledge of the master, no action can be supported against the master. 6 *T. R.* 125, 123, note; 2 *H. Bla.* 442, 443; 1 *East.* 106; and see 6 *T. R.* 659.

If a servant, in driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce an accident, the master is not liable;

and it is a question for the jury, whether the mischief arose from accident or mere negligence in the servant, or whether it arose from his wilful misconduct. 1 *East*, 106; *Croft v. Alston*, 4 B. & A. 590.

Where the carriage or horses are jobbed, as it is called, questions have arisen whether the hirer is answerable, as master, from mischief arising from the negligence of the coachman. When the party appoints the coachman, and furnishes the horses and hires the carriage, it has been held that he is well described as the owner and proprietor of the carriage; and there can be no doubt that he would be held liable, as master, for the negligence of the coachman in driving it. But where the owner of a carriage hired the horses for the day, to draw, and the owner of the horses appointed the coachman, in an action brought against the owner of the carriage, for damage occasioned by the negligence of the coachman, Abbott, C. J. and Littleale, J. held, that the defendant was not liable, since the coachman was not his servant. Bayley, J. and Holroyd, J. held, however, the contrary. 4 B. & A. 590; 5 B. & C. 547; and see 5 *Esp. Ca.* 95, 263; 12 *Ves.* 114. See further, *Trespass*.

A servant may be charged in trover, although the act of conversion be done by him for the benefit of his master. 4 *M. & S.* 259.

A master sends his servant with deceitful wares to market, and orders him to sell them, but says not to whom: if he sells them, no action will lie against the master. Though if he had bid the servant sell them to such a man in particular, and he had done so, the master would be chargeable in an action on the case. 11 *Edw.* 4; *Kitch.* 185. Where a carrier's servant loses things delivered to him, the master must answer it, and action lies against him; and if goods be undertaken to be carried safely for hire, but by negligence are spoiled, it has been held that whosoever employs another is answerable for him, and undertakes for his care to all that make use of him. 2 *Salk.* 440. See *Carrier*. If a surgeon undertakes the cure of a person, and, by sending medicines by his servant, the wound is hurt and made worse, the patient shall have action against the master, and not against the servant. 18 *Hen.* 8.

In all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehaviour, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim that no man shall be allowed to make any advantage of his own wrong. 1 *Comm.* 432.

The law which obliges masters to answer for the negligence and misconduct of their servants, though oftentimes apparently severe on an innocent person, is founded upon principles of public policy; in order to induce masters to be careful in the choice of their servants, upon whom both their own security and that of others so greatly depends. And to prevent masters from being imposed upon in the characters of their servants, it is enacted by 32 *Geo.* 3. c. 56. that if any person shall give a false character of a servant, or a false account of his former service; or if any servant shall give such false account, or shall bring a false character, or shall alter a certificate of a character, he shall, upon conviction before a justice of the peace, forfeit 20*l.* with 10*s.* costs. The informer is a competent witness; but if any servant will inform against an accomplice, he shall be acquitted.

An action was tried at the sittings after Trinity term, 1799, at Guildhall, against a person who had knowingly given a false character of a man to the plaintiff, who was thereby induced to take him into his service. But this servant soon afterwards robbed his master of property to a great amount, for which he was executed. And the plaintiff recovered damages against the defendant to the extent of his loss. This

was an action of great importance to the public, and there can be no doubt but it was founded in strict principles of law and justice. 1 *Comm.* 432, in n.

As to how far an action for libel or slander may be maintained against a master for giving a character of a servant, see *Libel*, 1.

See further, *Combinations, Labourers, Larceny, Manufactures, &c.*

SERVI. Bondmen, or servile tenants. Our northern *Servi* had always a much easier condition than the Roman slaves. *Servi non in nostrum morem descriptis per familiam ministeriis utuntur. Snam quisque sedem, suos penates regit. Frumenti modum dominus, aut pecoris, aut vestis, colono, injungit, et servus hactenus paret.—Tacitus de Moribus Germanorum.* Which plainly describes the condition of our Saxon and Norman servants, natives, and villains, whose servitude did more respect their tenure than their persons. No author has fixed the distinction between *Servi* and *Villains*; though undoubtedly their servile state was different, for they are all along in the Domesday-book distinguished from each other. So in Burcester there were, *Quinquus Servi, et viginti octo Villani, &c.* It is supposed the *Servi* were those whom our lawyers have since called pure villains, and villains in gross, who, without any determined tenure of land, were at the arbitrary pleasure of the lord appointed to such servile work, and received their wages or maintenance at the discretion of the lord. The other were of a superior degree, and were called *villani*, because they were *villæ et glebæ adscripti*, i. e. held some cottage and lands, for which they were burdened with such stated servile offices, and were conveyed as appurtenant to the manor or estate to which they belonged. See *Kennett's Glossary*.

The name and quality of their bondage do often occur in Domesday register; and their condition, no doubt, was worse than that of the *Bordarii* or *Cotseti*, who performed likewise some servile offices for their lord, and yet as to their persons and goods were not obnoxious to servitude as the proper *Servi* were. These were of four sorts: 1. Such as sold themselves for a livelihood. 2. Debtors that were to be sold for being incapable to pay their debts. 3. Captives in war, retained and employed as perfect slaves. 4. *Nativi*, such as were born servants, and by such descent belonged to the sole property of the lord. All these had their persons, their children, and their goods, at the disposal of their lord, incapable of making any wills, or giving away any thing. *Cowell*. There are also said to be *servi testamentales*, those which we now call covenant servants. *Leg. Athelst.* c. 31. See *Slaves, Villain*.

SERVICE, servitium.] That duty which the tenant, by reason of his fee or estate, oweth unto the lord.

Our ancient law books make many divisions of it; as into personal and real, free and base, continual or annual, casual and accidental, intrinsic and extrinsic, &c. *Bract.* lib. 2. *Brit.* c. 66; 4 *Co. Rep.* 9.

Personal service is where something is to be done by the person of the tenant, as homage and fealty; and real was subject to wards and marriages, when in use.

Annual and certain service is rent, suit of court to the lord, &c.

Accidental services are heriots, reliefs, and the like. And some services are only for the lord's benefit, and some *pro bono publico*. *Co. Copyhold*, 22; *Co. Litt.* 222; 22 *H.* 4. 5.

Also services are said to be entire; of chattels valuable such as an ox; or things pleasurable, as a hawk, &c. *A.* 3. so are those personal, and consisting of manual work, or exercise some office, &c.

Magna Charta, 9 *Hen.* 3. c. 32. ordains, that no freeman shall sell so much of his lands, but that of the residue the lord may have his services. In feoffments to a man and his heirs, the feoffee shall hold the land of the lord by the same service

as the feoffer, &c. 18 Ed. 1. And where services are entire, and cannot be divided, upon the alienation of parcel of the lands by the tenant, the services shall be multiplied, and every alienee render the whole service; though by the purchase of parcel by the lord, the whole is extinct, except in case of fealty and heriot custom. 6 Rep. 1; *Wood's Inst.* 139. See further, *Tenures*.

Personal services of hosting and hunting, anciently due to superiors in Scotland, were abolished by 1 Geo. 1. st. 2. c. 54. Personal services relative to agriculture or lawful business, stipulated and expressed, may be demanded; but where annual, and not exacted within the year, are lost for that year. Services by tenants used and wont, excepting what relates to mill services, were abolished by 20 Geo. 2. c. 50.

SERVICE OF AN HEIR. By the law of Scotland, before an heir can regularly acquire a right to the estate of the ancestor, he ought to be served heir; which is one of the old forms of the law of Scotland proceeding upon a writ, and including in it the decision of a jury fixing the right and character of the heir to the estate of the ancestor.

SERVICE AND SACRAMENTS. The blessed sacrament to be administered in both kinds. 1 Edm. 6. c. 1. For the uniformity of the service and administration of sacraments. 2 & 3 Edm. 6. c. 1; 5 & 6 Edm. 6. c. 1; 1 Eliz. c. 1; 3 Eliz. c. 1; 13 & 14 Car. 2. c. 4. The penalty of disturbing a preacher or priest saying divine service, or pulling down an altar, &c. 1 Mar. st. 2. c. 3. The penalty of not repairing to church on Sundays and holidays. 1 Eliz. c. 2. See *Sunday*. The bible and divine service shall be translated into the Welch tongue. 5 Eliz. c. 23. All ecclesiastical persons shall read and subscribe to the book of common prayer, &c. 13 & 14 Car. 2. c. 14; 15 Car. 2. c. 6. See *Parson*. Allowance of impediments for not rendering the service extended to the certificate of subscription. Reading the articles to indemnify against neglect in point of time. 23 Geo. 2. c. 28. See further, *Religion*, and the references there.

SERVICE SECTARIAL. Worldly service, contrasted to spiritual and ecclesiastical. 1 Edm. 6. c. 1.

SERVITIUM. Certain writs touching servants and domestics, violating the statutes made against their abuses; which see in *Reg. Orig.* fol. 189, 190, 191.

SERVITIUM TENEMENT. The estate in respect of which a service is owing; as the *Dominant Tenement* is that to which the service is due. See *Tenure*.

SERVITIUM FEODALE ET PREBIALE. Was not a personal service, but only by reason of the lands which were held in fee. *Bracton*, lib. 2. c. 10. par. 7. See *Tenure*.

SERVITIUM LORICIS. A service which did not belong to the chief lord, but to the king. It was called *foriscom* and *franchum*, because it was done *foris et extra servitium* *quod fit domino capitali*. And we find several grants of liberties with the appurtenances, *salvo forensi servitio*, &c. *Mon.* Ang. 1. 48.

SERVITIUM INTRINSECUM. That service which was due to the chief lord alone from his tenants within his manor. *Bracton*, lib. 2; *Fleta*, lib. 3.

SERVITIUM LIBERUM. A service to be done by feudatory tenants, who were called *liberi homines*, and distinguished from vassals, as was their service; for they were not bound to any of the base services of ploughing the lord's land, &c. but were to find a man and a horse, or go with the lord into the army, or to attend his court, &c. and sometimes it was called *servitium liberum armorum*; as in an old rental of the manor of South Malling, in Essex, mentioned by Somner in his treatise of *Gavelkind*, p. 56. See *Tenure*.

SERVITIUM REGALE. Royal service, or the prerogatives that within a royal manor belonged to the lord of it; which were generally reckoned to be the following, viz. power of jurisdiction in matters of property; and of life and death in felonies and murders; right to waifs and estrays; minting of money; assize of bread and beer; and weights and mea-

sures. All which privileges, it is said, were annexed to some manors by grants from the king. *Paroch. Antiq.* 60. See *Manor*.

SERVI TESTAMENTALES. Covenant servants; mentioned in the laws of King *Athelstan*, c. 31. See *Servant*.

SERVITIUS ACQUIETANDIS. A writ judicial for a man distrained for services to one, when he owes and performs them to another for the acquittal of such services. *Reg. Judic.* 27.

SERVITOR, servulus.] A serving man; particularly applied to scholars in the colleges of the universities, who are upon the foundation.

SERVITORS OF BILLS. Such servants or messengers of the marshal of the King's Bench as were sent abroad with bills or writs to summon men to that court. 2 H. 4. c. 23.

SERVITUDES. Burdens affecting property and rights. *Scotch Dict.* See *Tenures*.

They nearly correspond with easements in the English law.

SESSION, COURT OF, in Scotland. The highest civil court in Scotland. The judges are styled lords of council and session. The title of the court is derived from those formerly intrusted with the highest civil jurisdiction. By the act 1425, c. 65, the court of session was established, and continued till 1469, when its jurisdiction was restored to the king and council; and in 1503, the king's daily council was ordered to sit in Edinburgh; and the jurisdiction of those two courts, as well as their respective titles of council and session, were by the acts 1532 and 1537, c. 36, transferred to the present court, which with its members and officers was incorporated under the title of the college of justice. The judges consisted originally of seven churchmen and seven laymen, and a president; the abbot of Canbuskenneth being the first president.

By the articles of union between Scotland and England, no person can be appointed a judge who has not served as an advocate or principal clerk of session for five years, or as a writer to the signet for ten years. The judge must be at least 25 years of age. Besides the 15 ordinary lords, it was anciently the practice for the crown to name extraordinary lords; but this power was renounced by the act 10 Geo. 1. c. 19, by which the trial and admission of the ordinary lords is regulated. Of this court of 15, nine were a quorum. But see *post*.

By 48 Geo. 3. c. 151, it was enacted, that the judges or lords of session shall usually sit in two divisions, the lord president of the whole court and seven of the ordinary lords forming the first division, and the lord justice clerk and the six other ordinary lords making the second division; four judges in each division to be a quorum: the judges in each division to exercise the same powers as before. Judges of each division may state questions of law to the judges of the other. Regulations for transacting the business to be made by acts of *sederunt* by the whole court of session. Regulations are also introduced with respect to appeals to the House of Lords. His majesty was empowered to appoint a commission to inquire into the forms of process in the court of session, and to report in what civil causes trial by jury might be usefully established.

By 55 Geo. 3. c. 42, to facilitate the administration of justice in Scotland, by the extending trial by jury to civil causes, his majesty was empowered to commission one chief judge, and two other judges, before whom the trial of issues may be had, to be called "Lords Commissioners of the Jury Court in civil causes." To this jury court, either division of the court of session in all cases brought before them wherein matters of fact were to be proved, were authorized to order and direct, by special interlocutor, such issues to be sent as might appear to them expedient for the due administration of justice, in order that such issues might be there tried by a jury according to the directions of the act. By § 44. of this act, the commissioners or judges of the jury court were required to make annual reports to parliament; and by § 45.

the act was declared in force for seven years. But by 59 Geo. 3. c. 35. the reports were declared no longer requisite, (§ 55); and (by § 36.) the jury court under the act 55 Geo. 3. was declared permanent, and that it should remain in all time coming a part of the judicial establishment of Scotland, and of the college of justice therein, subject to regulations by parliament.

By the 6 Geo. 4. c. 120. certain provisions were made relative to the constitution of the jury court, which were to continue in force for a limited period; and in the meanwhile his majesty was authorized to appoint persons to inquire, among other things, at what time and in what manner the union of the benefit of jury trial in civil causes, with the jurisdiction of the court of session, might be best accomplished.

Finally, by the 11 Geo. 4. and 1 Wm. 4. c. 69. it was enacted, that trial by jury in civil causes should be united with the ordinary administration of justice in the court of session in Scotland, and that the jury court should after such union cease.

§ 20. enacts, that when vacancies shall occur, the permanent lords ordinary shall be reduced to five, so that the total number of judges comprising the court of session, including the lord president and lord justice clerk, shall be limited to 13.

By § 21. the high court of admiralty is abolished, and its jurisdiction transferred to the court of session.

By the 2 Wm. 4. c. 5. the judges of the court of session are empowered to make regulations for carrying on the business of the court when interrupted by the death or necessary absence of any of the judges thereof.

By 55 Geo. 3. c. 70. the formation and arrangement of the judicial and other records of the court of session are regulated under an officer to be appointed by the lord president of the college of justice, to be keeper of the records of the court.

SESSION, *sessio*.] A sitting of justices in court upon their commission; as the sessions of oyer and terminer, &c.

SESSION OF PARLIAMENT, *sessio parliamenti*.] The sitting of the parliament; the session of parliament continues till it be prorogued or dissolved, and breaks not off by adjournment. 4 Inst. 27. See *Parliament*.

SESSION, GREAT, of Wales. By the 1 Will. 4. c. 70. the Courts of Great Session in Wales are abolished, and the proceedings in Wales now issue out of the courts at Westminster, and two of the judges of the superior courts hold the circuits in Wales and Cheshire, as in other English counties.

SESSION OF GAOL DELIVERY. A session held for delivering a gaol of the prisoners therein being. See *Gaol Delivery*; *Justices*.

SESSIONS OF THE PEACE.

There are three different kinds of sessions holden by justices of peace: 1. General sessions, which may be holden at any time of the year, for the general execution of the authority of the justices; 2. The general quarter sessions, which are holden at stated times in the four quarters of the year, as appointed by statute; and 3. A special or petty sessions, which is holden on any special occasion for the execution of some particular branch of the authority of the justice. 2 Hawk. c. 8. § 47.

By the 1 Will. 4. c. 70. § 35. in the year 1831, and afterwards, the justices of the peace in every county, riding, or division, (in England and Wales, see the title of the statute,) for which quarter sessions of the peace, by law, ought to be held, shall hold such sessions in the first week after the 11th of October, in the first week after the 28th of December, and the first week after 31st of March, and in the first week after 24th of June.

But by the 4 & 5 Will. 4. c. 47. in order to prevent the

interference of the Spring assizes with the April quarter sessions, it is enacted, that the justices in every county, at the Epiphany sessions, may name, if they see occasion, two of their body as soon as may be, after the time for holding the assizes shall be appointed, to fix the day for holding the next quarter sessions for such county, so as such time shall not be earlier than the 7th of March, or later than the 22d of May.

In the county of Middlesex the justices are directed by the 14 Hen. 6. c. 4. to keep their sessions twice in a year, at least, and more often (if need be) for any riot, or forcible entry. And it has long been customary, on account of the multiplicity of business in this county, to hold eight sessions every year, viz. four general quarter and four general sessions.

And it was held in a recent case that the justices of Middlesex having, in addition to the four general quarter and four quarter sessions they had been in the habit of holding appointed other original intermediate sessions; that they had a right to do so, and that an indictment found at one of such sessions was valid. 6 C. & P. 96.

If a sufficient number of justices do not appear on the day appointed for holding the quarter sessions, they may still be legally held, if a proper number meet on any day during the week after any of the days specified in the act of parliament. For though there is not time within that week to summon a sessions *de novo*, yet a sessions may be holden without a previous summons; and the justices, when once assembled during the proper sessions week, may then adjourn to another day, and issue their precept to the sheriff against the day of adjournment. But when a sessions is holden by the justices without a previous summons, no man shall lose any thing for his default of appearance there because no man had a proper notice of their sitting. Lamb. 380; 2 Hawk. c. 8. § 41. In large and populous counties as in Yorkshire, Lancashire, and Surrey, it is the custom to hold the sessions by adjournment at different places in the county. Thus in Surrey, when the justices meet at the general quarter sessions, a day of adjournment is fixed by the justices, such a day having been generally agreed upon before; and notice is given to all the magistrates by the clerk of the peace, as well as advertised in the newspapers. The grand jury and the petit jury, before they are dismissed from their attendance, are informed that their attendance will be required at the day to which the court intend to adjourn; and they are again summoned for that purpose by the sheriff. 3 Chit. Burn's J. 204, note. The adjournment, however, ought never to be beyond the time of meeting of the next quarter sessions; for the justices cannot continue one sessions to a day subsequent to the time appointed by the statute for holding another original sessions. *Re v. Grince*, 19 L. M. Ab. 358. Therefore, if the justices were to hold a general sessions of the peace, pending a continuation of the general quarter sessions by adjournment, it seems, that such general sessions would supersede and put an end to the adjourned quarter sessions, 5 Burn's J. 204, note.

The sessions may be held at any place within the county for which they purport to be holden, and before any two justices of the same county, one of them being of the *quorum*. And any two such justices may direct their precept under their *teste*, directed to the sheriff, for the summons of the sessions thereby commanding him to return a grand jury before them or their fellow-justices, at a certain place, and to give notice to all stewards, constables, and bailiffs of liberties, to be present and to do their duties at such day and place, and to proclaim in proper places throughout his bailwick, that such sessions will be holden at such day and place, and to attend there himself to do his duty. 2 Hawk. c. 8. § 12. This precept should be tested fifteen days before the return, and ought forthwith to be delivered to the sheriff, that he may have sufficient time to fulfil its requisitions.

The Sessions of the Peace is a court of record, and is held before two or more justices of the peace, one of which must be of the *quorum*. The jurisdiction of this court, by 34 *Edw. 3. c. 1.* extends to the trying and determining all felonies and trespasses whatsoever; though they seldom, if ever, try any capital offence; their commission providing that, if any case of difficulty arises, they shall not proceed to judgment, but in the presence of one of the justices of the Courts of King's Bench or Common Pleas, or one of the judges of assize. And therefore murders, and other capital felonies, are usually remitted for a more solemn trial to the assizes.

The sessions have cognizance of all offences which tend to a breach of the peace, except forgery and perjury. 2 *East*, 18. The general words in the commission of the peace including all trespasses, this comprehends not only direct breaches of the peace, but also all such offences as have a tendency thereto; and on this ground, conspiracies and libels, or any illegal solicitations, attempts or endeavours to commit crimes, have been holden to be cognizable by the sessions. 2 *East*, 28; 3 *Salk.* 194; 3 *Burr.* 1320; 1 *Bl.* 369.

They cannot take cognizance of forgery as a cheat; but over other cheats in general their jurisdiction is undoubted. 1 *East*, 173. 183. To solicit a servant to steal his master's goods is a misdemeanor indictable at the sessions, although no theft were actually committed. 2 *East*, 5.

An indictment lies at the quarter sessions, for lighting fires in the croft contrary to 47 *Geo. 3. st. 2. c. 98.* and if it be removed, and the defendants be tried, and convicted before a judge *ad nisi prius*, the Court of King's Bench shall award sentence. 4 *M. & S.* 71.

The justices cannot try any new-created offence, as usury, without express power given them by the statute which creates it. 4 *Mod.* 379; *Salk.* 400; *Ld. Raym.* 1144. But there are many offences, and particular matters, which by particular statutes belong properly to this jurisdiction, and ought to be prosecuted in this court: as, the smaller misdemeanors against the public or commonwealth, not amounting to felony; and especially offences relating to the game, highways, alehouses, bastard children, the settlement and provision for the poor, vagrants, servants' wages, and apprentices. Some of these are proceeded upon by indictment, and others in a summary way by motion and order thereupon; which order may for the most part, unless guarded against by particular statutes, be removed into the Court of King's Bench, by writ of *certiorari facias*, and be there either quashed or confirmed.

The sessions have, like every other court, the power to fine for a contempt committed in the face of the court. 4 *B. & A.* 334. But they cannot award an attachment for a contempt in disobeying any of their orders; the ordinary and proper method being by indictment. 2 *Sess. Cas.* 176; 2 *Burr.* 800; 8 *East*, 41; 5 *Burn's J.* 214.

Where a power is given to the sessions to inquire of, hear and determine any offence, it must be understood to mean, by the common law mode of proceeding, viz. either by indictment, or presentment. 4 *T. R.* 409; *Dalt.* 469.

The justices at sessions are not obliged any more than other courts to give any reason for their judgment in the orders made by them. 4 *Burr.* 2102; 2 *Salk.* 607.

The whole of the sessions, like the term of the courts at Westminster, is considered but as one day in law, consequently the justices may alter and set aside their own judgments, or orders, at any time during the sessions. 2 *Salk.* 608; 1 *Str.* 383. But they cannot do so at any subsequent sessions. See 1 *M. & S.* 442.

When the sessions are authorized to try any appeal, they have an incidental authority to adjourn it, after it is once properly lodged, if the adjournment be necessary for the advancement or convenience of justice; and the sessions are to judge of the proper occasion for doing so. 13 *East*, 352.

The Court of King's Bench has no jurisdiction to review the judgment of the sessions, except in a case sent up for their consideration. 4 *B. & A.* 86. Notwithstanding the judgment may be in some respects erroneous. 4 *B. & C.* 844; 8 *B. & C.* 137.

Neither are the justices punishable for what they do at sessions, if it arise only from an error in judgment. *Staud.* 173. But if they are guilty of some manifest act of oppression, or wilful abuse of power, or if there are flagrant proof of their having acted from corrupt motives: a criminal information will be granted against them. 2 *Barnard.* 249; 1 *Bl.* 432; 7 *T. R.* 374. See *Information*, II.

The records or rolls of the sessions are committed to the custody of a special officer, denominated the *custos rotulorum*, who is always a justice of the *quorum*. The nomination of this *custos rotulorum* (who is the principal civil officer in the county, as the lord lieutenant is the chief in military command) is by the king's sign manual. And to him the nomination of the clerk of the peace belongs, which office he is expressly forbidden to sell for money. See *Custos*, &c.; *Clerk*, &c.

In most corporation towns there are quarter sessions kept before justices of their own, within their respective limits; which have exactly the same authority as the general quarter sessions of the county, except in a very few instances; one of the most considerable of which is the matter of appeals from orders of removal of the poor, which, though they be from the orders of corporation justices, must be to the sessions of the county, by 8 & 9 *Will. 3. c. 30.* In both corporations and counties at large, there is sometimes kept a special or petty session, by a few justices, for despatching smaller business in the neighbourhood between the times of the general sessions; as for licensing alehouses, passing the accounts of parish officers, and the like.

By the 59 *Geo. 3. c. 28.* for remedying the inconveniences resulting from the great increase of business at the quarter sessions, it is enacted that whenever any court of quarter sessions, or general session of the peace, shall be assembled for despatch of business, the justices present at the first day of the session may take into their consideration the state of the business likely to be brought before them; and if it is likely to occupy more than three days, they may appoint two justices, one being of the *quorum*, to sit apart in some place near the court, and determine such business as shall be referred to them, while the other justices proceed in despatching other business; and all such proceedings shall be valid and enrolled: and the clerk of the peace shall appoint a person to record the proceedings of such two separate justices, as part of the records of the session, who shall be paid by the treasurer: an extra-cryer may be appointed by the justices.

As to the jurisdiction of the sessions, in points relative to the poor-laws, the following summary of decisions is taken from *Const's* edition of *Bott's Poor Laws*. For its contents with the subject, see *Poor*.

The sessions cannot make an original order of removal; but they may adjudge the pauper to be settled in any of the parishes that are parties to the order, although they cannot appoint a new place of settlement, for they can only affirm or quash the order in the whole or in part. Nor can they review an order, on which they have determined at a preceding sessions; but they may make a new order, vacating a former order made the same sessions: and it seems that on quashing an order of removal, they can only direct the pauper to be sent back to the respondent parish, and cannot adjudge his settlement in a third parish. If the magistrates present are equally divided, no order can be made; but whatever a majority decides is, as to matters of fact, conclusive, and also as to matters of law, unless they consent to a special case; but this they are not compellable to grant, nor a bill of exceptions lie.

In stating a special case, the sessions must state their conclusion from the facts, and not refer the evidence to the opinion of the superior court. But they need not set forth the reason for their judgment, nor even state the evidence upon which their judgment is founded; but if they do state all the evidence, the court will thereupon examine whether they have drawn a right conclusion; except in the case of fraud, for that is a fact that must be expressly found by the sessions; and the court will not infer it from the strongest evidence. But the court may send the case back, and order the sessions to inquire into that fact; as well as they may any other defective case, to be amended by stating a particular fact: but the sessions are not in this case obliged to hear new evidence, although they should proceed in it as if it were a new business. The court, however, will not send a case to be re-stated because the sessions have admitted hearsay evidence; or on affidavit that the clerk of the peace has not stated the case truly. Justices of both the contending parishes, who are rated to the poor, are excluded from voting at sessions, upon any question relating to the removal of a pauper belonging to either parish. 4 T. R. 81.

Not only the pauper removed, but the parish, or any of the parishioners, may appeal against an order of removal. The reasonable notice which the 9 Geo. 1. c. 7. requires to be given, before an appeal can be heard, means such notice as is usual in the practice of the particular session where the appeal is brought; but they cannot quash an order for want of notice, but must adjourn it to the next session, unless it clearly appears to the court that there has been sufficient time since the removal for the appellants to give notice, and come prepared, to try the appeal at the sessions where it is lodged. And it has been determined that this clause does not relate to the receiving, but to the hearing, of the appeal; and therefore they are bound to receive an appeal, though no notice has been given. The appeal must be to the next sessions after the order of removal is served, or the parties are aggrieved, whether it be an original or an adjourned session; but as to the time which shall intervene between the order and the appeal, respecting what shall be considered the next sessions, it must depend upon the special circumstances of the case; for if, from the distance between the parish to which the pauper has been removed and the place where the sessions are held, there is not time to lodge an appeal at the sessions held immediately subsequent to the removal, the first sessions ensuing are to be considered as the next sessions, and the justices are bound to receive the appeal at such sessions. It must however be so short an interval that the reasonable notice required cannot be given. This time of appealing to the next sessions is not suspended by the matter being referred to arbitration; for the consent of the parties that the sessions shall delegate their authority, concludes such parties, and gives validity to all acts of the sessions in consequence of such consent. The sessions however may, if they think proper, adjourn the appeal; but it cannot be to a time beyond that within which it is required by 2 Hen. 5. c. 4. that a sessions should be held; and every order made at such adjourned session must state when the original session commenced; and on adjourning a session, the continuance of it by the adjournment must be regularly entered, for unless the session be regularly adjourned they cannot hear the appeal. The allowance of costs is in the discretion of the sessions; and they need not state the particular sum; but they cannot direct costs to attend the event of a presumed appeal; nor order costs on a mere adjournment of an appeal.

Where an order of removal was served on the appellant-parish on Saturday, and the sessions were holden on the following Tuesday, and the appellant-parish was thirty-seven miles distant from the place where the sessions were holden, but there was no appeal to those sessions, and the justices

refused to receive the appeal at the next sessions, the Court of King's Bench granted a mandamus to compel them so to do. 1 B. & A. 210.

But the Court of King's Bench will not compel the sessions by mandamus to try an appeal dismissed for want of notice of trial, where the sessions have granted a case upon the question, whether it had been rightly dismissed, and which case has been abandoned by the party applying for the mandamus. 3 N. & M. 757.

Where the sessions have improperly refused the hearing of an appeal upon a preliminary objection, the Court of King's Bench will interfere by mandamus; but where an objection has been taken during the trial of an appeal to the reception of a particular piece of evidence, and the sessions considering the objection valid dismissed the appeal, the court will not interfere, unless the sessions send up a case. 5 B. & Ad. 597.

See the provisions of the recent statutes for the amendment of the poor laws, with respect to appeals, *Poor*, VII.

The proceedings, as has been already noticed, may be removed from the sessions into the Court of King's Bench by *certiorari*. But by the 18 Geo. 2. c. 18. "No *certiorari* shall be granted to remove any conviction, judgment, order, or other proceedings before any justice of the peace, or sessions, unless it be applied for in six calendar months after such proceedings had or made; and unless it be duly proved on oath, that the party suing forth the same hath given six days notice in writing to the justice or justices, or two of them, before whom such proceedings have been; to the end that such justices, or the parties therein concerned, may show cause, if they think fit, against issuing the *certiorari*."

By 5 Geo. 2. c. 19. "no such *certiorari* shall be allowed unless the party enter into a recognizance of 50*l*. with condition to prosecute the same at his own costs and charges with effect and without delay; and to pay the party, in whose favour the judgment or order was made, within a month after the same shall be confirmed, his full costs: and if he shall not enter into such recognizance, or shall not perform the condition, the justice may proceed, and make such further order for the benefit of the party for whom judgment shall be given, as if no *certiorari* had been granted. And if the order shall be confirmed by the court, the person entitled to the costs, for the recovery thereof, within ten days after demand made, upon oath of such demand and refusal of payment, shall have an attachment granted for the contempt; and the recognizance not to be discharged till the costs are paid, and the order complied with."

This writ of *certiorari* cannot be applied for until after the appeal is allowed; but if it be granted before, and the writ be filed, it is too late to object. It may be directed to the session, and returned by them. If a session's case, removed by *certiorari* into the King's Bench, be sent down again to the sessions to be re-stated, and the prosecutor abandon it when it is returned, the court will discharge his recognizance for the costs; but not if he dispute the amended order. See further, *Certiorari*, *Justices of the Peace*.

SESSIONS FOR ORDERING SERVANTS, called statute sessions, held by constables of hundreds, &c. See further, *Statutum Sessionum*.

SESSIONS FOR WEIGHTS AND MEASURES. In London, for justices, from among the mayor, recorder, and aldermen, (which the mayor or recorder to be one,) may hold a sessions to inquire into offences of selling by false weights and measures, contrary to the statutes, and to receive indictments to punish the offenders, &c. *Char. K. Cha. 1*.

SET-OFF. A mode of defence, whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other sets up a demand of his own to counterbalance it, either in the whole or in part.

At common law, if the plaintiff was as much, or even

more, indebted to the defendant, than the defendant was to him, yet he had no method of striking a balance: the only way of obtaining relief was by going into a court of equity. To remedy this inconvenience, it was enacted by the 2 Geo. 2. c. 22. § 13. "That where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other; and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require; so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due; or otherwise such matter shall not be allowed in evidence, upon the general issue." This clause was made perpetual by the 8 Geo. 2. c. 24. § 4; and it having been doubted, whether mutual debts of a different nature could be set against each other, it was by the last-mentioned statute, (§ 5.) further enacted, "That, by virtue of the said clause, mutual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature, as in cases where either of the said debts shall accrue by reason of a penalty, contained in any bond or specialty; and in all cases, where either the debt for which the action hath been, or shall be brought, or the debt intended to be set against the same, hath accrued or shall accrue by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action, or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid." And where the debt due to the defendant is less than that due from him, he must, on pleading such set-off, pay the remaining balance into court. 3 Comm. c. 20. p. 304.

The actions in which a set-off is allowable upon these statutes are debt, covenant, and assumpsit, for the non-payment of money; and the demand intended to be set off must be such as might have been made the subject of one or other of these actions. A set-off, therefore, is never allowed in actions upon the case, trespass, or replevin, &c.; nor of a penalty, in debt on bond, conditioned for the performance of covenants, &c.; nor against an avowry for rent; nor of general damages in covenant or assumpsit; but where a bond is conditioned for the payment of an annuity, or of liquidated damages, a set-off may be allowed. A debt barred by the statute of limitations cannot be set off, and if it be pleaded in bar to the action, the plaintiff may reply the statute of limitations; or if given in evidence, on a notice of set-off, it may be objected to at the trial. *Tidd's Pract. K. B.* and the authorities there cited.

The debts sued for, and intended to be set off, must be mutual, and due in the same right; therefore a joint debt cannot be set off against a separate demand, nor a separate debt against a joint one; but a debt due to a defendant, as surviving partner, may be set off against a demand on him in his own right. In an action of debt against a man on his own bond, he cannot set off a debt due to him in right of his wife. Neither, for the same reason, can a defendant, sued as executor or administrator, set off a debt due to himself personally, nor if sued for his own debt, can he set off what is due to him as executor or administrator.

So a defendant cannot set off a debt due on a bond made by the plaintiff to a third party, and by him assigned to the defendant; for the legal debt is due to the obligee, and not

to the defendant. 16 East, 86. Lord Ellenborough, C. J., said the doctrine of *Bottomley v. Brook*, and *Rudge v. Birch*, was rather to be restrained than extended.

And although the bond in this case was a *chose in action*, not assignable, and therefore not legally vested in the defendant; yet the principle is the same in the case of a bill of exchange accepted by the plaintiff (which is legally assignable), if the bill is in fact vested in a third party, and only transferred to the defendant for the purpose of being set off against a sum due from the defendant to the plaintiff, for goods bought by the defendant of the plaintiff, with the intention of setting off his acceptance; for in such case the defendant holds the acceptance only as a trustee for the real owner, and no debt is *bond fide* due upon it to the defendant. *Fair v. M'Iver*, 16 East, 130.

So in an action by a trustee to recover a debt for the benefit of the *cestui que trust*, a debt due from the *cestui que trust* cannot be set off. 1 N. & M. 477. The cases of *Bottomley v. Brook*, quoted above, and *Rudge v. Birch*, 1 T. R. 621, were much questioned by the court.

A judgment recovered against a person, for which he is charged in execution, cannot be pleaded as a set-off to an action brought by him against the party at whose suit he is in execution. 5 M. & S. 103.

So the amount of a verdict cannot be set off against the amount of a judgment. 2 D. P. C. 157.

The general rule is, that the debts must be mutual, and the debt claimed to be set-off must be legally due from the plaintiff on the record. There are however some cases in which the defendant may have a right to set off against the plaintiff's claim a debt due to the defendant from a third party. These are principally where factors and agents, in dealing for their principals, do not disclose their representative character. Under these circumstances, a person dealing with them, and ignorant of their representative character, may, in general, set-off against the demand of the principal a debt due from the factor to himself. *George v. Claget*, 7 T. R. 359; *Rabone v. Williams*, 7 T. R. 360, n.; *Curr v. Hinckley*, 4 B. & C. 547.

But circumstances which show collusion between the factor and buyer, as the insolvency of the factor known to the buyer, will deprive the latter of his right of set-off. 7 T. R. 361, (b.)

And this right does not arise in dealing with a broker, for his character is materially different from that of a factor; as he has not the possession of the goods, he does not appear to the world as owner; and if he sells without disclosing his principal, he acts beyond the scope of his authority; the buyer, therefore, cannot set off against the principal's demand a debt due from the broker. It follows, therefore, that in dealing with a person known to be in the habit of acting as a broker, a buyer should presume he is a mere agent, until the contrary appears; whereas in dealing with a factor, the mere general knowledge that he is a factor will not deprive a buyer of the privileges arising from his acting as a principal, unless the buyer knows that he acts only as a factor in that particular transaction. The buyer however need not have this knowledge at the time of the sale of the goods; if he has it at any time before the completion of the delivery, he cannot set off the factor's debt. 2 B. & A. 137; 2 Camp. 22. *Ibid.*

As the buyer's right of set-off of a factor's debt arises from the presumed deception to which he is subjected, by the principal's suffering the factor to deal with the goods as his own, the buyer cannot of course have any such right to set off against the owner of goods a debt due to the buyer from his own broker employed to purchase them; since such broker is the agent of the buyer, and not of the owner. 1 Camp. 85.

Upon the above principle, viz. that a party dealing with

an individual suffered to hold himself out as dealing on his own account, is not to be prejudiced by the appearance of another party to the transaction of whom he was ignorant, it is decided that where a person becomes indebted for goods sold to an ostensible partner, who appears to the world as trading alone, the debtor may set-off a debt due from such partner alone, against an action for the goods brought by him and his dormant partner. 7 T. R. 361, n., *et vide Peake's Ca.* 197.

The distinction above stated between brokers and factors, must be understood in reference to the class of brokers alluded to in *Baring v. Corrie*, viz. sworn brokers for buying and selling merchandize; for insurance brokers do not appear to be in the same manner distinguishable from factors.

The insurance broker, in effecting a policy with underwriters, is now held in all cases to be so far in the situation of a principal, that he is personally liable to the underwriter for the premium; and this, whether he effect the policy as agent, or in his own name; for the custom of dealing is, for the underwriters to look to him, not to the assured; and the receipt for the premium contained in every policy is conclusive as between the underwriter and the insured. Hence it follows that, in an action by the assured against the underwriters for a total loss, the underwriter cannot set off the amount of premium, although, in fact, it have never been paid him by the broker. It would seem, however, that if it were agreed between the broker and underwriter, that the loss should be paid out of premiums due to the underwriter in the broker's hands, that would be an answer to the claim of the assured. *Airey v. Bland, Park, Ins.* (7th ed.) 36; 1 Camp. 532; 4 Taunt. 217, *et vide, id.* 775; 12 East, 507.

The cases as to set-off, between the underwriter and insurance-broker are very numerous; most of them arise upon claims by brokers, in actions brought against them for premiums, to stand in the situation of principals, and to set off sums due from the underwriters for losses or for returns of premiums. In the earlier cases on the subject, great stress was laid upon the circumstance of the broker guaranteeing the losses to the assured, in consideration of a *del credere* commission; but the courts have since held, that this circumstance is a matter entirely between the broker and his principal, and cannot confer on the former any rights against third parties. And the more recent decisions rest on the sounder ground of the character in which the broker appears in effecting the insurance, viz. whether he appears as principal or as agent. The result of the cases seem to be, that where the broker effects the insurance in the name of his principal, the broker appears merely as an agent, he is so considered by the underwriters, and consequently is not entitled to the rights of a principal: he cannot sue on the policy in his own name, and cannot, in an action against him for premiums, set off sums due for losses, and this whether he acts under a *del credere* commission or not; but that, where the policy is effected in the broker's name, he there appears as a principal, he may sue in his own name, and is entitled to the right of set-off, provided he has an interest; which interest may be acquired either by his guaranteeing the losses to his principal for *del credere*, or by his advancing money on the goods insured. 1 T. R. 112, *id.* 287; 1 M. & S. 494; 2 M. & S. 112; *id.* 423; 4 M. & S. 568; 6 Taunt. 519; 4 Bing. 575.

It was formerly holden, that the statutes of set-off did not extend to assignees of a bankrupt; but it has since been determined, that in an action at their suit, the defendant may set-off a debt due to him at the time of the bankruptcy; but a note indorsed to him afterwards cannot be set-off.

And in actions by or against the assignees of a bankrupt, the sum really due may be recovered without either pleading or giving notice of a set-off. 1 T. R. 115; 3 Comm. c. 20, n.

In cases of bankruptcy, not only mutual debts between the bankrupt and any other person, but mutual credits may be set one against another. The term mutual credit is more extensive than the term mutual debt; and under it sums may be set off which had not been actually due at the time of the bankruptcy. So also may unliquidated damages for breach of a contract, and the time and credit given need not be of money on both sides; for if one party entrusts the other with goods or value, it will fall within the statute. See § 50 of the Bankrupt Act, 6 Geo. 4. c. 16. Under the language of this section, debts and credits are made the subject of set-off, notwithstanding the credit be given, or the debt contracted after an act of bankruptcy; provided that the party had not notice of such act of bankruptcy, and notwithstanding he may have had notice of the bankrupt stopping payment, or being insolvent. See *Bac. Ab. Set-off, C.* (7th ed.)

The same mutuality is requisite to constitute a mutual credit under the bankrupt laws, which is required to make mutual debts under the statute of set-off. Thus, where three partners, A., B., and C., delivered bills to D. for a special purpose, and A. and B. became bankrupts, in an action by their assignees against D. for the proceeds of the bills, it was held that C., not having become bankrupt, this was not a case of mutual credit, within the bankrupt law, so as to entitle the defendant to set off against the bills a debt due to him from A., B., and C. *Staniforth v. Fellowes*, 1 Marsh. R. 184.

Where a broker, indebted for premiums of insurance on policies, subscribed by an underwriter who afterwards became bankrupt, had a *del credere* commission on one of the policies, effected in the name, not of the broker, but of the person expressed in the body thereof, the broker not being intrusted with the custody of the policy, whereon a loss happened before the bankruptcy, though the broker paid the loss to the assured before the bankruptcy, the Court of C. P. held, that he could not set off that loss against the premium due to the assignees of the bankrupt. 7 Taunt. 478.

Where either of the debts accrues by reason of penalty, the debt intended to be set off must, by the 8 Geo. 2. c. 24. be pleaded in bar; and the defendant, in his plea, must aver what is really due; which averment has been held to be traversable: but, in most other cases, the defendant might until recently, have pleaded or given notice of set-off at his election.

Now, by the rules of H. T. 4. Wm. 4. a set-off must be pleaded.

By a rule of T. T. 1. Wm. 4. the particulars (if any) of the defendant's set-off shall be annexed, by the plaintiff's attorney, to every record.

SETTLEMENT, ACT OF. The 12 & 18 Wm. 3. c. 2. is so called; whereby the crown was settled on, and limited to his present majesty's illustrious house. See *King, I.*

SEVERAL ACTION. See *Action*.

SEVERAL COVENANT. A covenant by two or more severally; i. e. separately. See *Covenant*.

SEVERAL FISHERY. See *FISHERY, Right of*.

SEVERAL INHERITANCE. An inheritance conveyed, so as to descend or come to two persons severally by moieties, &c. See *Estate, Limitation, Inheritances*.

SEVERAL TAIL. Is that whereby land is given and entailed severally to two. Co. Litt. See *Limitation, Tail*.

SEVERAL TENANCY, *tenura separatis*.] A plea or exception taken to a writ that is laid against two persons as joint-tenants, who are several. Bro. 273. See further, *Joint-tenants*.

SEVERALTY, Estates in. He that holds lands or tenements in severalty, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein. 2 Comm. c. 12. p. 179.

SEVERANCE. The separating or severing of two or more, joined in one writ or action. There was a severance of the tenants in an assise, when one of two disseisees appeared upon the writ, and not the other. *Lib. Intr.* 81. A severance in *debet*, where two executors, &c. are plaintiffs, and one refuseth to act or prosecute. *Ibid.* 220. Severance in *quare impedit*, &c. 5 *Rep.* 97. And it lies in real as well as personal actions; and on writs of error. *F. N. B.* 78; 10 *Rep.* 135. In writ of error, if three defendants in the action bring error, and one releases the errors, he may be summoned and served, and then the other two shall proceed to reverse the judgment. 6 *Rep.* 26. And if in error where there are several plaintiffs, one only appears and signs errors, this is not good, without summoning and severing the rest, *Cro. Eliz.* 893.

It has been held, that summons and severance lies in partition; yet he who has severed shall have his part; for partition must be made of the whole. *Jenk. Cent.* 211. And in case of joint-tenants of lands by severance, the prosecution of the suit is severed, but not the parties; for where one of them recovers afterwards, the other may enter into the moiety recovered. *Ibid.* 40. Summons and severance is usually before appearance, as nonsuit is after appearance. 10 *Rep.* 194. But, according to *Hale*, there are two sorts of severances, one when a plaintiff will not appear; and the other when several plaintiffs appear, but some will not proceed and prosecute. *Hard 347; 5 N. L. Abr.* 575. If a plaintiff or defendant on a writ of summons and severance, sued out against him by another, doth not come in upon it, judgment shall be had *ad prosequendum solum*; and this hath been done in B. R. by giving a rule to appear and come in. 2 *Lill. Abr.* 539. See *Summons and Severance*.

SEVERANCE OF CURS. The cutting and carrying it from off the ground, and sometimes the setting out the titles from the rest of the curus, is called severance. *Cro. Jac.* 5. See *Tithes*. Where executors of tenants for life, &c. dying before severance, shall have curus sown, see *Pathens*.

SEVERANCE OF JOINT-TENANCY. See *Joint-tenants*.

SEWARD, rather SEA-WARD. See *Sea-Reeve*.] A Saxon word for him who guards the sea-costs; it signifies *custos maris*.

SEWER, seweria; query, from sevoir, to sit, and eau, water. Termes de la Ley. A fresh water trench, or little river, or channel, passed with banks on both sides, to carry the water into the sea, and thereby preserve the lands against inundations, &c.

The court of sewers is a temporary tribunal, erected by virtue of a commission under the great seal.

The kings of England used to grant commissions of sewers long before any statute was enacted in parliament for the purpose; and during the reigns of King Henry VI., Edward IV., and Henry VII., several statutes were made for appointing commissions of sewers in all parts of the realm, and others five years, &c. with certain powers to the commissioners; which commissions, by 23 *Hen. 8. c. 5.* were to be settled by the lord chancellor, lord treasurer, and the two chief justices, or any three of them, whereof the lord chancellor to be one; and by this law, the commissioners ought to be appointed; they were to be qualified as to estates, by law, lands, tenements, or hereditaments, in fee for life, worth forty marks *per annum*, besides reprises; (except they were resident in and free of a corporation; and had moveables worth 100 *l.*) and, if they executed the commission, not being qualified, or before sworn, they incurred a forfeiture of 40 *l.*

Now see the recent statute, *post*.

The said 23 *Hen. 8. c. 5. § 17.* directed that laws, acts, decrees, and ordinances made by commissioners of sewers should stand good and be put in execution so long as the commission endured and no longer; except the said laws and

ordinances were engrossed in parchment, and certified under the seals of the commissioners into Chancery, and had the royal assent: and the 13 *Eliz. c. 9.* directed that all commissions of sewers should continue in force for ten years, unless sooner determined by supersedeas or new commission; and that all laws, ordinances, and constitutions made by force of such commission, being written in parchment, indented and under seal, should without such certificate or royal assent continue in force notwithstanding the determination of the commission by supersedeas until repealed or altered by new commissioners; and that all laws so sealed should without certificate or royal assent, be in force for one year after the determination of such commission by the expiration of ten years from its teste. But see now the recent statute, *post*.

The court of commissioners of sewers is classed by *Blackstone* among those whose jurisdiction is private and special; their jurisdiction being confined to such county or particular district as the commission expressly names. The commissioners are a court of record, and may fine and imprison for contempts. 1 *Sid.* 145. And in the execution of their duty may proceed by a jury (who may amerce for neglects) or upon their own view; and may take order for the removal of any annoyances, or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney Marsh (see that title), or otherwise at their own discretion; but they may not imprison persons for disobedience to their orders; nor can they intermeddle where there is not a public prejudice. *Laws Sew.; 3 Comm.* c. 6.

The sea, creeks, and bays on the coasts, are all within the statutes of sewers, in point of extent; but they and the shores and the relinquished grounds are out of the commission of sewers to be determined thereby; but ports and havens, as well as the walls and banks of waters, are within the commission of sewers; and the shore and grounds left by the sea, when they are put in gainage and made profitable, are then within the power of commission of sewers; and though before the ground left by the sea is not, as to defence, within the commission of sewers; yet a wall or bank may be thereon raised for the succour of the country, although not for any private commodity, the commission of sewers aiming at the general good. *Callis*, 31, 32.

The commissioners of sewers have jurisdiction over a sewer communicating with a navigable stream, or with the sea above the point where the tide ebbs and flows, if it be useful for navigation, and if the place over which the jurisdiction is exercised, is, or is likely to be, benefited by it. 2 *T. R.* 358.

The business of the commissioners of sewers is to repair sea-banks and walls, survey rivers, public streams, ditches, &c. and make orders for that purpose. They have authority grounded on the statute to inquire of all nuisances and offences committed by the stopping of rivers, erecting mills, not repairing of banks and bridges, &c. and to tax and assess all whom it may concern, for the amending of defaults, which tend to the obstruction or hindrance of the free passage of the water through its ancient courses: and they may arrest carts and horses, and take trees, paying a reasonable price for them, for reparations; appoint workmen, bailiffs, surveyors, and other officers, &c. *Termes de la Ley*, 541; 4 *Inst.* 275; *Laws Sew.* 86, 96.

Upon the 23 *Hen. 8. c. 5.* the commissioners decreed that a new river should be made out of another large river through the main land for seven miles unto another part of the old river; and for that purpose they laid a tax of a shilling gross upon several towns: adjudged that the commissioners have no power to make a new river, or any new invention to cast out water, &c., for such things are to be done in parliament; but they may order an old bank to be new made, or alter a

sewer upon any inevitable necessity. The tax of a sum in gross was not warranted by their commission, they being to tax every owner or possessor of the lands according to the quality of their lands, rents, and number of acres, and their respective portions and profits, whether of pasture, fishing, &c. 10 Rep. 141. See the powers given to the commissioners by the late statute, *post*.

The commissioners of sewers cannot assess a person, in respect of drains which communicate with other drains that fall into the great sewer, if the level of his drain is so much above the sewer that the stopping of the sewer could not possibly throw back the water so as to injure his premises, and if he be not, and it does not appear that he is, likely to be benefited by the works done upon the sewer. 3 M. & S. 147.

There are several causes and considerations for which persons may be obliged to repair and maintain sewers, as frontagers were bound to the repairs of the walls and banks, &c. by reason of frontage. 37 Lib. Assis. pl. 10. The being owner of a bank, wall, or other defence, is a sufficient inducement to impose the charge of the repairs thereof upon such owner. 1 Hen. 7. Prescription and custom are much of the same nature, and the law takes notice of them in this case; but prescription doth not bind a man to the repairs, except it be *ratione tenuræ*. 21 Edw. 4. 38; 19 Hen. 7. By tenure of land, a person may be bound to repair a wall, bank, or defence, mentioned in the statute of sewers. 12 Hen. 4. A man may bind himself and his heirs by covenant expressly to repair a bank, wall, or sewer, and be good; yet this shall not bind the heir after his death, where assets are not left from the ancestor, who entered into the covenant. *Callis's Reading on Sewers*. That this is a good authority on the subject of sewers, see 2 T. R. 365.

The use of defences may tie a man to the reparation thereof, if one and his ancestors have had the use of a river by sailing up and down the same, or have used a ferry on or over it, &c. If no person or grounds can be known, who ought to make repairs by tenure, prescription, custom, or otherwise, then the commissioners are to tax the level. *Laws Sewers*, 57, 67, 68.

If a sea-bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any default in such owners, the commissioners of sewers may order a new one, even in a different form, if necessary, to be erected at the expense of the whole level. 8 T. R. 312.

By the 3 & 4 Wm. 4. c. 22. the laws relating to sewers have been amended. The following is an outline of the principal provisions of the act.

By § 1. the qualification of the commissioners is increased.

And § 2. Quakers may act as commissioners, upon making an affirmation.

§ 3. imposes an oath of qualification to be taken by other commissioners before acting, in addition to the oath prescribed by the 23 Hen. 8.

§ 4. imposes a penalty of 100*l*. on persons acting not qualified. But proceedings are not to be impeached on account of disqualification.

By § 5. ex-officio commissioners are not required to qualify.

By § 6. every commission of sewers is to continue for ten years, unless renewed or repealed by writ of superseas.

By § 7. all laws, decrees, and ordinances, made by any court of sewers, and duly registered in the rolls of such court, are to continue in force notwithstanding the expiration of the commission, and although not ingrossed in parchment, or not certified into the Court of Chancery.

§ 8, 9. regulate the meetings of the commissioners.

§ 10. after reciting that doubts have arisen as to the extent of the jurisdiction of commissioners of sewers, enacts, that all walls, banks, culverts, and other defences whatsoever,

whether natural or artificial, situate or being by the coasts of the sea, and all rivers, streams, sewers, and watercourses, which now are or hereafter shall be navigable, or in which the tide now does or hereafter shall or may ebb and flow, or which now do or hereafter shall or may directly or indirectly communicate with any such navigable or tide river, stream, or sewer, and all walls, banks, culverts, bridges, dams, floodgates, and other works erected or to be erected upon or adjoining to any such river, streams, sewers, or watercourses, shall be within and subject to the jurisdiction of commissioners of sewers: provided, that nothing therein contained shall empower any commissioners of sewers to exercise authority over any dams, floodgates, or other works erected for ornament, previous to the act, in, upon, or over any rivers, streams, ditches, gutters, sewers, or watercourses near or contiguous to any house or building, or in any garden, yard, paddock, park, planted walk, or avenue to a house, without the consent in writing of the owner or proprietor thereof respectively first obtained.

§ 11 & 12. specify the manner in which juries are to be summoned to make inquiries or presentments either under the old law or that act.

§ 13. declares that a presentment of a jury shall not be necessary upon each occasion to repair.

By § 14. rates are to be made for every distinct level or district.

But (§ 15.) nothing therein contained is to discharge persons from liability by tenure, &c.

And by § 17. nothing contained in the act is to preclude courts of sewers from causing inquiry and presentment by jury as before.

By § 18. rates are to be apportioned between outgoing and incoming tenants.

By § 19. any court of sewers may decree and ordain any new walls, banks, sewers, guts, gotes, calcies, bridges, tunnels, culverts, sluices, floodgates, tumbling bays, cuts, or other works, aids, and defences, or any alteration in the gauge, dimension, course, direction, or situation of any old or existing wall, &c. to be constructed, for the more effectually defending any lands and premises within the jurisdiction of such court against the irruption of the sea, or for carrying off the superfluous fresh waters, and also, in like manner and at the discretion, may decree any former walls or defences against the sea, or against any rivers, streams, sewers, or watercourses, within their commission, to be abandoned and given up, and new defences and walls, banks, sluices, floodgates, tumbling bays, cuts, and other works to be made and continued in lieu thereof; and in every such case may direct by inquiry and presentment of a jury, in what manner and proportions the same shall thereafter be repaired and maintained by the person, body politic or corporate, deriving advantage or avoiding damage thereby or therefrom, having regard to previous liabilities in respect of the walls and defences so to be abandoned.

Provided (§ 21.) that no new works are to be made without the consent of the owners and occupiers of three-fourth parts in value of the lands to be charged.

§ 22. Occupiers of land adjoining sewers may take away soil and weeds from the banks for their own use.

And (§ 23.) upon neglect of occupiers to remove soil, surveyors may remove it.

By § 24. the commissioners are authorized to contract for the purchase of lands, &c.

And (§ 26.) where persons shall neglect or refuse to treat &c. commissioners are to issue their warrants to the sheriff to impanel a jury. The jury may be challenged. Witnesses are to be summoned and examined upon oath; and the jury are to assess damages, and their verdict to be binding.

By § 27. commissioners may impose a fine on the sheriff witnesses, &c. making default.

§ 39. enables commissioners to sell lands, &c. which are not wanted; and the first offer is to be given to the owners of adjoining grounds.

§ 41. empowers the courts of sewers to borrow and take up money at interest for making and maintaining works.

And (§ 42.) the courts of sewers may grant securities to persons advancing money in the form therein set forth.

And (§ 43.) such securities may be transferred.

By § 44. courts of sewers may be held out of the limits of the commission, at any place not exceeding five miles from such limits.

And by § 45. all acts of commissioners done without the district of the commission, but within five miles thereof, are declared valid.

By § 46. several defaults may be included in one presentment, and separately traversed.

By § 52. constables, &c. are to obey orders of commissioners.

And (§ 53.) fines, &c. may be levied by warrant of commissioners of sewers.

§ 55. Commissioners may decree and assess costs; and in default of distress may raise the same upon the lands of the defaulters.

§ 57. Commissioners of sewers may sue and be sued in the name of their clerk.

By § 61. the act is not to prejudice any local act.

And by § 62. the rights of the city of London are saved.

The 3 Jac. 1. c. 14. ordains that all ditches, banks, bridges, streams, and watercourses, within two miles of London, falling into the Thames, shall be subject to a commission of sewers; and the lord mayor, &c. is to appoint persons who have power of commissioners of sewers.

The conduct of commissioners of sewers is under the control of the Court of King's Bench, which will prevent or punish any illegal or arbitrary proceedings. *Cro. Jac.* 336. And yet in the reign of King James I. (8th Nov. 1616) the privy council took upon them to order that no action or complaint should be prosecuted against the commissioners unless before that board, and committed several to prison who had brought such actions at common law, till they had released the same; and one of the reasons for discharging Sir Edward Coke from his office of lord chief justice was for countenancing those proceedings at law. *Moor.* 825, 826; see 3 *Comm.* 55, 74. But now it is clearly established that this (like other inferior jurisdictions) is subject to the discretion or coercion of the Court of King's Bench. 1 *Vent.* 66, 67; *Salk.* 146.

If it is found before commissioners of sewers that a certain person ought to repair a bank, and this is removed into B. R., the court will not quash the inquisition, or grant a new trial, except he repair it; and if afterwards he is acquitted, he shall be reimbursed. *Sid.* 78. In case of sewers the Court of King's Bench inquire into the nature of the fact before they grant a *certiorari* to remove orders, that no mischief may happen by inundations in the mean time, which is a discretionary execution of their power. 1 *Salk.* 146.

The court commonly hears counsel on both sides, where orders of commissioners of sewers are removed by *certiorari*, before such orders are filed; for if good, the court will grant a *procedendo*, which cannot be done after they are filed; but they will file them in any case where there is no danger likely to ensue. 1 *Salk.* 145. If commissioners of sewers proceed after a *certiorari* delivered out of B. R. attachment will issue against them, and they may be fined. 3 *Nels. Abr.* 218.

Orders of sewers being removed by *certiorari*, the court would not file the orders till they had heard the objections debated, so as to have it in their power to send the orders back again. 2 *Str.* 1263. The court held, that a *certiorari* bringing up an order made by the commissioners for the removal of their own clerk, was of common right, and not discretionary, as in the case of other orders, where great inconveniences may follow by inundations. 1 *Str.* 609.

With respect to offences committed against the property of the commissioners of sewers, see *Indictment*, V.

As to breaking down sea-banks and sea-walls, and persons removing piles, &c. see *Malicious Injuries*.

SEXAGESIMA SUNDAY. The sixtieth day before Easter. See *Septuagesima*.

SEXHINDENI, or SEXHINDMEN, Sax.] The middle thanes, valued at 600 shillings. See *Hinden Homines*.

SEXTARY, *sextarius*.] Was an ancient measure containing about our pint and a half. The town of Leicester paid, among other things, to the king yearly, twenty-five measures, called sextaries, of honey, as we read in *Domesday*. See *Mon. Angl.* ii. 849 b; and i. 136 b; in which latter place it seems to have been used for a much greater quantity. A sextary of ale contained sixteen lagenas. *Cowell*. See *Tolsester*.

SEXTERY LANDS. Lands given to a church or religious house for maintenance of the sexton or sacristan. *Cowell*.

SEXTONS. Parish clerks and sextons are regarded by the common law as persons who have freeholds in their offices; and therefore, though they may be punished, yet they cannot be deprived by ecclesiastical censures. 2 *Roll. Abr.* 224; 1 *Comm. c.* 11. See *Mandamus*, Office.

SHACKE. A custom in Norfolk to have common for hogs, from the end of harvest till seed-time, in all men's grounds, without contradiction. And in that country, to go at shackle is as much as to go at large. *Cowell*. *Terms de la Ley*. Sir M. Corbet's case, *Co. Rep. Hil.* 27 *Eliz.*

SHARNBURN in Norfolk, pleas held at, *temp. Wm.* 1., for the purpose of confiscating the estates of such as opposed that Conqueror. See *Spelm. Gloss.* in v. *Drenges*; where it is mentioned as *quidam bellus* of the family of Sharnburne, in Norfolk. See *Wright's Tenures*, 62, who also mentions pleas held at Pinenden for the same purpose. *Hume* says, "There is a paper or record of the family of Sharnborne, which pretends that that family, which was Saxon, was restored upon proving their innocence. Though this paper was able to impose on such great antiquaries as *Spelman* and *Dugdale*, it is proved by *Dr. Brady* (*Ans. to Petyt*, p. 11, 12) to have been a forgery." *Hume's Hist. Engl.* i. 263. note H.

SHARPING-CORN. A customary gift of corn which at every Christmas the farmers in some parts of England give to their smith for sharpening their plough-irons, harrow-tines, &c. *Blount*.

SHAW. A grove of trees, or a wood, mentioned in 1 *Inst.* 4; now generally applied to underwood.

SHAWALDRES. Soldiers. *Cowell*.

SHEADING. A riding, uthing, or division in the Isle of Man, where the whole island is divided into six sheadings, one of which there is a coroner, or chief constable, appointed by delivery of a rod at the Trowld Court, or annual convention. *King's Descrip. Isle of Man*, 17.

SHEARMAN'S CRAFT. A craft or occupation used at Norwich and elsewhere, the artificers whereof do shear worsteds, fustians, and all woollen cloth. See 19 *Hen.* 7. c. 17; 22 & 23 *Car.* 2. c. 8.

SHEEP. By an ancient and obsolete statute, no person shall keep at one time above two thousand sheep, on pain of 3s. 4d. per sheep above that number; but lambs are not to be accounted as sheep till they are a year old. 25 *Hen.* 8. c. 13. As to the exportation and shearing of sheep, &c. see *Wool*. As to stealing sheep, &c. see *Cattle*, *Larceny*.

SHEEP-SILVER. A service turned into money, which was paid in respect that anciently the tenants used to wash the lord's sheep. *W. Jones's Rep.* 280.

SHEPWAY, Court of. A court held before the lord warden of the Cinque Ports. A writ of error lies from the

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mayor and jurats of each port to the lord warden in this Court of Shepway, and from thence to the King's Bench. See *Cinque Ports*.

SHEREFFE. The body of the lordship of Caerdiff in South Wales is so called, excluding the members of it. *Powell's Hist. Wal.* 123.

SHERIFF; SHIRE-REEVE; or SHIRIFF.

THE Reeve, bailiff, or officer of the shire; Lat. *Viccomes*; Sax. *Sere gersa*, from the Sax. *sciran*, to divide.] The chief officer under the king in every shire or county, being so called from the first division of the kingdom into counties. *Cand. Brit.*

The Scotch sheriff differs very considerably from the English sheriff. The Scotch sheriff is properly a judge; and by the 20 Geo. 2. c. 43. he must be a lawyer of three years' standing; and is declared incapable of acting in any cause for the county of which he is sheriff. He is called Sheriff Depute (so called as being deputed by the crown, in contradistinction to the sheriff principal, or high-sheriff, the officer who formerly enjoyed jurisdiction as attached to patrimony); he must reside within the county four months in the year: he holds his office *ad vitam aut culpam*. He may appoint substitutes, who as well as himself receive stated salaries. The king may appoint a *High Sheriff* for the term of one year only. The civil jurisdiction of the sheriff depute extends to all personal actions on contract, bond, or obligation, to the greatest extent, and generally in all civil matters not especially committed to other courts. His criminal jurisdiction extends to the trial of murder, though the regular circuits of the Court of Justiciary prevent such trials occurring before him. He takes cognizance of theft and other felonies, and all offences against the police. His ministerial duties are similar to those of sheriffs in England.

What follows relates to sheriffs in England and Wales.

- I. Of Sheriff's generally.
 - II. Who are qualified for, or exempt from, serving the Office of Sheriff. And see III.
 - III. Of the Appointment and continuance in Office of Sheriffs.
 - IV. Of their Duties, Powers, and Jurisdiction.
 - V. Of the Under-Sheriff, &c.
- As to fees of sheriffs, see *Fees*.

I. It seems that anciently the government of the county was by the king lodged in the earl or count, who was the immediate officer to the crown; and this high office was granted by the king at will; sometimes for life, and afterwards in fee; but when it became too burdensome, and could not be commodiously executed by a person of so high rank and quality, it was thought necessary to constitute a person duly qualified to officiate in his room and stead; from hence he is called in Latin *Vice-comes*, as being deputy of the Earl or Comes; and sheriff from *Shire-reeve*, i. e. governor of the shire or county. He is likewise considered in our books as bailiff to the crown; and his county, of which he hath the care, and in which he is to execute the king's writs, is called a *baithwick*. *Dac.* 60; *Sutcl.* 43; 1 *Roll. Rep.* 274; *Co. Litt.* 168. See *Pref.* to 9 *Rep.* 33.

It is said by *Coke* and by *Dalton*, that earls, by reason of their high employments and attendance upon the king, being not able to follow all the business of the county, were delivered of all that burthen, and only enjoyed the honour as they now do, and that labour was laid upon the sheriff; so that now the sheriff doth all the king's business in the county; and the sheriff, though he be still called *Viccomes*, yet all he doth, and all his authority, is entirely independent of and not

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subject to the earl, being immediately from and under the king, and not from or under the earl; so that, at this day, the sheriff hath all the authority for the administration and execution of justice, which the count or earl had; the king, by his letters-patent, now committing to the sheriff *custodiam comitatus*. 9 *Co.* 49; *Dalt. Sher.* 2.

He is at this day considered as an officer of great antiquity, trust, and authority; having, as *Dalton* observes, from the king the custody, keeping, command, and government (in some sort) of the whole county committed to his charge and care; and, according to *Coke*, he is said to have *triplicem custodiam*, viz. *vitæ justitiæ, vitæ legis, et vitæ reipublicæ*, &c. *Vitæ justitiæ*, to serve process, and to return indifferent juries for the trial of men's lives, liberties, lands, and goods; *vitæ legis*, to execute process and make execution, which is the life of the law; and *vitæ reipublicæ*, to keep the peace. *Co. Litt.* 168; *Dalt. Sher.* 5.

It seems that, anciently, sheriffs were elected by the freeholders of the county, as the coroners are at this day; and, consequently, that their offices did not determine by the death of the king. 2 *Inst.* 558; 2 *Brownl.* 282. See *post*, III.

And though at this day the king hath the sole appointment of sheriffs, except in counties palatine, and where there are *jura regalia*, yet it hath been adjudged, that the office of sheriff is an entire thing, and that therefore the king cannot apportion or divide it; that is, he cannot determine it in part, as for one town or one hundred; neither can he abridge the sheriff of any thing incident to or belonging to his office. *Dac.* 60; 4 *Co.* 33; *Milton's case*; *Dalt. Sher.* 6; *Hob.* 13 *Raym.* 369.

The lord mayor and citizens of London have the shrievalty of London and Middlesex in fee by charter; and two sheriffs are annually elected by them, for whom they are to be answerable. If one of these sheriffs dies, the other cannot act till another is made; and there must be two sheriffs of London, which is a city and county; though they make but one sheriff of the county of Middlesex: they are several as to plaints in their respective courts. 3 *Rep.* 72; *Show. Rep.* 289. See *post*, III.

Where there are two sheriffs, and one of them is a party interested in any suit, process must go to the other sheriff and not to the coroner. 5 *M. & S.* 144.

II. It is provided by several acts of parliament, that no man shall be sheriff in any county, except he have sufficient lands within the same county where he shall be sheriff, whereof to answer the king and his people, in case that any person shall complain against them; and that none (that is steward or bailiff to a great lord shall be made sheriff. 9 *Edw.* 2. st. 2; 2 *Edw.* 3. c. 4; 4 *Edw.* 3. c. 9; 5 *Edw.* 3. c. 4; 13 & 14 *Car.* 2. c. 1. § 7.

This is the only qualification required from a sheriff that it was the intention of our ancestors, that the lands of a sheriff should be considerable, abundantly appears from their law. If this provision so frequently repeated; and at the same time that they obtained a confirmation of *Magna Carta* and their most valuable liberties. As the sheriff, both in criminal and civil cases, may have the custody of men of the greatest property in the county, his own estate ought certainly to be large, that he may be above all temptation to permit them to escape, or to join them in their flight. In ancient times, this office was frequently executed by the nobility, and persons of the highest rank in the kingdom. *Spelm. Gloss.* in *v. Viccomes*. Bishops also were not unfrequently sheriffs. Richard Duke of Gloucester (afterwards Richard III.) was sheriff of Cumberland five years together. It does not appear that there is any express law to exclude the nobility from the execution of this office; though it has long been appropriated to commoners. 1 *Comm.* c. 9. p. 346, a.

By 1 *Rich.* 2. c. 11. none that hath been sheriff of any

county a year, shall be within two years next chosen again, or put in the same office, if there be other sufficient.

And by 1 Hen. 5. c. 4. they that be bailiffs of sheriffs one year, shall be in no such office by three years next following, except bailiffs of sheriffs which inherit in their office.

It is holden that the king hath an interest in every subject, and a right to his service; and that no man can be exempt from the office of sheriff, but by act of parliament, or letters patent. *Sav. 43; 9 Co. 46; 1 Ld. Raym. 29.*

And on this foundation, it was adjudged, in Sir John Read's case, who was made high sheriff of Hertfordshire at the time he was excommunicated for non-payment of alimony, that an information properly lay against him for not executing the office; though it was objected, on his behalf, that the oath and sacrament enjoined by act of parliament are necessary qualifications for all sheriffs, which he was disabled to take by reason of the excommunication: but the court held, that he was punishable for not removing the disability, it being in his power to get himself absolved from the excommunication; and that therefore it could be no excuse. *2 Mod. 299.*

Though, in the above case, it was admitted that the subject was bound to serve the king in such capacity as he is in at the time of the service commanded, yet it was insisted upon, that he was not obliged to qualify himself to serve in every capacity; and that therefore a prisoner for debt is not bound nor compellable to be sheriff, no more than a person is bound to purchase lands to qualify himself to be either a coroner or justice of the peace: and it was likewise said that, by statute, every recusant is disabled; he may conform, but he is not bound to it; for if he submits to the penalty, it is as much as is required by law. *2 Mod. 301.*

Previous to the repeal of the Test and Corporation Acts it was settled that dissenters were not compellable to serve the office of sheriff. *Harrison (chamberlain of London) v. Evans*, in the House of Lords, 1766: but now that the sacramental test is abolished as a qualification for office there is no longer any reason why they should be exempt.

If a man is disabled by a judgment in law to bear an office, he is excused; *an judicium reddere in officio*; for though his fault or neglect was the occasion of such judgment, yet it is a mark set upon him by the government. *Salk. 108. 4 Mod. 27.*

Barristers and practising attorneys are exempt from serving the office of sheriff. *1 Burr. 2109.* And by the militia act 42 Geo. 3. c. 30. § 172. no officer of the militia can be compell'd to serve the office.

And as nothing but an extreme necessity can exempt a person from serving the office of sheriff, &c. on this foundation a bye-law made in London, that no freeman chosen sheriff, &c. shall be excused unless he voluntarily swears he is not worth 10,000*l.*, &c. (now 15,000*l.*) and that if he openly refuses to take the office, then to forfeit the sum of 40*l.* was adjudged good. *Salk. 142; Carth. 489, 5 Mod. 438. City of London v. Lumsden.* In the year 1748, the corporation of London made a bye-law, imposing a fine of 800*l.* on persons refusing to serve the office of sheriff.

The vast expense, which custom had introduced in serving the office of high sheriff, was grown such a burthen to the subject, that it was enacted, by 13 & 14 Car. 2. c. 21. that no sheriff (except of London, Westmoreland, and towns which are counties of themselves) should keep any table at the assizes, except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery. Yet, for the sake of safety and decency, he may not have less than twenty men in England and twelve in Wales; upon forfeiture, in any of these cases, of 200*l.*

III. The high sheriff hath his authority given him by two patents; by the one the king commits to him the custody of the county; by the other the king commands all other his

subjects within that county to be aiding and assisting to him in all things belonging to his office. *Dalt. Sher. 7.* where see the form of such patents.

Sheriffs were formerly chosen by the inhabitants of the several counties. In confirmation of which it was ordained by 28 Edw. 1. c. 8. that the people should have election of sheriffs in every shire, where the shrievalty is not of inheritance. For anciently in some counties the sheriffs were hereditary: as it seems they were in Scotland till the 20 Geo. 2. c. 43; and still continue in the county of Westmoreland to this day: the city of London have also the inheritance of the shrievalty of Middlesex vested in their body by charter. *3 Rep. 72.*

The Earl of Thanet is hereditary sheriff of Westmoreland, which office may descend to and be executed by a female, for Anne Countess of Pembroke had the office, and exercised it in person; and at the assizes at Appleby sat with the judges on the bench. *1 Inst. 326, n.* The election of the sheriffs of London and Middlesex was granted to the citizens of London, in consideration of their paying 300*l.* a year to the king's exchequer. *1 Comm. c. 9, n.*

The reason of these popular elections is assigned in 28 Edw. 1. c. 13. "that the commons might choose such as would not be a burthen to them." And herein appears plainly a strong trace of the democratical part of our constitution; in which form of government it is an indispensable requisite, that the people should choose their own magistrates. This election was in all probability not absolutely vested in the commons, but required the royal approbation. For, in the Gothic constitution, the judges of the county courts (which office is executed by our sheriff) were elected by the people, but confirmed by the king; and the form of their election was thus managed: the people, or *incolæ territorii*, chose twelve electors, and they nominated three persons, *ex quibus rex unum confirmabat.* But with us in England these popular elections, growing tumultuous, were put an end to by the 9 Edw. 2. st. 2. which enacted, that the sheriffs should from thenceforth be assigned by the chancellor, treasurer, and the judges; as being persons in whom the same trust might with confidence be reposed. By 14 Edw. 3. c. 7; 23 Hen. 6. c. 7. the chancellor, treasurer, president of the king's council, chief justices, and chief baron, are to make this election, and that on the morrow of All Souls in the exchequer. And the king's letters patent, appointing the new sheriffs, used commonly to bear date the sixth day of November. *12 Edw. 4. c. 1.* The 12 Rich. 2. c. 2. ordains that the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and the other, barons of the exchequer, and all other that shall be called to ordain, name, or make justices of the peace, sheriffs, and other officers of the king, shall be sworn to act indifferently, and to appoint no man that sueth either privily or openly to be put in office, but such only as they shall judge to be the best and most sufficient. And the custom now is and has been at least ever since the time of Fortescue, who was chief justice and chancellor to Henry the Sixth that all the judges, together with the other great officers and privy councillors, meet in the Exchequer on the morrow of All Souls yearly, (which day is now altered to the morrow of St. Martin by the last act for abbreviating Michaelmas term,) and then and there the judges propose three persons, to be reported (if approved of) to the king, who afterwards appoints one of them to be sheriff. See *1 Comm. c. 9. p. 340, 341; Fort. de LL. c. 24.*

The following is the present mode of nominating sheriffs in the Exchequer, on the morrow of St. Martin.

The chancellor, chancellor of the exchequer, the judges and several of the privy council assemble, and an officer of the court administers an oath to them, in old French, that they will nominate no one from favour, partiality, or any im-

proper motive: this done, the same officer, having the list of the counties in alphabetical order, and of those who were nominated the year preceding, reads over the three names, and the last of the three he pronounces to be the present sheriff: but where there has been a pocket-sheriff (see *post*), he reads the three names upon the list, and then declares who is the present sheriff. If any of the ministry or judges has any objection to a person named, he mentions it, and another gentleman is nominated in his room: if no objection is made, some one rises and says, "To the two gentlemen I know no objection, and I recommend A. B. esq. in the room of the present sheriff."

Another officer has a paper, with a number of names, given him by the clerk of assize for each county, which paper generally contains the names of the gentlemen upon the former list, and also of gentlemen who are likely to be nominated; and whilst the three are nominated, he prefixes 1, 2, or 3 to their names according to the order in which they are placed; which, for greater certainty, he afterwards reads over twice. Several objections are made to gentlemen: some perhaps at their own request; such as, that they are abroad, that their estates are small and incumbered, that they have no equipage, that they are practising barristers, or officers in the militia, &c.

The new sheriff is generally appointed about the end of the following Hilary Term: this extension of the time was probably in consequence of the 17 *Edw. 4. c. 7.* which enables the old sheriffs to hold his office over Michaelmas and Hilary Terms. 1 *Comm. c. 9. p. 341. n.*

This custom, of the twelve judges proposing three persons, seems borrowed from the Gothic constitution before mentioned; with this difference, that, among the Goths, the twelve nominors were first elected by the people themselves. And this usage, it is suggested by *Blackstone*, was, at its first introduction, founded upon some statute, though not now to be found among our printed laws: first, because it is materially different from the direction of all the statutes before mentioned; which it is hard to conceive that the judges would have countenanced by their concurrence, or that Fortescue would have inserted in his book, unless by the authority of some statute: and also, because a statute is expressly referred to in the record, which *Sir Edward Coke* says he transcribed from the *Council-book* of 3d March, 34 *Hen. VI.* and which is in substance as follows:—The king had of his own authority appointed a man sheriff of Lincolnshire, which office he refused to take upon him; whereupon the opinions of the judges were taken, what should be done in this behalf: and the two chief justices, *Sir John Fortescue* and *Sir John Prisot*, delivered the unanimous opinion of them all; "that the king did an error, when he made a person sheriff that was not chosen and presented to him according to the statute; that the person refusing was liable to no fine for disobedience, as if he had been one of the three persons chosen according to the tenor of the statute; that they would advise the king to have recourse to the three persons that were chosen according to the statute, or that some other thrifty man be entreated to occupy the office for this year; and that, the next year, to eschew such inconveniences, the order of the statute, in this behalf made, be observed." 1 *Comm. c. 9.*

Mr. Christian expresses his dissent from the foregoing opinion of the learned commentator, that the present practice originated from a statute which cannot now be found; because, if such a statute ever existed, it must have been passed between the date of this record, 34 *Hen. 6.* and the 23 *Hen. 6. c. 7.* before referred to; for that statute recites and ratifies the 14 *Edw. 3. st. 1. c. 7.* which provides only for the nomination of one person to fill the office when vacant: yet the former statute, 9 *Edw. 2. st. 2.* leaves the number indefinite; viz. sheriffs shall be assigned by the chancellor, &c.; and if such a statute had passed in the course of those eleven years,

it is probable that it would have been referred to by subsequent statutes. *Mr. Christian* conceives that the practice originated from the consideration, that as the king was to confirm the nomination by his patent, it was more convenient and respectful to present three to him than only one; and though this proceeding did not exactly correspond with the directions of the statute, yet it was not contrary to its spirit, or, in strictness, to its letter; and therefore the judges might perhaps think themselves warranted in saying, that the three persons were chosen according to the tenor of the statute. 1 *Comm. c. 9. p. 342. n.*

Notwithstanding the unanimous resolution of all the judges of England, entered, as before mentioned, in the council book, and the 34 and 35 *Hen. 8. c. 26. § 61.* which expressly recognizes this to be the law of the land; some have affirmed that the king, by his prerogative, may name whom he pleases to be sheriff, whether chosen by the judges or not. *Jenk. 229.* This is grounded on a very particular case in the fifth year of Queen Elizabeth, when, by reason of the plague, there was no Michaelmas term kept at Westminster, so that the judges could not meet there in *Crastino Animarum*, to nominate the sheriffs; whereupon the queen named them herself, without such previous assembly, appointing for the most part one of the two remaining in the last year's list. *Dyer, 225.* And this case, thus circumstanced, is the only authority in our books for the making these extraordinary sheriffs. It is true, the reporter adds, that it was held that the queen by her prerogative might make a sheriff without the election of the judges non obstante aliquo statuto in contrarium: but the doctrine of non obstante's, which sets the prerogative above the laws, was effectually demolished by the Bill of Rights at the revolution and abdicated Westminster Hall when King James abdicated the kingdom. However, it must be acknowledged, that the practice of occasionally naming what are called Pocket-Sheriffs, by the sole authority of the crown, hath uniformly continued to the reign of his present Majesty, in which, few (if any) compulsory instances have occurred. 1 *Comm. c. 9.*

They were called Pocket-Sheriffs who were appointed by the king, not being one of the three nominated in the Exchequer. The unanimous opinion of the judges above referred to, from 2 *Inst. 359.* seems to preclude the possibility of a compulsory appointment. 1 *Comm. 342. n.*

Where the appointment is legal, and there is no sufficient excuse for not accepting it, it is a misdemeanour to refuse to serve, and the court of K. B. would probably grant permission to proceed by criminal information against a person so refusing. See *Rex. v. Woodrow, 2 T. R. 731.*

The sheriffs in every of the shires of Wales shall be nominated yearly by the lord president, council, and justices of Wales, and shall be certified up by them; and after, appointed and elected by the king, as other sheriffs be. 34 *Hen. 8. c. 26; Dalt. Sh. 6.* See 1 *Wm. 4. c. 70;* and title *Wales.*

Formerly the sheriff, before he exercised any part of his office, and before his patent was made out, was to give security in the King's Remembrancer's Office in the Exchequer, under pain of 100*l.* for the payment of his proffers, and all other profits of the sheriffwick: but these securities were never sued, unless there was a deficiency in the sheriff's effects. *Dalt. Sh. 7.*

But now by 3 & 4 *Will. 4. c. 89. § 2.* it is no longer necessary for any sheriff in England or Wales to sue out any patent or writ of assistance, or to make or pay proffers, nor shall any bailiff or bailiffs of liberties in England or Wales be required to make or pay any proffers, nor shall he or they have any day of prefixion, or be apposed, or take any oath or oath before the cursitor baron to account, or account, or be cast out of court, as theretofore in use in his majesty's Court of Exchequer.

And by § 3. whenever any person shall be duly pricked or nominated by his majesty to be sheriff of any county in England or Wales, except the county palatine of Lancaster,

the same shall be forthwith notified in the London Gazette, and a warrant in the form set forth in the schedule to the act shall be made out and signed by the clerk of the Privy Council, and transmitted to the person so appointed sheriff; and the appointment of sheriff thereby made shall be as effectual as if the same had been made by patent under the great seal of Great Britain, or by any ways and means theretofore in use; and the sheriffs so appointed shall thereupon, and upon taking the oath of office, thereafter mentioned, have and exercise all powers, privileges, and authorities whatsoever usually exercised and enjoyed by sheriffs of counties in England and Wales, without any patent, writ of assistance, or other writ whatsoever, or entering into any recognizance by himself or sureties, and without payment of or being liable to pay any fees whatsoever for the same.

§ 4. provides that a duplicate of the said warrant shall, within ten days next after the date of the same warrant, be transmitted by the said clerk of the Privy Council to the clerk of the peace of the county for which such person shall be appointed sheriff, to be by the said clerk of the peace enrolled, without fee or reward.

The sheriff, before he takes upon him the exercise of his office, must not only take the oaths of allegiance and abjuration, enjoined to all officers by divers acts of Parliament, but all sheriffs, except those of Wales, and the counties palatine, must take the oath appointed by 8 Geo. 1. c. 15. § 18. for the due execution of their office.

As to the exceptions taken by Sir Edward Coke to the oath in the case of the sheriffs of Berks, see *Bac. Abr. Sheriffs, G.* (edit. by Gmillin & Dodd.)

By the 3 and 4 Will. 4. c. 90. § 5. every person appointed sheriff and under sheriff, except the sheriffs of London and Middlesex and their under sheriffs, shall, before he enter upon the execution of his office, take the oath of office now required by law, which oath shall be fairly written on parchment (without being subject to any stamp duty) and signed by him, and may be sworn before the barons of his majesty's exchequer, or any justice of the peace for the county of which he shall be appointed sheriff or under sheriff; and the same shall be thereupon transmitted to the clerk of the peace for the same county, who is thereby required to file the same among the records of his office.

If a person refused to take upon him the office of sheriff, it was usual to punish him in the Star-chamber; and he may now be proceeded against by information in the Court of King's Bench. Also if he refuses to take the oaths enjoined him, or officiates in the office before he hath thus qualified himself, the court, which hath a general superintendency over all officers and ministers of justice, will grant an information against him, and it hath been held, that a refusal of oaths required to be taken, amounts to a refusal of the office. *Dalt. Sh. 15; Dyer, 167; 3 Lev. 116; Carth. 307.*

The office of sheriff doth not determine by the party's becoming a peer on the death of his father, but that he still remains sheriff *ad voluntatem Regis*. *Cro. Eliz. 12.* Sir Lewis Morant's case.

When a sheriff is chosen, the old sheriff continues sheriff of the county till the new is sworn, which completes him in his office; but the office of the old sheriff ceases and is at an end when the writ of discharge comes to him.

By 14 Edw. 3. c. 7. no sheriff shall tarry or abide in his office above one year, upon pain to forfeit 200l. a year as long as he occupieth the office; and every pardon made for such offence or forfeiture shall be void: and see 43 Edw. 3. c. 9. post, V. London, Middlesex, &c. are not within these statutes. See 3 Geo. 1. c. 15. § 21.

Notwithstanding these old statutes, it hath been said, 4 Rep. 32. that a sheriff may be appointed *durante bene placito*, or during the king's pleasure: and so is the form of the royal writ. Therefore till a new sheriff be named, his office cannot be determined, unless by his own death or the demise of the

king; in which last case, it was usual for the successor to send a new writ to the old sheriff; but now by 1 Ann. st. 1. c. 8. all officers appointed by the preceding king may hold their offices for six months after the king's demise, unless sooner displaced by the successor. See *Dalt. 7, 8.*

IV. A SHERIFF cannot be elected knight of the shire for that county for which he is sheriff. 4 Inst. 48; *Litt. Rep. 326.* See *Parliament.*

By 4 Hen. 4. c. 5. every sheriff shall be dwelling in proper person within his bailiwick, for the time he shall be such officer; and that the sheriff shall be sworn to do the same.

Hence it is clear that a sheriff hath no jurisdiction in any other county, nor can he do a judicial act, in which his personal presence is required, out of his county; but it is held, that he may do a ministerial act, as make a panel, or return a writ out of his county, unless he is beyond sea. *Dalt. Sher. 22; 9 Hen. 4. 1.* See further *Plowd. 37; Dalt. Sher. 23.*

By 23 Hen. 6. c. 9. it is provided, "that no sheriff shall let to farm, in any manner, his county, nor any of his bailiwicks, hundreds, or wapentakes."

In the construction hereof it hath been holden, that this is a particular law, and must be pleaded, otherwise the judges cannot take notice of it. 3 Keb. 678.

It hath been held, that a lease of the county, though no rent was ever received, is within the statute: the intent thereof being that sheriffs should keep their counties in their own hands. 20 Hen. 7. 19. See *Dalt. Sher. 23, 24; Plowd. 87; Moor, 781.*

Although the same persons are sheriffs of London and sheriffs of Middlesex, yet in a writ directed to them as sheriffs of London, they have no authority to execute it in Middlesex; and so *è converso*. 3 Barn. & A. 408.

A sheriff may make and deliver the return of a writ anywhere. 1 Wils. 328. A sheriff gives out a blank warrant upon a writ which is filled up by an attorney, this is ill. 2 Wils. 47. See *Commitment.*

Until a different regulation was made by 8 Eliz. c. 16. in a great many instances two counties had one and the same sheriff: this is still the case in the counties of Cambridge and Huntingdon.

It will appear to be of the utmost importance to have the sheriff appointed according to law, when we consider his power and duty. These are either as a judge, as the keeper of the king's peace, as a ministerial officer of the superior courts of justice, or as the king's bailiff. 1 Comm. c. 9.

In his judicial capacity he has a jurisdiction both in civil and criminal cases; and for this purpose he hath two courts,—his *tourn* for criminal cases, which is therefore the king's court, and his *county court* for civil cases, which last is the court of the sheriff himself. 3 Salk. 322.

He is to hear and determine all causes of 40s. value, and under, in his county court; and he has also a judicial power in divers other civil cases. *Dalt. c. 4.* He is likewise to decide the elections of knights of the shire, subject to the control of the House of Commons, of coroners, and of verderers; to judge of the qualification of voters, and to return such as he shall determine to be duly elected. 1 Comm. c. 9.

A sheriff has authority to order a freeholder into custody and to take him before a justice of peace, if he interrupt the proceedings at a county court held for the election of knights of the shire, by making a noise and disturbance. 1 Taunt. 146.

As the keeper of the king's peace both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein during his office. 1 Roll. Rep. 237. He may apprehend and commit to prison all persons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the king's peace. He may, and is bound, *ex officio* to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county

against any of the king's enemies, when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatús*, or power of the county: and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend, upon warning, under pain of fine and imprisonment. *Stat. 2 Hen. 5. st. 1. c. 8.* See *Riot*. But though the sheriff is thus the principal conservator of the peace in his county, yet, by the express directions of the great charter, (c. 17.) he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown; or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office: for this would be equally inconsistent; he being in many respects the servant of the justices. *Stat. 1 Mar. st. 2. c. 8.*

In his ministerial capacity the sheriff is bound to execute all process issuing from the king's courts of justice. In the commencement of civil causes, he is to serve the writ, to arrest, and to take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution. In criminal matters, he also arrests and imprisons, he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extends to death itself. See *Execution*.

By the interpleader act, 1 & 2 Will. 4. c. 58. § 6. an important provision is enacted for indemnifying sheriffs where the property of goods seized is disputed. See *Interpleader*.

He is also compelled to execute the warrant of a justice of the peace, if upon any extraordinary occasion it should be directed to him; though magistrates' warrants are usually directed to constables and other inferior officers: but he need not go in person to execute it, but may authorize another to do so. *2 Hawk. c. 13. § 29.*

He is also bound to attend the sessions of the peace, there to return his precepts, to take charge of the prisoners, to receive fines for the king and the like. *2 Hawk. c. 8. § 45.* And for any default in executing the writs or precepts of the sessions, he is punishable by the justices in sessions as for a contempt. *Id. c. 22. § 2.*

The sheriff has also the keeping of the gaols within the county, and is answerable for all escapes suffered by the gaolers; to the king, if it be a criminal matter; or in a civil case, to the party injured; though if a gaoler suffer a felon voluntarily to escape, this, inasmuch as it reacheth to life, is felony only in the gaoler, but the sheriff may nevertheless be indicted, fined, and imprisoned. *1 Hale, 597.*

As the king's bailiff, it is his business to preserve the rights of the king within his bailiwick; for so his county is frequently called in the writs: a word introduced by the princes of the Norman line; in imitation of the French, whose territory is divided into bailiwicks, as that of England into counties. *Fortesc. de L. L. c. 24.* He must seize to the king's use all lands devolved to the crown by attainder or escheat; must levy all fines and forfeitures; must seize and keep all waifs, wrecks, estrays, and the like, unless they be granted to some subject; and must also collect the king's rents within the bailiwick, if commanded by process from the Exchequer. *Dalt. c. 9;* but see *post*.

By *st. 57 Geo. 3. c. 68.* for amending the laws relating to sheriffs in Ireland, sheriffs are empowered to make like returns of writs against former sheriffs, as against any other persons; and to recover double costs in actions against their under-sheriffs, &c. for breach of duty.

The same act provides, that if the sheriff pays money for which he is accountable before the time required by law, he

shall receive a discount; and, on the other hand, if he neglects to pay it in due time, he shall pay interest; and after attachment for non-payment, double interest.

V. To execute his various duties, the sheriff has under him many inferior officers; an under-sheriff, bailiffs, and gaolers.

The high-sheriff may execute the office himself; and the under-sheriff hath not, nor ought to have, any estate or interest in the office itself; neither may he do any thing in his own name, but only in the name of the high-sheriff, who is answerable for him. *Dalt. Sher. 3; Salk. 96.*

By the 3 & 4 Wm. 4. c. 99. § 7. prisoners and writs not wholly executed are to be turned over by sheriffs at the expiration of their office to the incoming sheriff.

By § 8. sheriffs' accounts are to be audited by commissioners for auditing public accounts.

§ 9. Sheriffs going out of office (except those of Chester, Lancaster, and Durham) are to transmit these accounts to commissioners. And the sheriff of Westmoreland is to transmit like accounts yearly.

§ 10. In case it shall be necessary, the oath or affidavit of sheriff, relative to such accounts, may be taken before a judge, commissioner, or magistrate.

§ 11. The sheriff's claim for certain allowances, usually called the bill of cravings, is to be settled by the Treasury.

By § 12. no sheriff or sheriffs shall receive or shall be chargeable with the collection and receipt of quit-rents, viccomital or viscontiel rents, and other rents or payments issuing out of or payable to his majesty in respect of any honors, manors, lands, tenements, or hereditaments in England or Wales; but the same (except such as shall be released pursuant to the provision next hereinafter contained) shall thereafter be considered as parcel of the land revenue of the crown, and shall be under the management and direction of his majesty's commissioners of woods, forests, and land revenue.

§ 13. empowers the Treasury to release certain rents. By § 15. sheriffs are not to be chargeable with pre-fines or post-fines.

But by § 16. this provision is not to extend to the county palatine of Lancaster.

By the 3 & 4 Wm. 4. c. 99. § 5. every person appointed sheriff shall, within one calendar month next after the notification of his appointment in the London Gazette, by writing under his hand, nominate and appoint some fit person to be his under-sheriff, and shall transmit a duplicate thereof to the clerk of the peace for the county, to be by him filed among the records of his office, and for which he shall be entitled to demand from such under-sheriff five shillings, and no more; and such appointment and duplicate shall not be liable to any stamp duty whatever.

By *stat. 3 Geo. 1. c. 15.* "it shall not be lawful for any person to buy, sell, let, or take to farm, the office of under-sheriff or deputy-sheriff, seal-keeper, county-clerk, shire-clerk, gaoler, bailiff, or any other office pertaining to the office of high-sheriff, or to contract for any of the said offices, on forfeiture of 500*l.*, one moiety to his majesty, the other to such as shall sue in any court at Westminster, within two years after the offence." § 10.

"Provided, that nothing in this act shall hinder any high-sheriff from constituting an under-sheriff or deputy sheriff, as by law he may, nor to hinder the under-sheriff in any case of the high-sheriff's death, when he acts as high-sheriff, from constituting a deputy; nor to hinder the receipt of, or accounting to the sheriff, &c. for legal fees." See *Dalt. c. 5. s. 3. Hob. 13; 2 Brownl. 281.*

By § 8. if any sheriff shall die before the expiration of his year, or before he be superseded, the under-sheriff shall nevertheless continue in his office, and execute the same in the name of the deceased, till another sheriff be appointed and

sworn; and the under-sheriff shall be answerable for the execution of the office during such interval, as the high-sheriff would have been; and the security given by the under-sheriff, and his pledges, shall stand a security to the king, and all persons whatsoever, for the performing of his office during such interval."

The under-sheriff, before he intermeddle with the office, is to be sworn; this was first enjoined by 27 *Eliz. c. 12.* and the form of the oath there prescribed. Before this statute, the under-sheriff was never sworn. 1 *Rot. Rep. 274, per Coke.* And by 3 *Geo. 1. c. 15. § 19.* it was enacted, that all under-sheriffs of any counties in South Britain, except the counties in Wales, and county palatine of Chester, before they enter upon their offices, should take an oath appointed by that act, for the execution of their office. And see 3 & 4 *Wm. 4. c. 99. § 6; ante, III.*

A sheriff cannot appoint two deputy-sheriffs extraordinary. 2 *Wils. 378.*

The under-sheriff usually performs all the duties of the office, a very few only excepted, where the personal presence of the high-sheriff is necessary. But no under-sheriff shall abide in his office above one year; 42 *Edw. 3. c. 9;* and if he does, by 29 *Hen. 6. c. 8.* he forfeits 200*l.*, a very large penalty in those early days. And no under-sheriff or sheriff's officer shall practice as an attorney, during the time he continues in such office; for this would be a great inlet to partiality and oppression. 1 *Hen. 5. c. 4.* But these salutary regulations are evaded by practising in the names of other attorneys, and putting in short deputies by way of nominal under-sheriffs; by reason of which, says *Dalton*, the under-sheriffs and bailiffs do grow so cunning in their several places that they are able to deceive; and it may well be feared that many of them do deceive both the king, the high-sheriff, and the county. *Dalt. c. 115.*

The under-sheriff is bound, without delay, to pay obedience to all the king's writs delivered to him, and he cannot refuse to execute process until he has his fees. 1 *Salk. 330.*

Sheriff's officers or bailiffs are either bailiffs of hundreds or special bailiffs. See *Bailiff.*

By 57 *Geo. 3. c. 68. § 3.* actions for neglect in the office of sheriffs in Ireland, may be brought against the under-sheriff, unless in case of the immediate act or default of the high-sheriff.

See further, as connected with this title, *County, County Court, Execution, Escape, Rescue, Tourn, &c. &c.* See also, *Impey's Sheriff.*

SHERIFF CLERK. The clerk to the sheriff's court in Scotland, who alone can be notary to the seisions given by the sheriff, proceeding on precepts for infesting heirs holding of the crown.

SHERIFF IN THAT PART OR REHALE. A person appointed to supply the place of the sheriff for executing process in Scotland.

SHERIFF'S COURT IN LONDON. See *London.*

SHERIFF'S TOURN. See *Turn.*

SHERIFF'S TOWN. [The sheriffship or time of sheriff's town.] 11 *Car. 2. c. 21.*

SHERIFF'S WICK. The extent of a sheriff's authority.

SHERIFF'S WICK. A rent formerly paid by the sheriff, and it is proved, that the sheriff in his account may be discharged thereof. *Rot. Parl. 50 Edm. 3.*

SHERIFF-TOOTH seems to be a tenure by the service of providing entertainment for the sheriff at his county courts. *Rot. Plac. in Hin. apud Centr. 14 Hen. 7.* In Derbyshire, the king's bailiffs anciently took 6*d.* of every bovat of land, in the name of sheriff-tooth. *Ryl. Plac. Parl. 653.* And it is now to be a common tax levied for the sheriff's diet.

SHEWING, *monstrari*. Is specially used to be quit of a debt in a court, in plaints shewed and not avowed. See *p. Entom. 1130.* See *Monstrans.*

SHIELD, *scutum*. An instrument of defence (from the

Saxon *scyldam*, to cover, or the Greek *σχυρος*, a skin), shields anciently being made with skins. And hence *scutage* and *escuage*. See *Tenures.*

SHIFTING USE. See *Use.*

SHILLING, Sax. *scilling*, Lat. *solidus*.] Among the English Saxons passed but for 5*d.*; afterwards it contained 1*d.*, and often 2*d.* In the reign of King William I. called the Conqueror, a shilling was of the same denominative value as this day. *Leg. Hen. 1. Domesday.* See *Coin.*

SHILWIT. See *Childwit.*

SHIP-MONEY. An imposition charged upon the ports, towns, cities, boroughs, and counties of this realm, in the time of King Charles I., by writs commonly called ship-writs, under the great seal of England, in the years 1635 and 1636, for the providing and furnishing certain ships for the king's service, &c.; which was declared to be contrary to the laws and statutes of this realm, the petition of right, and liberty of the subject, by 17 *Car. 1. c. 14.*

SHIPPER. Is a Dutch word signifying the master of a ship, mentioned in some of our statutes. We use it for any common seamen, and generally say skipper.

SHIPS AND SHIPPING. Nautical men apply the term ship to distinguish a vessel having three masts, each consisting of a lower-mast, a top-mast, and a top-gallant-mast, with their appropriate rigging. In familiar language, it is usually employed to distinguish any large vessel, however rigged; but it is also frequently used as a general designation for all vessels navigated with sails; and it is in this sense that it is here employed.

As to what are to be termed British and what foreign ships, and how the former are to be navigated, see *Navigation Acts.*

As a master or owner of a ship may have an action for the freight; either the one or the other are answerable, where goods are damaged in the ship. But where there are several owners, and one disagrees to the voyage, he shall not be liable to any action after for a miscarriage, &c. *Comb. 116.*

Where the owner, and not the freighter, is liable for a loss of gold sent by the ship, see 2 *Stra. 1251.* Owners of ships are liable for the goods on account of the freight, though robbed of them, and for default of the master. *Annot. 86.* See *Carrier.*

An action doth not lie against a man as owner, but as he hath the benefit of the freight; for when there are several owners, and one dissents from the voyage, he shall not be liable afterwards for a miscarriage, &c. *Ann. 90; Comb. 117.* See 2 *Stra. 816.* where it was held, that *prout facie* the repairer of a ship has his election to sue the master who employs him, or the owners; but if he undertakes it on a special promise from either, the other is discharged.

The owner of a vessel has no lien for the hire stipulated by charter-party for a voyage, upon goods shipped by the charterer, because the latter is the owner of the ship for the voyage; and the first owner has no possession of the ship or goods, without which there can be no lien. 7 *Taunt. 74.*

No owner of a ship shall be liable to answer loss, by reason of embezzling any gold, silver, jewels, &c. taken in or put on board, or for any forfeiture incurred, without the privity or knowledge of such owner, further than the value of the ship and freight due. But other remedies against the master and seamen of such ships are not taken away. 7 *Geo. 2. c. 15; 26 Geo. 2. c. 86.*

By the 53 *Geo. 3. c. 159.* reciting that it is of the utmost importance to promote the increase of shipping, and to prevent discouragement to merchants and others from being interested therein, it is enacted, that no owner or part owner of any vessel shall be liable to answer for any loss or damage arising from any act or neglect committed or occasioned without the fault or privity of such owner, to the ship or the goods laden on board, beyond the value of the ship and the freight due or to grow due for the voyage in which the loss shall happen. Lighters, &c. on rivers are excepted from the act; which

also reserves the responsibility of the master and mariners, and makes provision for ascertaining and liquidating losses to several persons, the whole amount of which may exceed the value of the ship and freight, by proceedings in equity.

In an action against several defendants, as ship-owners, for damage sustained by the loss of goods laden on board their ship, it was held, that under the last-mentioned act, § 1, they were not liable in that character beyond the value of the ship and freight due, or to grow due, although the loss was occasioned by the misconduct of one of the defendants, who was both master and part owner, and that the value of the ship was to be calculated at the time of the loss, and not at the time of the commencement of the voyage; and that in calculating the freight due, or to grow due, money actually paid in advance was to be included. *2 B. & A. 2.*

By 54 Geo. 3. c. 159. several regulations are made for the mooring, breasting, ballasting, &c. of ships in the several ports, harbours, roadsteads, sands, channels, bays, and navigable rivers in the United Kingdom. See *Harbours*.

By 1 & 2 Geo. 4. c. 75. § 1. pilots and others are to deposit anchors, cables, and other ships' materials, whether the same ship shall have been in distress or otherwise, parted with, cut from, or left by any ship within any harbours, rivers, or bays, or on any of the coasts of this kingdom, or any goods or merchandize taken possession of by them, in the places to be appointed by the act: concealing such articles, forfeits the claim to salvage, and subjects the offender to punishment.

§ 2. Every deputy vice-admiral is to send a report of goods deposited, to the Trinity House; but no report is to be made until the articles amount to 20*l*.

§ 3. Any deputy vice-admiral may seize goods not reported and deposited, and shall make report thereof to the Trinity House, on penalty of 20*l*., and double value of the seizure: one-third of the value of goods to be allowed on being claimed by the owner.

§ 5. If the deputy-vice admiral seize by previous information, he and informer to divide two-sixth parts.

§ 6. If the articles are not claimed within a limited time, they are to be sold according to 12 Ann. c. 18; and if they shall have been seized, the deputy vice-admiral seizing, and the person informing, shall be equally entitled to salvage.

§ 7. If the owners and salvors cannot agree respecting the salvage, three justices shall determine the difference: if the justices cannot agree, they shall nominate a person conversant in maritime affairs, who shall determine.

§ 8. Justices may in like manner determine upon remuneration to be made for services rendered to ships in distress or otherwise, and their decision shall be final, unless an appeal within thirty days is made to the Court of Admiralty.

§ 9. Persons dissatisfied may appeal to the High Court of Admiralty; but the goods to be restored to the owners on giving bail: bail to be taken by a commissioner in prize cases, if there is one in the place, otherwise by a justice.

By § 11. persons cutting away, casting adrift, removing, altering, defacing, or destroying any buoy, buoy rope, or mark belonging to any ship, or attached to any anchor or cable belonging to any ship whatever, whether in distress or otherwise, shall, on being convicted, be guilty of felony, and be liable to be transported for not exceeding seven years, or to be imprisoned for any number of years, at the discretion of the court in which the conviction shall be made.

§ 12. Persons fraudulently purchasing or receiving anchors, cables, &c. shall be considered receivers of stolen goods.

§ 13. Masters of ships bound to parts beyond the seas, finding or taking on board anchors and other articles, shall make an entry in the log-book, and report the same to the Trinity House, and on their arrival in England deposit the articles: if not claimed, the articles are to be sold and disposed of according to the law with respect to unclaimed property: penalty for making default, not exceeding 100*l*. nor less than 30*l*.

§ 15. Every pilot, hoveller, boatman, or the master of any vessel, who shall convey any anchor or cable taken possession of by them, to any foreign port, harbour, creek, or bay, and there sell and dispose of the same, shall be guilty of felony, and be transported for not exceeding seven years.

§ 16. imposes a penalty not exceeding 20*l*. on dealers in marine stores for not having their names, with the words "Dealer in Marine Stores," painted on their store-houses, or for cutting up any cable, exceeding five fathoms in length, without a permit from a magistrate.

§ 17. Such dealers are to keep an account of old stores bought by them, and to advertise before they cut up the cordage: persons may demand inspection of their books, which are to be produced, under a penalty, for refusing inspection, of not exceeding 20*l*. for the first, and not exceeding 50*l*. for the second or further offence.

By § 18. manufacturers of anchors are to place marks on anchors and kedge anchors, under a penalty, on neglect, of 5*l*.

§ 22. Offences under the act may be tried in the county where articles are found, or if sold in foreign parts, where offenders reside.

By the 1 & 2 Geo. 4. c. 76. similar provisions to the above are enacted for the protection of property belonging to ships within the jurisdiction of the cinque ports.

By the last act (3 & 4 Geo. 4. c. 35), for the registration of British vessels, § 2, no ship shall be entitled to any of the privileges of a British registered ship, unless the persons claiming property therein shall have caused the same to have been registered either under the 4 Geo. 4. c. 41, or 6 Geo. 4. c. 110. or until such persons shall have caused the same to be registered in manner thereafter mentioned, and shall have obtained a certificate of such registry, in the form therein-after set forth.

§ 3. Persons authorized to make registry and grant certificates, are the collector and controller of customs in any port in the United Kingdom and in the Isle of Man respectively, in respect of vessels to be there registered: the principal officers of customs in Guernsey or Jersey, together with the governor, lieutenant-governor, or commander in chief of those islands respectively, in respect of vessels to be there registered: the collector and controller of customs of any port in the British possessions in Asia, Africa, and America, or the collector of any such port at which no appointment of a controller has been made, in respect of ships or vessels to be there registered: the collector of duties at any port in the territories under the government of the East India Company, within the limits of the charter of the said company, or any other person of the rank in the said company's service of senior merchant, or of six years standing in the said service, being respectively appointed to act in the execution of this act by any of the governments of the said company, in respect of ships or vessels to be there registered: the collector of duties at any British possession within the said limits, and not under the government of the said company, and at which a custom-house is not established, together with the governor, lieutenant-governor, or commander in chief of such possession, in respect of ships or vessels to be there registered: the governor, lieutenant-governor, or commander in chief of Malta, Gibraltar, Heligoland, and Cape of Good Hope respectively, in respect of ships or vessels to be there registered: provided that no ship be registered at Heligoland, except such as are wholly of the built of that place, and ships registered elsewhere; and ships registered at Malta, Gibraltar, or Heligoland, shall not be registered elsewhere; and ships registered at Malta, Gibraltar, or Heligoland, shall not be entitled to the privileges of British ships in any trade between the United Kingdom and the British possessions in America: provided also that wherever by the act it is directed that any act or thing shall be done by or with any collector and controller of customs, the same may be done by or with the persons respectively thereinbefore author-

ized to make registry and to grant certificates of registry as aforesaid. provided also, that wherever by the act it is directed that any act or thing shall be done by or with the commissioners of customs, the same may be done by or with the governor, lieutenant-governor, or commander in chief of any place where any ship may be registered under the authority of the act, so far as such act or thing can be applicable to the registering of any ship at such place.

§ 4. Ships exercising privileges before registry, are to be forfeited; but not to affect vessels registered under the 6 Geo. 4.

§ 5. No ship or vessel shall be registered, or having been registered shall be deemed duly registered, by virtue of the act, except such as are wholly of the built of the United Kingdom, or of the Isle of Man, or of the islands of Guernsey or Jersey, or of some of the colonies, plantations, islands, or territories in Asia, Africa, or America, or of Malta, Gibraltar, or Heligoland, which belong to his majesty, his heirs or successors, at the time of the building of such ships or vessels, or such ships or vessels as shall have been condemned in any Court of Admiralty as prize of war, or such ships as shall have been condemned in any competent court as forfeited for the breach of the laws made for the prevention of the slave trade, and which shall wholly belong and continue to belong to his majesty's subjects duly entitled to be owners of ships or vessels registered by virtue of the act.

§ 6. No Mediterranean pass shall be issued for the use of any ship, as being a ship belonging to Malta or Gibraltar, except such as be duly registered at those places respectively, or such as, not being entitled to be so registered, shall have wholly belonged, before the 10th October, 1827, and shall have continued wholly to belong, to persons actually residing at those places respectively, as inhabitants thereof, and entitled to be owners of British ships there registered, or who, not being so entitled, shall have so resided upwards of fifteen years prior to the said 10th October, 1827.

§ 7. No ship shall continue to enjoy the privileges of a British ship after the same shall have been repaired in a foreign country, if such repairs shall exceed twenty shillings for every ton of the burden of the said ship, unless such repairs shall have been necessary by reason of extraordinary damage sustained by such ship during her absence from his majesty's dominions to enable her to perform the voyage in which she shall have been engaged, and to return to some port or place in the said dominions: the master, on arrival at any port in his majesty's dominions, is to report such repairs; and the necessity of such repairs is to be proved to commissioners of customs.

§ 8. Ships declared unworthy to be deemed ships lost or broken up, and shall never again be entitled to the privileges of a British built ship for any purposes of trade or navigation.

§ 9. No British ship or vessel captured by and become prize to an enemy, or sold to foreigners, shall again be entitled to the privileges of a British ship: provided that nothing contained in the act shall prevent the registering of any ship whatever which shall afterwards be condemned in any Court of Admiralty as prize of war, or in any competent court for breach of laws made for the prevention of the slave trade.

§ 10. Ships shall be registered at the port to which they belong; but the commissioners of customs may permit registry at other ports: at every port a book of registers shall be kept, and accounts transmitted to commissioners.

§ 11. Every ship shall be deemed to belong to some port at or near to which some or one of the owners who subscribe the declaration required by the act before registry be made, shall reside; and whenever such owner or owners shall have transferred all his or their share or shares in such ship, the same shall be registered *de novo* before such ship or vessel shall sail from the port to which she shall then belong, or from any other port which shall be in the same part of the

United Kingdom, or the same colony, plantation, island, or territory as the said port shall be in: provided that if the owner, &c. of such ship cannot in sufficient time comply with the requisites of the act, so that registry may be made before it shall be necessary for such ship to sail upon another voyage, the collector and controller of the port where such ship may then be, may certify upon the back of the existing certificate of registry of such ship, that the same is to remain in force for the voyage upon which the said ship or vessel is then about to sail: provided also, that if any ship shall be built in any of the colonies or territories in Asia, Africa, or America, to his majesty belonging, for owners residing in the United Kingdom, and the master of such ship, or the agent for the owner, &c. thereof, shall have produced to the collector and controller of the port at or near to which such ship or vessel was built, the certificate of the builder required by the act, and shall have subscribed a declaration before such collector, &c. of the names and descriptions of the principal owners of such ship, and that she is the identical ship mentioned in such certificate of the builder, and that no foreigner, to the best of his knowledge and belief, has any interest therein; the collector and controller of such port shall cause such ship to be surveyed and measured in like manner as is directed for the purpose of registering any ship, and shall give the master of such ship or vessel a certificate under their hands and seals, purporting to be under the authority of the act, and stating when and where and by whom such ship was built, the description, tonnage, and other particulars required on registry of any ship, and such certificate shall have all the force and virtue of a certificate of registry under this act, during the term of two years, unless such ship shall sooner arrive at some place in the United Kingdom; and such collector and controller shall transmit a copy of such certificate to the commissioners of customs.

§ 12. Persons residing in foreign countries may not be owners, unless members of British factories, or agents for or partners in British houses, or member of merchants trading to Levant seas.

§ 13. No registry shall thenceforth be made or certificate granted until the declaration therein required be subscribed by the owner of such ship, if such ship belongs to one person only, or in case there shall be two joint owners, then by both of such joint owners if both be resident within twenty miles of the port where such registry is required, or by one of such owners if one or both shall be resident at a greater distance from such port; or if the number of such owners exceed two, then by the greater part of such owners if the greater number shall be resident within twenty miles of such port, not in any case exceeding three of such owners or proprietors, unless a greater number shall be desirous to join in making and subscribing the said declaration, or by one of such owners if all, or all except one, shall be resident at a greater distance: provided always, that if it shall become necessary to register any ship belonging to any corporate body in the United Kingdom, the declaration thereinafter set forth, in lieu of the declaration thereinbefore directed, shall be subscribed by the secretary or other proper officer of such corporate body.

§ 15. Vessels to be surveyed, previous to registry, by persons appointed by the commissioners of customs.

§ 16. specifies the mode of admeasurement to ascertain tonnage.

And § 17. the mode of ascertaining tonnage when vessels are afloat.

§ 19. Tonnage, when so ascertained, to be ever after deemed tonnage.

By § 20. a bond is to be given at the time of registry, the conditions of which are to be, that the certificate shall be solely made use of for the service of the vessel, or given up to be cancelled in certain cases: if the ship, at the time of re-

gistry, be at any other port than that of registry, the master may there give bond.

§ 21. When the master is changed, the new master to give a similar bond, and his name be indorsed on the certificate of registry.

§ 23. Certificate of registry is to be given up by all persons, as directed by the bond, under the penalties therein contained.

§ 24. Name of vessel which has been registered never afterwards to be changed, and to be painted on the stern in white or yellow letters, of a length of not less than four inches, upon a black ground, under a penalty for omission of 100*l*.

§ 25. Every person applying for a certificate of the registry of any ship shall produce a true account, under the hand of the builder of such ship, of the denomination, and of the time and place where such ship was built, and also an exact account of the tonnage of such ship, together with the name of the first purchaser or purchasers thereof (which account such builder is thereby required to give), and shall also subscribe a declaration that the ship is the same with that which is so described by the builder as aforesaid.

§ 26. If the certificate of registry be lost or mislaid, the commissioners may permit a registry *de novo*, or grant a licence.

§ 27. Persons wilfully detaining a certificate of registry, are to forfeit 100*l*. on conviction before a justice, who is to certify the detainer, and the ship is to be registered *de novo*: if person detaining certificate have absconded, ship may be registered as in case of a lost certificate.

§ 28. If any ship shall be altered so as not to correspond with all the particulars contained in the certificate of her registry, such ship shall be registered *de novo*, in manner thereinbefore required, as soon as she returns to the port to which she belongs, or to any other port in the same part of the United Kingdom, or in the same colony, plantation, island, or territory, as the said port shall be in, on failure whereof such ship be considered a vessel not duly registered.

§ 29. For the purpose of registering vessels condemned as prizes, or for the breach of the laws against the slave trade, certificates of condemnation are to be produced.

§ 30. Prize or forfeited vessels are not to be registered at Guernsey, Jersey, or Man; but at Southampton, Weymouth, Exeter, Plymouth, Falmouth, Liverpool, or Whitehaven.

§ 31. Transfers of interests in ships are to be made by bill of sale, reciting certificate of registry; and the bill of sale shall not be void by unimportant error of recital, &c.

§ 32. The property in every ship of which there are more than one owner, shall be considered divided into sixty-four equal shares, and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth shares; and no person shall be registered as an owner of any ship in respect of any proportion of such ship, not an integral sixty-fourth share of the same; and upon the first registry of any ship, the owner or owners who shall subscribe the declaration required before registry shall also declare the number of such shares then held by each owner, and the same shall be so registered accordingly: provided that if it shall at any time happen that the property of any owner in any ship cannot be reduced by division into any number of integral sixty-fourth shares, the owner of such fractional parts as shall be over and above such number of integral sixty-fourth shares may transfer the same one to another, or jointly to any new owner, by memorandum upon their respective bills of sale, or by fresh bill of sale, without such transfer being liable to any stamp duty: provided also, that the right of any owner to any such fractional parts shall not be affected by reason of the same not having been registered: provided also, that partners may hold ships or shares without distinguishing proportionate interest of each owner.

§ 33. No greater number than thirty-two persons shall be entitled to be legal owners at one time of any ship as tenants in common, or to be registered as such: provided that nothing therein contained shall affect the equitable title of minors, heirs, legatees, creditors, or others, exceeding that number, duly represented by or holding from any of the persons within the said number, registered as legal owners of any shares of such ship: provided also, that if it shall be proved to the satisfaction of the commissioners of customs that persons have associated themselves as a joint-stock company, for the purpose of owning any ship, or any number of ships, as the joint property of such company, and that such company have duly elected not less than three of the members of the same to be trustees of the property in such ships, such trustees or any three may with the permission of such commissioners, subscribe the declaration required by the act before registry, except that instead of stating therein the names and descriptions of the other owners, they shall state the name and description of the company to which such ships shall in such manner belong.

§ 34. Bills of sale shall not be effectual until produced to the officers of customs, and entered in the book of registry or of intended registry.

§ 35. That when the particulars of any bill of sale or other instrument by which any ship, or any share thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the said bill of sale or other instrument shall be valid to pass the property thereby intended to be transferred as against all persons whatsoever, except as against such subsequent purchasers and mortgagees who shall first procure the indorsement to be made upon the certificate of registry of such ship in manner thereafter mentioned.

§ 36. When a bill of sale has been entered for any shares, thirty days shall be allowed for indorsing the certificate of registry, before any other bill of sale for the same shall be entered, it being the intent of the act that the several purchasers and mortgagees of any ship, or shares thereof, when more than one appear to claim the same property, or to claim security on the same property, in the same rank and degree, shall have priority one over the other, not according to the respective times when the particulars of the bill of sale or other instrument by which such property was transferred to them were entered in the book of registry as aforesaid, but according to the time when the indorsement is made upon the certificate of registry as aforesaid: Provided, that if the certificate of registry shall be lost or mislaid, or shall be detained by any person whatever, and proof thereof shall be made to the satisfaction of the commissioners of his majesty's customs the commissioners may grant such further time as to them shall appear necessary for the recovery of the certificate of registry, or for the registry *de novo* of the said ship or vessel under the provisions of the act.

§ 37. Bills of sale may be produced after entry at other ports than those to which vessels belong, and transfers indorsed on certificate of registry; but previous notice must be given to the officers at the port of registry.

§ 38. If upon registry *de novo* any bill of sale shall not have been recorded, the same shall then be produced; and a bill of sale previous to registry may be recorded after registry.

§ 39. Upon a change of property, a registry *de novo* may be granted if desired, although not required by law.

§ 40. Copies of declarations, &c. and of extracts from books of registry, are to be admitted in evidence.

§ 41. If vessels or shares are sold in the absence of owners, without formal powers, the commissioners may permit record of such sales or registry *de novo* as the case may require, and in other cases where bills of sale cannot be produced, upon security being given to produce legal powers, or to satisfy future claims.

§ 42. When any transfer of any ship, or of any share

thereof, shall be made only as a security for the payment of debts, either by mortgage, or of assignment to trustees for the purpose of selling the same for the payment of debts, in every such case the collector and controller of the port where the ship is registered shall, in the entry in the book of registry, and also in the indorsement on the certificate of registry, in manner thereinbefore directed, state that such transfer was made only as a security for the payment of debts, or by way of mortgage; and the person to whom such transfer shall be made, or any other persons claiming under him as a mortgagee or mortgagees, or a trustee or trustees only, shall not be deemed to be the owner or owners of such ship, or shares thereof, nor shall the person making such transfer be deemed by reason thereof to have ceased to be an owner of such ship, except so far as may be necessary for rendering the ship, or shares so transferred, available by sale or otherwise for the payment of the debts, for securing the payment of which such transfer shall have been made.

§ 43. On transfers of ships for security of debts being registered, the rights of mortgagee shall not be affected by any act of bankruptcy of mortgagee or after such registry, notwithstanding such mortgagee, at the time he shall so become bankrupt, shall have in his possession, and shall be the reputed owner of, the said ships.

§ 44. Governors of colonies, &c. may cause proceedings in relation to the force and effect of any register granted to any ship to be stayed until his majesty's pleasure shall be certified to them by his majesty, by and with the advice of his majesty's privy council; and such governors are thereby required to transmit to a secretary of state, to be laid before his majesty in council, an authenticated copy of the proceedings in every such case, with their reasons for causing the same to be stayed, and such documents (properly verified) as they may judge necessary for the information of his majesty.

§ 45. imposes a penalty of 50*l.* on persons making any false declaration, or falsifying any document.

Where A., having contracted for a ship to be built for him in the East Indies, agreed, during the time of building, to sell a share to B., and B. paid a part of the price in pursuance of the agreement, and afterwards on the ship's arrival in England, A. caused her to be registered, and accounted with B. as part owner, but B.'s name was never on the register as owner, it was determined that B. had no legal interest in the ship. *2 B. & A. 218.*

As to further matters relating to this title, see *Freight, Insurance, Navigation Acts, Navy, Pilots, Quarantine, Seamen, Trading House, Wreck, &c.*

SHIP'S PAPERS. The papers or documents required for the manifestation of the property of the ship and cargo, &c.

They are of two sorts, viz. 1st. Those required by the law of a particular country; as the certificate of registry, licence, charter-party, bills of lading, bill of health, &c. required by the law of England to be on board British ships; and 2dly. Those required by the law of nations to be on board neutral ships, to vindicate their title to that character. Mr. Serjeant Marshall, following Mr. Hubner, *In la Suisse des Batiments Neutres*, tome 1. pp. 241—252, has given the following description of the latter class of documents:—

1. *The Passport, Sea Brief, or Sea Letter.*—This is a permission from the neutral state to the captain or master of the ship to proceed on the voyage proposed, and usually contains his name and residence; the name, property, description, tonnage, and destination of the ship; the nature and quantity of the cargo; the place whence it comes, and its destination. This document is indispensably necessary for the safety of every neutral ship. Hubner says that it is the only paper rigorously insisted on by the Barbary corsairs; by the production of which alone their friends are protected from insult.

2. *Proofs of Property.*—These ought to show that the ship really belongs to the subjects of a neutral state. If she appear to either belligerent to have been built in the enemy's country, proof is generally required that she was purchased by the neutral before, or captured and legally condemned and sold to the neutral after, the declaration of war; and, in the latter case, the bill of sale, properly authenticated, ought to be produced. M. Hubner admits that these proofs are so essential to every neutral vessel for the prevention of frauds, that such as sail without them have no reason to complain if they be interrupted in their voyages, and their neutrality disputed.

3. *The Muster-Roll.*—This, which the French call *rôle d'équipage*, contains the names, ages, quality, place of residence, and, above all, the place of birth, of every person of the ship's company. This document is of great use in ascertaining a ship's neutrality. It must naturally excite a strong suspicion if the majority of the crew be found to consist of foreigners; still more, if they be natives of the enemy's country.

4. *The Charter-Party.*—Where the ship is chartered, this instrument serves to authenticate many of the facts on which the truth of her neutrality must rest, and should therefore be always found on board chartered ships.

5. *The Bills of Lading.*—By these the captain acknowledges the receipt of the goods specified therein, and promises to deliver them to the consignee or his order. Of these there are usually several duplicates, one of which is kept by the captain, one by the shipper of the goods, and one transmitted to the consignee. This instrument being only the evidence of a private transaction between the owner of the goods and the captain, does not carry with it the same degree of authenticity as the charter-party.

6. *The Invoices.*—These contain the particulars and prices of each parcel of goods, with the amount of the freight, duties, and other charges thereon, which are usually transmitted from the shippers to their factors or consignees. These invoices prove by whom the goods were shipped, and to whom consigned. They carry with them, however, but little authenticity, being easily fabricated where fraud is intended.

7. *The Log Book, or Ship's Journal.*—This contains a minute account of the ship's course, with a short history of every occurrence during the voyage; if this be faithfully kept it will throw great light on the question of neutrality; if it be in any respect fabricated, the fraud may in general be easily detected.

8. *The Bill of Health.*—This is a certificate, properly authenticated, that the ship comes from a place where no contagious distemper prevails, and that none of the crew, at the time of her departure, were infected with any such disorder. It is generally found on board ships coming from the Levant, or from the coast of Barbary, where the plague so frequently prevails.

A ship using false or simulated papers is liable to confiscation. 1 *Marshall on Insurance*, c. 9. § 6.

SHIRE, *comitatus*, from the Sax. *scýran*, to part or divide. Is well known to be a part or portion of this kingdom, called also county. The old Latin word was *scyra*; and *scyræ*, *provinciæ indicabantur*. Brompt. 659. King Alfred first divided this land; and his division was in *satrapias*, now called shires, in *centurias*, now called hundreds, and *decennas*, now called tithings. *Leg. Alfred.* See Brompton, 956; and tit. County.

SHIRE-CLERK. He that keeps the county court; his office is so incident to the sheriff that the king cannot grant it. *Milton's case*, 4 *Rep.*

SHIRE-MAN, or **SCYRE-MAN**, was anciently judge of the county, by whom trials for land, &c. were determined before the Conquest. *Lamb. Peramb.* p. 442.

SHIREMOTE. An assembly of the county or shire at the assizes, &c. See *Scyregemot*, *Turn.*

SHOOTING. See *Game, Maihem.*

SHOP, shops.] A place where any thing is openly sold.

SHOP-BOOKS. See *Evidence.*

SHOPLIFTERS. Those who steal goods privately out of shops. See *Larceny.*

SHORLING AND MORLING, or MORTLING. Words to distinguish fells of sheep; shorling being the fells after the fleeces are shorn off the sheep's back; and morlings the fells flayed off after they die or are killed. In some parts of England they understand by shorling a sheep whose face is shorn off; and by a morling, a sheep that dies. 45 Ed. 4. c. 1.

SHORTFORD. The ancient custom of the city of Exeter is, when the lord of the fee cannot be answered rent due to him out of his tenement, and no distress can be levied for the same, the lord is to come to the tenement, and there take a stone or some other dead thing of the said tenement, and bring it before the mayor and bailiffs; and thus he must do seven quarter-days successively; and if, on the seventh quarter-day, the lord is not satisfied his rent and arrears, then the tenement shall be adjudged to the lord to hold the same a year and a day; and forthwith proclamation is to be made in the court, that if any man claims any title to the said tenement, he must appear within the year and a day next following, and satisfy the lord of the said rent and arrears. But if no appearance be made, and the rent not paid, the lord comes again to the court, and prays that, according to the custom, the said tenement be adjudged to him in his demesne as of fee, which is done accordingly; so as the lord hath from thenceforth the said tenement, with the appurtenances, to him and his heirs. And this custom is called shortford. *Izack's Antiq. Exet.* 48.

A like custom in London, by the ancient statute of Gavelet, attributed to 10 Ed. 2. is called forschot, or forschoke. See *Gavelet.*

SHRIVED, or SHRIEVED, from the Sax. *scrifan.*] A penitent person confessed by a priest. See *Confessor.*

SHROUD, stealing of.] If any one, in taking up a dead body, steals the shroud or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral. 3 Inst. 110; 12 Rep. 113; 1 Hal. P. C. 595.

SHRUBS. See *Gardens, Larceny, and Malicious Injuries.*

SICA, SICHA. A ditch; from the Sax. *sic, lacuna.* *Mon. Angl.* ii. 130.

SICH, sichetum, and sikettus.] Is a little current of water, which is dry in summer; a water furrow or gutter. *Mon. Angl.* ii. 426.

SICIUS. A sort of money current among the old English, of the value of 2d. *Egbert in Dialogo de Ecclesiasticis Institutionibus.* 98.

SICUT ALIAS, as at another time, or heretofore.] Another writ like the former. See *Alias, Capias, Process, &c.*

SIDELINGS. Meers betwixt or on the sides of ridges of arable land. *Mon. Angl.* ii. 275.

SIERRA LEONE, Settlement of. See *Slaves.*

SIFECERIT TE SECURUM. A species of original writ, so called from the words of the writ, which directed the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gave the sheriff security effectually to prosecute his claim. See *Original.*

SIGLA, from the Sax. *seget.*] A sail, mentioned in the laws of King Etheldred, c. 24.

SIGNAL STATIONS. See 53 Geo. 3. c. 128. to enable his majesty to acquire ground necessary for signal and telegraph stations; by which the Admiralty were empowered from time to time to procure and take land, &c. for the purpose of such stations, and of making and maintaining an uninterrupted communication between the respective signals or telegraphs thereon, and of preventing and removing any

obstructions by buildings, trees, or otherwise, with all ways necessary up to and from the same.

SIGNATURES. Writings presented to the barons of the Exchequer in Scotland as the grounds of royal grants, which, after being passed by the barons in some instances, have the sign manual of his majesty; in others, being authenticated by the cashet (privy seal), become the warrants of grants under one or other of the seals, according to the nature of the subject, or the object in view. *Bell's Scotch Law Dict.*

SIGNET, Fr.] One of the king's seals in England, used in sealing his private letters, and all such grants as pass his majesty's hand by bill signed; which seal is always in the custody of the king's secretaries, and there are four clerks of the Signet Office attending them. 2 Inst. 556. The law takes notice of the sign-manual and privy signet. See *Grant of the King, Privy Seal.*

By 57 Geo. 3. c. 63. the offices of the clerks of the signet and privy seal shall be executed in person under the regulation of the Treasury; and persons holding such offices shall be incapable of sitting in parliament as members of the House of Commons.

SIGNET, in Scotland, is the seal by which the king's letters or writs, for the purpose of private justice, are now authenticated.

Clerks to the signet or writers to the signet, in Scotland, are nearly the same as attornies in England. They were anciently clerks in the office of the secretary of state, by whom writs passing the king's signet were prepared. When, a consequence of the change of the ancient forms of judicial procedure, the signet was applied to writs, summonses, and process in private causes, the new writs which became requisite were prepared by the writers to the signet, who have also the privilege of acting as agents or attornies in causes before the court of session. The society is now under the keeper of his majesty's signet, who acts by his deputy. Persons who are qualified to be writers to the signet must be articulated for five years, and other regulations are adopted for securing the respectability of the members of this society.

SIGNIFICAVIT. A writ issuing out of the Chancery upon certificate given by the ordinary of a man's standing excommunicate by the space of forty days, for the laying him up in prison till he submit himself to the authority of the church. And it is so called, because *significavit* is the emphatical word in the writ. *Reg. Orig.* There is also another writ of this name in the register, directed to the justices of the bench, commanding them to stay any suit depending between such and such parties, by reason of an excommunication alleged against the plaintiff, &c. *Reg. Orig.* 7. And in Fitzherbert we find writs of *significavit* in other cases; as *significavit pro corporis deliberatione*, &c. *F. N. B.* 62, 66. The common writ of *significavit* is the same with the writ *excommunicato capiendo*. See that title.

SIGN-MANUAL. The subscription of the king at the top of grants or letters-patent, which first pass by bill. See further, *Forgery, Grant of the King.*

SIGNUM. A cross prefixed as a sign of assent and approbation to a charter or deed, used by the Saxons. See *Seals.*

SIGNS. The citizens of London are to hang out signs at their houses for the better finding out their respective dwellings, &c. *Chart. King Charles 1.* See *London, Police.*

SILENTARIUS. One of the privy council; and silentium was formerly taken for *conventus privatus*. *Matt. 1. anno 1171.*

According to Littleton, it is an usher, who seeth good rule and silence kept in court. *Litt. Dict.*

SILK. In 1697 an act of parliament was passed prohibiting the importation of all French and other European silk goods, which in 1701 was extended to those of India and China. This prohibition was continued down to the year 1826, when

it was taken off, and foreign silks were allowed to be imported on the payment of an *ad valorem* duty of 30 per cent.

By the 3 & 4 Wm. 4. c. 52. silk goods, the manufacture of Europe, are not to be imported except into the port of London, or into the port of Dublin, direct from Bourdeaux, or the port of Dover, direct from Calais; and not in any vessel under 70 tons burden, except by licence from the commissioners of customs to vessels belonging to Dover, to import such manufactures direct from Calais, though such vessels may not exceed 60 tons burden.

See further, *Malicious Injuries*, 2; *Manufactures, Navigation Acts, Servants*.

SILK-THROWER, and THROWSTER. The trade or mystery of those who wind, twist, and spin or throw silk, thereby fitting it for use. They are incorporated by statute, and mention is made of silk-winders and doublers, who are members of the same trade. 13 & 14 Car. 2. c. 15. None shall exercise the silk-throwers' trade but such as have served seven years' apprenticeship to it, on pain of forfeiting 40s. a month. *Ibid.* Silk-winders, &c. embezzling or detaining silk delivered by silk-throwers, shall pay such damage as a justice shall order, or not doing it shall be whipt and set in the stocks; and the receivers are to be committed to prison by a justice of peace till satisfaction is made the party injured. 20 Car. 2. c. 6; 8 & 9 Wm. 3. c. 36. See *Manufactures, Weavers*.

SILVA-CÆDUA. Wood under twenty years' growth, or coppice-wood. 45 Ed. 3. c. 3. See *Tithes*.

SILVER-COINAGE. See *Coin, Money*.

SIMNEL, or SIMINELL, *siminellus, vel simnellus.* Is mentioned in the assize of bread, and is still in use, especially in Lent. The English simnel is *panis purior*, or the purest white bread. 51 Hen. 3. st. 1; *Ord. pro pistor' incerti temp.* c. 1.

It is said to come from the Lat. *simila*, which signifies the finest part of the flour; *panis similageneus*, simnell-bread. It is mentioned in *stat. assise panis*, bread made into a simnell shall weigh two shillings less than wastell-bread. *Cowell*.

SIMONY,

SIMONIA, venditio rei sacræ.] An unlawful contract for the presenting a clergyman to a benefice. So called from the resemblance it is said to bear to the sin of Simon Magus. Though the purchasing of holy orders seems to approach nearer to this offence. See *Parson*, II.

I. Of Simony generally: what shall be deemed Simony; and the Penalty on this Offence.

II. Of Bonds of Resignation; and of the interference of the Court of Chancery in respect of such bonds. See also tit. *Resignation*.

I. SIMONY is defined to be *studiosa voluntas emendi vel vendendi aliquid spirituale aut spirituali alicuius opere subsecuto*. Also *venditio rei sacræ*. And some authors mention *simony per munus triplex*; as *per munus à manu*, i. e. by bribery, where money is paid down for a benefice; *per munus à lingua*, by favour and flattery; *per munus ab obsequio*, i. e. by a sordid subjection to the patron, or doing services. To which has been added, the making of presents, without taking any notice of expecting a church benefice.

Some authors tell us of a person who took off the cap of Grosulan, an archbishop of Milan, and taking it, told the people. *Iste Grosulanus qui est sub istâ cappâ (et non de alio dicitur, est simoniacus, &c.*

Simony is defined by Blackstone to be the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward [or benefit.] It was, by the canon law, a very grievous crime; and is so much the more odious, because, as Coke observes, it is ever accompanied with perjury, for the presentee is sworn to have committed no simony. 3 Inst. 156, 176. However, it was not an offence punishable in a criminal way at the common law, it being thought sufficient to leave the clerk to ecclesiastical censures. But as these did not affect the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to restrain it by means of civil forfeitures; which the modern prevailing usage, with regard to spiritual preferments, calls aloud to put in execution. 2 Comm. c. 18.

Simony is generally said to be the buying or selling holy orders, or some ecclesiastical benefice. An ecclesiastical benefice, in the larger sense of it in which it is here used, comprehends not only parochial benefices, but all ecclesiastical dignities and promotions. As by this offence worthy and learned men are kept out of the church, and a door is, to the great scandal of religion and prejudice of morality, opened to persons by no means qualified to discharge the duties of the sacred function, it is of the utmost consequence to society that it be prevented. With a view to this, canons were anciently made, by which a very strict oath was enjoined; and it was punished with deprivation or disability, as the case required.

Simony is mentioned as a thing so detestable in the eye of the common law, that a plaintiff in *quare impedit* could not, before the statute of West. 2. recover damages for the loss of his presentation, it being considered as a thing of no value; nor could a guardian in soccage present to an advowson in the right of his heir, because, as he could take nothing for it, he could not bring it to account. 1 Inst. 17 b; 89 a.

In Cro. Ch. 353. it is said that this has, by the law of God and of the land, been always accounted a great offence. In Hob. 167. it is laid down, that a bond on a simoniacal contract is against law, because *ex turpi causâ*, and *contra bonos mores*; nay, that it is void as an usurious bond, which, if paid by an executor, is a *devastavit*. The same is held in Cro. Car. 425. In Cart. 252. such bonds are said to be void as being against law, although they are not so declared by the statute. But, as has been already remarked, since neither the consideration of the heinousness of the offence, nor the provision made against it by the canon or common law, was sufficient to put a stop to this mischief, it was at length restrained by the statute law.

By the 31 Eliz. c. 6. it is, for avoiding of simony, enacted, that if any patron for any corrupt consideration, by gift or promise, directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity; such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice; and the crown shall present to it for that turn only. The words of the statute are, "that if any person or persons, bodies politic or corporate, shall, for any sum of money, reward, gift, profit, or benefit, or by reason of any promise, agreement, grant, bond, or covenant, of or for any sum of money, reward, gift, profit, or benefit, present or collate any person to any benefice, &c. every such presentation, collation, &c. shall be utterly void, and it shall be lawful for the queen, her heirs and successors, to present, &c. unto such benefice, &c.; and that every person or persons, bodies politic or corporate, that shall give or take any such sum of money, &c. or take or make any such promise, &c. shall forfeit the double value of one year's profit of every such benefice, &c. and the person so corruptly taking, &c. such benefice, &c. shall be adjudged a disabled person in law to enjoy the same." § 5.

"If any person shall, for any sum of money, reward, &c. admit, institute, instal, induct, invest, or place any person in

or to any benefice, &c. every such person shall forfeit the double value of one year's profit of every such benefice, and the same shall be void; and the patron collate thereto as if the party admitted were dead." § 6.

But if the presentee dies, without being convicted of such simony in his life-time, by the 1 *W. & M. st. 1. c. 16.* the simoniacal contract shall not prejudice any other innocent patron on pretence of lapse to the crown or otherwise.

Also by the 12 *Ann. st. 2. c. 12.* if any person for money or profit shall procure, in his own name, or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the party is subjected to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown. Before this statute, it was doubted whether it was simony for a clerk to purchase the next turn in a living for himself.

Upon these statutes many questions have arisen with regard to what is and what is not simony. And, among others, these points seem to be clearly settled:

1. That to purchase a presentation, the living being actually vacant, is open and notorious simony; this being expressly in the face of the statute. *Cro. Eliz. 788; Moor, 914.* Lord Hardwick was of opinion, that the sale of an advowson, during a vacancy, is not within the statute of simony, as the sale of the next presentation is; but it is void by the common law. *Ambl. 268.* See 2 *Comm. 22, in n.*

2. For a clerk to bargain for the next presentation, the incumbent being sick and about to die, was held to be simony, even before the statute of Queen Anne. *Hob. 165.* And now, by that statute, to purchase, either in his own name or another's, the next presentation, and to be thereupon presented at any future time to the living, is direct and palpable simony.

An agreement entered into by a clergyman by which he is restrained during his incumbency from asserting a claim to tithes by due course of law, as furnishing evidence against his successors, if it is the consideration of his being appointed or presented, is simoniacal. *7 East, 600.*

3. For a father to purchase such a presentation in order to provide for his son, is not simony; for the son is not concerned in the bargain, and the father is by nature bound to make a provision for him. *Cro. Eliz. 686; Moor, 916.* But where a father, the church being void, contracts with the grantee of the void turn to permit the grantor to present his son, and it is done, this is a simoniacal promotion. *Cro. Jac. 533.* So if a father, in consideration of a clerk's marrying his daughter, doth covenant with the father of the clerk, to procure for him a presentation to a certain church when it shall become void, and he is afterwards thereto presented, it is a simoniacal promotion. *Cro. Car. 425.*

By § 8. of the 31 *Eliz. c. 6.* if persons also corruptly resign or exchange their benefices, both the giver and taker shall forfeit double the value of the money, or other corrupt consideration. Under this clause it has been held, that any resignation or exchange for money is corrupt, however apparently fair the transaction: as where a father, wishing that his son in orders should be employed in the duties of his profession, agreed to secure by bond the payment of an annuity exactly equal to the annual produce of a benefice, in consideration of the incumbent's resigning in favour of his son. The annuity being afterwards in arrear, the bond was put in suit, and the defendant pleaded the simoniacal resignation in bar. The court, though they declared that it was an unconscientious defence, yet as the resignation had been made for money, determined that it was corrupt and simoniacal, and in consequence that the bond was void. *Young v. Jones, E. T. 1782, cited 4 Comm. c. 4. p. 62, n.*

4. If a simoniacal contract be made with the patron, the clerk not being privy thereto, the presentation for that turn shall indeed devolve to the crown as a punishment of the

guilty patron; but the clerk, who is innocent, does not incur any disability or forfeiture. *3 Inst. 154; Cro. Jac. 385.*

5. Bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal, provided the patron or his relations be not benefited thereby; for this is no corrupt consideration, moving to the patron. *Noy, 142; Stra. 534.*

The following determinations will further elucidate this part of the subject.

It was agreed by all the justices, *Trin. 8 Jac.* that if the patron present any person to a benefice with cure, for money, that such presentation, &c. is simoniacal, though the presentee were not privy to it. *12 Rep. 74.* Simony may be by compact between strangers, without the privy of the incumbent or patron. *1 Cro. 331; Hob. 165; Noy, 22; 3 Inst. 153.*

A donative is not within the words of the statute; yet, as a corrupt presentation thereto is within the mischief intended to be thereby remedied, it is within the meaning of it. *Cro. Car. 331.* For the same reason the corrupt promoting to or obtaining of a curacy, has been held to be simony. *Curth. 185.*

This offence is more frequently committed when a church is void; but it may be committed when it is full. If a contract be, when a church is full, to give a sum of money for a presentation to it, when it shall become void, this is a simoniacal contract. *1 Brownl. 7.* So the buying when a church is full, with intent to present a certain person, and the presenting that person when the living becomes void, is simony. *Lane, 102; Noy, 25.* So the purchase of the next avoidance of a church when the incumbent is sick or near dying, with intent to present a certain person, and the presenting him, is simony. *Winch. 63; Noy, 25; Hughes, 330.* But the purchase of an advowson in fee, when the incumbent was on his death-bed, without any privy of the clerk afterwards presented, has been held not to be simoniacal, and not to vacate the next presentation. *2 Black. Rep. 1352.*

Where a contract was made for the sale of the next presentation to a living, the incumbent being at the time afflicted with a mortal disease and at the point of death, within the knowledge of the parties, this was held simoniacal and void within the 31 *Eliz. c. 6.* although the purchaser had no intention of presenting any particular individual: and a clerk having been presented by the purchaser, it was held that the presentation was void, although the clerk was not privy to the corrupt contract. *Fos v. Chester, (Bp.), in Error, 4 D & R. 93; 2 B. & C. 635.* But these decisions were reversed in *Dow. Proc.* where it was determined that this was not simony, as it is to authorize the bishop to reject the clerk. *1 Dow, 416; Bingham, 1.*

From all these authorities it appears, that although it be lawful, except in the cases excepted, to purchase the next avoidance, when a church is full, there is great danger of being guilty, at least in *foro conscientiae*, of this offence. It is fit it should be so, else men would be for ever purchasing for their sons and friends; and the almost necessary consequence of such a traffic in livings would be the filling the church with very improper persons. *4 New Abr. 469.*

It is equally simony where the presentation is by a person usurping the right to present, as if it had been by the person having a good right. *3 Inst. 153.* So if a presentation be by one usurping the right of patronage, and pending a quarrel impedit for removing his clerk, who is after removed, the living is sold; this is simony, for the church was never free of that clerk. And by this means the statute might be eluded, for it would only be getting an usurper to present while the living was void, and then selling it. *7 Ler. 111; 2 Vent. 32.* A corrupt contract with the wife of the patron is simoniacal, although the patron is not privy to it. *1 Black. Rep. 25; Cro. Jac. 381.* If a clerk contracts to give money for being presented to a church, and is after presented gratis

statute had declared the presentation to be simoniacal and void. Such a bond is so manifestly intended by the parties to be a benefit to the patron, that it seems surprising that it should have been ever argued and decided, that it was not a benefit within the meaning of the statute. Yet many learned men have expressed themselves dissatisfied with this determination of the lords, and are of opinion that their judgment would be different if the question were brought before them a second time. But it is generally understood that the lords, from a regard to their dignity, and to preserve a consistency in their judgments, will never permit a question, which they have once decided, to be again debated in their House. See 2 *Comm. c.* 18. p. 280, n.; and *Bro. P. C.* 8vo ed. title *Clergy*, ca. 3. where it appears that six judges delivered their opinions in favour of the bond, and only two against it. The decision of the House was made by a division of nineteen to eighteen.

In a subsequent case it was determined, that a bond given by an incumbent to the patron on presentation, to reside on the living, or to resign if he did not return to it after notice, and also not to commit waste, &c. on the parsonage-house, was good. 4 *T. R.* 78. And where a bond was given to resign a rectory when the patron's son came of age, and before that time to reside and keep the chancel and rectory-house in repair; it was decided by the Court of King's Bench in favour of the bond, without argument. 4 *T. R.* 359.

But it was afterwards decided by the House of Lords, that there was no distinction between a bond conditioned for resigning generally on the request of the patron, and a bond conditioned to resign in favour of a particular relation of the patron; and a bond for resigning in favour of one of two brothers of the patron was held simoniacal and void. *Fletcher v. Lord Sondes*, 3 *Bing.* 501; 1 *Bligh.* (new series) 144.

In consequence of this decision, two statutes were passed, the one retrospective and the other prospective, rendering such bonds valid to a certain extent and under certain regulations.

By the 7 & 8 *Geo. 4. c.* 25. § 1. it was enacted, that no presentation to any spiritual office, made before the 9th April, 1827, shall be void on account of any engagement to resign when another person, or one of two persons, specially named, shall become qualified to take the same. And persons having made any such engagement, shall not be subject to any penalty on account thereof.

§ 2. declares all such engagements entered into before 9th April, 1827, valid and effectual in law.

§ 3. Provided, that nothing in the act contained shall extend to the case of any engagement which shall not have been entered into really and *bond fide* to the intent aforesaid, and no other: provided also, that nothing therein contained shall be deemed compulsory upon the ordinary to accept the resignation.

§ 4. Provided, that if the person, &c. so specially named be not presented to such spiritual office within six months, the resignation shall be void.

By the 9 *Geo. 4. c.* 94. § 1. every engagement *bond fide* made, after the passing of the act, for the resignation of any spiritual office, being a benefice with cure of souls, dignity, prebend, or living ecclesiastical, to the intent, that any one person whosoever, or one of two persons to be specially named and described therein, being such persons as are therein-after mentioned, shall be presented, collated, nominated, or appointed to such spiritual office, or that the same shall be bestowed upon him, shall be valid in law, and the performance of the same may also be enforced in equity: provided, that such engagement shall be so entered into before the presentation, &c. of the party so entering into the same.

§ 2. Provided, that where two persons shall be so specially named and described in such engagement, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand nephew of the patron or of one of the

patrons of such spiritual office, not being merely a trustee or trustees of the patronage of the same, or of the person or one of the persons for whom the patron or patrons shall be a trustee or trustees, or of the person or one of the persons by whose direction such presentation, collation, gift, or bestowing shall be intended to be made, or of any married woman whose husband in her right shall be the patron or one of the patrons of such spiritual office, or of any other person in whose right such presentation, &c. shall be intended to be made.

§ 3. No presentation to any spiritual office shall be void by reason of such agreement to resign. And persons making such agreement not to be liable to penalty, but such presentations to be valid.

Provided (§ 4.) that the act shall not extend to any engagements, unless the deed be deposited within two months with the registrar of the diocese or peculiar jurisdiction wherein the benefice is situated: and the deed shall be open to inspection; and a certified copy be admitted to evidence.

§ 5. Every resignation shall state the engagement, and name of person for whom made, and shall be void, unless the person be presented within six months: provided (§ 6.) that nothing therein shall extend to presentations made by the king, or by any archbishop, bishop, or other ecclesiastical person, or by any other body politic or corporate, whether aggregate or sole, or by any other persons, in right of any office or dignity; or by any company, or any feoffees or trustees for charitable or other public purposes; or by any other person or persons not entitled to the patronage of such spiritual office as private property.

If a bond of resignation, which ought only to be made use of to keep the incumbent to residence or good behaviour, be made an improper use of, the Court of Chancery will interpose. *Chan. Prac.* 513; 2 *Chan. Rep.* 399. A perpetual injunction was granted against such a bond, because it appeared, on hearing the cause, that the patron had made use of it to prevent the incumbent from demanding his tithes. 1 *Vern.* 411.

An injunction has been granted where an ill use has been made of the bond, i. e. by taking an annuity from the incumbent for the use of the nephew, for whom the living was intended. *Str.* 534.

A bill being brought to be relieved against a judgment obtained on a bond to resign upon request, it appeared to have been offered to the incumbent, that if he would give 700*l.* he should not be sued upon it. Satisfaction was ordered to be entered upon the judgment, and a perpetual injunction was granted. A new bond of resignation in a penalty of 200*l.*, a much less sum, was indeed decreed; but no action was to be brought on it without leave of the court. And the lord keeper said, he did not know that such bonds were used before the statute; that they had been since allowed only to preserve the benefice for the patron himself, or some child or friend of his, or to prevent non-residence or a vicious course of life in an incumbent; and that though a bond be to resign generally, he would not allow it to be put in suit, unless some such reason was shown for requiring a resignation, because a door would be thereby opened for simony. *Eq. Cases Abr.* 86.

On a bill to be relieved against a judgment on such a bond, the defendant proved misbehaviour, and it was for that reason dismissed. *Eq. Cases Abr.* 228. So a bond to resign on request shall not be made use of to turn out the incumbent, unless there be non-residence or gross misbehaviour, and if any other use be made of it, the court will grant an injunction. *Chan. Prec.* 513.

SIMPLE-CONTRACT, DEBT BY. Debts by simple contract are such, where the contract upon which the obligation arises, is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better than a verbal

promise. 2 Comm. c. 30. p. 466. See *Assumpsit, Fraud, &c., Real Estate*.

SIMPLE DESTINATION, the settlement by the proprietor of an estate in Scotland, by which he substitutes the persons who are to succeed one to another. *Scotch Dict.*

SIMPLE LARCENY. See *Larceny*.

SIMPLE WARRANTICE, an obligation to warrant or secure from all subsequent or future deeds of the grantor. *Scotch Dict.*

SIMPLEX. Simple, or single; as *charta simplex* is a deed-poll, or single deed.

SIMPLEX BENEFICIUM. A minor dignity in a cathedral or collegiate church, or any other ecclesiastical benefice opposed to a cure of souls; and which, therefore, is consistent with any parochial cure, without coming under the name of pluralities.

SIMPLEX JUSTICIARIUS. This style was anciently used for any puisne judge that was not chief in any court, and there is a form of a writ in the Register beginning thus:—*I, John Wood, a simple judge of the Court of Common Pleas, &c.*

SIMUL CUM, [together with.] Words used in indictments, and declarations of trespass against several persons, where some of them are known, and others not known: as, the plaintiff declares against A. B. the defendant, together with C. D., E. F. and divers others unknown, for that they committed such a trespass, &c. 2 Lil. Abr. 469. If a writ is generally against two or more persons, the plaintiff may declare against one of them, with a *simul cum*; but if a man bring an original writ against one only, and declares with a *simul cum*, he abates his own writ. *Comber. 260*. See *Action, Joinder in Action*.

SINE ASSENSU CAPITULI. A writ where a bishop, dean, prebendary, or master of an hospital, aliened the lands holden in right of his bishopric, deanery, house, &c. without the assent of the chapter, or fraternity; in which case his successor should have this writ. *F. N. B. 195*. And if a bishop or prebendary was disseised, and afterwards released to the disseisor, this was an alienation, upon which might be brought a writ *de sine assensu capituli*. But the successor might enter upon the disseisor, if he did not die seised, notwithstanding the release of his predecessor; for, by the release, no more passed than he might rightfully release. A person might have had this writ of lands upon demises of several predecessors, &c. *New Nat. Br. 432*.

This writ is now abolished.

SINE-CURE. Is where a rector of a parish hath a vicar under him, endowed and charged with the cure; so that the rector is not obliged either to duty or residence. And when a church is fallen down, and the parish becomes destitute of parishoners, it is said to be a *sine cure*. *Wood's Inst. 153*. See *Purson, I.*

SINE DIE, without day. Where judgment is given against a plaintiff, he is in mercy for his false claim; but when it is given for the defendant, it is said *eat inde sine die*, let him go thereof without day; that is, he is dismissed out of Court.

SINGLE AVAIL OF MARRIAGE. The value of the betroth or marriage portion of the vassal's wife, which is modified to two years' rent of the vassal's free estate. *Scotch Dict.* See *Marriage*.

SINGLE-BOND, [simplex obligatio.] A deed whereby the obligor obliges himself, his heirs, executors, and administrators to pay a certain sum of money to another at a day appointed. See *Bond*.

SINGLE COMBAT, trial by. See *Duel, Hager of Battle*.

SINGLE ESCHEAT. When all a man's moveables fall to the king as a casualty, because of his being declared rebel. *Scotch Dict.*

SINGULAR SUCCESSOR. A purchaser is so termed in the Scotch law in contradistinction to the heir of a landed proprietor, who succeeds to the whole heritage by regular title of succession or universal representation; whereas the purchaser

acquires right solely by the singular title acquired by the disposition of the former proprietor.

SI NON OMNES. A writ on association of justices, by which, if all in commission cannot meet at the day assigned, it is allowed that two or more of them may finish the business. *Reg. Orig. 202; F. N. B. 185*. And after the writ of association, it is usual to make out a writ of *si non omnes*, directed to the first justices, and also to those who are associated to them; which, reciting the purport of the two former commissions, commands the justices, that if all of them cannot conveniently be present, such a number of them may proceed, &c. *F. N. B. 111*. See *Assizes, &c.*

SINKING FUND. See *National Debt*.

SIPESSOCNA. A franchise, liberty, or hundred. *Leg. Hen. 1. cap. 6; Rot. Parl. 16 Hen. 2. Sithesoca*.

SI RECOGNOSCAT. A writ that, according to the old books, lay for a creditor against his debtor who had acknowledged before the sheriff in the county-court, that he owed his creditor such a sum received of him. *Old Nat. Br. 68*.

SITHCUNDMAN, [Sax.] Such a man as had the office to lead the men of a town or parish. *Leg. Inæ, cap. 56*. *Dugdale* says, that in Warwickshire the hundreds were formerly called *sithesoca*; and that *sithsoccundman* and *sithcundman* was the chief officer within such a division, i. e. the high constable of the hundred. *Dugdale Antiq. Warm.*

SIX CLERKS IN CHANCERY. Officers in Chancery of ancient continuance; they are appointed by the Master of the Rolls and were heretofore spiritual persons, as appears by the 14 & 15 Hen. 8. which was made to enable them to marry. They receive and file all proceedings by bill and answer; and also issue some patents that pass the great seal, as patents for ambassadors, and some others. They likewise sign all office copies of pleadings made by the sworn clerks in order to be read in court, and also certificates; and attend upon the court in term, by two at a time, at Westminster, and there read the pleadings.

The disposal of the offices of the six clerks in the Court of Chancery in Ireland, is regulated by the 55 Geo. 3. c. 114.

See titles *Chancellor, Chancery, Office*.

SIXHINDI. Servants of the same nature with rod-knights, viz. bound to attend their lord wherever he went; but they were accounted among the English Saxons as freemen, because they had lands in fee subject only to such tenure. *Leg. Inæ, cap. 26*. See *Hindeni*.

SIZEL. Where pieces of money are cut out from the flat bars of silver, after being drawn through a mill into the respective sizes or dimensions of the money to be made; the residue is called by this name, and is melted down again. *Lowndes's Essay upon Coin. p. 96*.

SKARKALLA. Seems to be an engine for catching of fish. 2 Inst. 38.

SKERRIES (island or rock). Patent granted to William French, Esq., for a light-house there, confirmed the 3 Geo. 2. c. 36.

SKINNERS. None shall retain any servant, journeyman, &c. to work in the trade of a skinner, unless he himself hath served seven years as an apprentice in the same trade, on pain to forfeit double the value of his ware wrought. 3 Jac. 1. c. 9. See *Leather*.

SKYVINAGE, or *skevinage*. The precincts of Calais. 27 Hen. 6. c. 2.

SLADES, [Sax. *slæd*.] A long narrow piece or slip of ground. *Paroch. Antiq. 465*.

SLAINS, [letters of, in Scotland.] Letters heretofore subscribed by the relation of a person slain, declaring that they had received an assignment or recompense, and concerning an application to the crown for a pardon to the murderer. See *Act, 1474, c. 74; 1528, c. 7*.

SLANDER. The maliciously defaming of a man in his reputation, profession or livelihood, by words; as a libel is

by writing; which is actionable, &c. See *Action*, II. 1, *Libel*.

By the 58 *Geo. 3. c. 80*, in actions for slander in inferior courts there shall, in certain cases, be no more costs than damages; and such costs shall not be increased.

SLAVES AND SLAVERY. Pure and proper slavery does not, nay cannot, subsist in England; such, that is, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And, indeed, it is repugnant to reason, that such a state should subsist any where; and the law of England abhors, and will not endure, the existence of slavery within this nation: so that when an attempt was made to introduce it, by 1 *Edw. 6. c. 3*, which ordained, that all idle vagabonds should be made slaves and fed on bread and water, or small drink, and refuse meat, should wear a ring of iron round their necks, arms, or legs; and should be compelled by beating, chaining, or otherwise, to perform the work assigned them, were it never so vile: the spirit of the nation could not brook this condition, even in the most abandoned rogues; and therefore this statute was repealed in two years afterwards, by 3 & 4 *Edw. 6. c. 16*. And now it is laid down, that a slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person and his property. *Salk. 666*. Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this, says *Blackstone*, will remain exactly in the same state as before: [what that right is now, we shall presently see:] hence too it follows, that the infamous and unchristian practice of withholding baptism from negro servants, lest they should thereby gain their liberty, is totally without foundation, as well as without excuse. The law of England acts upon general and extensive principles; it gives liberty, rightly understood, that is, protection, to a Jew, a Turk, or a Heathen, as well as to those who profess the true religion of Christ; and it will not dissolve a civil obligation between master and servant, on account of the alteration of faith in either of the parties; but the slave is entitled to the same protection in England before, as after, baptism; and, whatever service the heathen negro owed of right to his American master, by general, not by local law, the same (whatever it be) is he bound to render when brought to England and made a Christian. See 1 *Comm. c. 14*.

Liberty, by the English law, depends not on the complexion; and what was said even in the time of Queen Elizabeth is now substantially true, that the air of England is too pure for a slave to breathe in. 2 *Rushw. 468*.

In the celebrated case of James Somersett, it was decided, that a heathen negro, when brought to England, owes no service to an American, or any other master. James Somersett had been made a slave in Africa, and was sold there: from thence he was carried to Virginia, where he was bought, and brought by his master to England: here he ran away from his master, who seized him and carried him on board a ship, where he was confined in order to be sent to Jamaica to be sold as a slave. Whilst he was thus confined, a *habeas corpus* was granted, ordering the captain of the ship "to bring up the body of James Somersett, with the cause of his detainer." The above-mentioned circumstances being stated on the return to the writ, after much discussion in the Court of King's Bench, the court were unanimously of opinion, that the return was insufficient, and that Somersett ought to be discharged. See Mr. Hargrave's argument for the negro. 11 *St. Tr. 340*; and *Lofft's Reports*, 1.

In consequence of this decision, if a ship laden with slaves was obliged to put into an English harbour, all the slaves on board might (and Mr. Christian says ought to) be set at liberty. Though there are acts of parliament which recognise and regulate the slavery of negroes (but now see *post*), yet it exists not in the contemplation of the common law; and the reason they are not declared free before they reach an English harbour is only because their complaints cannot

sooner be heard and redressed by the process of an English court of justice. 1 *Comm. c. 14. p. 425, n*.

Before this determination in the case of Somersett, a case had occurred in Chancery, in 1762, before Lord Chancellor Northington, on a disputed gift to a slave by his mistress on her death-bed, which was unsuccessfully claimed by her administrators. The lord chancellor, in dismissing the bill with costs, said that, "as soon as a man sets foot on English ground he is free." *Stanley v. Harvey*. In the year 1778, in the case of *Knight v. Widderburn*, the Scotch judges determined, on consideration of the case of Somersett, "that the dominion exercised over a negro by the law of Jamaica could not be exercised in Scotland." In the case of *Keane v. Roycott*, 2 *H. Blackst. 511*, an infant slave in the West Indies had executed an indenture, by which he covenanted to serve B. for a certain term of years as his servant. B. came to England with the slave; and in an action against a person for seducing the slave from B.'s service, the defendant was not permitted to allege that the contract with B. was void; for the Court of C. P. held that the effects of such a contract might be the manumission of the slave, and consequently that it was for his benefit. In *Williams v. Brown*, 3 *Bos. & Pul. 69*, a negro had agreed to serve as seaman during a voyage to the West Indies and back. On his arrival at Grenada he was claimed as a runaway slave, and delivered up to his master. Whereupon it was agreed between the master, the negro, and the captain, that upon payment of a sum of money by the captain to the master, the latter should manumit the negro; he covenanting to serve the captain for three years, at certain and stipulated wages. He was accordingly manumitted; and having served the captain on the homeward voyage, brought an action against him to recover wages for that voyage on a *quantum meruit*. The court held that he was estopped by his covenant from claiming more than the sum stipulated. And in that case it was agreed, "that the plaintiff (the negro) being free while in England, became again a slave on his arrival at the place from whence he had run away; and, without the manumission, must have remained so." In the case of the slave, Grace, before Lord Stowell, in the Admiralty Court, (Nov. 1827), his lordship cited the case of *Williams and Brown*, as deciding the principle, that "one having been a slave, returning to the place where he was so, returned to a state of slavery." His lordship also cited the case of *Forbes v. Cochrane*; as tending, though perhaps not so directly, to the same conclusion. In that case many of the slaves of a British merchant, residing in East Florida, deserted from his plantation, and were found on board a British man-of-war, not lying in the East Florida waters. The merchant claimed them, and was allowed to see them, and attempted to persuade them to return; but he was not permitted to use force. They refused to go, and he brought an action against the British commander for harbouring them. It was held not to be maintainable, even upon the admission that the laws of East Florida permitted slavery; which was not expressly stated in the plaintiff's declaration, claiming only a general right of property in the slaves. The principle of the decision was, that slavery is not a state recognized by the law of nations generally, or the law of England, locally; and that wherever it legally exists, it does so only by the force of some local law. Whenever, therefore, a slave comes from a place where slavery is recognized into a place under the English law, he ceases to be a slave; because the local law of slavery loses its force, and the English law neither itself suffers the relation, nor will, by the *comitas inter communitates*, enforce any local law contrary to the law of nature. An English ship, (or a territory newly discovered by Englishmen,) are for this purpose the same as England; because the English law of freedom will apply equally in each, and be the right of every one there. 2 *B. & Cr. 448*; 3 *D. & R. 229*.

By a provision in the recent act for the abolition of slavery,

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slaves or apprenticed labourers brought into the United Kingdom from the West India colonies, became absolutely free; and slavery no longer exists in any part of the British dominions, (see *post*), except in the East Indies, where, by the 3 & 4 Wm. 4. c. 85, § 88. slavery is to be extinguished as soon as it is practicable and safe. See *East India Company*, X.

By 30 Geo. 3. c. 33. (continued and amended by 31 Geo. 3. c. 54; 32 Geo. 3. c. 52; 33 Geo. 3. c. 73; 34 Geo. 3. c. 80; 35 Geo. 3. c. 90; 37 Geo. 3. c. 104, & c. 118; 38 Geo. 3. c. 88, and 39 Geo. 3. c. 80, and subsequent acts; and explaining and amending a former statute of 29 Geo. 3. c. 66.) several humane provisions were made to restrain the cruelties practised in the African slave trade. Bounties were given to the masters and surgeons of ships delivering slaves well at their destined port, &c.

By 46 Geo. 3. c. 52. the exportation of slaves by British subjects into foreign colonies, and the fitting out of foreign slave ships in British ports, was prohibited. By 46 Geo. 3. c. 119. it was enacted that no ship should clear out from any port in Great Britain to the coast of Africa, for taking negroes on board, unless such ship had been previously employed in the African trade.

At length an end was put to this detestable traffic by the 47 Geo. 3. st. 1. c. 36, which enacted, that from May 1, 1807, the slave trade should be abolished; and a penalty of 100*l.* per head was imposed in all cases of trading or purchasing slaves. All vessels concerned in the traffic became forfeited, and all insurances relating to such trade were declared void. Subjects of Africa, &c. unlawfully carried away, and imported into any British colony as slaves, became forfeited to his majesty; and also slaves taken as prizes of war, whose slavery was declared to cease; and they might be enlisted to serve the king.

Further measures being found necessary, by the 31 Geo. 3. c. 23. the penalty of felony was imposed on all British subjects engaged in the slave trade. Petty officers, servants, or seamen on board ships engaged therein, and masters underwriting them, were made guilty of misdemeanors. Governors and commanders-in-chief of the colonies are authorized to cause all forfeited vessels, &c. to be seized. By 53 Geo.

vessels, &c. to be seized. By 5 Geo. 3. c. 112. forfeitures under 46 Geo. 3. c. 52; 47 Geo. 3. c. 36, might be prosecuted at any time within three years after the offence committed. By 54 Geo. 3. c. 59. vessels condemned for breach of laws relating to the slave trade were entitled to the privilege of prize ships, and to be registered accordingly. By 55 Geo. 3. c. 172. provision was made for the support of captured slaves during the period of adjudication.

By 58 Geo. 3. c. 59. regulations were made as to importing slaves into certain British possessions in South America from the Bahamas, &c. By 50 Geo. 3. c. 58. felonies and misdemeanors under 51 Geo. 3. c. 23. committed on the 1st & 2^d seas might be tried under commissions issued under the 46 Geo. 3. c. 54. for the trial of other offences at sea.

By the 59 G. L. C. 120 provisions were made for the establishing, in Great Britain, a society and slaves in its colonies, according to be made and be made, and to be made to be made in a society.

By the 18th century, slaves were being registered and sent to the exportation and importation of slaves, were provisions have been superseded by the recent statute for the extinction of slavery.

By § 9 of the act, it is provided that any person who shall be convicted of piracy and who shall be sentenced to death shall be executed by hanging.

by § 10, persons taking, selling, or receiving on board any ship, or embarking capital in the outfitting, or guaranteeing slave adventures, or serving on board any such ships, as captain, master, mate, surgeon, or surgeon's mate, were declared guilty of felony, and punishable by seven years transportation.

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By § 11, seamen, &c. serving on board such ships were guilty of a misdemeanor, and punishable with not exceeding two years' imprisonment.

By this act various bounties were granted upon the seizure of slaves by the British ships of war, stationed off the coast of Africa, for suppressing the slave trade; which bounties are reduced by the 11 *Geo. 4. & 1 Wm. 4. c. 55.*

It was not however until the year 1833, nearly thirty years after the slave trade itself was put an end to, that the friends of emancipation succeeded in carrying an act of parliament, abolishing slavery throughout the British colonies; and although this great measure has been obtained at the expense of twenty millions, the nation has most cheerfully submitted to a sacrifice which has removed so foul a blot from the page of its history.

The following is a sketch of some of the principal provisions of this important statute :—

By § 1. all persons who on the 1st August, 1834, shall have been registered as slaves, and shall appear on the registry to be six years' old, or upwards, shall from that day become apprenticed labourers.

§ 2. During the continuance of the apprenticeship of any such apprenticed labourer, such person shall be entitled to the services of such apprenticed labourer as would have been entitled to his or her services as a slave.

§ 3. All slaves who may at any time previous to the passing of the act have been brought with the consent of their possessors, and all apprenticed labourers who may hereafter, with the like consent, be brought into the United Kingdom, shall be absolutely free.

§ 4. Apprenticed labourers to be divided into three classes, viz. prædial attached, prædial unattached, and non prædial.

§ 5. Apprenticeship of the prædial labourers not to continue beyond 1st August, 1840. And (§ 6.) of the non-prædial labourers not beyond 1st August, 1838.

By § 7. before the apprenticeship is expired, the labourer may be discharged by the voluntary act of his employer. But in case of the voluntary discharge of aged or infirm apprenticed labourers, the employer to continue liable for their support.

§ 8. An apprenticed labourer may purchase his discharge against the will of his employer, on payment of the value of his services, to be appraised as therein mentioned.

By § 9, apprenticed labourers are not removable from the colony; and pre-dial apprenticed labourers are not removable from the plantation except by consent of two special justices. Such consent not to be given till the justices have ascertained that the removal will not separate the members of families.

By § 10, the right to the services of apprenticed labourers is to be transferable property; but such labourer shall not be separated from wife, husband, parent, or child.

§ 11. The employer to supply the labourer with such food, &c. as the law at present requires in case of slaves, and where the preclial labourer shall be maintained by the cultivation of provision grounds, a proper quantity of ground, with leisure time, to be set apart by the employer.

§ 12. Subject to the obligations imposed hereby, all slaves in the British colonies shall be emancipated from the 1st August, 1834; from which time slavery shall be abolished throughout the British dominions.

§ 18. Children below the age of six on 1st August, 1834, or born after that time, to any female apprentice, if destitute, may be bound out by any special magistrate as an apprentice to the person entitled to the services of the mother; but at the date of such indentures the apprentice must be under twelve years of age. Such indentures to continue in force until the child has completed his or her twenty-first year and no longer.

§ 14. His majesty, or any governor by his authority, may appoint justices of the peace by special commission to give

effect to this act, and to all colonial laws to be made in pursuance of the act; and no other qualification shall be necessary. And such justices may also be included in the general commission of the peace.

§ 15. His majesty may grant salaries to special justices, not exceeding 300*l.* per annum. Lists of such persons to be laid annually before parliament.

§ 16. after the recital of various regulations necessary for giving effect to the act, declares that it shall not prevent the enactment, by the colonial assemblies or by his majesty in council, of the laws necessary for establishing such regulations. But provisions repugnant to the act contained in any such colonial law are void.

§ 17. Such colonial acts may not authorize the whipping or other punishment of the labourer by the employer's authority.

§ 18. Colonial acts or orders in council not to authorize any justices, except those having special commissions, to act in execution thereof.

But by § 19. the justices having special commissions are to exercise exclusive jurisdiction between apprenticed labourers and their employers.

§ 20. Apprenticed labourers not to be subjected to a prolongation or renewal of their apprenticeship, nor to more than fifteen hours extra labour in any week for their employers' benefit.

And § 21. not to be compelled to work on Sundays, nor prevented from attending religious worship on Sundays.

§ 22. Nothing herein to interfere with any colonial laws, by which apprenticed labourers may be exempted or disqualified for certain military or civil services and franchises.

§ 23. Acts passed by local legislatures, with similar but improved enactments to the act, to supersede the act on being confirmed by his majesty in council.

§ 24. The Treasury may raise loans, not exceeding twenty millions, for a compensation to the persons entitled to the services of the slaves to be manumitted.

And § 33. commissioners to be appointed for distributing the compensation provided by the act.

§ 40. Commissioners may compel the attendance and examination of witnesses.

And § 41. are authorized to take examinations on oath.

§ 44. No part of the compensation to be applicable to any colony, unless his majesty by order in council shall have first declared that adequate provision has been made by the legislature thereof, for giving effect to the act by such supplementary enactments as aforesaid. Such orders to be published, and laid before parliament.

§ 45. The commissioners to apportion the compensation fund into nineteen shares; being one share for each colony. In making such apportionment, regard to be had to the number of registered slaves, &c.

§ 46. No compensation to be allowed for persons illegally held in slavery.

§ 47. Commissioners to institute inquiries to ascertain the facts to be taken into account in effecting the apportionment of the compensation fund between the proprietors in each colony. And having made the inquiries, commissioners to frame general rules for the equitable distribution of the fund assigned to each colony. Such rules to be laid before his majesty in council.

§ 48. Rules to be published in the London Gazette, with a notice that appeals will be received against their establishment.

And § 49. his majesty in council may hear such appeals, and thereupon confirm or disallow any general rule so appealed against.

§ 50. In absence of appeal, his majesty in council may confirm, rescind, or amend such rules.

§ 51. Rules when confirmed by his majesty shall be recited in the confirmatory order in council, and enrolled in Chancery.

But § 52. rules so enrolled may be revoked or amended.

§ 53. Rules when confirmed and enrolled shall be of the same validity as if enacted by parliament.

And § 54. shall be observed by the commissioners in making their awards.

§ 55. Persons interested in any slaves manumitted by the act may prefer claims before the commissioners, who are to make rules for the conduct of all proceedings under the commission.

§ 56. Commissioners to adjudicate on all claims preferred to them; but an appeal may be made against adjudication. His majesty in council may make rules for the regulation of such appeals. In adverse claims, any claimant interested in the adjudication may undertake its defence.

§ 57. His majesty in council may confirm or disallow, or alter or remit adjudication appealed against.

But § 58. failing any appeal, the award of the commissioners final.

§ 62. His majesty in council may make all necessary laws for giving effect to the act in the settlement of Honduras.

§ 64. Act not to extend to East Indies, &c. or to the Island of Ceylon, or St. Helena.

A variety of acts of parliament have been, from time to time, passed, for carrying into effect treaties entered into with foreign powers for the suppression of the slave trade; notwithstanding these treaties, and the activity of the British cruisers, it is still continued to a very considerable extent.

See 58 *Geo. 3. c. 36.* for carrying into effect a treaty with Spain, for the suppression of the slave trade; 58 *Geo. 3. c. 35.* & 59 *Geo. 3. c. 17.* for a like treaty with Portugal; and 59 *Geo. 3. c. 16.* for a like treaty with the Netherlands. By these acts, for the purpose of more effectually putting an end to this detestable traffic, the ships of those powers laden with slaves may be searched by British ships of war.

By the 3 & 4 *Wm. 4. c. 72.* an act was passed for carrying into effect two conventions with the king of the French for suppressing the slave trade. By those conventions, a mutual right of search is given to the ships of war of each nation; whose commanders have at least the rank of lieutenants in the navy, within certain specified limits.

Under the 31 *Geo. 3. c. 55.* an African company was established at Sierra Leone; the possessions and rights of which were vested in the crown by 47 *Geo. 3. st. 2. c. 44.*

Since the abolition of the slave trade, the negroes taken on captured vessels, and liberated by the mixed commissions courts, have been carried to this colony, and form the greater part of its population. Great doubts are entertained of the expediency of maintaining it: as hitherto it has been kept at an immense expense, both of money and lives; and it seems to have failed in checking the illicit traffic in slaves.

A foreigner who is not prohibited from carrying on the slave trade by the laws of his own country, may, in an English court of judicature, recover damages which may have been sustained by him in respect of a wrongful seizure by a British subject of a cargo of slaves on board a ship employed by him in carrying on the African slave trade. *Madram v. Willes*, 3 *B. & A. 353.*

SLEDGE. A sledge or hurdle is generally allowed to draw offenders guilty of high treason to the gallows, to preserve them from the extreme torture of being dragged on the ground or pavement. 1 *Hal. P. C. 82.* See *Execution of Criminals, Treason.*

SLIPPA. A stirrup; and there is a tenure of land for holding the king's stirrup, in Cambridgeshire. *Carl. 6. H. 6.*

SLOUGH-SILVER. A rent paid to the castle of Worcester, in lieu of certain days' work in harvest, heretofore reserved to the lord from his tenants. *Pat. 48 Eliz.*

SLUICE, exclusa.] A frame to keep or let water out of a ground. See *Malicious Injuries.*

SMALL DEBTS, Courts for. See *Courts of Co. 100.*

SMALT, Ital. smalto.] That of which painters made their

blue colouring; mentioned in 21 Jac. 1. c. 3. A sort of glass. 58 Geo. 3. c. 21. § 3.

SMOKE-FARTHINGS. The pentecostals, or customary oblations offered by the dispersed inhabitants within a diocese, when they made their procession to the mother cathedral church, came by degrees into a standing annual rent, called smoke-farthings. *Cowell.*

SMOKE-SILVER. Lands were holden in some places by the payment of the sum of 6d. yearly to the sheriff, called smoke-silver. *Pat. 4 Edw. 6.* Smoke-silver and smoke-penny are to be paid to the ministers of divers parishes, as a modus in lieu of tithe-wood: and in some manors formerly belonging to religious houses there is still paid, as appendant to the said manors, the ancient Peter-pence, by the name of smoke-money. *Twisd. Hist. Vindicat. 77.*

SMUGGLING. Is the offence of importing or exporting goods, without paying the duties imposed thereon by the custom or excise laws, whereby the revenue is defrauded. Numerous statutes were formerly passed to put down this offence, all of which were repealed, and the law consolidated by the 6 Geo. 4. c. 108; but which, with several subsequent acts, is now superseded by the 3 & 4 Wm. 4. c. 53.

The following is an outline of its most important enactments:—

By § 2. vessels not square rigged and boats belonging to his majesty's subjects, or whereof half the persons on board are subjects of his majesty, and foreign vessels not square rigged and boats, found within certain distances of the coast of the United Kingdom, or of the islands of Guernsey, Jersey, Alderney, Sark, or Man, with certain goods on board, are declared forfeited.

§ 3. Any vessel or boat arriving within any port of the United Kingdom, having prohibited goods on board or attached thereto, forfeited, unless there was no want of care in the master or owner.

§ 4. specifies certain cases in which vessels shall not be forfeited for having on board tobacco, snuff, spirits, tea, or segars.

§ 5. Vessels belonging to his majesty's subjects, or having one half of the persons on board subjects of his majesty, found within one hundred leagues of the coast, and not bringing to upon signal, or throwing overboard any goods during chase, forfeited, and persons escaping shall be deemed subjects, unless the contrary be proved.

§ 6. Vessels in port with a cargo, and afterwards found in ballast and cargo unaccounted for, forfeited.

§ 7. Vessels to bring to on being chased by vessels or boats of the navy or in preventive service; not bringing to, may be fired into.

§ 8. Vessels belonging to his majesty's subjects not to hoist any pendant, ensign, or colours, usually worn by his majesty's ships. *And see 4 & 5 Wm. 4. c. 13. § 41, post.*

§ 9. Vessels and boats used in removal of run goods to be forfeited.

§ 10. Boats of vessels to have thereon the name of vessel, port, and master.

§ 11. Boats not belonging to ships to have name of owner and port thereon.

§ 12. Vessels and boats used in piloting or fishing to be painted black, and not to be painted like preventive boats.

§ 13. British vessels having secret places for concealing, or depositing for running goods, and foreign vessels not square-rigged, having goods in secret places, forfeited.

§ 14. Goods concealed on board forfeited, and all goods packed therewith.

§ 15. Vessels of certain proportions not being square-rigged, or armed for resistance, forfeited, if found within one hundred leagues, unless they are licensed by the commissioners of the customs.

§ 16. Vessels and boats belonging to his majesty's subjects, or whereof half the persons on board are subjects of his

majesty, not to be navigated with a greater number of persons than therein mentioned, unless licensed.

§ 22. Vessels not to be used in any manner not mentioned in the licence, which is to be produced when demanded.

§ 23. Certain vessels, boats, and luggers not required to be licensed.

§ 24. Goods unshipped without payment of duty, and prohibited goods, liable to forfeiture, with the boats, &c. used in removal.

§ 25. Spirits and tobacco found without a permit to be deemed run.

§ 26. Restricted goods to be deemed run goods for the purpose of proceeding for forfeiture.

§ 27. Prohibited goods shipped or waterborne, with intent to be exported, &c. forfeited, with all goods packed therewith.

§ 28. Vessels, boats, and goods, may be seized by officers and persons therein mentioned, and must be delivered to the proper officer.

§ 29. Penalty of 500*l.* on officers and persons making collusive seizures or taking bribes, and of 200*l.* on persons offering them.

§ 30. Vessels may be searched within the limits of the ports, as also persons on board, or who may have landed from them, if the officers have reason to suspect goods are concealed about their person.

But (§ 35.) before persons are searched, they may require to be taken before a justice or a superior officer of the customs, who shall determine whether there are reasonable grounds of suspicion.

§ 36. If any such officer or officers shall not take such person with reasonable despatch before such justice, &c. when so required, or shall require any person to be searched by him, not having reasonable ground to suppose that such person has any uncustomed or prohibited goods about his or her person, such officer shall forfeit ten pounds.

§ 37. If any passenger or other person on board any vessel or boat shall, upon being questioned by any officer or officers of his majesty's customs, whether he or she has any foreign goods upon his person, or in his possession, deny the same, and any such goods shall, after such denial, be discovered upon his person, or in his possession, such goods shall be forfeited, and such person shall forfeit treble the value.

§ 38. Officers, authorized by writ of assistance, and having a peace officer, may search houses for prohibited goods, and break open doors and packages to seize such goods.

§ 39. All writs of assistance issued from the Court of Exchequer shall continue in force during the reign in which such writs shall have been granted, and for six months from the conclusion of such reign.

§ 40. Officers of customs or excise may, on probable cause, stop carts, &c. and search for goods.

§ 41. Police officers seizing goods to carry them to the Custom-House warehouse.

§ 42. Goods stopped by police officers may be retained until trial of persons charged with stealing them.

§ 43. Commissioners of treasury, or commissioners of customs or excise, may restore seizures, and mitigate or remit penalties.

§ 44. Persons unshipping, harbouring, or having custody of any prohibited or uncustomed goods, to forfeit treble the value, or 100*l.*

§ 45. Persons insuring the delivery of prohibited or uncustomed goods to forfeit 500*l.*

§ 46. Persons offering goods for sale under pretence of being run and prohibited, shall forfeit treble the value of the goods, or 100*l.*

§ 47. Where persons are taken before a justice for any offence under any act relating to the customs, such justice may order them to be detained a reasonable time.

§ 52. Any person liable to be arrested, making his escape, may afterwards be detained by any officer of the customs.

§ 53. Persons making signals to smuggling vessels at sea may be detained, and on conviction to forfeit 100*l.* or be kept to hard labour for one year.

§ 54. Proof of a signal not being intended to lie on the defendant.

§ 55. Any person may prevent signals, and enter upon lands for that purpose.

§ 58. Three or more armed persons assembled to assist in the illegal landing of any goods, or in the rescuing of goods seized, to be deemed guilty of a capital felony.

§ 59. Persons shooting at any boat belonging to the navy, or in the service of the revenue, &c. deemed guilty of a capital felony.

§ 60. Any person in company with four others having prohibited goods, or with one other armed or disguised, guilty of felony, punishable with seven years transportation.

§ 61. Persons assaulting officers by force or violence may be transported, &c.

§ 62. Commanding officers of vessels in the service may haul their vessels on shore without being liable to any action for so doing.

§ 72. No subject of his majesty, except officers, to take up spirits in small casks sunk or floating upon the sea.

§ 73. Rewards to be granted to persons giving information of goods floating or sunk in the sea.

§ 74. Commissioners may make an allowance to poor persons confined for offences against laws of customs and excise, not exceeding seven-pence halfpenny nor less than four-pence halfpenny per day.

§ 76. All vessels, boats, and goods, seized under any laws of customs, and ordered to be prosecuted, shall be deemed to be condemned, unless the owner gives notice that he intends to claim.

§ 77. Offences on the high seas deemed to have been committed at the place into which the offender is brought, or in which he is found.

§ 102. If a suit be brought on account of seizure, and the judge shall certify that there was probable cause, plaintiff to have two-pence damages, and defendant fined not more than one shilling.

§ 103. No process to be sued out against any officer making seizure, until one calendar month next after notice given.

And § 104. no evidence to be adduced but what is contained in the notice.

§ 105. Officer may tender amends, or (§ 106.) neglecting to tender amends, may pay money into court.

And § 107. every action to be commenced within six months next after cause of action has arisen.

§ 108. Judges of the King's Bench may issue warrants for apprehending offenders prosecuted by indictment or information, who, neglecting to give bail, may be committed to gaol.

§ 109. When the recognizance is given, and the party shall not plead, a copy of the information or indictment may be delivered to his attorney or agent.

§ 111. When offenders are arrested and give bail to the sheriff, the bail bond to be assigned to his majesty.

§ 112. Indictments (except cases before justices) to be preferred by order of the commissioners, and suits to be in the name of the attorney general, or lord advocate.

§ 113. The attorney general or lord advocate may sign a *noli prosequi*.

§ 122. Indictments or informations may be tried in any county in England, Scotland, or Ireland, respectively.

By the 4 & 5 Will. 4. c. 13. so much of the above act, as empowers justices to sentence persons convicted of smuggling to serve on board the royal navy for five years, was repealed.

By § 2. persons found on board vessels within the prohi-

bited distance, and having a prohibited lading, or assembled to the number of three, or more, to run, or procuring others to run, spirits, tea, tobacco, or silk, or obstructing the officers in their duty, or rescuing or destroying any goods, to prevent their seizure, may be sentenced to the House of Correction to hard labour for six months for the first offence, nine for the second, and twelve for the third.

By § 11. no vessel is to hoist the union jack, or any pendants, &c. usually worn in his majesty's ships, and prohibited to be worn by the proclamation of the 1st of Jan. 1801, under a penalty of 500*l.*

SNOTTERING-SILVER. There was a custom in the village of Wylegh, that all the servile tenants should pay for their tenements a small duty called snottering-silver, to the abbot of Colchester. *Placit.* 18 Edw. 1.

SNUFF, or SNUSH. One of the many articles subject to the excise. See *Excise; Tobacco*.

SOCAGE, or SOCCAGE, *socagium*; from Fr. *soc*, *comer*, a coulter or plough-share.] A tenure of lands by or for certain inferior services of husbandry, to be performed to the lord of the fee. See further, *Tenures*, III. 3.

Skene de Feudor. Signif. says, socage is a tenure of lands, when a man is enfeoffed freely, without any service, writ, relief, or marriage; and pays to his lord such duty as is called *petit serjeanty*, &c.

This was a tenure of so large an extent, that *Littleton* tells us, all the lands in England, which were not held in knights-service, were held in socage. So that it seems the land was divided between these two tenures; and as they were of different natures, so the descent of these lands was in a different manner; for the lands held in knights-service descended to the eldest son; but these held in *villano socagio*, equally among all the sons; yet if there was but one messuage, the eldest son was to have it, so as the rest had the value of that messuage to be divided between them. *Bracton*, l. 2. c. 35, *ibi*.

It is not easy to decide between the two derivations of the words *socage* and *socmen*. (The Saxon *soc*, a franchise; or the French *soc*, a plough-share.) On the one hand, the frequent recurrence in Domesday-book of the expression *socmanni de socd A. &c.* serve to lead us to infer that these words, so near in sound, were related to each other. *Socmanor* (on *Gavelkind B.*) is clearly for this derivation. But *Bracton* (l. ii. c. 35.) derives *socage* from the French *soc*, and this etymology is curiously illustrated by a passage in *Blomefield's History of Norfolk*, (vol. iii. p. 538. *fol.*) In the manor of Cawston a mace, with a brazen hand holding a plough-share, was carried before the steward, as a sign that it was held in socage of the Duchy of Lancaster. *Hallam*. See *Tenures*, III. 3, &c.

SOCAGERS, SOCKMANS, SOCMEN, or SOKEMANS, *socmanni*.] Such tenants as hold their lands and tenements by socage-tenure. *Kitchin. fol.* 81. *Sokemans* of base tenures, *ibid.*; and sokemans of ancient demesne; which last seem most properly to be styled sockmans. *Cowell*. See *Tenures*.

The husbandmen among our Saxon ancestors were of two sorts; one, that hired the lord's outland, or *tenementary* land, like our farmers; the other that tilled and manured no land, like our husbandmen; (yielding *operam, non censum*, work, not rent;) and were thereupon called his sockmen, or ploughmen. *Spelman of Feuds, cap.* 7. But after the Conquest, the proper *socmanni*, or *sokemanni*, often mentioned in Domesday, were those tenants who held by no servile tenure, but commonly paid their rent as a *soke* or sign of freedom to the lord, though they were sometimes obliged to customary duties for the service and honour of their lords. *Cowell*. See also *Britton*, c. 66; *Fleta*, l. 1. c. 8.

The *sokemanni*, or *socmens*, says *Nichols*, were those inferior landowners who had lands in the *soc* or franchise of a great baron; privileged villains, who, though their tenures were absolutely copyhold, yet had an interest equal to a

freehold. Their services were fixed and determined. They could not be compelled to relinquish these tenements at their lord's will, nor against their own, *et idco*, says Bracton, *denominantur liberi*. It seems idle, Nichols adds, to suppose that they took their name from the *soca* or plough, for it nowhere appears that they held by plough-service. Such men were actual freeholders, and a certain number of them were necessary in every manor to hold the pleas of the manor court. *Socmen* were, of consequence, those who owed suit and service to the lord's court; and it is from the word *soc*, which gave them their name, that we must derive our tenures in fee and common socage. *Hist. Leic. Introd.* 46.

Domesday, however, exhibits different conditions of *socmen*; sometimes enjoying the usufruct within the *soke* freely, and sometimes performing certain inferior services of husbandry. See 1 Ellis's Domesday, 69.

SOCIETY. See Corporation, Partners.

SOCOME. A custom of grinding corn at the lord's mill; and bond socome is where the tenants are bound to it. *Blount.*

SODOR AND MAN, BISHOPRIC OF, was formerly within the province of Canterbury, but annexed to that of York, by 28 Hen. 8, c. 31. See *Man, Isle of*.

SOJOURNERS. See *Sorners*. To sojourn horse is to quarter horse. *Old Scotch Dict.*

SOKL, SOK, SOC, SOCA. Liberty or privilege of tenants exercised from customary burdens and impositions. *Soka*, or *soke*, also signifies the power of administering justice, and the territory or precinct in which the chief lord did exercise his *soc, soka, or soka*, his liberty of keeping court, or holding trials within his own *soke* or jurisdiction.

In the second volume of the Domesday Survey, *soca falds*, the privilege of the lord's fold, occurs in numerous instances, that is, the privilege of the lord to take the profits within his manor.

Sometimes it signified a payment or rent to the lord for using his land with such liberty and privilege as made the tenant a soeman or freeholder, upon no other conditions than a quit-rent. *Cowell. Vide Bract. lib. 3; Lamb. Leg. H. 1. 244; Fleta, lib. 1, cap. 47.*

SOKEMANS. See *Socagers; Tenures; Villenage*.

SOKEMANRIES. The tenures of socagers.

SOKE REEVE. The lord's rent-gatherer in the *soke* or *soke*. *Fleta.*

SOLARIUM. A solar, upper room, or garret.

SOLDIERS.

THE MILITARY STATE of the kingdom includes the whole of the soldiery; or such persons as are peculiarly appointed among the rest of the people for the safeguard and defence of the realm.

In a land of liberty it is extremely dangerous to make a despotic order of the profession of arms. In a despotic monarchy this is necessary to the safety of the prince, and arises from the nature of the constitution, which is that of government by fear. But in the states the profession of a soldier is taken singly and merely as a profession, is just a trade, and is not a duty. In the Norman state the soldier is not off the citizen, and would wish to continue so, that he makes himself for awhile a soldier. The laws, therefore, and constitution of these kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war: and it was not till the reign of Henry VII. that the Kings of England had so much as a guard about their persons.

In the time of our Saxon ancestors, as appears from Edward the Confessor's laws, the military force of this kingdom was in the hands of the dukes or hercticks, who were constituted through every province and county in the king-

dom; being taken out of the principal nobility, and such as were most remarkable for being "*sapientes, fideles, et animosi*." Their duty was to lead and regulate the English armies, with a very unlimited power; and because of this great power they were elected by the people in their full assembly, or folk-mote, in the same manner as sheriffs were elected. But it appears from history, that this large share of power, thus conferred by the people, though intended to preserve the liberty of the subject, was unreasonably detrimental to the prerogative of the crown.

Upon the Norman conquest the feudal law was introduced here in all its rigour, the whole of which is built on military plan. It is not necessary here to enter into the particulars of that constitution; it is sufficient to observe, that in consequence thereof, all the lands in the kingdom were divided into what were called knights' fees, in number above sixty thousand; and, for every knight's fee, a knight or soldier, *miles*, was bound to attend the king in his wars, for forty days in a year; in which space of time, before war was reduced to a science, the campaign was generally finished, and the kingdom either conquered or victorious. By this means the king had, without any expense, an army of sixty thousand men always ready at his command. This personal service, however, as early as the reign of Henry II., degenerated into pecuniary commutations or aids; and at length all military tenures were entirely abolished by 12 Car. 2, c. 24.

Other measures were also pursued for the internal defence of the kingdom; which terminated in the establishment of the militia, as at present regulated by our statute law. See *Militia*.

When the nation was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary, than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the raising of armies, and the due regulation and discipline of the soldiery; which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. Martial law has been said to be, in truth and reality, no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. Wherefore, Thomas, Earl of Lancaster, being condemned at Pontefract, 15 Edw. 2., by martial law, his attainer was reversed (1 Edw. 3.) because it was done in time of peace. The petition of right (3 Car. 1.) enacted, that no soldier shall be quartered on the subject without his own consent; and that no commission should issue to proceed within this land according to the martial law. And after the Restitution, King Charles II. kept up above five thousand regular troops, by his own authority, for guards and garrisons; which King James II. having by degrees increased to no less than thirty thousand, all paid from his own civil list; it was made one of the articles of the Bill of Rights, that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law. 1 W. & M. st. 2, c. 2.

The following account of the origin and progress of the military force of the country is extracted from Hallam's *Constitutional History of England*, from Henry VII. to George II., chap. ix.:

The military force which our ancient constitution had placed in the hands of the chief magistrate, and those deriving authority from him, may be classed under two descriptions. One principally designed to maintain the king's and nation's rights abroad; the other to protect them at home from attack or disturbance. The first comprehends the *tenures by knights' service* which, according to the constant principles of a feudal monarchy, bound the owners of lands thus held from

the crown to attend the king in war, within or without the realm, mounted and armed during the regular term of service. Their own vassals were bound by the same law to accompany them. But the feudal service was limited to forty days, beyond which time they could be retained only by their own consent, and at the king's expense. The military tenants were frequently called upon in expeditions against Scotland, and last of all in that of 1640. But the short duration of their legal service rendered it, of course, nearly useless in continental warfare. Even when they formed the battle, or line of heavy-armed cavalry, it was necessary to complete the army by recruits of foot soldiers, whom feudal tenure did not regularly supply, and whose importance was soon made sensible by their skill in our then national weapon, the bow. What was the extent of the king's lawful prerogative, for two centuries or more after the Conquest, as to compelling any of his subjects to serve him in foreign war, independently of the obligations of tenure, is a question scarcely to be answered: since, knowing so imperfectly the bounds of constitutional law in that period, we have little to guide us but precedents, and precedents in such times are apt to be much more records of power than right. We find certainly several instances under Edward I. and II.; sometimes of proclamations to the sheriffs, directing them to certify to all persons of sufficient estate that they must hold themselves ready to attend the king whenever he should call on them; sometimes of commissions to particular persons in different counties, who are enjoined to choose and array a competent number of horse and foot for the king's service. (*Rymer, sub Edward I. & II. passim.*) But these levies being, of course, vexatious to the people, and contrary to the spirit at least of those communities which under the shadow of the great charter they were entitled to enjoy, in the first parliament of Edward III. (judging that such compulsory service either was or ought to be rendered illegal) an act was passed, 1 *Edw. 3. c. 2. c. 5.* "That no man be charged to arm himself otherwise than he was wont in the time of the king's progenitors, kings of England; and that no man be compelled to go out of his shire but where necessity requireth, and sudden coming of strange enemies into the realm: and then it shall be done as hath been used in times past for the defence of the realm." This statute, by no means of inconsiderable importance in our constitutional history, put a stop for some ages to those arbitrary conscriptions. But Edward had recourse to another means of levying men without his own cost—by calling on the counties and principal towns to furnish a certain number of troops: against this the parliament provided a remedy in the 25th year of his reign, by enacting, (25 *Edw. 3. c. 8.*) "That no man shall be constrained to find men at arms, hobblers, nor archers, other than those who held by such service, if it be not by common assent and grant in parliament." Both these statutes of Edward III. were recited and confirmed in the fourth year of Henry IV. 4 *Hen. 4. c. 18.*

The successful resistance thus made by parliament appears to have produced the discontinuance of compulsory levies for foreign warfare. Edward III. and his successors, in their long contention with France, resorted to the mode of recruiting by contracts with men of high rank or military estimation, whose influence was probably greater than that of the crown, towards procuring voluntary enlistments. Their pay, as stipulated in some of those contracts which are extant, was extremely high; but it secured the service of a brave and vigorous yeomanry. Under the House of Tudor, in conformity to their more despotic system of government, the salutary enactments of former times came to be disregarded. Henry VIII., and Elizabeth, sometimes compelling the counties to furnish soldiers: and the prerogative of pressing men for military service, even out of the kingdom, having not only become as much established as undisputed usage could make it, but acquiring no slight degree of sanc-

tion by an act passed under Philip and Mary, (4 & 5 *P. & M. c. 3.*) which, without repealing or adverting to the statutes of *Edw. 3.* and *Hen. 4.*, appeared (or attempted) to recognize the right of the crown to levy men for service in war; and imposed penalties on persons absenting themselves from musters, commanded by the royal authority to be held for that purpose.

In fact, there had never been kept up any regular army in England. Henry VII. established the Yeomen of the Guard in 1485, solely for the defence of his person; and rather perhaps, even at that time, to be considered as the king's domestic servants than as soldiers. Their number was at first fifty, and seems never to have exceeded two hundred. A kind of regular troops, however, chiefly accustomed to the care of artillery, were maintained in the very few fortified places where it was thought necessary or practicable to keep up the show of defence. The Tower of London, Portsmouth, the castle of Dover, the fort of Tilbury; (and before the union of the crowns, Berwick, and some other places on the Scotch border); but very little is to be met with on the nature of these garrisons: their whole number must have been insignificant, and probably at no time capable of resisting any serious attack.

Care must be taken not to confound this strictly military force, serving, whether by virtue of tenure or engagement, whosoever it should be called, with that of a mere domestic and defensive character, to which alone the name of Militia was usually applied. By the Anglo-Saxon laws, or rather by one of the primary and indispensable conditions of political society, every freeholder, (if not freeman,) was bound to defend his country against hostile invasion. It appears that the alderman, or earl, while those titles continued to imply the government of a county, was the proper commander of the militia. Henry II., in order to render it more effective in cases of emergency, and perhaps with a view to extend its service, enacted by consent of parliament, (27 *Hen. 2. Assize of Arms*;) that every freeman, according to the value of his estate or moveables, should hold himself constantly furnished with suitable arms and equipments; see *Wilkin's Leg. Anglo-Sax. p. 333; Lyttleton's Hen. II. 364.* By the statute of *Winton*, 13 *Edw. 1. c. 6.* these provisions were enforced and extended. Every man between the ages of fifteen and sixty was to be assessed and sworn to keep armour, according to the value of his lands and goods. For 15*l.* and upwards in rent, or 40 marks in goods, a hauberk, an iron helmet, a sword, a knife, and a horse; for smaller property less expensive arms. A view of this armour was to be taken twice in the year by the constables chosen in every hundred. These regulations appear by the context of the whole statute to have more immediate regard to the preservation of internal peace, by suppressing tumults and apprehending robbers, than to the actual defence of the realm against hostile invasion, a danger not at that time very imminent. The sheriff, as chief conservator of the public peace and minister of the law, had always possessed the right of summoning the *posse comitatus*; that is, of calling on all the king's liege subjects, within his jurisdiction, for their assistance, in case of any rebellion or tumultuous rising, or when bands of robbers infested the public ways; or when, as occurred very frequently, the execution of legal process was forcibly obstructed. It seems to have been the policy of that wise prince, Edward I., to whom we are indebted for so many signal improvements in our law, to give a more effective and permanent energy to this power of the sheriff. The provisions, however, of the statute of *Winton*, so far as they obliged every proprietor to possess suitable arms, were, of course, applicable to national defence. In seasons of public danger, threatening invasion from the side of Scotland or France, it became customary to issue commissions of array, empowering those to whom they were addressed to muster and train all men capable of bearing arms in the

counties to which the commissions extended, and hold them in readiness to defend the kingdom. The earliest of these commissions, in *Rymer*, is of 1324, and the latest 1557.

The obligation of keeping arms according to each man's estate was enforced by a statute of Philip and Mary, (5 P. & M. c. 2), which made some changes in the rate and proportion, as well as the kind of arms. But these ancient provisions were repealed by 1 Jac. 1. c. 25. § 46. The nation, become for ever secure from invasion on the quarter where the militia service had been most required, and freed from the other dangers which had menaced the throne of Elizabeth, gladly saw itself released from an expensive obligation. The government also may be presumed to have thought that weapons of offence were safer in its hands than in those of its subjects. Magazines of arms were formed in different places, and generally in each county (*Rymer*, xix. 310); but (if we may reason from the absence of documents) there was little regard to military array and preparation, save that the citizens of London mustered their trained bands on holidays; an institution which is said to have sprung out of a voluntary association called the artillery company, formed in the reign of Henry VIII., for the encouragement of archery, and acquiring a more respectable and national character at the time of the Spanish Armada. *Grose's Military Antiquities*.

The word artillery was at that time used for the long-bow. The Artillery Company still exists in London, and may be considered as the origin of those volunteer military associations which were so honourable and serviceable to the country in the French revolutionary war, from 1793 to 1814.

The power of calling into arms, and mustering the population of each county given a career times to the sheriff or justices of the peace, or to special commissioners of array, began (about the reign of Henry VIII. or his daughter Mary) to be entrusted to a new officer, entitled the lieutenant, or lord-lieutenant of the county, (who is mentioned as a known officer in 4 & 5 P. & M. c. 1.) This lord lieutenant was usually a peer, or at least a gentleman of large estate within the county, whose office gave him the command of the militia, and rendered him the chief viceregent of his sovereign, responsible for the maintenance of public order. This institution may be considered as a revival of the ancient local earldom; and it certainly took away from the sheriff a great part of the dignity and importance which he had acquired since the discontinuance of such local earldom: yet the lord-lieutenant has so peculiarly military an authority, that it does not in any degree control the civil authority of the sheriff, as the executive minister of the law. In certain cases, such as a tumultuous obstruction of legal authority, each may be said to possess an equal power; the sheriff being still undoubtedly competent to call out the posse comitatus, in order to enforce obedience. Practically, however, in all serious circumstances, the lord-lieutenant is reckoned the efficient and responsible guardian of public tranquillity.

In Ireland a similar office is exercised by the governors of counties; and, in cases of exigency, the militia may be called out under the acts regulating that national force. See *Militia*.

As the fashion of keeping standing armies has of late years universally prevailed over Europe, it has also, for many years past, been annually judged necessary by our legislature, to maintain, even in time of peace, a standing body of troops under the command of the crown; who are, however, *ipso facto* disbanded at the expiration of every year, unless continued by parliament.

To keep this body of troops in order, an annual act of parliament passes, "to punish mutiny and desertion, and for the better payment of the army and their quarters." This regulates the manner in which they are to be dispersed among the several unkeepers and victuallers throughout the kingdom; and establishes a law martial for their govern-

ment. By this, among other things, it is enacted, that if any officer or soldier shall excite or join any mutiny, or, knowing of it, shall not give notice to the commanding officer; or shall desert, or list in any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel or enemy, or strike or use violence to his superior officer, or shall disobey his lawful commands; such offender shall suffer such punishment as a court martial shall inflict, though it extend to death itself. See *Court Martial*.

However expedient the most strict regulations may be in time of actual war; yet, in times of profound peace, a little relaxation of military rigour would not, one should hope, be productive of much inconvenience. And, upon this principle, though by our statute laws (still remaining in force, though not attended to,) desertion in time of war is made felony, without benefit of clergy, and the offence is triable by a jury, and before justices at the common law; yet, by our militia laws, a much lighter punishment is inflicted for desertion in time of peace. But our mutiny act makes no such distinction: for any of the faults above mentioned are equally at all times punishable with death itself, if a court martial shall think proper. This discretionary power of the court martial is indeed to be guided by the directions of the crown; which, with regard to military offences, has almost an absolute legislative power. "His majesty," says the act, "may form articles of war, and constitute courts martial, with power to try any crime by such articles, and inflict penalties by sentence or judgment of the same."

But as soldiers, by this annual act, are in some respects put in a worse condition than any other subjects; so by the humanity of our standing laws, they are in other cases put in a much better. By 43 Eliz. c. 3, a weekly allowance is to be raised in every county, for the relief of soldiers that are sick, hurt, and maimed; and the royal hospital at Chelsea is established for such as are worn out in their duty. Officers and soldiers that have been in the king's service, are, by several statutes enacted at the close, or during the continuance of wars, at liberty to use any trade or occupation they are fit for, in any town in the kingdom, (except the two universities, notwithstanding any statute, custom, or charter to the contrary. And soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expenses, which the law requires in other cases. 29 Car. 2. c. 3; 5 Wm. 3. c. 21. § 6. See *Wills*.

By the annual mutiny acts no soldier shall be taken out of the service by any process, except it be for some criminal matter, or for a real debt amounting to 30*l*. of which affidavit is to be made; and if any soldier be otherwise arrested, one judge by a warrant under his hand and seal shall discharge him: but the plaintiff may file an appearance in an action of debt, upon notice thereof given, and proceed to judgment and execution, other than against the body of such soldier. Soldiers, while confined for debt, shall not receive pay.

By 31 Car. 2. c. 1, no soldier shall be quartered on any persons without their consent: and inhabitants of places may refuse to quarter any soldier, notwithstanding any order whatsoever.

By the 43 Geo. 3. c. 61. § 1, every soldier or marine duly discharged out of any regiment, and every sailor duly discharged from the navy, upon carrying his discharge to the mayor or chief magistrate of the nearest town, may receive a certificate, stating the place to which he is desirous of going, being his home or last legal settlement, together with the time to be fixed, not exceeding ten days for every 100 miles. And such person producing such discharge and certificate, when lawfully demanded, and being in his proper route, shall not, by asking relief, be deemed a rogue and vagabond.

And by § 2. the wife of any soldier ordered for foreign service, making due proof of her not being allowed to embark with her husband, may receive a like certificate.

By the 37 Geo. 3. c. 70. (made perpetual by the 57 Geo. 3. c. 7.) any one maliciously and advisedly endeavouring to seduce any person serving in his majesty's forces by sea or land from his duty and allegiance, or inciting him to commit any act of mutiny, or to make, or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, is guilty of felony, punishable with death.

During the war foreign soldiers were occasionally admitted into the British service, and in such cases commissions were allowed to be granted by his majesty to foreign officers. See the acts, 45 Geo. 3. c. 75; 46 Geo. 3. c. 23.

By the 7 Geo. 4. c. 16. the several acts relating to Chelsea Hospital were consolidated and amended. This act contains a variety of regulations for the payment of pensions to disabled soldiers, which are placed under the management of the commissioners of the hospital.

By the 2 & 3 Wm. 4. c. 106. the officers in the army, and their representatives and widows, and persons on the compassionate list, and also civil officers on retired or superannuation allowances, are empowered to draw bills of exchange for their half pay or pensions upon the paymaster general of the forces.

For the acts which have been passed from time to time, with respect to serving in foreign states, see *Foreign Service*. And see further, *False Personation*, *Militia*, *Prize Money*, &c.

SOLE CORPORATIONS. See *Corporations*.

SOLET ET DEBET. Vide *Debet et Solet*.

SOLE TENANT, solus tenens. He that holds lands by his own right only, without any other joined; and if a man and his wife hold lands for their lives, with remainder to their son for life; here the man dying, the lord shall not have an heriot, because he dies not sole tenant. *Kitch.* 134.

SOLICITATIONS. It is an indictable offence to solicit and incite another to commit a felony, although no felony be in fact committed; and the sessions have cognizance of such an offence as having a tendency to a breach of the peace. *2 East*, 5.

SOLICITOR, solicitor. A person employed to follow and take care of suits depending in courts of equity. Solicitors are to be sworn and admitted by the judges, like unto attornies, before they shall practise in the common law courts; attornies may be admitted solicitors in the courts of equity, &c. *2 Geo. 2. c. 23.* See *Attorney*.

There is also a solicitor-general to the king, who is a great officer next to the attorney-general.

SOLIDATUM. Used in the neuter gender, is taken for that absolute right or property which a man hath in any thing. *Malmsh. lib.* 1.

SOLIDUM. To be bound in *solidum* is to be bound for the whole debt jointly and severally with others. Where each is bound for his share, they are said to be bound *pro rata parte*. *Scotch Dict.*

SOLINUS TERRÆ. In Domesday Book this word is only used in Kent, and no other county. *Septem solini terræ sunt 17 carucatæ.* *1 Inst. fol.* 15. According to this computation *solinus terræ* is about 160 acres, and 7 *solini* are about 1120 acres, which is less than 17 *carucatæ*, for at the lowest *carucata terræ* is 100 acres. But Lord Coke was of opinion that it did not consist of any certain number of acres. This word *solinus* was probably from the Sax. *sulk*, a plough; but what quantity of land this *solk*, *sulking*, or *swoling*, did contain, is not so easily determined. It seems to have been the same with a plough-land; so that in Domesday *se defendit pro uno solino* is, it is taxed for one *carucate* or plough-land. *Conell*.

SOLITARY CONFINEMENT. This punishment has

been only recently introduced into the criminal law of this country.

By the 7 & 8 Geo. 4. c. 28. § 9. the Consolidation Larceny Act, it is enacted that where any person shall be convicted of any offence punishable under that statute, for which imprisonment may be awarded, the court may direct that the offender shall be kept in solitary confinement for the whole or any portion of such imprisonment. And a similar provision is also contained in the 7 & 8 Geo. 4. c. 29. § 4. and 7 & 8 Geo. 4. c. 30. § 27. with respect to felonies or misdemeanors punishable under those acts.

SOLLER, or SOLAR, solarium. A chamber or upper room. *Conell*.

SOLVENDO ESSE. A term of art, signifying that a man hath wherewith to pay, or is a person solvent.

SOLVERE PŒNAS. To pay the penalty, or undergo the punishment inflicted for offences. *3 Salk.* 32.

SOLVIT AD DIEM. A plea in an action of debt on bond, &c. that the money was paid at the day limited. See *Bond*, *Payment*.

SOLUTIONE feodi militis parliamenti, and solutione feodi burgens. parliamenti. Writes whereby knights of the shire and burgesses might recover their wages or allowance, if it were denied. *35 Hen. 8. c. 11.* See *Parliament*.

SON ASSAULT DEMESNE, his own assault. A justification in an action of assault and battery; because the plaintiff made the first assault, and what the defendant did was in his own defence. *2 Litt. Abr.* 523. See *Assault*, *Pleading*.

SONTAGE. A tax of forty shillings heretofore laid upon every knight's fee. *Stor.* p. 284.

SORCLRY. See *Conjurat.*

SORNORS (sojourners). Such as masterfully (forcibly) take meat and drink from the king's people without payment. An offence formerly punishable with death. *Scotch Dict.*

SORS. In sums of money lent upon usury the principal was anciently called *sors*, to distinguish it from the interest. *Pryn's Collect.* ii. 161.

SORUS ACCIPITER. A sor, or soar hawk. King John granted to Robert de Hese land in Berton, of the honor of Nottingham, to be held by the service of yielding the king yearly one soar-hawk, &c. *Cartular. S. Edmund. MS.*

SOTHSAGA, or SOTHSAGE. An old word signifying history; from the Sax. *soth*, *verum*, and *sagu*, *testimonium*, for all histories should be true, or true sayings; from hence we derived our English word soothsayer. *Conell*.

SOVERAIGN, or SOVEREIGN. A chief or supreme person; one highest of all; as a king, &c. See *King*.

SOVEREIGN. A piece of gold coin current at 22s *anno* 1 Hen. 8. when, by indenture of the Mint, a pound weight of gold of the old standard was to be coined into twenty-five sovereigns. *Anno* 34 Hen. 8. sovereigns were coined at 20s. a-piece, and half sovereigns at 10s. But *anno* 4 Edw. 6. the sovereign of gold passed for 24s. and *anno* 6 Edw. 6. at 30s.

By the 36 Geo. 3. c. 68. § 11. declaring the gold coin to be the only legal tender, (but see now, *Tender*), and that the same should be of the weight and fineness of the Mint indenture as to the denominations then in use, it was provided that gold coins of any new denomination should be of the standard in fineness, and proportionate weight. Sovereigns to pass for 20s., and half sovereigns to pass for 10s., were accordingly coined, weighing 20-21th parts of a guinea and half guinea respectively.

SOVEREIGN POWER, or SOVEREIGNTY. By this is truly meant the power of making laws; for whomever the power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases. And all the other powers of

the state must obey the legislative power in the execution of their several functions, or else the constitution is at an end. 1 *Comm.* 49. In our constitution the law ascribes to the king the attribute of sovereignty; but that is to be understood in a qualified sense, i. e. as supreme magistrate, not as sole legislator, as the legislative power is vested in the king, lords, and commons, not in any one of the three estates alone. See *Parliament.*

SOUL-SCOT. A mortuary is so called in the laws of King Canute, c. 13. See *Mortuary.*

SOUND. A narrow sea; as *Mare Balticum*, the sound; and to sound is to make trial how many fathom a sea is deep. *Merch. Dict.*

SOUTH AUSTRALIA. By the 4 & 5 Wm. 4. c. 95. his majesty is empowered to erect South Australia into one or more British provinces; and all persons settling within the same are to be subject only to such laws as shall be made as thereafter directed for the government of such province or provinces.

§ 2. authorizes his majesty, with the advice of his privy council, to empower persons resident in any of such provinces to make laws, constitute courts, appoint officers and clergymen, and impose taxes, &c., but the laws so made are as soon as may be laid before the king in council.

By § 22. his majesty is empowered to frame a constitution of local government for any of the provinces possessing a population of 50,000 souls.

The act contains a variety of provisions for the sale of lands, and for the conveyance of emigrants from this country, and also a clause forbidding convicts to be transported to the colony.

SOUTH SEA COMPANY. A company of merchants trading to the South Sea. They were incorporated on lending the government ten millions of money towards paying the debts of the army, &c. They might purchase lands not exceeding 10000. per annum; and besides an interest for the money advanced the government, 50000. a year was to be paid them out of the funds towards the management of this company. But see 24 Geo. 2. c. 11. The corporation were granted the sole trade from the river Orinoko called Aranoka in the act, on the east side of America, to the southernmost part of Terra del Fuego, and from thence through the South Sea, &c. And the company were to be owners of all islands, ports, &c. they could discover. 9 *Ann.* c. 21.

Their privileges were first narrowed by the 12 Geo. 2. c. 77. by which act British-built ships were permitted to carry on fisheries in the Pacific Ocean without licence by the South Sea Company (or East India Company). By 47 Geo. 3. st. 1. c. 28. so much of the 9 *Ann.* c. 21. as vested in the company the exclusive trade was repealed as to all places which then were, or should at any time thereafter, be belonging to, or in the possession, or under the dominion or protection of his majesty, his heirs and successors.

Finally, by the 50 Geo. 3. c. 57. 141. amended by 56 Geo. 3. c. 77. so much of 9 *Ann.* c. 21. as vested in the said company the sole and exclusive privilege of trade into the territories within the limits of their charter as described in the said act, and all powers, rights, privileges, penalties, and forfeitures, for securing such exclusive trade, and for preventing other persons from trading, were repealed. A guarantee fund of 610,000. was established by the act, to be produced by a custom duty of 1. per cent. on goods with certain exceptions imported from the countries within the limits of the exclusive trade, as a consideration for the surrender by the company of such exclusive trade.

A duty of 1s. 6d. per ton was also imposed on all vessels (except in ballast, or importing the produce of the fishery of British subjects) entering inwards or clearing outwards from or to places within the said limits. The duties are to cease when the guarantee fund is completed.

See also 10 *Ann.* c. 80; 1 Geo. 1. st. 2. c. 21; 3 Geo. 1.

c. 9; 5 Geo. 1. c. 19; 6 Geo. 1. c. 4; 7 Geo. 1. c. 5; 8 Geo. 1. c. 22. as to the establishment of the company and regulation of its stock. And further, the 24 Geo. 2. c. 11. for reducing the interest upon the capital stock of the South Sea Company from the time and upon the terms therein mentioned, and for preventing of frauds committed by the officers and servants of the said company; and the 26 Geo. 2. c. 16. for reducing the number of directors of the said company, and for regulating the election of the governors and directors of the said company.

Creation of the old South Sea annuities, 9 Geo. 1. c. 6. § 3; 3 Geo. 2. c. 16. Redemption of South Sea annuities out of sinking-fund, 4 Geo. 2. c. 5; 6 Geo. 2. c. 25; 9 Geo. 2. c. 34; 10 Geo. 2. c. 17. § 35. New South Sea annuities created 6 Geo. 2. c. 28. Restrained from issuing bonds without a general court, 6 Geo. 2. c. 28. § 26; 7 Geo. 2. c. 17. The company continued till the annuities should be redeemed, 24 Geo. 2. c. 2. § 31. The first and second subscribed South Sea annuities to be consolidated, 25 Geo. 2. c. 27. § 26. See further, *National Debt.*

SOUTHWARK. See *London.*

SOWLEGROVE. An old name of the month of February, so called by the inhabitants of South Wales.

SOWMING and Rowming (or *zooming and rooming*). The apportioning or placing of cattle on a common, or goods in a house, according to the respective rights of various parties interested. *Scotch Law Dict.*

SOWNE, from the Fr. *souvenue*, remembered.] A word of art formerly used in the Exchequer, where estreats that sowne not, were those that the sheriff could not levy, viz. such estreats and casualties were not to be remembered, and ran not in demand; and estreats that sowne were such as he might gather, and were leviable. 4 *Hen.* 5. c. 2; 4 *Inst.* 107.

SPADARIUS, for *spatharius*. A sword-bearer. *Blount.*

SPATÆ PLACITUM. A court for the speedy execution of justice on military delinquents. *Brad. Append. Hist. Engl.* 45.

SPATULARIA, is numbered among the holy vestments, &c. in *Mon. Ang.* iii. 331.

SPAWN AND FRY OF FISH. See *Fish.*

SPEAKER. See *Parliament*, VII.

SPECIAL OCCUPANT. See *Occupancy.*

SPECIALTY, *specialitas*.] A bond, bill, or such like instrument; a writing or deed under the hand and seal of the parties. *Lit.* These are looked upon as the next class of debts after those of record, being confirmed by special evidence under seal. 2 *Comm.* c. 30. p. 465. See *Bond, Deed, Executor*, V. 6. *Real Estate.*

SPECIFIC LEGACIES. See *Legacy*, 2.

SPECIFICATION. See *Patent.*

SPECIFICATION, in Scotch law, signifies the making a new property from materials belonging to another; as wine from grapes, or other instances in which the thing converted can by no means be reduced to its original state.

SPECIFIC RELIEF IN EQUITY. See *Chancery, Equity.*

SPENCEAN SOCIETIES. See *Seditious Societies.*

SPIGURNEL, *spigurnellus*.] The sealer of the king's writ; from the Sax. *spicurrān*, to shut up or inclose; but the following original has been given of this word, that Galfridus Spigurnel being by King Henry III. appointed to be sealer of his writs, was the first in that office, and therefore in after-times the persons that enjoyed the office were called spigurnels. *Pat.* 11 *Hen.* 3; 4 *Edw.* 1. This office was also known by the name of *spicurnantia*, or *espicurnantia*, and Oliver de Stanford held lands in Nettlebed in *Com. Oxon. per serjantiam spicurnantie in Cancellaria Domini Regis.* 27 *Edw.* 1.

SPINACIUM. A sort of vessel which we now call a pin-nace. *Knight, Ann.* 1338.

SPINDULÆ, were those three golden pins which were

used about the archiepiscopal pall, and from thence *spindulatus* signified to be adorned with the pall. *Du Cange*.

SPINSTER. An addition in law proceedings usually given to all unmarried women; and it is a good addition for the estate and degree of a woman. See *Abatement*, I. 3. (c.)

SPIRITUAL CORPORATIONS. See *Corporations*, *Ecclesiastical Corporations*.

SPIRITUAL COURTS. See *Courts Ecclesiastical*.

SPIRITUALTIES OF A BISHOP. See *Bishop*, *Guardian of the Spiritualities*.

SPIRITUALTY. The clergy of England.

SPIRITUALTY OF BENEFICES. The tithes of land, &c. Lands conveyed to a church, &c. are termed the temporalities of a church, bishop, &c.

SPITTLE HOUSE. A corruption from hospital; or it may be taken from the Teuton. *spital*, an hospital or almshouse. It is mentioned in 15 *Car. 2. c. 9*.

SPOILIATION, *spoliatio*] A writ or suit for the fruits of a church, or the church itself, to be sued in the Spiritual Court, and not in the temporal, that lies for one incumbent against another, where they both claim by one patron, and the right of patronage doth not come in question. As if a parson be created a bishop, and hath dispensation to hold his benefice, and afterwards the patron presents another incumbent, who is instituted and inducted; now the bishop may have a spoliation in the spiritual court against the new incumbent, because they both claim by one patron, and the right of patronage doth not come in debate; and for that the other incumbent came to the possession of the benefice by the course of the spiritual law, viz. by institution and induction; for otherwise, if he be not instituted and inducted, a spoliation lies not against him, but writ of trespass, or assize of novel disseisin (now abolished). *F. N. B.* 36, 37. So it is where a parson that hath a plurality accepts of another benefice, by reason whereof the patron presents another clerk, who is instituted and inducted; in this case one of them may have spoliation against the other, and then shall come in question, whether he hath a sufficient plurality or not: and it is the same of deprivation, &c. *Terms de la Ley*. And see 3 *Comm. c. 7. p. 90*.

SPONTE OBLATA. A free gift or present to the king

SPORTULA. Gifts and gratuities forbidden to be received by the clergy.

SPOUSALS, *sponsalia*. See *Espousals*.

SPOUSE-BREACH. Adultery, as opposed to simple fornication.

SPRING GUNS. See *Engines*.

SPRINGING USES, or contingent uses. See *Uses*.

SPULLERS OF YARN. Persons that work at the spole or wheel; or triers of yarn to see that it be well spun, and fit for the loom. 1 *Mar. st. 1. c. 7*.

SPULZIE, *spoliatio*.] The taking away or meddling with moveables in another's possession, without the consent of the owner or authority of law. *Scotch Law Dict.*

SPUR-ROYAL, *spurareum aureum*.] An ancient gold coin. *Paroch. Antiq.* 321.

SQUALLEY. A faultiness in the making of cloth. 43 *Eliz. c. 10*. See *Rowey*.

SQUIBBS. See *Fire-Works*.

STABBING. See *Homicide*, III. 2; *Mayhem*.

STABILIA. A writ called by that name, on a custom in Normandy that where a man in power claimed lands in the possession of an inferior, he petitioned the prince that it might be put into his hands till the right was decided, whereupon he had this writ, *Breve de Stabilia*. To this a charter of King Henry I. alludes in *Pryn's Lib. Angl. tom. 1. p. 120 l.*

STABILITIO VENATIONIS. The driving deer to a stand. *Stabilitas*, the place where one ought to stand in hunting. *Leg. Hen. 1. c. 17*.

STABLE-STAND, *stabilis statio, vel stans in stabulo*.] Is where a man is found at his standing in the forest with a

cross or long-bow bent ready to shoot at any deer; or standing close by a tree with greyhounds in a leash ready to slip. And it is one of the four evidences or presumptions whereby a person is convicted of intending to steal the king's deer in the forest: the other three are *dog-draw*, *back-bear*, and *bloody-hand*. *Manwood, par. 2. cap. 18*.

STACK. A quantity of wood three feet long, as many feet broad, and twelve feet high. *Merch. Dict.*

STADIUM. A furlong of land; the eighth part of a mile. *Domesday*.

STAFF-HERDING. The following of cattle within a forest. And where persons claim common in any forest, it must be inquired by the ministers whether they use staff-herding, for it is not allowable of common right; because by that means the deer, which would otherwise come and feed with the cattle, are frightened away, and the keeper or follower will drive the cattle into the best grounds, so that the deer shall only have their leavings; therefore, if any man who hath right of common, under colour thereof use staff-herding, it is a cause of seizing his common till he pay a fine for the abuse. 1 *Jon. Rep.* 282.

STAGE-COACHES. See *Coaches*, *Furious Driving Hackney-Coaches*.

STAGE-PLAYS. See *Playhouse*.

STAGIARIUS. A resident; as *J. B. Canonicus et Stagiarius Sancti Pauli*; a canon residentiary of St. Paul's Church. *Hist. Eccl. S. Paul*. But this distinction was made between *residentiarius* and *stagiarius*—every canon installed to the privileges and profits of residence, was *residentiarius*; and while he actually kept such stated residence, he was *stagiarius*. *Statut. Eccles. Paulin. MS. 44*. *Stagiaria*, the residence to which he was obliged; *stagiari*, to keep residence.

STAGNES, *stagna*.] Pools of standing water. 5 *Eliz. c. 21*. A pool consists of water and land; and therefore, by the name of *stagnum*, the water and land shall pass also. *Inst. 5*.

STAL-BOAT. A kind of fishing boat, mentioned in the 27 *Eliz. c. 21*.

STALKING. The going gently, step by step, under cover of a horse, &c. to take game. None shall stalk with bush or beast to any deer, except in his own forest or park, under the penalty of 10*l.* 19 *Hen. c. 11*.

STALKERS. Certain fishing nets. See 13 *Rich. 2. c. 10*.

STALLAGE, *stallagium*, from the Sax. *stal*, i. e. *stabulum, statio*.] The liberty or right of pitching and erecting stalls in fairs or markets, or the money paid for the same. *Kennett's Gloss.* See *Market, Toll*.

STALLARIUS. Is mentioned in our historians, and signifies *praefectus stabuli*; he was the same officer which we now call master of the horse. *Speim.* Sometimes it hath been used for him who hath a stall in a market. *Fleta, lib. 2. c. 28*.

STAMP-DUTIES. A branch of the perpetual revenue of this kingdom. (See *Taxes*.) They are a tax imposed upon all parchment and paper whereon many legal proceedings or private instruments are written; and also upon licences for retailing wines, letting horses to hire, and various other purposes; and upon all newspapers, advertisements, cards, and dice. These imposts are very varied according to the nature of the thing stamped or taxed, rising gradually from one penny to ten pounds (and indeed, in many cases, as legacies, administrations, conveyances, &c. to an amount proportioned to the property conveyed). The institution of the stamp-duties was by the 5 & 6 *H. 8. c. 21*; and they have since been increased to an amount which nothing but the absolute necessity of their being imposed could prevent us from styling enormous. These duties are managed by commissioners appointed for the purpose. They now extend to such an astonishing variety of articles, and depend on such a multiplicity of statutes, which are continually varying the amount, that no table or compendium

which could be framed would probably be of any service to the reader after one session of parliament.

Of late years the stamp duties on many articles have been lessened or altogether repealed; and by a recent act (the 4 & 5 Wm. 4. c. 60.) the board of stamps and taxes have been consolidated.

STANDARD, from the Fr. *estandard*, &c. *signum, vexillum*.] In the general signification, is an ensign in war. And it is used for the standing measure of the king, to the scantling whereof all the measures in the land are or ought to be framed by the clerks of markets, aulnagers, or other officers, according to Magna Carta and divers statutes. This is not without good reason called a standard, because it standeth constant and immoveable, having all measures coming towards it for their conformity: even soldiers in the field have their standard or colours for their direction in their march, &c. to repair to. *Britton*, c. 30. See *Measure*.

There is a standard of money, directing what quantity of fine silver and gold, and how much alloy, are to be contained in coin of old sterling, &c.; and standard of plate, and silver manufactures. 6 Geo. 1. c. 11. See *Alloy, Gold, Money, &c.*

STANDARDUS. True standard, or legal weight or measure. *Cartular. S. Edmund. MS.* 268.

STANDLI. A young store oak-tree, which in time may make timber, and twelve such young trees were to be left standing in every acre of wood at the felling thereof, by the (repealed) 35 Hen. 8. c. 17. And see (repealed) 19 Eliz. c. 25. § 18. and post, tit. *Wood*.

STANDING ARMY, not to be kept in time of peace without consent of parliament. 1 W. & M. sess. 2. c. 2. See *Soldiers*.

STANNARIES, *stannaria*, from the Lat. *stannum*, tin.] The mines and works where tin metal is got and purified; as in Cornwall, Devonshire, &c. *Camden Britt.* 109. The tanners are called stannary men.

The stannary courts in Devonshire and Cornwall, for the administration of justice among the tanners therein, are courts of record, but of a private and exclusive nature. They are held before the lord warden and his substitutes; in virtue of a privilege granted to the workers in the tin-mines there, to sue and be sued only in their own courts, that they may not be drawn from their business, which is highly profitable to the public, by attending their law-suits in other courts, 4 Inst. 32. The privileges of the tanners are confirmed by a charter 35 Edw. 1. and fully expounded by a private statute, 50 Edw. 1. given at length in 1 Inst. 232. which has since been explained by a public act, 16 Car. 1. c. 1.

All tanners and labourers in and about the stannaries shall, during the time of their working therein, ~~be~~ be privileged & freed from suits of other courts, and be only amenable in the stannary court, in all matters, excepting pleas of land, tithes, and mortgag. No writ of error lies from hence to any court in Westminster-hall: but an appeal lies from the steward of the court to the under-warden, and from thence to the lord-warden, and thence to the privy council of the Prince of Wales, as Duke of Cornwall, when he hath and lives; or next of kin of the same; and from thence the appeals to the king himself in the last resort. 3 Comm. c. 6. p. 79, 80. cites 4 Inst. 230, 231; 3 Bulst. 183; *Dodr. Hist. Corn.* 94.

Transitory actions between tinner and tinner, &c. though not concerning the stannaries, or arising therein, if the defendant be found within the stannaries, may be brought into these courts, or at common law; but if one party alone is a tinner, such transitory actions which concern not the stannaries, nor arise therein, cannot be brought in the stannary courts. 4 Inst. 251.

By the 4 & 5 Wm. 4. c. 42. commissioners for taking affidavits in the common law courts at Westminster, or masters extraordinary in Chancery, having commissions from the vice-warden of the stannaries, are empowered to take affidavits in the courts of the vice-warden.

Labourers in the stannaries may recover their wages before justices of peace. 27 Geo. 2. c. 6.

STANNARIUS. A pewterer or dealer in tin; of or belonging to tin. *Lit. Dict.*

STAPLE, *stapulum*.] From the Fr. *estape*, i. e. *forum vinarium*, a market or staple for wines, which formed the principal commodity of France; or rather from the Germ. *stapulen*, which signifies to gather or heap any thing together: in an old French book it is written *a Calais Estape de la Laine*, &c. i. e. the staple for wool: and with us it hath been a public mart appointed by law to be kept at the following places, viz. Westminster, York, Lincoln, Newcastle, Norwich, Canterbury, Chichester, Winchester, Exeter, and Bristol, &c. A staple court was held at the Wool Staple in Westminster, the bounds whereof began at Temple-Bar and reached to Tuthill; in other cities and towns, the bounds are within the walls; and where there are no walls, they extend through all the towns: and the courts of the mayor of the staple is governed by the law merchant in a summary way, which is the law of the staple, 4 Inst. 235. See the *Statute of the Staple*, or *Ordinance of the Staples*, 27 Edw. 3. st. 2. The staple goods of England are wool, wool-fels, (or skins,) leather, lead, tin, cloth, butter, cheese, &c. as appears by the statute 14 R. 2. c. 1. Though some allow only the five first; and yet of late staple goods are generally understood to be such as are vendible, of any kind, and not subject to perish.

The acts above referred to are repealed. But that there is still a company of the merchants of the staple of England, see *Petition*, No. 246, *Appendix to Votes of House of Commons*, A. D. 1824, under the seal of the mayor, constables and commonalty. See further *Customs on Merchandise*, *Statute Staple*.

STAR, *starrum*, a contraction from the Hebr. *shetar*, a deed or contract.] All the deeds, obligations, &c. of the Jews, were anciently called stars, and written for the most part in Hebrew alone, or in Hebrew and Latin, one of which yet remains in the treasury of the Exchequer, written in Hebrew without points, the substance whereof is expressed in Latin just under it, like an English condition under a Latin obligation: this bears date in the reign of King John; and many stars, as well as of grant and release, as obligatory, and by way of mortgage, are pleaded and recited at large in the Plea-rolls. *Pusch*, 9 Edw. 1. See *Star-Chamber*.

In one of the statutes of the university of Cambridge, the antiquity of which is not known, the word *starrum* is twice used for a schedule or inventory. 4 Comm. c. 19. p. 266, n.

STAR AND BENT. See *Sea Baul*.

STARCH AND **STARCH POWDER**. Were articles subject to the duties and controul of the Excise, but by the 4 & 5 Wm. 4. c. 77. these duties were repealed.

STAR-CHAMBER, *camera stellata*, otherwise called *Chambre des estoilles*. A chamber at Westminster so called, (as Sir Thomas Smith, de Rep. Anglor. lib. 1. c. 1 conjectures,) because at first the ceiling thereof was adorned with images of gilded stars. And in the 25 Hen. 8. c. 1. it is written the Starred Chamber. It was ordained by 9 Hen. 7. c. 1; and 21 Hen. 8. c. 2. that the chancellor, assisted by others there named, should have power to punish routs, riots, forgeries, maintenances, embraceries, perjuries, and other such misdemeanors as were not sufficiently provided for by the common law, and for which the inferior judges were not so proper to give correction.

But by 16 Car. 1. c. 10. this Court, commonly called the Star-chamber, and all jurisdiction, power, and authority thereto belonging, are abolished. *Cowell*.

Molly and Blackstone seem to think it was called the Star-Chamber, because the recognizances which the Jews formerly entered into to the crown, and which were called stars, were kept in that chamber. See *ante*, *Star*.

See 4 Comm. c. 19. in the notes, for some particulars relative to this court. *Hudson's Treatise of the Court of Star-*

Chamber, there referred to, is now published at the beginning of the second volume of *Collectanea Juridica*.

STATED DAMAGES. See *Bonds, Covenants, Damages, &c.*

STATICS, *staticæ, scientia ponderum.*] Knowledge of weights and measures; or the art of balancing or weighing in scales. *Merch. Dict.*

STATIONARIUS. The same as *Stagarius*.

STATUARIUM. A tomb adorned with statues. *In-gulph. 853.*

STATUS DE MANERIO. The state of a manor: all the tenants within the manor, met in the court of their lord to do their customary suit, and enjoy their rights and usages, were termed *omnis Status de manerio*. *Pursh. Antiq. 156.*

STATUTE.

STATUTUM.] Has divers significations: first, it signifies an act of parliament; and, secondly, it is a short writing called a *statute-merchant*, or *statute staple*, (see those titles,) which are in the nature of bonds, &c. and called statutes, as they are made according to the form expressly provided in certain statutes.

The acts of parliament, statutes, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled, (see *8 Rep. 20.*) compose the *Leges Scriptæ*, the written laws of the kingdom. The earliest statute, of which any record exists, is the statute of *Gloucester*, 6 *Edw. 1.* which is entered on a statute roll at the tower. There are six of these rolls, the latest containing the statutes of 12 *Edw. 1.* The previous statutes of *Merton*, 20 *Hen. 3.*; *Marleberge*, 52 *Hen. 3.* and *Westminster the first*, 3 *Edw. 1.* are found in all printed collections, and in numerous ancient manuscripts of the statutes. The general printed collections of the statutes are preceded by *Magna Carta*, 9 *Hen. 3.* as confirmed and entered on the statute roll of 25 *Edw. 1.* or the charter roll, 28 *Edw. 1.* and that charter has now the force of a statute, and had such force, if not at the time of its being granted, certainly very soon after.

After the parliament of 14 *Edw. 3.* a certain number of prelates, barons and councillors, with twelve knights and six burgesses, were appointed to sit from day to day, in order to turn such petitions and answers as were fit to be perpetual into a statute; but for such as were of a temporary nature, the king issued his letters patent. *Rot. Parl. (Edw. 3., p. 113.* This reluctance to innovation without necessity, and to swell the number of laws which all were bound to know and obey, with an accumulation of trifling enactments, led apparently to the distinction between statutes and ordinances. The latter are indeed defined by some lawyers to be regulations proceeding from the king and lords without concurrence of the commons. But if this be applicable to some ordinances, it is certain that the term, even when opposed to statute, with which it is often synonymous, sometimes denotes an act of the whole legislature. In 37 *Edw. 3.* where divers temporary regulations against excess of apparel were made in full parliament, "it was demanded of the lords and commons, inasmuch as the matter of their petition were novel and unheard of before, whether they would have them granted by way of ordinance or of statute?" They awarded that it would be left to him than by way of ordinance and not of statute, in order that any thing which should need amendment might be awarded at the next parliament." So much scruple did they entertain about tampering with the statute law of the land. *R. P. p. 280.* And see *R. P. iii. 17, iv. 35,* and the ordinances of the staple, 27 *Edw. 3.* confirmed as a statute in the subsequent parliament.

If there be any difference between an ordinance and a statute, as some have called it, it is but only this, that an ordinance is but temporary till confirmed and made perpetual, but a statute is perpetual at first, and so have some ordinances also

been. *Whitelock on P. Writ, 277. Hallam, Middle Ages, cap. viii. on the English Constitution.*

The mode in which statutes are made is stated under title *Parliament, Div. VII.*—To what is there said we may here only add, that the royal assent, when given, is written upon the several acts by the clerk of the parliament.

In the reigns of *Hen. 6.* and *Edw. 4.* the language of the statutes was sometimes English, but more commonly French, but were framed and entered on the parliament roll in English. After receiving the royal assent the public acts were translated out of English into French or Latin, and having been so entered on the statute roll were promulgated in those languages. The statutes of *Hen. 7.* were the first that were all drawn in English.

The method of citing these acts of parliament is various. Many of our ancient statutes are called after the name of the place where the parliament was held that made them; as the statutes of *Merton* and *Marleberge* (*Marlborough*), of *Westminster*, *Gloucester*, and *Winchester*. Others are denominated entirely from their subject; as the statutes of *Wales* and *Ireland*, the *Articula Cleri*, and the *Prærogativa Regis*. Some are distinguished by their initial words, a method of citing very ancient, as the statute of *Quia Emptores*, and that of *Cursum Spectat Agatus*. But the most usual method of citing them, especially since the time of *Edw. 2.* is by naming the year of the king's reign in which the statute was made, together with the chapter, or particular act, according to the numeral order. All the acts of one session of parliament taken together make properly but one statute: and therefore when two sessions have been held in one year, we usually mention *stat. 1. or stat. 2.* Thus the Bill of Rights is cited, as 1 *W. & M. st. 2. c. 2.* signifying that it is the second chapter or act, of the second statute, (or the laws made in the second session of parliament,) in the first year of King William and Queen Mary.

These statutes, or acts of parliament, were anciently promulgated by means of exemplifications thereof under the great seal, which were sent to the sheriffs of the several counties, with writs requiring them to be published in such places of the county as the sheriffs thought fit. Writs of this nature appear annexed to the statutes on the statute rolls in the Tower from 6 *Edw. 1.* down to the reign of *Hen. 5.* Not very long after that time printing came into use, and then the statutes of each session were printed at the end of the session, and thus made known to the public; though proclamations were not entirely superseded in particular instances till a much later date. See the 25 *Hen. 8. c. 22.* The earliest sessional publication of statutes was that of the acts passed at the first and only parliament of *Rich. 3.* From that time until the year 1796, these sessional publications were the only mode of promulgation adopted, and these were not generally obtainable, except by private purchase, the delivery of them being confined to about 1100 copies (assisted at the public cost) to the members of each house of parliament, the privy council, and some great officers of state. In consequence of several reports made by committees of the House of Commons specially appointed to consider of the promulgation of the statutes, 5000 copies are now distributed throughout the United Kingdom of Great Britain and Ireland, to the Houses of Parliament, great officers and departments of state, public libraries, courts of justice, sheriffs, municipal magistrates, and clerks of the peace.

By 41 *Geo. 3. c. 90.* it is enacted, that the statutes printed by the king's printer, in Great Britain and Ireland respectively, shall be evidence of all such statutes prior to the 1st Jan. 1801.

By 33 *Geo. 3. c. 13.* it is enacted, that when the operation of an act of parliament is not directed to commence from any time specified within it, the clerk of the parliaments shall endorse upon it the day upon which it receives the royal assent, and which since this act is added in the printed statutes immediately after the title; and that day shall be the date of

its commencement.—The statute has obviated much inconvenience (not to say injustice) which arose from the former maxim, that an act of parliament operated from the first day of the session, the whole session, like the whole term, being considered as one day, and thus many statutes had the force of *ex post facto* laws.

By 48 Geo. 3. c. 106. when bills for continuing temporary acts shall not pass before such acts expire, such acts shall be continued from the time of their expiration, except as to penalties, &c.

An edition of the *Statutes of the Realm*, from original records and authentic manuscripts, was undertaken in the year 1801, under the authority of the commissioners on the public records in Great Britain. The first volume, containing the statutes from 20 Hen. 3. to the end of the reign of Edw. 3. preceded by a complete collection of the *Charters of Liberties*, from Hen. 1. to Edw. 3. was published in 1811. The second volume, including the statutes from Rich. 2. to the end of Hen. 7. appeared in 1816. These two volumes contain the whole of what may be termed the ancient part of the statute law. A long introduction with an appendix thereto, prefixed to the first volume, and the notes throughout that and the second volume, afford information on the subject of statute law, not much known even to the best lawyers of the present day. The preface to the quarto edition of the statutes, (i. Geo. 3. &c.) published by the king's printer, subsequent to the Union between Great Britain and Ireland, and two prefaces prefixed to the first volume of the Collection of Statutes, in ten volumes quarto, from *Magna Charta* to 1801, also published by the king's printer, will be found useful, with reference to the history of former printed editions of the statutes. The authentic collection has been continued by the commissioners on the records, by subsequent volumes, to the reign of Hen. 3.; from which time the sessional collections printed by the king's printers are sufficiently accessible. Two volumes of the acts of parliament of Scotland have also been printed by the same commissioners. The commissioners on the records of Ireland, are about in like manner to publish an authentic collection of the acts of the parliaments of Ireland.

A good law, says a celebrated author, who, however his principles of arbitrary non-right, as applied to the British constitution, are far from correct, was yet a true reasoner, is that which is needful for the good of the people, and withall perspicuous. "The perspicuity, (he sagaciously adds,) consisted just so much in the words of the law itself, as in a declaration of the causes and motives for which it was made. That it is which shows us the meaning of the legislature; and that meaning once known, the law is more easily understood by few than by many words; for all words are subject to ambiguity and a future and pleader's words in the body of the law is an implication of ambiguity. Besides, it seems to imply by too much diligence that was observed in evading the words, is without the compass of the law; and this is a cause of many unnecessary processes. For when I consider how short were the laws of ancient times, and how by degrees they grow still longer, methinks I see a contention between the framers and pleaders of the law, the former seeking to circumscribe the law, and the latter to evade their circumscriptions, and that the pleaders have got the victory. It belongeth therefore to the office of a legislator to make the reasons perspicuous why the law was made, and the body of the law itself is short, but in as significant terms as may be." *Hobbes's Leviathan*, part 2. ch. 30. ed. 1651, p. 182.

We are now to consider,

I. The different kinds of statutes.

II. Some general rules with regard to their construction.

I. The first division of statutes is obviously into ancient and modern. The statutes from *Magna Charta* down to the end

of Edw. 2. including also some which (because it is doubtful to which of the three reigns of Hen. 1. Edw. 1., or Edw. 2., to assign them) are termed *incerti temporis*, compose what have been called the *vetera statuta*; those from the beginning of the reign of Edw. 3. being contradistinguished by the appellation of the *nova statuta*. The former also, from some accidental circumstance of collection or publication, are sometimes spoken of as *prima aut secunda pars veterum statutorum*. *Dunbar on Stat.* 626.

Statutes are either general or special, public or private. A general or public act is an universal rule, that regards the whole community: and of this the courts of law are bound to take notice judicially and *ex officio* without the statute being particularly pleaded, or formerly set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns: and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formerly shewn and pleaded. Thus, to shew the distinction, the 13 Eliz. c. 10. to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the bishop of Chester to make a lease to A. B. for sixty years, is an exception to this rule: it concerns only the parties and the bishop's successors; and is therefore a private act. 1 *Comm. Introd.* § 3. p. 85, 86.

Some statutes (says another authority) are general, and some are special: and they are called general from the genus, and special from the species; as for instance: the whole body of the spirituality is the genus, but a bishop, dean, and chapter, &c. are the species: therefore statutes which concern all the clergy are general laws, but those which concern bishops only are special. 4 *Rep.* 76. The 21 Hen. 8. c. 13. which makes the acceptance of a second living by clergymen an avoidance of the first, is a general law, because it concerns all spiritual persons.

All statutes concerning mysteries and trades in general are general or public acts; though an act which relates to one particular trade is a private statute. *Dyer*, 75. A statute which concerns the king is a public act; and yet the 23 Hen. 8. concerning sheriffs, &c. is a private act, *Plond.* 38; *Dyer*, 119. It is a rule in law, that the courts at Westminster ought to take notice in a general statute, without pleading it; but they are not bound to take notice of particular or private statutes unless they are pleaded. 1 *Inst.* 98.

All difficulties respecting the distinction of modern statutes, as public or private, are prevented by regulations of both houses of parliament, under which the statutes are at present classed in four series: 1. Public general acts: 2. Local and personal acts to be judicially noticed: 3. Private acts printed: 4. Private acts not printed. The first of these are, in the largest sense of the word, public acts. The nature of those in the second series is defined by the clauses respectively annexed to them. Road acts and others of an extensive nature are made public acts by a clause in each act enacting, "That this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others without being specially pleaded." Inclosure Acts, Estate Acts, and such others in the third series, the persons concerned wherein choose to be at the expense of printing them, have a clause annexed to each act, "That this act shall be printed by the printer to the king's most excellent majesty, and a copy thereof, so printed, shall be admitted as evidence thereof by all judges, justices, and others." These may be called quasi-public acts. The acts classed in the fourth series are strictly private: being either naturalization acts, divorce acts, &c. or, though relating to inclosures or estates, not having the clause last quoted annexed to them.

Statutes are also either declaratory of the common law, or remedial of some defects therein; or, to speak more strictly, they are either declaratory of the old law, or introductory of a new law; remedial statutes being generally mentioned in contradistinction to penal statutes; declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, in *perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus the statute of treasons, 25 *Edw. 3. st. 5. c. 2.* doth not make any new species of treasons; but only for the benefit of the subject, declares and enumerates those several kinds of offence, which before were treason at the common law.

Remedial, or introductory, statutes, are those which are made to supply defects, and abridge such superfluities in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division of these remedial introductory acts of parliament, into enlarging and restraining statutes. To instance again in the case of treason. Clipping the current coin of the kingdom was an offence not sufficiently guarded against by the common law; therefore it was thought expedient by 5 *Eliz. c. 11.* (now repealed) to make it high treason, which it was not at the common law. So that this was an enlarging statute. At common law also spiritual corporations might lease out their estates for any term of years, till prevented by the 13 *Eliz. c. 10.* before mentioned. This was therefore a restraining statute. 1 *Comm.* 86, 87.

It is remarked by Mr. Christian that the 5 *Eliz. c. 11.* above referred to, hardly corresponds with the general notion either of a remedial or an enlarging statute. In ordinary legal language, remedial statutes are (as has been already noticed) contradistinguished to penal statutes. An enlarging or an enabling statute is one which increases, not restrains, the power of action. As the 32 *Hen. 8. c. 28.* which gave bishops and all other sole ecclesiastical corporations, except parsons and vicars, a power of making leases which they did not possess before, is always called an enabling statute. The 19 *Eliz. c. 10.* which afterwards limited that power, is on the contrary styled a restraining or disabling statute. 1 *Comm.* 87, n. See also 2 *Comm. c. 20*; and tit. *Lease*, II.

Penal statutes are acts of parliament that impose a forfeiture on such as transgress the provisions therein contained.

A penal statute may also be a remedial law, 1 *Wils.* 126; and a statute may be penal in one part, and remedial in another part. *Dougl.* 702.

But where an act of parliament only gives a remedy to the party grieved, it shall not be considered as a penal statute. *Wilson, par. 1. fol. 412.*

Statutes may also be considered as permanent or temporary. Of the former sort are such as are passed for the establishing of general regulations of law, or for the imposing such taxes as are in their nature intended to be permanent, being applicable to the payment of permanent national burthens. Of the latter are the annual acts for regulating the army, for granting duties on malt and pensions, for funding particular loans, &c. also such acts, the policy of which depends on temporary circumstances, as the duration of war, &c. or the utility of which may be at first uncertain, and which therefore are made for a time only, in order that they may come under the frequent review of the legislature, to be continued, and if necessary amended, until at last they are made permanent or perpetual. To secure a regularity in the continuance of those temporary acts, a committee is appointed at the commencement of every session of parliament, who

report the state of all expiring laws; and on such report these laws are continued and amended, or suffered to expire, as the nature of their purposes requires.

II. THE rules to be observed with regard to the construction of statutes are principally these which follow:—

1. There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief, and advance the remedy. 3 *Rep.* 7; *Co. Litt.* 11. 42. Let us instance again in the same restraining statute, 13 *Eliz. c. 10.* By the common law ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases to the impoverishment of their successors. The remedy applied by the statute was, by making void all leases by ecclesiastical bodies for longer terms than three lives or twenty one years. Now in the construction of this statute it is held, that leases, though for a longer term, if made by a bishop, are not void during the bishop's continuance in his see; or if made by a dean and chapter, they are not void during the continuance of the dean; for the act was made for the benefit and protection of the successor. *Co. Litt.* 45; 3 *Rep.* 60; 10 *Rep.* 58. The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the grantors; but the leases, during the continuance of that interest, being not within the mischief, are not within the remedy. 1 *Comm.* 87.

The construction of statutes, though relating to matters of an ecclesiastical nature, belongs to the superior courts of common law. 5 *East*, 345.

2. A statute which treats of things or persons of an inferior rank, cannot, by any general words, be extended to those of a superior. So a statute, treating of "deans, prebendaries, parsons, vicars, and others having spiritual promotion," is held not to extend to bishops, though they have spiritual promotion, deans being the highest persons named, and bishops being of a still higher order. 2 *Rep.* 46.

3. Penal statutes must be construed strictly. Thus (to instance several statutes, all of which are now repealed) the 1 *Edw. 6. c. 12.* having enacted that those who are convicted of stealing horses should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal but one horse, and therefore procured a new act for that purpose in the following year, 2 & 3 *Edw. 6. c. 33*; *Bac. Elem. c. 12.* Though Lord Hale states the true reason of the difficulty to have arisen from the circumstance of a doubt as to the benefit of clergy attaching where only one horse was stolen, on account of the words in the old stat. 37 *Hen. 8. c. 8.* respecting stealing a horse. 2 *H. P. C.* 365. To mention a more modern and a more applicable instance; by the 14 *Geo. 2. c. 6.* stealing sheep, or other cattle, was made felony without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute, (15 *Geo. 2. c. 11*) extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs by name.

Where by the enacting clause of an act an offence is created and a penalty given, and in the same clause there follows a distinct and substantive proviso containing an exemption not incorporated with the enacting part of the clause by any words of reference, it is not necessary, in an action for the penalty, to negative such proviso in the declaration. 1 *B. & A.* 94. But see 7 *T. R.* 27, 141.

So acts of parliament which take away the trial by jury

and abridges the liberty of the subject, ought to receive the strictest construction. 4 *Bing.* 183.

So also it is a well settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous terms. See 2 *B. & B.* 30; 2 *B. & C.* 515; 4 *B. & C.* 248.

4. Statutes against frauds are to be liberally and beneficially expounded. These are generally called remedial statutes. And it is a fundamental rule of construction, that penal statutes shall be construed strictly, and these remedial statutes liberally. See 1 *Comm.* 88, & n. This may seem a contradiction to the last rule, most statutes against frauds being in their consequences penal. But this difference is here to be taken; where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing, the 13 *Eliz. c. 5.* which avoids all gifts of goods, &c. made to defraud creditors and others, was held to extend, by the general words, to a gift made to defraud the queen of a forfeiture. 3 *Rep.* 82. It has also been held, that the same words of the same statute will bear different determinations, according to the nature of the suit or prosecution instituted upon them. For example, the 9 *Ann. c. 11.* against gaming, enacts, that if any person shall lose at any one time or sitting 10*l.* and shall pay it to the winner, he may recover it back within three months; and if the loser does not within that time, any other person may sue for it, and treble the value besides. In a case where an action was brought to recover back fourteen guineas which had been won and paid after a game of play, except an interposition during dinner, the court held the statute was repealed, as far as it prevented the effects of gaming, without inflicting a penalty; and therefore, in this action, they considered it one time or sitting. But they said, if an action had been brought by a common informer for the penalty, they would have construed it strictly, in favour of the defendant, and would have held that the money had been lost at two sittings. 2 *Black. R.* 1226; 1 *Comm.* 88, 89, & n.

5. One part of a statute must be so construed by another, that the whole may, if possible, stand; *ut res magis valeat, quam pereat.* As if land be vested in the king and his heirs by act of parliament, saving the right of A.; and A. has at that time a lease of it for three years: here A. shall hold it for his term of three years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon. But,

6. A saving, totally repugnant to the body of the act, is void. If, therefore, an act of parliament vests land in the king and his heirs, saving the right of B. prisoners who ever creates the land of A. in the king, saving the right of A.: in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king. 1 *Rep.* 47; 1 *Comm.* 80.

Where a continuing act is cited the later of the act contradicted, it was held sufficient to repeal the former. For the legislature in continuing an act is not bound to use any particular form of words. *Longnead's case*, 2 *Leuch.* 694.

7. Where the common law and a statute conflict, the common law gives place to the statute, and the old statute gives place to a new one. And this is a general principle of universal law, *leg posterior derogat legi priori*. But this is to be understood only when the latter statute is contained in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have twenty pounds a-year, and a new statute afterwards enacts that he shall have twenty marks; here the latter statute, though it does not express, yet necessarily implies a negative, and virtually

repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end. *Jenk. Cent.* 2. 73. But if both acts be merely affirmative, and the substance such as both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If, by a former law, an offence be indictable at the quarter sessions, and the latter law makes the offence indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either; unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, and not elsewhere. 11 *Rep.* 63; 1 *Comm.* 89, 90.

8. If a statute that repeals another is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose. So when the statutes of 26 *Hen.* 8. c. 1; 35 *Hen.* 8. c. 3. declaring the king to be the supreme head of the church, were repealed by a statute 1 & 2 *P. & M.* and this latter statute was afterwards repealed by an act of 1 *Eliz.* there needed not any express words of revival in Queen Elizabeth's statute, but these acts of King Henry were implied and virtually revived. 4 *Inst.* 325; 1 *Comm.* 90.

But when a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited to continue only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the legislature to that effect be expressed. 3 *East*, 205.

A statute introductive of a new qualification, or additional condition, respecting any subject, though penned in the affirmative, repeals a former less extensive or contrary statute concerning the same matter. 9 *East*, 44.

A contract declared by statute to be illegal, is not made good by a subsequent repeal of the statute. 1 *H. Bla.* 65.

9. Acts of parliament derogatory from the power of subsequent parliaments bind not. So the 11 *Hen.* 7. c. 1. which directs that no person for assisting a king *de facto* shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason, but will not restrain or clog any parliamentary attainder. 4 *Inst.* 43. Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority; it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. 1 *Comm.* 90.

Statutes against the power of subsequent parliaments are not binding, notwithstanding the statute 42 *Edw.* 3. c. 3. declares that any statute made against *Magna Charta* shall be void; and thus saving, saving many parts of *Magna Charta* have been repealed and altered by subsequent acts. *Read, on Stat.* vol. 4. p. 340. And the law has been mistaken on this point, for the statutes which intervene between the 9 *Hen.* 3. and 12 *Edw.* 3. are not repealed, though they vary from and are contrary to *Magna Charta.* *Jenk. Cent.* 2.

10. Lastly, acts of parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to collateral consequences, void. *Blackstone* lays down the rule with these restrictions, though he allows it is generally laid down more largely, that acts of parliament contrary to reason are void: but if the parliament will positively enact a thing to be done which is unreasonable, I know of no power (says the commentator) in the ordinary forms of the constitution, that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens

to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it [or to state it perhaps more correctly, it will not be presumed that any construction can be agreeable to the intention of the legislature, the consequences of which are unreasonable.] Thus, if an act of parliament gives a man a power to try all causes that arise within his manor of Dale, yet if a cause should arise in which he himself is party, that act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. 8 Rep. 118. But if we could conceive it possible for the parliament to enact that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words as leave no doubt whether it was the intent of the legislature or no. 1 Comm. 91, and note.

The following general notes may assist the student in his further researches on this subject:

It is the general rule, that to statutes enacted in parliament there must be the assent of the king, lords, and commons, without which there can be no good act of parliament; but there are many acts in force, though these three assents are not mentioned therein, as *Dominus rex statuit in parlamento*, and *Dominus res in parlamento suo statuta edit*, and *de communi concilio statuit*, &c. Plowd. 97; 2 Bulet. 186. And Sir Edward Coke says, that several statutes are penned like charters, in the king's name only, though they were made by lawful authority. 4 Inst. 25. Before the invention of printing, all statutes were proclaimed by the sheriff in every county, by virtue of the king's writ. 2 Inst. 526, 644.

Statutes continue in force, although the records of them are destroyed by the injury of time, &c. 2 Inst. 587.

Statutes consist of two parts, the words and the sense, and it is the office of an expositor to put such a sense upon the words of the statute as is agreeable to equity and right reason. Equity must necessarily take place in the exposition of statutes; but explanatory acts are to be construed according to the words, and not by any manner of intendment; for it is incongruous for an explanation to be explained. Plowd. 363, 465; Cro. Car. 23.

An act made to correct an error, by omission, in a former act of the same session, was construed to relate back to the time when the first act passed, that they might be taken together as if they were one and the same act. 2 Price, 381.

The preamble of a statute, which is the beginning thereof, going before, is, as it were, a key to the knowledge of it, and to open the intent of the makers of the act, it shall be deemed true, and therefore good arguments may be drawn from the same. 1 Inst. 11.

But the preamble has been held to be no part of the statute. 6 Mod. 62, 144. And the true meaning of the statute is generally and properly to be sought from the purview or body of the act. The preamble is no more than a recital of some inconveniences which by no means exclude any other for which a remedy is given by the enacting part of the statute. Great doubts have existed how far the preamble should control the enacting part; but abundant cases have established that where the words in the enacting part are strong enough to take in the mischief intended to be prevented, they shall be extended for that purpose, though the preamble does not warrant it; in other words, the enacting part of the statute may extend the act beyond the preamble. 3 Atk. 304. Comp. 543.

It is the most natural and genuine exposition of a statute, to construe one part by another part of the same statute, for that best expresses the meaning of the makers; the words of an act of parliament are to be taken in a lawful and rightful sense; and though as has been already said, the construction of statutes in general must be made in suppression of

the mischief, and for the advancement of the remedy intended by the statute, but so that no innocent person by a literal construction shall receive any damage. 1 Inst. 21, 381.

The best way to expound a statute is to consider what answer the lawyers would probably have given to the question made, if proposed to them. Plowd. 465; 2 Nels. Abr. 245.

Where a statute gives a remedy for any thing, it shall be presumed there was no remedy before at common law. And the rules to construe acts of parliament are different from the strict rules of the common law; though in the construction of a statute, the reason of the common law gives great light. Raym. 191, 355; 2 Inst. 301. If an act of parliament is dubious, long usage may be good to expound it by; and the meaning of things spoken and written must be as hath been constantly received; but where usage is against the obvious meaning of a statute, by the vulgar and common acceptation of words, then it is rather an oppression than an exposition of the statute. Vaugh. 169, 170. An election committee refused to admit evidence of usage to explain the words of a stamp act, on the question whether deeds were valid, which conveyed several freeholds to several voters, which had only one stamp. 3 Lud. 177.

A statute which alters the common law shall not be strained beyond the words, except in cases of public utility, where the end and design of the act appears to be larger than the words themselves. Vaugh. 179. Relative words in any statute may make a thing pass as well as if particularly expressed; and cases of the same nature shall be within the same remedy. Raym. 54.

Statutes made for the public good are to be expounded so as to attain their end. 1 Stra. 253, 258.

Such statutes as are beneficial to the people shall be expounded largely, and not with restriction. Style, 502. The exposition of statutes concerning the ecclesiastical courts belongs to the common law courts; and a statute made in imitation of the common law is to be expounded by it. Hoar. 83, 97.

The affirmative words of statutes do not change the common law without negative words added therein. Thus the Statute of Wills, being in the affirmative, doth not take away the custom to devise land in places where it existed before the statute. Jonk. Cent. 212; Dyer, 155; 1 Inst. 111; and see 7 T. R. 628. So though the 54 Geo. 3. c. 84. enacted that the Michaelmas quarter sessions should be held in the week after 11th October, it was decided to be merely directory and that those sessions might be held at another time; but negative words would have made the statute imperative and see Dougl. 188; Bac. Abr. Statute G. (7th ed.)

If a statute be made only in affirmance of the ancient common law, and doth not enact any thing new, but what was before provided for, it is nevertheless a statute, and may be pleaded, but the defendant hath a plea at common law. Style, Reg. 301. An act of parliament, in affirmance of the common law, extends to all times after, though it mentions only to give remedy for the present; and where a thing is granted by statute, all necessary incidents are granted with it. 1 Inst. 235.

Wherever a statute gives or provides a thing, the common law supplies all manner of requisites. Hard. 62. Every statute made against an injury gives a remedy by action, expressly or implicitly. 2 Inst. 55, 74. And besides an action upon the statute, as the subject's private remedy, the offender may be punished for contempt at the king's suit, by fine, &c. 2 Co. Inst. 131, 163.

Keble's edition of the statutes and Rastall's differed, and they who were for adhering to Keble, proved they had examined him with the parliament roll. The chief justice ruled it was enough, and Keble was read. 1 Stra. 446.

See further, Dwarries on Statutes.

STATUTE-MERCHANT. A bond of record, acknowledged

before the clerk of the statutes-merchant, and lord mayor of the city of London, or two merchants assigned for that purpose; and before the mayors of other cities and towns, or the bailiff of any borough, &c., sealed with the seal of the debtor and the king, upon condition that if the obligor pays not the debt at the day, execution may be awarded against his body, lands, and goods; and the obligee shall hold the lands to him, his heirs and assigns, till the debt is levied. *Terms de la Ley.*

Estates by statute-merchant and statute-staple are classed by Blackst. among the species of estates defeasible on condition subsequent, and are said to be very nearly related to the *vivum vadium*, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute-merchant and statute-staple are securities for money, the one entered into before the chief magistrate of some trading town, pursuant to the 13 Edm. 1. st. 3. *de mercatoribus*, and thence called a statute-merchant; the other pursuant to the 27 Edm. 3. st. 2. c. 9. before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns, from whence this security is called a statute-staple. They are both securities for debts acknowledged to be due, and originally permitted only among traders, for the benefit of commerce, whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied. And during such time as the creditor so holds the lands, he is tenant by statute-merchant or statute-staple. There is also a similar security, the recognizance in the nature of a statute-staple, acknowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster, and the recorder of London, whereby the benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the statute 23 Hen. 8. c. 6. amended by 8 Geo. 1. c. 22. which direct such recognizances to be enrolled and certified into Chancery. But these, by the Statute of Frauds, 29 Car. 2. c. 3. are only binding upon the lands in the hands of *bona fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record. 2 Comm. c. 10. p. 160. See further, *Execution, Recognizance.*

These estates, though sometimes referred to in argument, seem now nearly unknown in practice; but as the law relating to them is in force, and as it may serve to elucidate other subjects by analogy, the following information on the subject has been preserved, as useful to the student, if not to the practitioner.

11. Statute of Acton Burnel, 11 Edm. 1. and statute *de mercatoribus*, 13 Edm. 1. st. 3. enact, that the merchant shall cause his debtor to appear before the mayor of the city of London, or other city or town, and there acknowledge the debt &c. by recognizance, which is to be enrolled, the roll whereof must be double, one part to remain with the mayor, and the other with the clerk appointed by the king; and then one of the clerks is to write the obligation, which shall be sealed with the debtor's seal, and that of the king, &c.

By these statutes, if the debt be acknowledged at the day upon the merchant's account, the mayor is to cause the debtor to be imprisoned, if to be found, and in prison to remain until he hath agreed the debt; and if the debtor cannot be found, the mayor shall send the recognizance into the Chancery, from whence a writ shall issue to the sheriff of the county where the debtor is to arrest his body, and keep him in prison till he agree the debt; and within a quarter of a year his lands and goods shall be delivered to him to pay the debt; but if the debtor do not satisfy the debt within that time, all his lands and goods shall be delivered to the mer-

chant by a reasonable extent, to hold until the debt is levied thereby; and in the mean time he shall remain in prison; but when the debt is satisfied, the body of the debtor is to be delivered, together with his lands. If the sheriff return a *non est inventus*, &c. the merchant may have writs to all the sheriffs where he hath any land; and they shall deliver all the goods and lands of the debtor by extent; and the merchant shall be allowed his damage, and all reasonable costs, &c.

All the lands in the hands of the debtor at the time of the recognizance acknowledged, are chargeable (but see 29 Car. 2. c. 3. before referred to), though after the debt is paid, they shall return to grantees, if they are granted away, as shall the rest to the debtor. The debtor or his sureties dying, the merchant shall not take the body of the heir, &c. but shall have his lands until the debt is levied. If the debtor have sureties, they shall be proceeded against in like manner as the debtor; but so long as the debt may be levied of the goods of the debtor, the sureties are to be without damage. Also the merchant shall, besides the payment of his debt, be satisfied for his stay and detainer from his business. In London, out of the commonalty two merchants are to be chosen and sworn, by this statute, and the seal shall be opened before them, whereof one piece is to be delivered to the said merchants, and the other remain with the clerk; and before these merchants, &c. recognizances may be taken. A fee of 1d. per pound is allowed to the clerk for fixing the king's seal, and a seal is to be provided that shall serve for fairs, &c.; but the statute extends not to Jews. *Cro. Car.* 440, 457.

Statutes-merchant were contrived for the security of merchants only, to provide a speedy remedy to recover their debts, but at this day they are used by others who follow not merchandize, and are become one of the common assurances of the kingdom. *Bridg.* 21; *Owen*, 82. And all obligations made to the king are of the nature of these statutes-merchant. 12 Rep. 2, 3.

STATUTE-STAPLE. A bond of record, acknowledged before the mayor of the staple, in the presence of all or one of the constables; to this end, says the statute, there shall be a seal ordained, which shall be affixed to all obligations made on such recognizance acknowledged in the staple. This seal of the staple is the only seal the statutes requires to attest this contract; but it is no more under the power or disposal of the mayor, than that appointed by the statute-merchant; for though the statute appoints him the custody of it, yet it is in such a manner that he cannot affix it to any obligation without their consent, it being to remain in the mayor's hands, under the security of their own seals. 2 Roll. Abr. 460; 27 Edm. 3. c. 9. See *Statute-Merchant.*

To understand a little of the original and constitution of the staple, and the advantage the nation had by this establishment, we must observe that the place of residence, whither the merchants resorted with their staple commodities, was anciently called *Etaple*, which signifies no more than mart or market; and this was formerly appointed out of the realm, as at Calais, Antwerp, &c. and other ports on the continent, which were nearest to us, and whither the merchants might with safety coast it. 4 Inst. 238. See *Staple.*

But besides these staple ports appointed abroad, there were others appointed at home, whither all the staple commodities were carried in order to their exportation, such as London, Westminster, Hull, &c. This was found to be of great use and consequence to the prince in particular, and to the interest and credit of the nation in general; for at these staple ports were the king's customs easily collected, and were by the officers of the staple, at two several payments, returned into the Exchequer; besides, at these staples, all merchant's goods were carefully viewed and marked by the proper officers of the staple; and this necessarily avoided the exportation of decayed goods, or ill-wrought manufactures, and

consequently fixed a stamp of credit on the merchandizes exported, which, upon the view, always answered the expectation of the buyer. *Maline's Lex Merc.* 337, 338.

The staple merchandizes, according to Lord Coke, are only wool, woolfells, leather, lead, and tin; others, butter, cheese, and cloths; but whatever they were, the mayor and constables had not only consance of all contracts and debts relating to them, but they had likewise jurisdiction over the people, and all manner of things touching the staple. This power was given them lest the merchants should be diverted and drawn from their business and trade, by applying to the common law, and running through the tedious forms of it, for a determination of their differences; and for the greater encouragement of merchants, that they might have all imaginable security in their contracts and dealings, and the most expeditious method of recovering their debts, without going out of the bounds of the staple. 4 *Inst.* 238; *Maline's Lex Merc.* 337.

By this it appears that this security was only designed for the merchants of the staple, and for debts only on the sale of merchandizes brought thither; yet in time others began to apply it to their own ends, and the mayor and constable would take recognizances from strangers, surmising it was made for the payment of money for merchandizes brought to the staple. To prevent this mischief, the parliament, in 23 *Hen. 8.* reduced the statute-staple to its former channel, and laid a penalty of 40*l.* on the mayor and constables who should extend the benefit of the statute to any but those of the staple. But though the 23 *Hen. 8. c. 6.* (amended by the 8 *Geo. 1. c. 25.*) deprived them of this benefit, yet it framed the new sort of security known by the name of a recognizance, in the nature of a statute-staple; so called because this act limits and appoints the same process, execution, and advantage, in every particular, as is set down in the statute-staple. *Co. Litt.* 290. See *Statute-Merchant*.

A recognizance, therefore, in nature of a statute-staple, as the words of the act declare, is the same with the former, only acknowledged under other persons; for, as the statute runs, the chief justice of the King's Bench and Common Pleas, or, in their absence, out of term, the mayor of the staple, at Westminster, and the recorder of London, jointly together, shall have power to take recognizances for payment of debt in the form set down in the statute. In this, as in the former cases, the king appoints a seal to attest the contract. *Co. Litt.* 290, *a*; 4 *Inst.* 238; 2 *Roll. Abr.* 466; *Co. Ent.* 12.

Debt lies as well upon a statute-staple as upon a bond. And a statute acknowledged on lands is a present duty, and ought to be satisfied before an obligation; a debt due on an obligation being but a *chose in action*, and recoverable by law, and not a present duty by law, as a debt upon a statute, judgment, or recognizance is, upon which present execution is to be taken without farther suit. *Cro. Eliz.* 355, 461, 494; 2 *Lill. Abr.* 536.

But a judgment in a court of record shall be preferred, in case of execution, before a statute. Though if one acknowledge a statute, and afterwards confess judgment, if the land be extended thereon, the cognisee shall have a *scire facias* to avoid the extent upon the judgment. It is otherwise as to goods; for there, he that comes first shall be first served. 8 *Rep.* 45; 1 *Brownl.* 37. The cognisor of a statute grants his estate to the cognisee; by this the execution of the statute will be suspended. 2 *Cro.* 424. But if the cognisee, before execution of a statute, release to the cognisor all his right to the land, it will not be a discharge of the whole execution; for, notwithstanding, he may sue execution of his body and goods. 3 *Shep. Abr.* 326. Upon a statute-staple, a *capias* and extent of lands, goods, and chattels, are contained in one writ; but it is not so on a statute-merchant. *Jenk. Cent.* 163.

In Chancery, the proceedings on a statute-staple are in the

petty-bag office; and statutes staple are suable in the King's Bench or Common Pleas, as well as in Chancery. *Cro. Eliz.* 208. Chancery will give relief against an infant in case of a statute-staple, though it is not extendible against him at law. 1 *Lev.* 198. On a statute's being satisfied, it is to be vacated by entering satisfaction, &c. Statutes-staple and statutes-merchant are to be entered within six months, or shall not be good against purchasers. 27 *Eliz. c. 4.* See 16 & 17 *Car. 2. c. 5.* for preventing delays and extending statutes.

He that is in possession of lands on a statute-merchant, or staple, is called tenant by statute-merchant, or statute-staple, during the time of his possession. And creditors shall have freehold in the lands of debtors, and recovery by *novel disseisin*, if put out; but if tenant by statute-merchant or statute-staple hold over his term, he that hath right may sue out a *venire facias ad computand'*, or enter, as upon an *elegit*. 27 *Edw. 3. st. 2. c. 9.*

STATUTO MERCATORIO. The ancient writ for imprisoning him that had forfeited a statute-merchant bond, until the debt were satisfied. And of these writs, one was against lay persons, and another against persons ecclesiastical. *Reg. Orig.* 146, 148. See *Statute-Merchant*.

STATUTO STAPULE. The ancient writ that lay to take the body to prison, and seize upon the lands and goods of one who had forfeited the bond called statute-staple. *Reg. Orig.* 151. See *Statute-Staple*.

STATUTUM SESSIONUM. The statute-sessions, a meeting, in every hundred, of constables and householders, by custom for the ordering of servants, and debating of differences between the masters and servants, rating of servants' wages, &c. See 5 *Eliz. c. 4.* and tit. *Labourers*.

STAUTURUM. Any store or standing stock of cattle, provision, &c. *Mat. West. anno 1259.*

STEALING. See *Larceny, Robbery*.

STEALING CHILDREN. See *Child-Stealing*.

STEEL-BOW GOODS. Corn, cattle, straw, and implements of husbandry, let or delivered by a landlord to a tenant, by which the tenant is enabled to stock and work a farm; in consideration of which he becomes bound to return articles, equal in quantity and quality, at the expiration of the lease. *Bell's Scotch Law Dict.*

STELLIONATE. A term applied in the law of Scotland to conveyances of the same right to different persons.

By the Roman law, the making a second mortgage without giving notice of the first, was punished as a crime, called *stellionatus*; but the crime was not committed if the land was equal in value to all the sums charged on it. *Dig.* 17, 36. 1. *Bac. Abr. Mortgage*.

STERBRECHE, alias, Strebrich, (query street-breach.) The breaking, obstructing, or straitening of a way. *Termes de la Ley*.

STERLING, sterlingum.] Was the epithet for silver money current within this kingdom, and took its name from this: that there was a pure coin stamped first in England by the Easterlings, or merchants of East Germany, by the command of King John; and Hoveden writes it *Easterling*. Instead of the pounds sterling, we now say so many pounds of lawful English money; but the word is not wholly disused, for though we ordinarily say lawful money of England, yet the mint they call it sterling money; and when it was found convenient, in the fabrication of monies, to have a certain quantity of baser metal to be mixed with the pure gold or silver, the word sterling was then introduced; and it has ever since been used to denote the certain proportion or degree of fineness which ought to be retained in the respective coins. *Lowndes's Essay on Coins*, 14. See *Coins*.

STEUART. The king's sheriff within the king's own proper lands. *Scotch Dict.*

STEWART, seneschallus; compounded of the Sax. *Stead*, i. e. Room or Stead, and *Ward*, a ward or keeper; i. e. a man appointed in my place or stead.] The term hath many appr.

cations, but always denotes an officer of chief account within his jurisdiction.

The greatest of these officers is the Lord High Steward of England, who anciently had the supervising and regulating, next under the king, the administration of justice, and all other affairs of the realm, whether civil or military; and the office was hereditary, belonging to the Earls of Leicester, till forfeited to King Henry III. But the power of this officer being very great of late, the office of High Steward of England hath not been granted to any one, only *pro hac vice*, either for the trial of a peer of the realm on an indictment for a capital offence; or for the determination of the pretensions of those who claim to hold by grand serjeanty, to do certain honourable services to the king at his coronation, &c. for both which purposes he holds a court, and proceeds according to the laws and customs of England; and he to whom this office is granted must be of nobility, and a lord of parliament. 4 *Inst.* 58, 59; *Crompt. Jur.* 84; 13 *Hen.* 8. 11; 2 *Hawk. P. C.* c. 2. See *Peers of the Realm*, IV.; *Parliament*. Of the nine great officers of the crown, the Lord High Steward is the first; but when the special business for which he is appointed is once ended, his commission expires. The first Lord High Steward that was created for the solemnizing of a coronation, was Thomas, second son of Henry IV.; and the first Lord Steward, for the trial of a peer, was Edward Earl of Devon, on the arraignment of John Holderness, Earl of Huntingdon, in the same reign. *Lex Constitution.* 170.

See further, *Lord High Steward*.

There is a Lord Steward of the household mentioned 24 *Hen.* 8. c. 13, whose name was changed to that of great master of the household, anno 32 *Hen.* 8. But this statute was repealed by 1 *Mar.* c. 4, and the office of Lord Steward of the household revived. He is the chief officer of the king's house, to whom is committed the care of the king's household, and he has authority over all officers and servants of the household, except those belonging to the chapel, chamber, and stable; and the palace royal exempted from all jurisdiction of any court, but only of the Lord Steward, or in his absence, of the treasurer and comptroller of the household, with the steward of the marshalsea, who, by virtue of their offices, must be any commissioner, hear and determine all treasons, murders, felonies, breaches of the peace, &c. committed in the king's palace. Besides the treasurer and comptroller, the Lord Steward hath under him several clerks of the great cloth, &c. He attends the king's person at the beginning of parliaments; and is a white staff officer, which he breaks over the hearse on the death of the king, and thereby discharges all officers taken in. Of this officer's ancient power, read *Plat.* 16. c. 1, and *P. N. B.* 2. 1. See *Court of Marshalsea*, *Court of the Lord Steward*.

The steward of Scotland was in office at the highest dignity and trust. He administered the crown revenues, superintended the affairs of the household, and possessed the privilege of holding the first place in the army next to the king, in the day of battle. From this office the royal house of Stuart took its name; and after advancement to the throne this office was staid, and was never afterwards revived.

In the liberty of Westminster, an officer is chosen and appointed, called high steward, and there is a deputy steward of the university. See *Peter*. The word steward is of so great authority, that in almost all corporations and all houses of honour, an officer is found of this name and authority. See other stewards of *Epiph. lit. Courts*, *Marshalsea*. See the several titles.

STILLS. Places where any commodity in England is wont to be sold, as in a market, or in a fair. See *Bawdy-House*.

STICA. A brass Saxon coin of the value of half a farthing, or of the value of a halfpenny.

STICK OR FELS. A quantity or measure of twenty-five, and it contains ten sticks, and each stick twenty-five. See *Weights and Measures*.

STICKLER. An inferior officer who cuts wood within the king's parks of Clarendon. *Rot. Par.* 1 *Hen.* 6.

STILLICIDIUM. The water that falls from the roof of a house in scattered drops. According to the Scotch law, a proprietor cannot build so as to throw the rain from his own roof on his neighbour's property, without a special right of servitude.

STILYARD, or STEELYARD. Otherwise called the style-house, in the parish of Allhallows in London, was by authority of parliament assigned to the merchants of the Hanse; and to Almaine or Easterling merchants, to have their abode in for ever, with other tenements, rendering to the mayor of London a certain yearly rent. 14 *Edw.* 4. In some records it is called *Gildhalda Teutonicorum*; and it was at first denominated stilyard, of a broad place or court where steel was sold, upon which that house was founded. See 19 *Hen.* 7. c. 32; 22 *Hen.* 8. c. 38; 1 *Edw.* 6. c. 13.

STINT, Common without. See *Common*.

STIPEND. This term in Scotland is particularly applied to the provision made for the support of the clergy; it consists of payments in money and grain; and is more or less according to the extent of the parish and the state of the free tithes. See *Tithes*.

STIPENDIARY PRIESTS. The stipendiary priests were for trentals, anniversaries, obits, and such like, grounded on the doctrine of purgatory and masses satisfactory; and for these, charities were founded and endowed to pay for the souls of the founder and his friends, which charities were dissolved by the 1 *Ed.* 6. c. 14.

STIPULA. Stubble left standing in the field after the corn is reaped and carried away. *Cart. Antiq.*

STIPULATION IN THE ADMIRALTY COURTS. The first process in these courts is frequently by arrest of the defendant's person; when they take recognizance or stipulation of certain fidejussors in the nature of bail, and, in case of default, may imprison both them and their principal. 3 *Comm.* 108. See *Admiral*.

Now by the 3 & 4 *Wm.* 4. c. 41, the jurisdiction of the Courts of Admiralty is transferred to the privy council. See that title.

STIREMANNUS, sturemannus, Sax. steor-man.] A pilot of a ship, or steersman. *Domesday*.

STIRPES, Distribution per. See *Executor*, V. 9.

STIRPES, succession in. See *Descent*.

STOCK AND STOVEL, a forfeiture where any one is taken carrying *stipites* and *pabulum* out of the woods; for *stoc* signifies sticks, and *stovel* pabulum. *Antiq. Chart.*

Stock, or Stroke. Syllables added to the names of places, from the Sax. *socce*, i. e. *stipes*, *truncus*; as *Woodstock*, *Basingstoke*, &c.

Stock and Family. If lands were devised generally to a stock or family, it shall be understood of the heir principal of the house. *Hob.* 33. See *Tybbith*; and *tit. Will, Descent*.

STOCKBROKER. A stockbroker is one who for hire concludes contracts or bargains in government or South-Sea stock. See 4 *Burr.* 2104; 2 *H. Bl.* 556; 4 *Bing.* 301.; and see the 8 & 9 *Will.* 3. c. 20 & 60; 10 *Ann.* c. 19. § 121; 6 *Geo.* 1. c. 18. § 21; and 7 *Geo.* 2. c. 8. § 9, all of which statutes recognize persons making contracts for public or joint-stock as brokers.

A stockbroker is a broker within the 6 *Ann.* c. 16, and must be admitted by the lord mayor and aldermen. 4 *B.* & *Adol.* 546; 1 *N. & M.* 392.

STOCKJOBBER. Agreements for the sale of stock are generally made at the Stock Exchange, which is frequented by a set of middlemen called jobbers, whose business is to accommodate the buyers and sellers of stock with the exact sums they want. A jobber is generally possessed of considerable property in the funds, and declares a price at which he will either sell or buy. Thus he declares he is ready to buy 3 per cent. consols at 85½, or to sell at 85½; so that in this way, a person willing to buy or sell any sum, however

small, has never any difficulty in finding an individual with whom to deal. The jobber's profit is generally $\frac{1}{2}$ per cent., for which he transacts both a sale and a purchase. He frequently confines himself entirely to this sort of business, and engages in no other description of stock speculation. *McCulloch's Comm. Dict.*

By the 7 Geo. 2. c. 8. (made perpetual by the 10 Geo. 2. c. 8.) all *premiums* to deliver or receive, accept or refuse any public stock, or share therein, and contracts in nature of wagers, putts, and refusals relating to the value of the stock, shall be void; and the *premiums* shall be returned, or may be recovered by action, with double costs; and the persons entering into or executing any such contract, shall forfeit 500*l.* No money shall be given to compound any difference for not delivering or transferring stock, or not performing contracts; but the whole money agreed is to be paid, and the stock transferred, on pain of 100*l.* Persons buying, on refusal or neglect of the seller to transfer at the day, may buy the like quantity of stock of any other person, and recover the damage of the first contractor: and contracts for sale of any stock, where contractors are not actually possessed of or entitled unto the same, are void, and the parties agreeing to sell, &c. incur a penalty of 500*l.* Brokers making agreements, &c. and acting contrary, are also liable to penalties. But the act is not to hinder lending money on stock, or contracts for the re-delivering or transferring thereof, so as no *premium* be paid for the loan more than legal interest.

Jobbing in *omnium* is within the statute. 7 T. R. 630.

An agreement to invest or replace stock at a certain time in consideration of money actually paid or advanced equivalent to the value of the stock at the time of such payment or advance is valid; and not usurious, or within the 7 Geo. 2; 8 East, 304.

In an action on this statute, the contract laid in the declaration was to deliver stock on the 27th of February: the contract proved was to deliver stock on the *Settling-day*, which at the time was fixed for, and understood by the parties to mean, the 27th of February: held, that the proof supported the declaration. 2 B. & A. 335.

Money lent for the express purpose of enabling the borrower to pay stockjobbing differences cannot be recovered. 3 B. & A. 179.

Stocks, or public funds. See *National Debt, Taxes.*

Stocks, *cippus*.] A wooden engine to put the legs of offenders in, for the security of disorderly persons, and by way of punishment in divers cases ordained by statute, &c. And it is said, that every vill within the precinct of a town is indictable for not having a pair of stocks, and shall forfeit 5*l.* *Kitch.* 13. See *Drunkenness.*

The stocks are a wooden engine to put the legs of offenders in, being originally used, not so much to punish as to keep men in hold; and the constable still, by the common law, may confine unruly offenders in the stocks by way of security, though not by way of punishment. 1 *Wood's Inst.* b. 4. c. 1. p. 505; 5 *Burn's Just.*

STOCKING FRAMES. See *Frames.*

STOCKLAND (or STOKELAND) and BONDLAND.

In the manor of Wadhurst in Sussex, there are two sorts of copyhold estates, called *Stokeland* and *Bondland*, descendible by custom in several manors: as if a man be first admitted to stockland, and afterwards to bondland, and dies seised of both, his eldest son and heir shall inherit both estates; but if he be admitted first to bondland, and after to the other, and of these die seised, his youngest son shall inherit: and bondland held alone, descends to the youngest son. 2 *Levin.* 55.

STOLA. A garment or hood formerly worn by priests. Sometimes it was taken for the archiepiscopal pall. *Eadmer.* c. 188. Also a vestment which matrons wore. *Cowell.*

STOLEN GOODS. See *Larceny, Restitution, Rewards.*

STONE. A weight of 14 pounds, used for weighing of

wool, &c. The stone of wool ought to weigh 14 pounds; but formerly, in some places, by custom, it was less, as 13 pounds and a half. So a stone of wax was eight pounds; and in London the stone of beef, until recently, was no more. See *Measure.*

STOPPAGE IN TRANSITU. When goods are consigned on credit by one merchant to another, it sometimes happens, that the consignee becomes a bankrupt or insolvent, while the goods are on their way to him, and before they are delivered. In such case, as it would be hard that the goods of the consignor should be applied in payment of the debts of the consignee, the former is allowed by law to resume possession of them, if he can succeed in doing so while they are on their way. This resumption is called *stoppage in transitu*, and was first allowed by equity, 2 *Vern.* 295; 1 *Atk.* 246; 2 *Eden.* 75; *Ambl.* 399; as it is now also by common law, where, on account of its remedial nature, it is regarded with considerable favour.

Whether its effect be or be not to dissolve the contract of sale between the consignor and consignee of the goods stopped, is a question which has been frequently discussed, particularly in *Clay v. Harrison*, 10 B. & C. 99, and which was adverted to in the 2 B. & Adol. 323, as undetermined. Lord Kenyon was of opinion that it did not rescind the sale, but was "an equitable lien, adopted by the law for the purposes of substantial justice," an opinion which certainly consists best with the decisions which have taken place, that payment of part of the price, or acceptance of a bill for the whole of it, by the vendee, will not defeat the vendor's right to stop in transitu, if the vendee become insolvent before the remainder of the price has been liquidated, or the bill taken up. 7 T. R. 440; 3 East, 93.

I. Who possesses the right of stoppage in transitu.

II. How long it continues.

III. How it may be defeated.

IV. How it may be exercised.

I. The person who stops goods in transitu must not be a mere surety for their price, one, for instance, who has, at the request of the vendee, accepted a bill drawn by the vendor for their purchase money. 6 East, 371; 1 East, 4. But a person abroad, who, in pursuance of orders sent him by a British merchant, purchases goods on his own credit, of others whose names are unknown to the merchant, and charges a commission on the price, is a consignor, so as to enable him to stop the goods in transitu if the merchant fail while they are on their passage; for he stands in the light of a vendor, and the British merchant of his vendee, 3 East, 93; and so is a person who consigns goods to be sold on the joint account of himself and the consignee, 6 East, 17.

II. The period during which the right to stop the goods continues, is, as we have seen, co-extensive with that of their transit from the vendor to the purchaser. Hence, in cases where the propriety of a resumption of this sort is questioned, the point disputed generally is, whether at the time of seizure by the vendor the transit of the goods had or had not determined. Such cases always mainly depend upon their own peculiar circumstances; but the general rule to be collected from all the decisions is, that goods are to be deemed *in transitu*, so long as they remain in the possession of the carrier: even as such, whether by water or land, 2 B. & P. 457; even though such carrier may have been appointed by the consignee himself, 1 *Esp.* 240; 2 *Esp.* 613; 7 T. R. 440; and also while they are in any place of deposit connected with the transmission and delivery of them, 3 East, 397; 1 *Campb.* 282; 6 B. & C. 422; and until they arrive at the actual or constructive possession of the consignee.

Thus, if goods be landed at a seaport town, and there deposited with a wharfinger appointed by the consignee to

forward them thence by land to his own residence, they are subject to the consignor's right of stoppage, while in the hands of the wharfinger. 2 B. & P. 457. But if a consignee be in the habit of using the warehouse of a carrier, packer, wharfinger, or other such person, as his own, for instance, by making it the repository of his goods, and depositing of them there, the transit will be considered at an end when they have arrived at such warehouse. 3 B. & P. 127; 3 B. & P. 469; 6 B. & C. 109; 2 Tyrn. 217; 8 Taunt. 83; nay, if, after goods are sold, they remain in the vendor's own warehouse, and he receives warehouse rent for them, that operates as a delivery to the purchaser, and puts an end to the right to stop *in transitu*. 1 Campb. 452. See also 14 East, 308. And it has been decided that where part of the goods sold by one entire contract is taken possession of by the vendor, without any intention on the vendor's part of retaining the rest, that is to be deemed a *transit* possession of the whole. 1 B. & P. New Rep. 69; 2 H. Bl. 504; 6 East, 614; though it is otherwise if there were such an intention. 4 B. & Adol. 670. And if the vendee charter a ship to convey the goods, not to himself, but to a foreign port, on a commercial speculation for his own benefit, a delivery on board that ship is, in point of law, a delivery to the vendee himself, and a determination of the transit, 7 T. R. 442; 1 East, 522; 3 East, 588; for as between him and the seller the goods have arrived at the end of their journey, and their voyage on board the chartered vessel is a new one under the direction of the purchaser. See also 3 M. & R. 396.

III. It has been already observed, that the delivery of goods to a carrier named by the vendee, though a delivery to the vendee himself for many purposes, is not such a one as to put an end to the right to stop them *in transitu*, and it has been ruled though that doctrine has been questioned, that the vendee, when a particular place of delivery has been appointed, cannot anticipate the regular determination of the transit by going to meet the goods upon their journey. 11 Esp. 240. but see 2 B. & P. 461; 5 B. & P. 511; 6 B. & C. 107. nor will the vendor's right be defeated by the exercise of any claim against the consignee, such, for instance, as process of foreign attachment at the suit of a creditor of the vendee, 1 Campb. 282; or the carrier's claim of a general lien for the balance due to him by the vendee, 2 N. R. 64; for the right to stop *in transitu* is paramount to any lien of a third party against the purchaser. 3 M. & R. 396. And notwithstanding an endorsement of the bill of lading, by the vendor, to a party who advances money on the security of it, an equitable right of (quasi) stoppage *in transitu* remains in the unpaid vendor, subject to theENDORSEE'S right to be repaid his advances. And the vendor has an equity to call upon such ENDORSEES to repay himself out of other property of the vendee, as he has, and if, instead of doing so, he apply for that purpose the proceeds of the goods so equitably stopped *in transitu* to the vendee, will have a claim upon the vendee's interest in such property. 2 N. & M. 414.

IV. A consignor, who is desirous, and who has a right, to stop his goods *in transitu*, is not obliged to make an actual seizure of them while upon the road; it is sufficient to give notice to the carrier in whose hands they are, on the delivery of which notice, it becomes that person's duty to retain the goods, so that if he afterwards by mistake deliver them to the vendee, the vendor may bring trover for them, 7 Taunt. 140; even against the vendee's assignees, if he himself have become bankrupt, and the carrier, who after receipt of such notice, delivers the goods to the vendee, is guilty of a tortious act, for which he may, of course, be held responsible. See cases cited in 3 T. R. 466; 3 East, 397. Smith's Mercantile Law, 330.

STORES OF WAR. See Public Stores.

STOTARIUS. He who had the care of the stud or breed of young horses. Leg. Alfred, c. 9.

STOW, Sax.] A place: it is often joined to other words; as *Godstow* is a place dedicated to God.

STOWAGE. Money paid for a room where goods are laid. See *Housage*.

STRAITS. A narrow sea between two lands, or an arm of the sea. Also there was a narrow coarse cloth anciently so called. Stat. Antiq. 18 Hen. 6. c. 16.

STRAND, Sax.] Any shore or bank of a sea or great river. Hence the street in the west suburbs of London which lay next the shore or bank of the Thames, is called the *Strand*. An impunity from custom, and all impositions upon goods or vessels, by land or water, was usually expressed by *Strand* and stream. Mon. Angl. tom. 3. p. 4.

STRANDED Goods. See *Wreck, Insurance*, II. 1.

STRANGER, from the Fr. *estranger*, alienus.] Born out of the realm, or unknown: an *Alien*. See that title.

In law it hath also a special signification for him that is not privy to an act: as a stranger to a judgment, is he whom a judgment doth not affect; and in this sense it is directly contrary to party or privy. Old Nat. Br. 128.

Strangers to deeds shall not take advantage of conditions of entry, &c. as parties and privies may; but they were not obliged to make their claims on a fine levied till five years; whereas privies, such as the heirs of the parties that passed the fine, were barred presently. 1 Inst. 214; 2 Inst. 516; 3 Rep. 79. Strangers have either a present or future right; or an apparent possibility of right, growing afterwards, &c. Wood's Inst. 245. See *Fines, Judgments, Privies*, &c.

STRAW. By the 4 & 5 Will. 4. c. 20. certain provisions of the 36 Geo. 3. c. 88. regulating the buying and selling of hay and straw, and the markets for the sale thereof, were amended.

STREAM-WORKS. A kind of works in the *Stannaries*, mentioned in 27 Hen. 8. c. 23.

STRETWARD. An officer of the streets; of old, like our surveyor of the highways, or rather, a scavenger. Mon. Angl. tom. 2. p. 187.

STRIKING in the king's superior courts of justice in Westminster Hall, or at the assizes, whether blood be drawn or not, or even assaulting the judge sitting in the court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of the offender's lands during life. Staundf. P. C. 38; 3 Inst. 140. 141; 4 Comm. 125. See *Misprision, Rescue*, II.

Maliciously striking in the king's palace, wherein his royal person resides, whereby blood is drawn, was punishable by perpetual imprisonment, and fine at the king's pleasure; and also with loss of the offender's right hand, the solemn execution of which sentence was described at length in the 33 Hen. 8. c. 12; but that statute was repealed by the 9 Geo. 4. c. 31. § 1. This offence was triable in the court of the lord steward of the household, by a grand and petit jury, as at common law, taken out of the officers and sworn servants of the king's household. 4 Comm. 276.

As to striking in churches, see *Church*. See also *Assault*.

STRUMPET, meretrix.] A whore, harlot, or courtesan: this word was heretofore used for an addition. Plac. apud Cestr. 6 Hen. 5.

STRYKE. The eighth part of a seam or quarter of corn, a stryke or bushel. Cartular. Reading, MS. 116.

STURGEON. The king shall have sturgeon taken in the sea, or elsewhere within the realm, except in certain places privileged by the king. See *King*; and st. 17 Edw. 2. st. 1. c. 11.

STYLE, appello.] To call, name, or intitle one; as, the style of the king of England is William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, &c.

There is an old and new style of the Calendar. See *Year*.

SUB-DEACON. An ancient officer in the church, made

by the delivery of an empty platter and cup by the bishop, and of a pitcher, bason, and towel by the archdeacon. his office was to wait on the deacon with the linen on which the body, &c. was consecrated, and to receive and carry away the plate with the offerings at sacraments, the cup with the wine and water in it, &c. He is often mentioned by the monkish historians, and particularly in the *Apostolical Canons*, 42, 43.

SUBJECTS, subditi.] The members of the commonwealth under the king their head. *Wood's Inst.* 22.

SUBINFEUDATION. See *Feoffment*; was where the inferior lords, in imitation of their superiors, began to carve out and grant to others minuter estates than their own, to be held of themselves, and were so proceeding downwards, in infinitum, till stopped by various legislative provisions. See *Manor, Tenures*.

SUBLEGERIUS, from Sax. sybleger, incestus,] One who is guilty of incestuous whoredom.

SUBMARSHAL. An officer in the Marshalsea, who is deputy to the chief marshal of the king's house, commonly called the Knight Marshal, and hath the custody of the prisoners there. He is otherwise termed Under Marshal. *Crompt. Juris.* 104.

SUBMISSION to award. See *Award*.

SUBMISSION OF TITHES in Scotland. See *Surrender of Tithes*.

SUBNERVARE. To ham-string, by cutting the sinews of the legs and thighs: and it was an old custom in England, *meretrices et impudicas mulieres subnervare*.

SUBORNATION, subornatio.] A secret underhand preparing, instructing, or bringing in a false witness; and from hence subornation of perjury is the preparing or corrupt alluring to perjury. See *Perjury*.

SUBPŒNA. A writ whereby common persons are called into Chancery, in such cases where the common law hath provided no ordinary remedy; the name of which proceeds from the words therein, which charge the party called to appear at the day and place assigned, *sub pœna centum librarum, &c.* (under penalty of 100*l.*) *West. Symb. par.* 2; *Crompt. Jurisdict.* 35. The subpœna is the leading process in the Courts of Equity. There are several of these writs in Chancery; as the *subpœna ad respondend'*, *subpœna ad replicand' et ad rejoicend'*, *subpœna ad testificand' et ad audiend' judicium, &c.* which writs are to be made out by the proper clerks of the subpœna office. Subpœnas to answer must be personally served by being left with the defendant, or at his house with one of the family; on affidavit whereof, if the defendant do not answer, attachment shall be had against him, &c. As to the origin of the writ of subpœna in Chancery, see *Equity*: and as to the 4 & 5 *Ann. c.* 16; 5 *Geo. 2. c.* 25, see *Chancery*.

SUBPŒNA AD TESTIFICANDUM lies for the calling in of witnesses to testify in any cause, not only in Chancery, but in all other courts; and in that court, and in the exchequer, it is made use of in law and equity. The two chief writs of subpœna are to appear and to testify; and the latter issues out of the court where the issue is joined, upon which the evidence is to be given. 2 *Lill. Abr.* 536. As to which, see *Evidence*, *Introd.* Col. 2. and II. 2.

SUBPŒNA DUCES TECUM. A writ or process of the same kind with the *subpœna ad testificandum*, including a clause of requisition, for the witness to bring with him and produce books and papers, &c. in his hands, belonging to, or wherein the parties are interested; or tending to elucidate the matter in question. 3 *Comm.* 382.

This writ is of compulsory obligation on a witness to produce papers thereby demanded which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the court and not the witness are to judge: and an action for damages lies against the party disobeying the writ. 9 *East*, 473.

SUBREPTION. The obtaining a gift from the king by concealing what is true. *Scotch Law Dict.*

SUBSCRIPTION OF WITNESSES. See *Deed, Evidence, Will*.

SUBSEQUENT CONDITION. See *Condition*.

SUBSEQUENT EVIDENCE. See *Decree, Trial, Review, Bill of*.

SUBSIDY, subsidium.] An aid, tax, or tribute granted to the king for the urgent occasions of the kingdom, to be levied on every subject of ability, according to the value of his lands or goods.

History does not mention that the Saxon kings had any subsidies after the manner of ours at present; but they had both levies of money and personal services towards the building and repairing of cities, castles, bridges, military expeditions, &c., which they called *Burgbote, Brigbote, Herefare, Heregeld, &c.* But when the Danes harassed the land, King *Ethelred* submitted to pay them for redemption of peace several great sums of money yearly. This was called *Danegeld*, for the levying of which every hide of land was taxed yearly at twelve pence, lands of the church only excepted: and thereupon it was after called *Hydagium*, and that name remained afterwards upon all taxes and subsidies imposed upon lands; but sometimes it was laid upon cattle, and then was termed *Horngeld*. The Normans called these sometimes *Taxes*, sometimes *Tallages*, otherwise *Auxilia et subsidia*. The Conqueror had these taxes, and made a law for the manner of their levying as appears in *Emendationibus ejus*, page 125. sect. *Volumus et firmiter, &c.* Many years after the Conquest they were levied otherwise than now, as every ninth lamb, every ninth fleece, and every ninth sheaf. See *Stat. Antig.* 14 *Edw. 3. at.* 1. c. 20. Of which you may see great variety in *Rastall's Abridgment*, tit. *Fifteenth, Subsidies, Taxes Tenth, &c.* and 4 *Inst.* 26, 33. Whence we may gather, there is no certain rate, but as the parliament shall think fit. Subsidy is in our statutes sometimes confounded with customs. 11 *Hen. 4. c.* 7. *Conell.* See *Customs in Merchandise, Taxes*.

SUBSTITUTE, substitutus.] One placed under another person to transact some business, &c. See *Attorney, Attorney*.

Substitution, in the Scotch law, is the term for the emasculation or designation of the heirs in a settlement of property; and substitutes in an entail, are those heirs who are appointed in succession on failure of others.

SUBTRACTION OF RENTS AND SERVICES, &c. This happens when any person who owes any suit, duty, custom, rent, or service, to another, withdraws or neglects to perform or pay it, &c. See 3 *Comm.* c. 15; and *ante, Distress, Rent, &c.*

SUBTRACTION OF TITHES. See *Tithes*.

SUBURBANI. Husbandmen. *Monasticon*, ii. 464.

SUCCESSION to the Crown. See *King*, I.

SUCCESSION to real estate. See *Descent, Heir*; to personal estate, see *Executor*, V. 8.

SUCCESSOR, Lat.] He that followeth or cometh in another's place.

Sole corporations may take a fee-simple estate to them and their successors, but not without the word successors. And such a corporation cannot regularly take in succession goods and chattels; and therefore if a lease for a hundred years be made to a person and his successors, it hath been adjudged only an estate for life. Nor may a sole corporation bind its successors. 1 *Rep.* 65; 1 *Inst.* 8, 16, 94; 1 *Inst.* 249. An aggregate corporation may have a fee-simple estate in succession without the word successors, and take goods and chattels in action or possession; and they shall go to the successors. *Wood's Inst.* 111. See further, *Corporation*, *Aug.*

SUCKEN. Theucken consists of the whole lands abstracted to a mill (i. e. the tenants of which are bound to grind there). the possessors of these lands are termed the suckeners. *Scotch Law Dict.* See further, *Thirlage*.

SUFFERANCE. Tenant at sufferance is he who holdeth

over his term at first lawfully granted. *Terms de Ley.* A person is tenant at sufferance that continues after his estate is ended, and wrongfully holdeth against another, &c. 1 *Inst.* 57.

An estate at sufferance is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will, and dies, the estate at will is thereby determined; but if the tenant continueth possession, he is tenant at sufferance. *Co. Litt.* 57. But a lease at will being now considered as a lease from year to year, which cannot be vacated without half a year's notice to quit, the tenant cannot be ejected at the death of the lessor without half a year's notice from his heir. 2 *T. R.* 159. And it is also necessary, in case of the death of the tenant, to give that notice to his personal representative. 3 *Wils.* 25.

As a tenant at will cannot grant or surrender, so *à fortiori* cannot a tenant by sufferance.

No man can be tenant at sufferance against the king, to whom no laches or neglect, in not entering and ousting the tenant, is ever imputed by law; and his tenant so holding over is considered an absolute intruder. 1 *Inst.* 57. But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant; for before entry he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger; and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful, unless the owner of the land, by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful. 1 *Inst.* 57; 2 *Comm.* c. 9, p. 150.

Thus stands the law with regard to tenants by sufferance; and landlords are obliged in those cases to make formal entries upon the lands, and recover possession by the legal process of ejectment, and, at the utmost, by the common law, if the tenant was bound to account for the profits of the land as by him covenanted. But now, by the 11 *Geo.* 2. c. 28, in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of the term, and demand made and notice in writing given by the landlord, or him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof; such person so holding over or keeping the other out of possession, shall pay, for the time he detains the lands, at the rate of double the yearly value. And by the 11 *Geo.* 2. c. 19, in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former rent for such time as he continues in possession. See also the 6 *Ann.* c. 18, § 1, against holding over by guardians or trustees of infants, and by husbands seized in right of their wives, and by all others having particular estates determinable on any life or lives, by which they are considered as trespassers. These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement. 2 *Comm.* c. 9, *ad fin.*

Where a tenant has a lease for a term certain, and holds over after the expiration of it, it is not necessary for the landlord to give him any notice to quit, in order to recover possession by ejectment. 1 *T. R.* 53, 102. But if the landlord afterwards receives rent, or does any act by which he proves his assent to the continuance of the tenant, this turns the estate at sufferance into a tenancy from year to year.

The notice under the 4 *Geo.* 2. c. 28, may be given previous to the end of the term. *Black. Rep.* 1075. And it

seems that it may also be given afterwards, though the double value can only be recovered from the delivery of the notice and demand of the possession. This notice by the landlord must be in writing; but that by the tenant, under the 11 *Geo.* 2. c. 19, may be parol. 3 *Burr.* 1603. The double value can only be recovered by action of debt; but the double rent may be recovered by distress or otherwise, like single rent. 1 *Black. Rep.* 535. No length of time is necessary to the validity of these notices, under the statutes, to entitle the landlord to double value or double rent. 2 *Comm.* c. 9, *ad fin.* *ut n.* See further, *Ejectment, Rent.*

SUFFERENTIA PACIS. A grant or sufferance of peace or truce. *Rot. Claus.* 16 *Edm.* 3.

SUFFRAGAN, *suffraganeus, chorepiscopus, episcopi vicarius, &c.* A titular bishop ordained to aid and assist the bishop of the diocese in his spiritual function; or one who supplieth the place instead of the bishop, by whose suffrage ecclesiastical causes or matters committed to him are to be adjudged, acted, or determined. Some writers call these suffragans by the name of subsidiary bishops, whose number is limited by the 26 *Hen.* 8. c. 14; by which statute it was enacted, that it should be lawful for every bishop at his pleasure to elect two honest and discreet spiritual persons within his diocese, and to present them to the king, that he might give to one of them such title, style, and dignity, of such of the sees in the said statute mentioned, as he should think fit; and that every such person should be called bishop suffragan of the same see, &c. This act sets forth at large for what places such suffragans were to be nominated by the king; and if any one exercise the jurisdiction of a suffragan, without the appointment of the bishop of the diocese, &c. he shall be guilty of a *præmunire*. See *Kennett's Paroch. Antiq.* 639; and tit. *Bishops.*

SUGGESTIONS, suggestio. A surmise or representing of a thing. By Magna Charta no person shall be put to his law on the suggestion of another but by lawful witnesses. 9 *Hen.* 3. c. 28. Suggestions upon record are informations drawn in writing, showing cause for prohibitions to suits in the spiritual courts, &c. See *Prohibition, III.* Though matters of record ought not to be staid upon the bare suggestion of the party, there ought to be an affidavit made of the matter suggested, to induce the court to grant a rule for staying the proceedings upon the record. 2 *Lill.* 537. There are suggestions in replevin for a *retorno habendo*, which, it is said, are not traversable, as they are for prohibitions to the spiritual or admiralty courts. 1 *Plowd.* 76. Branches of covenants and deaths of persons must be suggested upon record, &c. 8 & 9 *Wm.* 3. c. 10. See *Abatement, Amendment.* Blackstone terms the proceeding by information a prosecution by suggestion. See *Information.*

SUICIDE. See *Homicide, III.* 1.

SUIT, *acta, Fr. suite, i. e. consecutio, sequela.* Signifies a following another, but in divers senses. The first is a suit in law, and is divided into several and personal, which is all one with action real and personal. See *Action, Chancery.* 2. Suit of Court, an attendance which the tenant owes to the court of his lord. 3. Suit covenant, when a man hath covenanted to do suit in the lord's court. 4. Suit custom, where I and my ancestors owe suit time out of mind. 5. Suit is the following one in chase, as fresh suit. See *Hue and Cry.* And this word is used for a petition made to the king or any great personage.

SUIT AND SERVICE. When the tenant had professed himself to be the man of his superior or lord, the next consideration was concerning the service which, as such, he was bound to render for the land he held. This, in pure, proper, and original feuds, was only two-fold:—to follow or do suit to the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. 2 *Comm.* 54. See *Tenures.*

SUIT OF COURT. That is, suit to the lord's court, is the

service which the feodary tenant was bound to do at the lord's court. At first it was expressly mentioned in the grant how often these courts should be held. This appears by *Fleta*, lib. 2. c. 71. p. 14. Sometimes one or more, but never exceeding three, in a year. *Thorn* mentions two, viz. Michaelmas and Easter. But all the lord's tenants were not bound to attend his courts, but only those to whom their estates were granted upon that condition; every man was however bound to attend the sheriff's turn twice in every year. See *Thorn*. And if the inheritance, by reason whereof the tenant was bound to attend only at one court, did descend to co-heirs, he who had *capitalem partem* was bound to attend the lord's court both for himself and all his co-heirs. *Comell*.

None to be distrained for suit of court but they who are bound to it by charter or prescription. Joint-tenants and parceners shall make but one suit. The remedy against the lord distraining for it where it is not due, and against the tenant withholding it where it is due, *stat. Marleb. 52 Hen. 3. c. 9*. This is not taken away by the *12 Car. 2. c. 24*. See *Tenure*.

SUIT OF THE KING'S PEACE. The pursuing a man for the breach of the peace. See *stat. antiq. 6 Rich. 2. c. 1*; *5 Hen. 4. c. 15*; and *post*, tit. *Surety of the Peace*.

SUIT-SILVER. A small rent or sum of money paid in some manors to excuse the appearance of freeholders at the courts of their lords.

SULCUS-AQUÆ. A little brook or stream of water, otherwise called *sike*, and in *Essex* a *doke*. *Paroch. Antiq. 531*.

SULLERY, from the Sax. *sulth*, *aratrum*.] A plough-land. *1 Inst. 5*.

SULLINGA. See *Swoling*.

SUMAGE. Toll for carriage on horseback. *Chart de Forest, c. 14*; *Crompt. Juris. 191*.

SUMMARY, *summarium*.] An abridgment. *Law Lat. Dict.*

SUMMARY ACTIONS. In Scotch law, such as are brought into court, not by summons, but by petition. So in the English courts there are certain summary proceedings by motions; and in both countries the practitioners of the court are the special objects of such mode of administering justice.

SUMMARY CONVICTIONS. See *Conviction, Justices*.

SUMMER-HUS-SILVER. A payment to the lords of the wood in the Wealds of Kent, who used to visit those places in summer-time, when their under-tenants were bound to prepare little summer-houses for their reception, or else pay a composition in money. *Custom. de Sittingburn, MS.*

SUMMONEAS. A writ judicial of great diversity, according to the divers cases wherein it is used. *Tabl. Reg. Judio*. See *Process*.

SUMMONERS, *summonitores*.] Petty officers that cite and warn men to appear in any court; and these ought to be *boni homines*, &c. *Fleta*, lib. 4. The *summonitores* were properly the apparitors who warned in delinquents at a certain time and place to answer any charge or complaint exhibited against them; and in citations from a superior court they were to be equals of the party cited; at least the barons were to be summoned by none under the degree of knights. *Paroch. Antiq. 177*. See *Process*.

SUMMONITORES SCACCARII. Officers who assisted in collecting the king's revenues by citing the defaulters therein into the Court of Exchequer.

SUMMONS, *summonitio*.] In the English law, is as much as *vocatio in jus*, or *citatio* among the civilians. *Fleta*, lib. 6. c. 6. See further, *Process*.

By a rule of T. T. 4 Wm. 4. hereafter it shall not be necessary to issue more than two summonses for attendance before a judge upon the same matter; and the party taking out such summonses shall be entitled to an order on the

return of the second summons, unless cause is shown to the contrary.

SUMMONS, in Scotland, is a writ under the king's signet, containing the grounds of the action, and a warrant for citing the defendant, directed to messengers at arms as sheriffs in that behalf.

SUMMONSES AND SEVERANCE. This title is distinguished in the books by the name of summons and severance; but the proper name is severance; for the summons is only a process, which must, in certain cases, issue before judgment of severance can be given. *4 New Abr. 660*. Severance is a judgment, by which, where two or more are joined in an action, one or more of these is unable to proceed in such action without the other or others. *4 New Abr. 660*. See *Severance*.

It is a principle of law, where two or more have a joint right to a thing, they must join in an action for the recovery thereof. *4 New Abr. 660*. Joint-tenants must implead jointly, for they claim under one and the same title. *1 Inst. 180*. So parceners, who make but one heir, must, in order to recover the possession of their ancestor, be joined in *procipe*. *1 Inst. 163, 164*. So executors, because the right of their testator devolves on all of them, must likewise all join in an action for the recovery thereof. *Salk. 3*; *Carth. 61*.

And wherever the right of action is in two or more persons, and they have not all joined in any action that is brought, the defendant may plead in abatement: for if one could recover in such case singly, every other might do the same; and by this means a defendant would be liable to answer in divers actions for the same thing. *Cro. Eliz. 554*; *3 Rep. 57*; *Salk. 3, 32*; *2 Lev. 113*; *3 Lev. 354*; *1 Mod. 102*. See *Abatement*.

It is indeed in the power of any one or more, where two or more have a joint right of action, to commence a suit in the name of all whose such right is; but, notwithstanding that a plea in abatement would be thereby prevented, it would still be in the power of any one of them, by neglecting to appear, or refusing to proceed afterwards in such suit, to render it fruitless. *1 Inst. 139*; *Bro. Summ. & Sev. pl. 17*. For if two or more join in bringing an action, and one makes default, the nonsuit of him is the nonsuit of them all. *Bro. Summ. & Sev. pl. 5, 7*. So, if divers join in a writ of error, the assignment of errors cannot be by one without the others. *Cro. Eliz. 192*.

To prevent the great inconvenience, and the failure of justice, which would be, if persons, in whom there is a joint right of action, should be precluded, by the negligence or collusion of any one of them, from having the effect of a suit for the recovery of such right; the law has provided, that if any one of those persons, in whose name a joint action is commenced, does not appear, or after appearance makes default, the other or others may have judgment *ad sequendum solum*, or, in other words, a judgment of severance. *Hard. 48*; *Bro. Summ. & Sev. pl. 4, 16*. And see *ib. pl. 18*; *F. N. B. 128*; *1 Inst. 139*.

The consequence of this judgment is, that, notwithstanding the severance of one or more who did not appear, or who made default, the other plaintiff or plaintiffs in the action may proceed in the suit. *4 New Abr. 661*.

Where two or more are plaintiffs in an action, and one of these has not appeared, he must be summoned before judgment of severance can be given against him: for it is a general rule, that a nonsuit is in no case peremptory but on appearance, because a writ may have been purchased in the plaintiff's name without his privity. *1 Inst. 139*; *Bro. Summ. & Sev. pl. 10*; *2 Roll. Abr. 488*.

But if two joint plaintiffs have both appeared, and afterwards one makes default, the court may, without issuing any summons, immediately give judgment of severance. *Bro. Summ. & Sev. pl. 10*; *10 Rep. 135*; *Hard. 317*.

No judgment of severance can be given in a writ of error.

unless it is prayed before the defendant has pleaded *in nullo est erratum*. *Cro. Jac.* 117. But such judgment may be after joinder in the assignment of error. *2 Ld. Pr. Reg.* 663.

For more learning on this subject, see *Vin. Abr. tit. Summons and Severance*; and *ante*, *Abatement, Error, &c.*

SUMMONS TO PARLIAMENT. See *Parliament*.

SUMMONS TO WARRANT, *summons ad warrantandum*.] The process whereby the vouches in a common recovery was called. *Co. Litt.* 101. See *Recovery*.

SUMPTUARY LAWS, *sumptuaria lex*, from *sumptuarius*, of or belonging to expenses.] Are laws made to restrain excess in apparel, and prohibit costly clothes, of which heretofore we had many in England; but they are all repealed by *1 Jac. 1. c. 25*; *3 Inst.* 149. See *Lawry*.

SUNDAY, *Dies Domestica*.] The Lord's Day; set apart for the service of God, to be kept religiously, and not be profaned.

Profanation of the Lord's Day, vulgarly (but improperly, called Sabbath-breaking, is classed by *Blackstone* amongst offences against God and religion, punished by the laws of England. For, besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day, in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in seven holy, as a time of relaxation and refreshment, as well as for public worship, is of admirable service to a state, considered merely as a civil institution. The laws of king Athelstan forbade all merchandizing on the Lord's Day, under very severe penalties. And by the *27 Hen. 6. c. 5*, no fair or market shall be held on the principal festivals, Good Friday, or any Sunday, (except the four Sundays in harvest,) on pain of forfeiting the goods exposed to sale. And by the *1 Car. 1. c. 1*, no person shall assemble, out of their own parishes, for any sport whatsoever, upon this day; nor, in their parishes, shall use any bull or bear-baiting, interludes, plays, or other unlawful exercises, or pastimes, on pain that every offender shall pay *3s. 4d.* to the poor. This statute does not prohibit, but rather impliedly allows, any innocent recreation or amusement, within their respective parishes, even on the Lord's Day, after divine service is over.

By the *3 Car. 1. c. 2*, no carrier with any horse, nor wagoner, nor carmen, nor wainmen with their respective carriages, nor drovers with any cattle shall travel on the Lord's Day, on pain of *20s.* And if any butcher shall kill or sell any victual on the Lord's Day he forfeits *6s. 8d.*

Travelling by stage coaches on Sunday is not unlawful within the *3 Car. 1.* and *29 Car. 2. 7 B. & C. 96*. But *attis*, as to the driver of a van travelling from London to York, for he is a carrier within the *3 Car. 1. c. 4. 9 B. & C. 164*.

And by *29 Car. 2. c. 7*, no person is allowed to do any worldly labour on the Lord's Day, (except works of necessity and charity,) or to use any boat or barge (see *post*), or expose any goods to sale; except meat in public houses, and milk before nine in the morning, and after four in the afternoon, on forfeiture of *5s.*

The goods exposed to sale on a Sunday, to be forfeited to the poor, &c. on conviction before a justice of the peace, who may order the penalties and forfeitures to be levied by distress, and may allow one third to the informer: but this is not to extend to dressing meat in families, inns, cook-shops, (but see *post*), or victualling houses.

By the *1 & 8 Geo. 4. c. 75. § 1*, so much of the *29 Car. 2. c. 7*, as prevents travelling by water on a Sunday is repealed. And by *§ 42*, the court of assistants of the Waterman's Company may appoint any number of watermen to ply on the Thames at and between Chelsea and Bow Creek: and by *§ 47, 49*, the justices at Gravesend may grant a similar license. Persons plying without a license by *§ 50*, forfeit *5l.*

Mackarel may be sold on Sundays, before and after divine

service, *10 & 11 Wm. 3. c. 24*. Fish carriages are allowed to travel on Sundays, either laden or returning empty, *2 Geo. 3. c. 15*.

Bakers were permitted to dress dinners on a Sunday, as a work of necessity. *5 T. R.* 419. But, by the *34 Geo. 3. c. 61*, every baker shall be subject to a penalty of *10s.* to the use of the poor, for exercising his business in any manner as a baker on the Lord's Day: except that he may sell bread between nine in the morning and one in the afternoon; and may also, within that time, bake meat, puddings, and pies for any person who shall carry or send the same to be baked.

And by the *1 & 2 Geo. 4. c. 50. § 11*, no baker out of the city of London, and beyond the bills of mortality, and ten miles of the Royal Exchange, shall on a Sunday make or bake any bread, rolls, or cakes of any sort or kind, or shall sell or expose the same to sale, except to travellers, or in cases of urgent necessity; or bake or deliver any victuals after half past one o'clock in the afternoon, or in any other manner exercise his trade or calling. And no victuals shall be brought to or taken from any bakehouse during divine service, nor within one quarter of an hour of the commencement thereof. Any offender may be convicted before one justice, within two days from the commission of the offence, on proof by one witness; and is liable for the first offence to the penalty of *5s.*, for the second offence *10s.*, and for the third and every subsequent offence *20s.*, besides costs: to be paid to the prosecutor, with such part of the penalty as the magistrate shall think proper for the loss of time, at a rate not exceeding *3s. per diem*, and the residue to the churchwardens or overseers of the parish where the offence is committed, for the use of the poor.

And see the *3 Geo. 4. c. 106*, (a local act) containing regulations, somewhat different from the above, as to bakers within the city of London and ten miles of the Royal Exchange.

By *21 Geo. 3. c. 49*, passed to restrain an indecent practice which had become very prevalent, it is enacted, that any house or place opened for public entertainment, or for publicly debating on any subject, upon the Lord's Day, and to which persons shall be admitted by money or tickets sold, shall be deemed a disorderly house. And the keeper (or person acting as such) shall forfeit *200l.* and be punished as in the case of keeping a disorderly house. And the person managing such entertainment, or acting as president, &c. of any public debate, shall forfeit *100l.* And every servant receiving money or tickets from the the persons coming, or delivering out tickets of admission, shall forfeit *50l.* *§ 1, 2*. And every person advertising, or printing an advertisement of such meeting, shall also forfeit *50l.* Actions to be brought within six months. *§ 5*.

An indictment for exercising the trade of a butcher must be laid to be *contra formam statuti*; for it was no offence at common law. *1 Strange*, 702.

Persons exercising their calling on a Sunday are only subject to one penalty; for the whole is but one offence, or one act of exercising, though continued the whole day. *Comp.* 640.

Law processes are not to be served on Sunday, unless it be in cases of treason or felony; or on an escape, by virtue of *5 Ann. c. 9*. See *Escape*. Sunday is not a day in law for proceedings, contracts, &c.

And hence it is, that a sale of goods on this day in a market overt is not good: and if any part of the proceedings of a suit, in any court of justice, be entered and recorded to be done on a Sunday, it makes it all void. *2 Inst.* 264; *3 Shep. Abr.* 181.

The service of a citation on a Sunday is good, and not restrained by the *29 Car. 2. c. 7*. And, by two judges, the delivery of a declaration upon a Sunday may be well enough, it not being a process; but *Holt, Ch. J.* thought it ill, because the act intended to restrain all sorts of legal proceedings. *1 Ld. Raym.* 706. Service, on a Sunday, of notice of plea filed is void. *8 East*, 547. A writ of inquiry cannot

be executed on a Sunday. 1 *Str.* 387. See *Arrest, Process, &c.*

It has been determined that an action would not lie on a contract entered into on a Sunday, though entered into by an agent, and though the objection was taken by the party at whose request the contract was made. 4 *Bingh.* 84. But in a subsequent case the price of goods bought on a Sunday was held to be recoverable, the defendant having kept them and subsequently promised to pay for them. 6 *Bingh.* 653.

The hiring of a labourer by a farmer on Sunday was held not to be prohibited by 29 *Car. 2. c. 7. § 5*; and such hiring for a year and service under it therefore conferred a settlement. The statute only applies to labour, business, or work done in the exercise of a man's ordinary calling. 7 *B. & C.* 573.

A horsedealer cannot maintain an action on a warranty of a horse made on a Sunday; 5 *B. & C.* 406; but the statutes are not violated by a person who makes a bargain for a horse with a horsedealer on a Sunday not knowing he is a horsedealer, for the dealer only is exercising his ordinary calling. 3 *B. & C.* 232; 1 *Taunt.* 131. See further, *Holy-days.*

SUPERCARGO. A person employed by merchants to go a voyage, and oversee their cargo, and dispose of it to the best advantage. *Merch. Dict.*

SUPERIOR. The grantor of a feudal right to be held of himself. *Scotch Law Dict.* See *Tenures.*

SUPER-INSTITUTION, super-institutio.] One institution upon another; as where A. B. is admitted and instituted to a benefice upon one title, and C. D. is admitted and instituted on the title or presentment of another. 2 *Cro.* 463. See *Institution.*

SUPER-JURARE. A term used in our ancient law, when a criminal endeavoured to excuse himself by his own oath, or the oath of one or two witnesses, and the crime objected against him was so plain and notorious, that he was convicted by the oaths of many more witnesses. This was called *super jurare*. *Leg. Hen. 1. 74; Leg. Athelstan. c. 15.*

SUPERONERATIONE PASTURÆ. A judicial writ that lies against him who is impleaded in the county court for the surcharging or overburdening a common with his cattle, in a case where he was formerly impleaded for it in the same court, and the cause is removed into one of the courts at Westminster. *Reg. Judic.* See *Common, III.*

SUPER PRÆROGATIVA REGIS. A writ which formerly lay against the king's tenant's widow for marrying without the king's license. *F. N. B.* 174.

SUPERSEDEAS. A writ that lies in a great many cases; and signifies in general a command to stay some ordinary proceedings at law, on good cause shown, which ought otherwise to proceed. *F. N. B.* 236.

A *supersedeas* is used for the staying of an execution, after a writ of error is allowed, and bail put in: but no *supersedeas* can be made out on bringing writ of error, till bail is given, where there is judgment upon verdict, or by default, in debt. 3 *Jac. 1. c. 8.* Nor in actions for tithes, promises for payment of money, trover, covenant, detinue, and trespass. 12 *Car. 2. st. 2. c. 2.* And execution shall not be staid in any judgment after verdict (except in the case of executors) by writ of error or *supersedeas* thereon, unless bail be put in. 16 & 17 *Car. 2. c. 8. § 3.* See *Error, Introductio* & II. 2.

A writ of error is said to be in judgment of law a *supersedeas*, until the errors are examined, &c. that is to the execution; not to action of debt on the judgment at law. From the time of the allowance, a writ of error is a *supersedeas*; and if the party had notice of it before the allowance, it is a *supersedeas* from the time of such notice; but this must be where execution is not executed, or begun to be executed. *Cro. Jac.* 524; *Raym.* 100; *Mod. Ca.* 130; 1 *Salk.* 321.

Where a first writ of error abates, or is put an end to by the act of the plaintiff in error, a second writ of error brought in the same court is not a *supersedeas* of execution as the first; and execution may then be sued out without leave of

the court. But in error of matter of fact *coram vobis*, which is not within the statutes requiring bail in error, the writ of error is or is not a *supersedeas* according to circumstances; and the court must be moved for leave to sue out execution pending it. 8 *East.* 412.

If, before execution, the defendant bring a writ of error, and the sheriff will execute a *feri facias* and levy the money, the court will award a *supersedeas, quia erroneè emanavit*, and to have restitution of the money. *Stile.* 114. After an execution, there was a *supersedeas, quia executio improvidè emanavit, &c.* issued, and there being no clause of restitution in the *supersedeas*, it was insisted that the execution was executed before the *supersedeas* awarded, and that a faulty *supersedeas* is no *supersedeas*; but the court ordered another *supersedeas*, with a clause of restitution. *Moor.* 465.

The *supersedeas, quia erroneè emanavit*, lies to restore a possession, after an *habere facias seisinam*, when sued out erroneously; so of a *supersedeas* after execution upon a *capias ad satisfaciend.* if it be immediately delivered to the sheriff. *Jenk. Cent.* 58. 92. It appearing, upon affidavit, that there were two writs of execution executed upon one judgment; the party moved for a *supersedeas*, because there cannot be two such executions, but where the plaintiff is hindered either by the death of the defendant, or by some act in law, that he can have no benefit of the first; and so it was adjudged. *Stile.* 255. A *supersedeas* is grantable to a sheriff to stay the return of an *habeas corpora*, and if he return it afterwards, and the parties proceed to trial, it is error; and so are all the proceedings in an inferior court, after an *habeas corpora* delivered, unless a *procedendo* is awarded, in which case a *supersedeas* is not to be granted. *Cro. Car.* 43. 350.

When a *certiorari* is delivered, it is a *supersedeas* to infer it courts below; and being allowed, all their proceedings afterwards are erroneous; and they may be punished. If a sheriff holds plea of 40s. debt in his county court, the defendant may sue forth a *supersedeas*, that he do not proceed, &c. On after judgment, he may have a *supersedeas* directed to the sheriff, requiring him not to award execution upon such judgment; and upon that an *alias*, a *pluries*, and an attachment &c. *New Nat. Br.* 432. See *Certiorari.*

Supersedeas may be granted by the court for setting aside an erroneous judicial process, &c. Also a prisoner may be discharged by *supersedeas*; as a person is imprisoned by the king's writ, so he is to be set at liberty: and a *supersedeas* is as good a cause to discharge a person, as the first process is to arrest him. *Finch.* 453; *Cro. Jac.* 379. If a privileged person is sued in any jurisdiction foreign to his privilege, he may bring his *supersedeas*. *Taugh.* 153.

There is a *supersedeas* where an *audita querela* is sued; and out of the Chancery, to set a person at liberty, taken upon an exigent, on giving security to appear, &c. And in cases of surety of the peace and good behaviour, where a person is already bound to the peace in the Chancery, &c. *New Nat. Br.* 524. 529. 532. So where a warrant issues against a man on an indictment found against him, for a misdemeanor, or other bailable offence, and he, having notice of it, does, before caption, duly put in bail, to appear and traverse the indictment, &c. he is entitled to a *supersedeas*, to prevent a caption.

It is false imprisonment to detain a man in custody after a *supersedeas* delivered, for the *supersedeas* is to be obeyed, and in such case it is a new caption without any cause. 2 *Cro.* 379.

See further *Bac. Abr.* and 20 *Vin. Abr.* tit. *Supersedeas*, and ante, tit. *Error, Execution, &c.* and the books of *Præced.*

SUPERSEDERE, in Scotch law. A private agreement among creditors to supersede proceedings against the person of a bankrupt, or other debtor.

SUPERSTITIOUS USES. See *Mortmain, Uses.*

SUPERVISOR, [Lat.] A surveyor or overseer: it was formerly a custom, in cases of great concern, to make a super-

visor of a will, to supersede and oversee the executors that they punctually performed the will of the testator; but this office was so very carelessly executed, as to be to little purpose or use, and it is now obsolete.

Supervisor (now surveyor) of the highways is mentioned in the 5 *Eliz. c. 13. See Ways.*

SUPPLEMENT, Letters of, in Scotch law. Where a party is sued before an inferior court, and does not reside within its jurisdiction, these letters are obtained on a warrant from the court of session, and on these the party may be cited to appear before the inferior judge. These letters, in the king's name, recite the ground of action, and the reason why it should proceed before the inferior judge, and contain a warrant to messengers at arms, as sheriff's in that behalf, ordering them to cite the defendant. *Bell's Scotch Law Dict.*

SUPPLEMENTAL BILL IN EQUITY. A suit in equity, imperfect in its frame, (or become so by accident, before its end has been obtained,) may in certain cases be rendered perfect by a new bill, which is not considered as an original bill, but merely as an addition to, or continuance of, the former bill, or both. A bill of this kind may be, 1st, A supplemental bill, which is merely an addition to the original bill. 2d. A bill of revivor, which is a continuance of the original bill: see *Revivor*. 3d. A bill both of revivor and supplement, which continues a suit upon abatement, and supplies defects arisen from some event subsequent to the institution of the suit. *Mitford's Treatise on Chanc. Plead. 33.* And see further, p. 59—67.

If the interest of a plaintiff or defendant suing, or defending in his own right, wholly determines, and the same property becomes vested in another person, not claiming under him,—as in the case of an ecclesiastical person succeeding to a benefice, or a remainder-man in a settlement becoming entitled upon the death of a prior tenant under the same settlement,—the suit cannot be continued by bill of revivor (see that title); nor can its defects be supplied by a supplemental bill. For though the successor in the first case, and the remainder-man in the second, have the same property which the predecessor or prior tenant enjoyed; yet they are not, in many cases, bound by his acts, nor have they, in some cases, precisely the same rights: but in general, by an original bill, in the nature of a supplemental bill, the benefit of the former proceedings may be obtained. If the party, whose interest is thus determined, was not the sole plaintiff or defendant, or if the property, which occasions a bill of this nature, affects only part of a suit, the bill as to the other parties, and as to the rest of the suit, is supplemental merely. There seems to be this difference between an original bill in the nature of a bill of revivor, and an original bill in the nature of a supplemental bill: upon the first, the benefit of the former proceedings is absolutely obtained, so that the pleadings in the first cause, and the depositions of witnesses, if any have been taken, may be used in the same manner as if filed or taken in the second cause; and if any decree has been made in the first cause, the same decree shall be made in the second: but, in the other case, a new defence may be made; the pleadings and depositions cannot be used in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage, than as it may be an inducement to the court to make a similar decree. *Mitford's Treatise, 67, 68.* and the authorities there cited; and see *Revivor*.

A supplemental bill must state the original bill and the proceedings thereon; and if it is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties, and in general the supplemental bill must pray, that all the defendants may appear and answer to the charges it contains. For as the supplemental bill is not for a discovery merely, the cause must be heard upon it at the same time that it is heard

on the original bill, if it has not been before heard: and if the cause has been before heard, it must be further heard upon the supplemental matter. If, indeed, the alteration or acquisition of interest happens to a defendant, or a person necessary to be made a defendant, the supplemental bill may be exhibited by the plaintiff in the original suit against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only; unless, which is frequently the case, the interest of other defendants may be affected by that decree. Where a supplemental bill is merely for the purpose of bringing formal parties before the court as defendants, the parties defendants to the original bill need not in any case be made parties to the supplemental bill. *Mitford's Treatise, 69, 70.*

A bill in the nature of a supplemental bill, in the cases abovementioned, must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then show the ground upon which the court ought to grant the benefits of the former suit to or against the person so become entitled; and pray the decree of the court adapted to the case of the plaintiff in the new bill. This bill, though partaking of the nature of a supplemental bill, is not an addition to the original bill, but another original bill, which, in its consequences, may draw to itself the advantage of the proceedings on the former bill. *Mitford's Treatise, 90.*

SUPPLETORY OATH. See 3 *Comm. 270*; and *Evidence*.

SUPPLICAVIT. A writ issuing out of Chancery, for taking surety of the peace, upon articles filed on oath, when one is in danger of being hurt in his body by another; it is directed to the justices of the peace and sheriff of the county, and is grounded upon the 1 *Edw. 3. st. 2. c. 16.* which ordains that certain persons shall be assigned by the chancellor to take care of the peace, &c. *F. N. B. 80, 81.*

When a man hath purchased a writ of *supplicavit*, directed to the justices of the peace, against any person, then he, against whom the writ is sued, may come into the Chancery, and there find sureties that he will not do hurt or damage unto him that sueth the writ; and upon that he shall have a writ of *superseasus*, directed to the justices, &c. reciting his having found sureties in Chancery, according to the writ of *supplicavit*: and also reciting that writ, and the manner of the security that he hath found, &c. commanding the justices, that they cease to arrest him, or to compel him to find sureties, &c. And if the party who ought to find sureties cannot come into the Chancery to find sureties, his friend may sue a *superseasus* in Chancery for him; reciting the writ of *supplicavit*, and that such a one and such a one are bound for him in the Chancery in such a sum, that he shall keep the peace according to it; and the writ shall be directed to the justices, that they take surety of the party himself according to the *supplicavit*, to keep the peace, &c. and that they do not arrest him; or, if they have arrested him for that cause, that they deliver him. *New Nat. Br. 180.*

Sometimes the writ of *supplicavit* is made returnable into the Chancery at a certain day; and if so, and the justices do not certify the writ, nor the recognizance, and the security taken, the party who sued the *supplicavit* shall have a writ of *certiorari* directed unto the justices of peace to certify the writ of *supplicavit*, and what they have done thereupon, and the security found, &c. *New N. B. 180.* If a recognizance of the peace be taken in pursuance of a writ of *supplicavit*, it must be wholly governed by the directions of such writ; but if it be taken before a justice of peace below, the recognizance may be at the discretion of such justice. *Lamb. 100; Dalt. c. 70.*

At the common law it was sufficient, in order to obtain this process for surety of the peace from the court of Chan-

cery, if the party who demanded it made oath, that he was in fear of some corporal hurt, and that he did not crave the same out of malice, but for the safety of his body. *F. N. B.* 79, 80.

But by 21 Jac. 1. c. 8. all process of the peace shall be void, unless granted on motion in open court on affidavit in writing.

When articles of the peace are exhibited in the Court of Chancery, and oath is made that the surety of the peace is not craved by the party through malice, but for the safety of his life, a writ of *supplicavit* issues, directed to the justices of the peace generally, or to some one justice of the peace, or to the sheriff, commanding them or him to take security in the sum thereon indorsed, and, if the party refuses to find such security, to commit him to the next gaol until he does find such security. *F. N. B.* 80. Vide *Bro. Off.* pl. 39; *F. N. B.* 81; *Bro. Peace*, pl. 9; *Lamb.* 101, 107.

If there be no proceedings on a *supplicavit* within a year, the recognizance is of course discharged; and if the party be committed after the expiration of that time, he shall be discharged upon very slight security. *Fitz.* 268. If taken below, and the party appear pursuant to the condition, no indictment being lodged, he must be discharged. *Hardw. Ca.* But the court in its discretion may refuse to discharge a recognizance, even though the exhibitant appear and consent; for a breach against any other person is equally a forfeiture. 11 *Mod.* 109. See further, *Surety of the Peace*; and same title, *Bac. Ab.* (7th ed.)

SUPPLIES. Extraordinary grants to government, by parliament, to supply the exigencies of the state. See *Subsidies*; *Taxes*.

SUPPLY, Commissioners of, in Scotland. Persons appointed to levy the land-tax within the county for which they are named. See *Land Tax*.

SUPREMACY. Sovereign dominion, authority, and pre-eminence; the highest estate. King Henry VIII. was the first prince that shook off the yoke of Rome here in England, and settled the supremacy in himself, after it had been long held by the pope. See 25 *Hen. 8.* c. 19, 20; 26 *Hen. 8.* c. 1; 1 *Eliz.* c. 1. By these laws the great power of Rome was suppressed; and the act of 1 *Eliz.*, Sir Edward Coke says, was an act of restitution of the ancient jurisdiction ecclesiastical, which always belonged of right to the crown of England; and that it was not introductory of a new law, but declaratory of the old; and that which was, or of right ought to be, by the fundamental laws of this realm, parcel of the king's jurisdiction; by which laws the king, as supreme head, had full and entire power in all causes ecclesiastical as well as temporal and as, in temporal causes, the king doth judge by his judges in the courts of justice, by the temporal laws of England; so, in causes ecclesiastical, they are to be determined by the judges thereof, according to the king's ecclesiastical laws. 5 *Rep.* 9; *Cumfrey's case*. And in this case it was resolved by all the judges, that, by our ancient laws, this kingdom is an absolute empire and monarchy; consisting of one head, which is the king, and of a body politic, made up of many well agreeing members; all which the law divides into two several parts, the clergy and the laity, both of them immediately, under God, subject and obedient to the head. And the kingly head of this politic body is furnished with prerogative and jurisdiction, to render justice and right to every part and member of this body, of what estate or degree soever; otherwise he would not be at the head of the whole. 5 *Rep.* 8.

There are several instances of ecclesiastical jurisdiction exercised by the kings of England in former ages; and, in this respect, the king is said to be *persona mixta et unita cum sacerdotibus*. The king is the supreme ordinary, and by the ancient laws of the land might, without any act of parliament, make ordinances for the government of the clergy; and if

there be a controversy between spiritual persons concerning jurisdiction, the king is arbitrator, and it is a right of his crown to declare their bounds, &c. *Moor*, 755. 1043; *Hob.* 17.

As to the oath of supremacy, see *Oaths, to the government*. And see further, *King*, V. 3; *Premunire*; *Roman Catholics*.

SURCHARGE. An overcharge, beyond what is just and right. *Merch. Dict.*

SURCHARGE OF COMMON. See further, *Common*, III. **SURCHARGE OF THE FOREST,** *superoneratio forestæ.*] Is where a commoner puts on more beasts in the forest than he has a right to. *Manwood*, part 2. c. 14. num. 7. And is taken from the writ *de secundâ superoneratione pasturæ*, in the same sense when the commoner surchargeeth. 3 *Inst.* fol. 293. See *Forest*.

SUR CU IN VITA. See *Cui in Vita*; *Limitation of Actions*, II. 1.

SURETY, *cas vadis*.] A bail that undertakes for another man in a criminal case, or action of trespass, &c.

SURETY OF THE PEACE,

AND GOOD BEHAVIOUR.

[*SECURITAS PACIS.*] Either because the party who was in fear is thereby secured; or for that the suspected party gives such security.

- I. *What this Security is.*
- II. *Who may take or demand it.*

1. *As relates both to the Peace and good Behaviour.*
2. *As to the Peace only.*
3. *As to good Behaviour, or good Abearance only; which includes Security for the Peace and somewhat more.*

III. *How it may be forfeited; or discharged.*

1. *As to both Peace and good Behaviour.*
2. *As to the Peace.*
3. *As to the good Behaviour.*

I. This is considered by Blackstone as a species of preventive justice; by obliging persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with, and to give full assurance to the public, that such offence as is apprehended from them shall not happen through the means of pledges or sureties for keeping the peace, or for their good behaviour. 4 *Comm.* c. 18.

By the Saxon constitution these sureties were always at hand, by means of King Alfred's wise institution of *accennaries* or frankpledges; wherein the whole neighbour hood or tithing of freemen were mutually pledges for each other's good behaviour. But this great and general security being now fallen into disuse, and neglected, there hath succeeded to it the method of making suspected persons find particular and special securities for their future conduct; of which we find mention in the laws of King Edward the Confessor "*tradat fidejussores de pace et legalitate tuenda*," cap. 18.

This security, therefore, at present consists in being bound with one or more sureties, in a recognizance or obligation to the king, entered on record, and taken in some court, or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the crown in the sum required (for instance 10 *l.*) with condition to be void and of no effect, if the party shall appear in court on such a day, and in the mean time shall keep the peace; either generally towards the king and all his liege people; or particular also, with regard to the person who craves the security. Or, if it be for the good behaviour, then on condition that he shall demean and behave himself well, (or be of good behaviour,) either generally or specially for the time therein limited, as for one or more years, or for life. This recog-

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nizance, if taken by a justice of the peace, must be certified to the next sessions, in pursuance of the 3 Hen. 7. c. 1. and if the condition of such recognizance be broken, by any breach of the peace in the one case, or any misbehaviour in the other, the recognizance becomes forfeited or absolute; and being estreated or extracted. (taken out from among the other records,) and sent up to the exchequer, the party and his sureties, having now become the king's absolute debtors, are sued for the several sums in which they are respectively bound. 4 Comm. c. 8.

II. 1. ANY justices of the peace, by virtue of their commission, or those who are *ex officio* conservators of the peace, may demand such security according to their own discretion. But a secretary of state or privy councillor are not, *ex officio*, such conservators, and therefore they cannot bind to the peace or good behaviour. 11 State Tri. 317. Or it may be granted at the request of any subject, upon due cause shown, provided such demandant be under the king's protection: for which reason it has been formerly doubted whether Jews, Pagans, or persons convicted of a *premeditation*, were entitled thereto. 1 Hawk. P. C. c. 60. § 3. Or if the justice is averse to act, it may be granted by a mandatory writ called a *supplicavit*, issuing out of the Court of King's Bench or Chancery, which will compel the justice to act as a ministerial and not as a judicial officer; and he must make a return to such writ, specifying his compliance, under his hand and seal. F. N. B. 80; 2 P. Wms. 202. See *Supplicavit*. But this writ is seldom used; for when application is made to the superior courts, they usually take recognizances there, under the directions of the 21 Jac. 1. c. 8. And indeed a peer or peeress cannot be bound over in any other place than the Courts of King's Bench or Chancery, though a justice of the peace has a power to require sureties of any other person, being *non nobis*, and under the de facto of nobility whether he be a fellow justice or other magistrate, or whether he be merely a private man. 1 Hawk. P. C. c. 60. § 5. Wives may demand it against their husbands (so peeresses against their lords), or husbands, if accessory against their wives. But *from courts* and infants to be brought to find security by their friends only, and not to be bound themselves; for they are incapable of engaging themselves to answer any debt, which is the nature of these recognizances or acknowledgment. See *Recognizance*; 4 Comm. 27, 28.

If the person against whom it is demanded be present, the justice of the peace may commit him immediately, unless he offers sureties; and *a fortiori* he may be commanded to find sureties, and be committed for not doing it. Bro. Mainp. pl. 99; 1 Hawk. P. C. c. 60. But if he is absent, a warrant for committing him cannot be granted till a warrant is issued commanding him to find sureties; and this warrant, which must be under seal, ought to show the cause for which it is granted, and at whose suit. Lamb. 85; 1 Hawk. P. C. c. 60.

The justice of the peace who grants this last-mentioned warrant may in this case make it special for bringing the party before himself only; for as he has most knowledge of the matter, he is best qualified to do justice in it. 5 Co. 89; *Foster's case*; 1 Hawk. P. C. c. 60. But if the warrant be in general terms to carry the party before any justice of the peace, the officer who executes it has his election to carry him before what justice he pleases, and carry him to gaol by virtue of the same warrant, if he refuses to find sureties before such justice; for the warrant has these words in it, 'if he shall refuse to find surety,' &c. Bro. False Imprisonment, pl. 11; 1 Hawk. P. C. c. 60; 5 Co. 59.

If once, however, who apprehends that the surety of the peace will be demanded against him, finds sureties before any justice of the peace of the same county, either before or after a warrant is issued against him, he may have a su-

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persecede from such justice; and this shall prevent or discharge him from an arrest under the warrant of any other justice, at the suit of the same party for whose security he has found such sureties. Lamb. 95, 96; 1 Hawk. P. C. c. 60.

The recognizance for keeping the peace, which a justice of the peace takes upon complaint below, is to be regulated as to the number and sufficiency of the sureties, the largeness of the sum, and the time it is to continue in force, by the discretion of such justice. Lamb. 100; 1 Hawk. P. C. c. 60. It has been said that a recognizance taken by a justice of peace, to keep the peace as to A. B. for a year, or for life, or without expressing any certain time, which shall be intended to be for life, although no time or place is fixed for the party's appearance, or he is not bound to keep the peace as to all the king's liege people, is good. 1 Hawk. P. C. c. 60; Lamb. 100. But it seems to be the safest way to bind the party to appear at the next sessions of the peace, and in the mean time to keep the peace as to the king and all his liege people, and especially as to the party who has demanded the surety of the peace. Lamb. 105; 1 Hawk. P. C. c. 60. However it is settled by a modern case, that a justice of the peace is authorized to require surety of the peace for a limited time, according to his discretion, and is not obliged to bind over the party to appear at the next sessions. 2 B. & A. 278.

If one of the sureties of a man who is bound to keep the peace, dies, he shall not be obliged to find a new surety, for the execution of the recognizance of his wife is deemed to be bound by the recognizance. Lamb. 119; Bro. Peace, pl. 17; 1 Hawk. P. C. c. 60.

2. ANY justice of the peace may, *ex officio*, bind all those to keep the peace who in his presence make any affray, or threaten to kill or beat another, or contend together with hot and angry words, or go about with unusual weapons or attendance, to the terror of the people, and all such as he knows to be common barrators, and such as are brought before him by the constable for a breach of the peace in his presence, and all such persons as having been before bound to the peace, have broken it and forfeited their recognizances. Also whenever any private man hath just cause to fear that another will burn his house, or do him a corporal injury, by killing, imprisoning, or beating him, or that he will procure others so to do, he may demand surety of the peace against such person. And every justice of the peace is bound to grant it, if he who demands it will make oath that he is actually under fear of death or bodily harm, and will show that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him; and will also further swear that he does not require such surety out of malice or for mere vexation: this is called *swearing the peace* against another; and if the party does not find such sureties as the justice in his discretion shall require, he may immediately be committed till he does. 1 Hawk. P. C. c. 60.

Surety of the peace may be demanded by a wife, if her husband gives her unreasonable correction. Moore, 874; Godb. 215; F. N. B. 80. Surety of the peace ought not to be granted to a man for fear of danger to his servant or cattle. Lamb. 83. It hath however been said, that a man may have the surety of the peace against one who threatens to hurt his wife or child. Dalt. 266. The surety of the peace ought not to be granted for any past battery, unless there is a fear of some present or future danger. But the offender must in such case be punished by action of indictment. Dalt. 266. The demand of the surety of the peace ought to be soon after the cause of fear; for the suffering much time to pass before it is demanded, shows that the party has been under no great terror. 6 Mod. 132.

It is said the fear of one cannot be the fear of another, and therefore every recognizance must be separated. But in Mich. 23 Geo. 2. B. R., the court allowed three women to

file joint articles of the peace against three men. *Res v. Nettle*, cited 1 *Hawk. P. C. c. 60. § 5, Leach's note*. Although the fact from which the fear arises be pardoned, the Court of King's Bench will receive it as a ground to grant the security upon. *Stra. 473*.

At the common law the oath of the party was a sufficient ground for the Court of King's Bench to grant the surety of the peace; but this cannot be done since the 21 *Jac. 1. c. 8*, unless articles of the peace are exhibited in court, upon motion in open court. *F. N. B. 79, 80*.

Where articles of peace are exhibited in the Court of King's Bench, and oath is made that the party does not crave the security of the peace out of hatred or malice, but merely for the preservation of his life and person from danger, an attachment of the peace issues to the sheriff, commanding him to take bond for the appearance of the party at the return of the writ, to put in bail to the articles in this court, and if such bond is not given, to commit the party to the next gaol. *Comb. 427, Russell's case; F. N. B. 79*. Where the party against whom articles of the peace are exhibited, comes into court to put in bail, the articles must be read to him. *6 Mod. 132*. An affirmation is not sufficient on which to grant surety of the peace. *Stra. 527; 12 Mod. 243*.

The court will not permit the truth of the allegations to be controverted by the defendant, but will order security to be taken immediately, if no objections arise upon the face of the articles themselves. *Stra. 1202*. But if on application for the assistance of the court to enforce the subsequent process, the articles should manifestly appear, from the corroborated affidavit of the defendant, to have been a malicious, voluntary, and gross perjury, the court will resist the application, and commit the offender. *2 Burr. 806; 3 Burr. 1922*.

If a defendant, through infirmity of age or sickness, be unable to attend the court, a *mandamus* will be granted to the justices in the country, to take such security. See *Stra. 835; Comb. 427*.

The court will not receive articles of the peace, if the parties live at a distance in the country, unless they have previously made application to a justice in the neighbourhood. *2 Burr. 780*. And if the court do receive them, the secondary may indorse the attachment in the form required, and order a justice of the county to take the security. *2 Burr. 1099; 1 Bla. 233*.

When surety of the peace is granted by the Court of King's Bench, if a *supersedeas* comes from the Court of Chancery to the justices of that court, their power is at an end, and the party as to them discharged. *Bro. Peace, pl. 17*.

3. Justices of peace are empowered by the 34 *Edw. 3. c. 1*. to bind over to the good behaviour towards the king and his people all them that be not of good fame, wherever they be found, to the intent that the people be not troubled or endangered, nor the peace diminished, nor merchants and others passing by the highways of the realm, be disturbed nor put in the peril, which may happen by such offenders. Under the general words of this expression, *that he be not of good fame*, it is holden that a man may be bound to his good behaviour for causes of scandal *contra bonos mores*, as well as *contra pacem*; as for haunting bawdy-houses with women of bad fame, or for keeping such women in his own house, or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers, eaves-droppers, such as keep suspicious company, or are reported to be pilferers or robbers, such as sleep in the day and wake in the night, common drunkards, whore-masters, the putative fathers of bastards, cheats, idle vagabonds, and other persons whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame, an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of

the magistrate himself. But if he commits a man for want of sureties, he must express the cause thereof with convenient certainty, and take care that such cause be a good one. 1 *Hawk. P. C. c. 61; 4 Comm. 256*.

III. 1. A RECOGNIZANCE may be discharged, either by the demise of the king, to whom the recognizance is made, or by the death of the principal party bound thereby, if not before forfeited, or by order of the court to which such recognizance is certified by the justices (as the quarter sessions, assizes, or King's Bench,) if they see sufficient cause; or in case he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued. 1 *Hawk. P. C. c. 60*.

2. Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault or menace to the person of him who demanded it, if it be a special recognizance; or if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace; or more particularly by any one of the many species of offences against the public peace; or by any private violence committed against any of his majesty's subjects. But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance. Neither are mere reproachful words, as calling a man a knave or liar, any breach of the peace, so as to forfeit one's recognizance (being looked upon to be merely the effect of unmeaning heat and passion), unless they amount to a challenge to fight. 1 *Hawk. P. C. c. 60; 4 Comm. 255, 256*.

By the 3 *Hen. 7. c. 1*. before mentioned, it is enacted, "that if the party who is called at a sessions of the peace, upon a recognizance of keeping the peace, makes default, his default shall be then and there recorded, and the same recognizance, with the record of the default, be sent and certified into the Chancery, or before the king in his Bench, or into the king's Exchequer."

He who is bound to keep the peace, and to appear at the sessions, must appear there and record his appearance, otherwise his recognizance is forfeited: and although the party who craved the surety of the peace comes not to pray that it may be continued, the justices may in their discretion order it to be continued till another sessions. *Bro. Peace, pl. 17; Lamb. 109*.

But if an excuse, which is judged by the court to be a reasonable one, is given for the non-appearance of a party, it seems that the court is not bound peremptorily to record his default, but may discharge the recognizance or respite till the next sessions. 1 *Hawk. P. C. c. 60*. A recognizance for keeping the peace may be forfeited by any actual violence to the person of another, whether it be done by the party bound, or others by his procurement. *Lamb. 116, 127; Bro. Peace, pl. 2; 1 Hawk. P. C. c. 60*. In support of a rule to stay proceedings in a *scire facias* upon a recognizance for keeping the peace, it was said that the assault, which had been made, was not upon him at whose request the surety of the peace was granted, but upon another person: it was held that this makes no difference, and the rule was discharged. *MS. Rep. Rex v. Stanley and his bail, Trin. 27 Geo. 2. B.* A recognizance for keeping the peace is not forfeited, when an officer, having a warrant against one who will not suffer himself to be arrested, beats or wounds him in the attempt to take him. *Lamb. 128; 1 Hawk. P. C. c. 60*.

So it is not forfeited, if a parent in a reasonable manner chastises his child; a master his servant, being actually in his service at the time; a schoolmaster his scholar; a gaoler his prisoner; a husband his wife. 1 *Sid. 176, 177; Lamb. 127, 128; Hetl. 149, 150; 1 Hawk. P. C. c. 60; B. 80*.

And, without enumerating all the actual assaults, which a man may make upon the person of another, and not forfeit his recognizance for keeping the peace, it may be laid down as a principle, that such a recognizance is not forfeited by any assault which could have been justified in an action, or upon an indictment, for the assault. *Bac. Abr.*

It has been held, that a recognizance for the peace may be forfeited by any treason against the person of the king, or by an unlawful assembly in *terrorem populi*. *Lamb. 115; 1 Hawk. P. C. c. 60.* Words which tend directly to a breach of the peace, as challenging a man to fight, or threatening to beat one who is present, amount to a forfeiture of such recognizance. *Lamb. 115; 1 Hawk. P. C. c. 60; Cro. Eliz. 86.* A recognizance is likewise forfeited by threatening to beat a person who is absent, if the party who has so threatened, does afterward lie in wait to beat him. *Lamb. 115.*

A man shall not forfeit a recognizance for keeping the peace, who does a hurt to another in playing at cudgels, or such like sport, by consent; for these sports, which tend to promote activity and courage, are lawful. *Dalt. 284; 1 Hawk. P. C. c. 60.* But he who wounds another in fighting with naked swords, forfeits his recognizance; because no consent, nor even the command of the king, can make so dangerous a diversion lawful. *Cro. Car. 229; 1 Hawk. P. C. c. 60.* If a soldier hurts another soldier, by discharging his gun in exercising without sufficient caution, it is no forfeiture of a recognizance for keeping the peace; for though he would be liable in an action for the damage occasioned by his negligence, this, it not being a wilful breach of the peace, is not within the purport of the recognizance. *1 Hawk. P. C. c. 60; Hob. 184; 2 Roll. Abr. 518.*

A court of quarter sessions cannot in any case proceed against the parties for a forfeiture of a recognizance for keeping the peace; but the recognizance must be sent into some of the king's courts in Westminster-hall. *1 Hawk. P. C. c. 60.* All proceedings upon a forfeited recognizance must be by *scire facias*, and not by indictment, because, where a *scire facias* is brought, the parties have an opportunity of pleading any matter in their discharge. *1 Roll. Abr. 909. Person's case; Com. die 7th. 1 Hawk. P. C. c. 60.*

The discharge of the king is a discharge of recognizance for keeping the peace; for the condition being *seu pacem nostram*, his successor cannot take advantage of a breach thereof. *Bro. P. C. pl. 55. 1 Hawk. P. C. c. 60.*

After such a recognizance is forfeited, the king may pardon the forfeiture; but he cannot release the condition before it is broken; because the party, at whose complaint it was taken, has an interest therein. *Bro. Recog. pl. 22; Bro. Chart. de Pard. 24.*

If no time for the continuance of a recognizance for keeping the peace is therein mentioned, it is perhaps in the power of the court, in which it was taken, or to whom it has been certified, to discharge it at their discretion. *4 New Abr. 695.*

The usual practice of court of a quarter sessions is to continue a recognizance for keeping the peace from sessions to sessions until the court thinks proper to discharge it. It is the constant course of the Court of King's Bench, to take a recognizance for twelve months; and if no indictment is within that time preferred against the party bound to keep the peace, it may, at the expiration thereof, be discharged. *1 Mod. 251; Str. 521.* This seems also to be the practice of the Court of Chancery; for upon a motion to discharge a writ of *supplicavit*, which was issued by my Lord Macarthur, the motion was granted, and he was discharged at that time. *2 P. Wms. 202, Clavering's case. See Supplication. 1 Hawk. P. C. c. 60; Pro. Peace, pl. 17; Lamb. 111; 11 Mod. 137. Cro. Jac. 282, 1 id. 207.*

A recognizance for the good behaviour may be forfeited by all the same means as one for the security of the peace

may be; and also by some others; as by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or by committing any of those acts of misbehaviour which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen; for though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended, yet it would be hard upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance. *1 Hawk. P. C. c. 61; 4 Comm. 257.*

As to the proceedings when a recognizance has become forfeited, see *Recognizance*.

SURGEON, *chirurgus*, from the *Fr. chirurgien*. Signifying him that dealth in the mechanical part of physic, and the outward cures performed with the hand; originally compounded of the two Greek words, *χειρ*, *munus*, *εργον*, *opus*; and for this cause surgeons are not allowed to administer any inward medicine.

By the 32 *Hen. 8. c. 42.* the barbers and surgeons of London were incorporated, and made one company.

But by the 18 *Geo. 2. c. 15.* the surgeons of London, and the barbers of London, were made two separate and distinct corporations; reserving the privileges each were entitled to under 32 *Hen. 8.* to each company separately. By the latter act examiners are appointed to admit surgeons, &c.

The 3 *Hen. 8. c. 11.* enacts that no one shall practise as a surgeon in London, or seven miles round, without being licensed by the College of Surgeons, under the penalty of 5*l.* per month; but, notwithstanding, it seems that a person not so licensed may sue for business done as a surgeon within these limits, the statute containing no prohibitory clause. *2 Camp. 143.*

An action on the case lies against a surgeon for gross ignorance and want of skill in his profession; as well as for negligence and carelessness to the detriment of his patient. *8 East, 348.* And see further, *Homicide, 3, II.*

A surgeon having a certificate from the College of Surgeons cannot charge for attending a patient in a fever, without having also a certificate from the Apothecaries Company. *4 Bng. 620.* But if the plaintiff had administered medicine as ancillary to a surgical case, his claim could not have been resisted. *Ibid. per Best, C. J.* And one who is both a surgeon and an apothecary may, besides his charges for medicine, recover reasonable charges for attendance. *4 C. & P. 110.* And see 4 *Tyrr. 325* and further, *Apothecary.*

Surgeons are not liable to serve on juries, by 6 *Geo. 1. c. 50. § 2.*

SURMISE. Something offered to a court to move it to grant a prohibition, *audita querela*, or other writ grantable thereon. See *Suggestion*.

SURPLUSAGE, *Fr. surplus*, *Lat. surplusagium, corollarium.* A superfluity or addition more than needful, which sometimes is the cause that a writ abates; but, in pleading, many times it is absolutely void, and the residue of the plea shall stand good. *Broke; Plow. 63.* See *Amendment, Pleading.*

If a jury find the substance of the issue before them to be tried, other superfluous matter is but surplusage. *6 Rep. 46.*

SURPLUSAGE OF ACCOUNTS, signifies a greater disbursement than the charge of the accountant amounts unto. In another sense, surplusage is the remainder or overplus of money left. *Litt. Dict.*

SURREBUTTER. The replication or answer of the plaintiff to the defendant's rebutter. See *Pleading, Rebutter*.

SURREJOINDER. A second defence (as the replication is the first) of the plaintiff's declaration in a cause, and is an answer to the rejoinder of the defendant. *West. Symb. par. 2.* As a rejoinder is the defendant's answer to the replication of the plaintiff; so a surrejoinder is the plaintiff's answer to the defendant's rejoinder. *Wood's Inst. 586.*

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Where a plaintiff in his surrejoinder is to conclude to the country, and not with an averment; see *Raym.* 94. After rejoinder and surrejoinder and rebutter, &c. there may be a demurrer. See *Pleading*.

SURRENDER, *surrem redditio*. A deed or instrument testifying that the particular tenant for life or years of lands and tenements, doth yield up his estate to him that hath the immediate estate in remainder or reversion, that he may have the present possession thereof; and wherein the estate for life or years may merge or drown by the mutual agreement of the parties. *Co. Litt.* 337.

A surrender is of a nature directly opposite to a release; for as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater. It is made by these words, *Hath surrendered, granted, and yielded up.* 2 *Comm.* c. 20, p. 326.

Of surrenders there are three kinds: a surrender properly taken at common law; a surrender of copyhold or customary estates, as to which see *Copyhold*; and a surrender, improperly taken, as of a deed, a patent, rent newly created, &c.

The surrender at common law is the usual surrender, and is of two sorts, viz. a surrender in deed, or by express words in writing, where the words of the lessee to the lessor prove a sufficient assent to give him his estate back again; and a surrender in law, being that which is wrought by operation of law, and not actual; as if a lessee for life or years take a new lease of the same land during the term, this will be a surrender in law of the first lease. 1 *Inst.* 338; 5 *Rep.* 11; *Perk.* 601.

To the making of a good surrender in deed of lands, the following things are requisite. The surrenderor is to be a person able to grant and make a surrender, and the surrenderee a person able to receive and take it; the surrenderor must have an estate in possession of the things surrendered, and not a future right; and the surrender is to be made to him that hath the next estate in remainder or reversion, without any estate coming between; the surrenderee must have a higher or greater estate in his own right, and not in the right of his wife, &c. in the thing surrendered, than the surrenderor hath, so that the estate of the surrenderor may be drowned therein; (so that lessee for life cannot surrender to him in remainder for years;) there is to be a privity of estate between the surrenderor and surrenderee; and the surrenderee must be sole seised of his estate in remainder or reversion, and not in joint-tenancy; and the surrenderee agree to the surrender, &c. 1 *Inst.* 338; *Perk.* 584, 588; 2 *Roll. Abr.* 494; *Noy's Max.* 73.

In some cases a surrender in law is of greater force than a surrender in deed; for if a man makes a lease for years, to begin at a day to come, this future interest cannot be surrendered by deed, because there is no reversion wherein it may drown; but if the lessee, before the day, take a new lease of the same land, it is a good surrender in law of the former lease: and this surrender in law, by taking a new lease, holds good, though the second lease is for a less term than the first; and, it is said, though the second lease is a voidable lease, &c. 5 *Rep.* 11; 6 *Rep.* 69; 10 *Rep.* 67; 1 *Inst.* 218; *Cro. Eliz.* 873.

If lessee for life do accept of a lease for years, this is a surrender in law of his lease for life; if it should be otherwise, the lease for years would be made to no purpose, and both the leases cannot stand together in one person. 2 *Lill. Abr.* 544. Lessee for twenty-one years takes a lease of the same lands for forty years, to commence after the death of A. B., it is not any present surrender of the first term; but if A. B. dies within the first term, it is. 4 *Leon.* 83. A lessee for years took a second lease, to commence at Michaelmas ensuing: adjudged this was an immediate surrender in law of the first; and that the lessor might enter and take the profits, from the time of the acceptance of the second lease, until Michaelmas following. *Cro. Eliz.* 605. If the

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lessor make, and lessee accept, a new lease, and it is upon condition; this shall be a surrender in law; and if an assignee of tenant for years take a new lease, &c. the first lease will be by law surrendered. 1 *Inst.* 218, 338. If a woman lessee for years marries, and afterwards she takes a new lease for life without her husband, this is a surrender and extinguishment of the term; but if the husband disagree, then it is revived: though if the new lease had been made to the husband and wife, then, by acceptance thereof, the first lease had been gone. *Mutt.* 7. A lessor takes the lessee to wife, then the term is not drowned or surrendered; but he is possessed of the term in her right, during the coverture. *Wood's Inst.* 285.

Lease of lands by indenture for twenty-one years, with provision that it should be determinable by lessee or lessor at the end of the first seven or fourteen years; memorandum indorsed six years after the execution of the lease, of its being agreed between the parties, previously to the execution, that the lessor shall not dispossess nor cause the lessee to be dispossessed of the said estate, but to have it for the term of twenty-one years from this present time; which memorandum was signed by the parties, and stamped with a lease stamp and not sealed. The Court of K. B. held that the lessor might determine the lease at the end of the first fourteen years; for the memorandum did not operate as a new lease and surrender of the first lease. 4 *M. & S.* 30.

A surrender may be of any thing grantable, either absolute or conditional; and may be made to an use, being a conveyance tied and charged with the limitation of an use; but it may not be of an estate in fee; nor of rights and titles only to other estates for life or years; or for part of such an estate; nor may one termor regularly surrender to another termor; nor can a tenant at will surrender any more than he can grant. *Perk.* 615; *Noy's Max.* 73; *Cro. Eliz.* 684, 1 *Leon.* 303. Where things will not pass by surrender, the deed may enure to other purposes, and take effect by way of grant, having sufficient words. *Perk.* 588, 624.

A man who hath a fee simple estate cannot surrender, because it cannot be drowned in another estate. 12 *Hen.* 21. And if a lease be made for life or years to A., the remainder for life to B., remainder in fee tail to C., and the first tenant surrenders to C.; this will not take effect as a surrender, by reason of the intervening estate. *Dyer.* 112. The lessee for life or years may surrender to him that is next in remainder in fee-simple or fee-tail. And if lessee for life surrenders his estate to one in remainder, that is tenant for his own life, it is a good surrender; for a man's estate for his own life, in judgment of law, is greater than that for another's. And where an estate is surrendered for life, there needs no livery or seisin, as in a grant, 1 *Inst.* 338; *Dyer.* 251, 280.

If there be lessee for years, the remainder for life, remainder in fee; the lessee for years may surrender to the lessee during life, and so may be to him in the remainder in fee. *Perk.* § 605.

In case of tenant for life, the remainder for life, reversion in fee; it was a question formerly, whether the remainderman for life by and with the consent of the tenant for life could surrender to him in reversion without deed, only on coming on the land and saying, that he did surrender to him in reversion. The court were divided; but two judges held, that if tenant for life and he in remainder for life surrendered to the reversioner, it should pass as several surrenders, viz. first of him in remainder to the tenant for life, and then by the tenant for life to him in reversion. *Poph.* 137.

If tenant for life grant his estate to him in reversion, this is a surrender; and it must be pleaded according to the operation it hath in law, or it will not be good. 4 *Mod.* 151. Though if lessees for life or years grant their estates to him in remainder or reversion, and a stranger, it shall enure as a

surrender of the one half to him in reversion, and as a grant of the other moiety to the stranger. 1 *Inst.* 335.

In some cases, an estate, &c. may have continuance, though it be surrendered; as where lessee for life makes a lease for years, and after doth surrender, the term for years doth continue; and so of a rent charge granted by such lessee, &c. *Bro.* 47; 1 *Inst.* 338. If the lessee for years, rendering rent, surrenders his estate to the lessor, hereby the rent is extinct; but if the rent were granted away before the surrender, it would be otherwise. 8 *Rep.* 145; *Bro.* *Surrend.* 42. Tenant for life is disseised, or for years ousted; and before entry or possession gained, he surrenders to him in reversion; this surrender is void. And yet if lessee for years, after his term is begun, before he enters, and when nobody doth keep from him the profits, surrenders, it will be good. *Park.* § 60.

In a surrender there is no occasion for livery of seisin; for there is a privity of estate between the surrenderor and surrenderer. The particular estate of one, and the remainder of the other, are one and the same estate. See *Remainder, Reversion*. And livery having once made at the creation of it, there is no necessity for having it afterwards. 1 *Inst.* 50. And for the same reason it is that no livery is required on a release, or continuation in fee, to tenant for years, or of will, though a freehold thereby passes, since the reversion of the releasor or continuor, and the particular estate of the releasee or continuee, are one and the same estate. And where there is already a possesson derived from such a privity of estate, any further delivery of possession would be vain and nugatory. 2 *Comm.* 323. See *Release, Livery of Seisin*.

At common law, an express surrender of things lying in grant could be made by deed only, but a surrender of things lying in possession might be made by *parol* without livery of seisin, or other formal mode of conveyance, though the particular estate had been originally created by deed; for it was but a restoring of the estate back again to him in reversion or remainder. 2 *Roll. Abr.* 24; 1 *Ventr.* 242, 272. But by the 20 *Car.* 2. c. 2. no estates of freehold, or of terms for years, shall be granted or surrendered, but by deed or note in writing, signed by the parties, or unless by operation in law, &c.

The statute extends to tenancies from year to year, and therefore a landlord and tenant cannot, by mere *parol* agreement in the middle of a quarter, determine a tenancy from year to year, though created by *parol*. 2 *Camp.* 189; 2 *Stark.* 370. And see further, *Lease*, I. 4.

A surrender of a prebendary's lease, upon condition that if he then prebendary did not, within a week after, grant a new lease for three lives, the surrender shall be void. Held to be a good surrender within the 32 *Hen.* 8. c. 28. § 2. 2 *Strange*, 1201. See further, *Lease*, II.

Many cases have arisen upon the question, after what length of time a mortgagee terms that have been surrendered, and terms that have been assigned to trustees to attend to the same, and have subsequently been dealt with as if they had been surrendered. The decisions of the courts of law and equity have been conflicting upon this subject, which has given rise to many learned arguments. See the point discussed in *Sugden's Vendors and Purchasers*.

It is no ground for presuming the surrender of a term devised to trustees less than twenty years ago, that the reversion in fee has been dealt with the property as absolutely as his estate by leasing it for lives. 1 *C. & M.* 221.

By the 4 *Geo.* 2. c. 28. § 6. leases may be renewed without the surrender of under-leases. See further, 20 *Fen.* II. 19—146; and *Lease*.

As to the surrender of leases to or by executors, administrators, or assigns, see *Idiota*, IV. 2; *Infant*, V. 1. Also extend to *leases of land*. See further, *Estate of Land*, *Mortgage*.

SURRENDER OF COPYHOLDS. Is the yielding up of the estate by the tenant into the hands of the lord, for such purposes as in the surrender are expressed. This method of conveyance is so essential to the nature of a copyhold estate, that it cannot properly be transferred by any other assurance. But courts of equity will, in some particular cases, supply the want of a surrender. See 2 *Comm.* c. 22; and tit. *Copyhold*.

SURRENDER OF LETTERS PATENT, AND OFFICES. A surrender may be made of letters patent to the king, to the end he may grant the estate to whom he pleases, &c.; and a second patent for years to the same person, for the same thing, is a surrender in law of the first patent. 10 *Rep.* 66.

Letters patent for years were delivered into chancery to be cancelled, and new letters patent made for years; but the first were not cancelled. It was held that the second were good, because they were a surrender in law of the first, and the not cancelling was the fault of the chancery, which ought to have done it. 10 *Rep.* 66, 67; 2 *Lil. Abr.* 545. If an officer for life accepts of another grant of the same office, it is in law a surrender of the first grant; but if such an officer takes another grant of the same office to himself and another, it may be otherwise. 1 *Ventr.* 297; 3 *Cro.* 198. See *Dyer*, 167, 198; *Godb.* 415; and *ante*, titles *Grant of the King*, *Office*.

SURRENDER OF TITHES in Scotland. The submissions and surrenders of tithes there were made to King Charles I., in consequence of an action of reduction brought by his majesty of all rights to tithes which had been granted by James VI. (James I. of England), contrary to the act of annexation. These submissions led to the happiest consequences, as the decree arbitrarily which passed on them provided for the valuation and sale of tithes, and laid the foundation of a system highly fortunate for the agriculture of that country. *Bell's Scotch Law Dict.*

SURROGATE, surrogatus.] Is one that is substituted or appointed in the room of another; as by a bishop, chancellor, judge, &c.

For his duties in granting marriage licences, see title *Marriage*.

By the 56 *Geo.* 3. c. 82. the judicial acts of surrogates of vice-admiralty courts in the colonies, during the death, resignation, or removal of the judges by whom they were appointed, &c. are declared valid.

SURSISE, supersisa.] A word especially used in the Castle of Dover, for penalties and forfeitures laid upon those that pay not the duties or rent of castle-ward, at their days limited. It probably comes from the *Fr.* *sursis*, i. e. forborn or neglected. *Brit.* 52. And Bracton hath it so in a general signification. *Bract.* lib. 5.

SURVEY. To measure, lay out, or particularly describe a manor, or estate in lands; and to ascertain not only the bounds and royalties thereof, but the tenure of the respective tenants, the rent and value of the same, &c. On the falling of an estate to a new lord, consisting of manors, where there are tenants by lease, and copyholders, a court of survey is generally held; and at certain other times, to apprise the lord of the present terms and interests of the tenants, and as a direction on making further grants, as well as in order to improvements, &c. In this court, a survey, or particular in the nature of a rent-roll, is made out, specifying the tenants and terms of their tenure, &c. See *Comp. Court Keep*.

SURVEYOR, from *Fr.* *sur*, i. e. *super*, and *voir*, *cernare*.] One that has the overseeing or care of some person's lands or works. A court of surveyors was erected by 35 *Hen.* 8. c. 39. for the benefit of the crown.

SURVEYOR OF THE KING'S EXCHANGE. An ancient officer belonging to the mint and coinage, mentioned in the 9 *Hen.* 5. c. 4.

SURVEYOR-GENERAL OF THE KING'S MANORS AND LANDS.

Is mentioned in *Crompt. Jurisd.* 106. See 46 *Geo. 3. c. 142.* and 50 *Geo. 3. c. 65.* as to the execution of the powers of this officer; and tit. *Forests.*

SURVEYORS OF THE HIGHWAYS. See *Ways.*

SURVEYOR OF THE NAVY. An officer appointed over all stores; and to survey hulls and masts of ships, &c. *Chamberl.*

SURVEYOR OF THE KING'S ORDNANCE. This officer surveys the ordnance and provisions of war, allows bills of debt, and keeps the checks on labourers' works, &c.

SURVEYORS OF THE WARDS AND LIVERIES. This office was abolished, with the courts of wards and liveries, by the 12 *Car. 2. c. 24.*

SURVIVOR, from Fr. *survivre*, Lat. *supervivo*.] The longer liver of two joint-tenants, or of any two persons joined in the right of a thing. He that remaineth alive after others be dead, &c. *Broke, 33.* See *Joint-tenant.*

SUSPENSE, SUSPENSION, suspensio.] A temporal stop, or hanging up, as it were, of a man's right for a time.

In legal understanding, it is taken to be where a rent, or other profit out of lands, by reason of the unity of possession of the rent, &c. and the land out of which it issues, is not in *esse* for a certain time, *et tunc dormit*, but may be revived or awaked. And it differs from extinguishment, which is when it dies or is gone for ever. *Co. Litt. 213.*

A suspension of rent is, when either the rent or land is so conveyed, not absolutely and finally, but for a time, after which the rent will be revived again. *Vaugh. 109.* A rent may be suspended by unity for a time; and if a lessor does any thing which amounts to an entry on the land, though he presently depart, yet the possession is in him sufficient to suspend the rent, until the lessee do some act which amounts to a re-entry. *Vaugh. 39; 1 Leon. 110.* As rent is not issuable out of a common, the lessor's inclosing the common cannot suspend his rent. *Cro. Jac. 679.*

If part of a condition is suspended, the whole condition, as well for payment of the rent, as doing a collateral act, is suspended. 4 *Rep. 25.* And a thing or action personal once suspended, is for ever suspended, &c. *Cro. Car. 373.* See *Extinguishment.*

By letters of suspension passing under the signet in Scotland, process at law, or the effect of the judgment of a court, may be suspended.

SUSPENSION, is also used for a censure, whereby ecclesiastical persons are forbidden to exercise their office, or take the profit of their benefices; or where they are prohibited for a certain time, in both of them, in the whole or in part. Hence is *suspensio ab officio*, or *suspensio à beneficio*, and *ab officio et beneficio.* *Wood's Inst. 510.*

There is likewise a suspension which relates to the laity, i. e. *suspensio ab ingressu ecclesie*, or from the hearing of divine service, &c. In which case it is used, as in the canon law, *pro minore excommunicatione.* 24 *Hen. 8. c. 12.* See *Excommunication.*

SUSPENSION OF THE HABEAS CORPUS ACT. See *Habeas Corpus, Government.*

SUSPENSION FROM OFFICES. See *Mandamus, Office.*

SUS. PER COLL. On the trial of criminals, the usage (at the assizes) is for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff. As for a capital felony, it is written opposite to the prisoner's name, "Hanged by the neck;" formerly, in the days of Latin and abbreviations, *sus. per coll.* for *suspendatur per collum.* 4 *Comm. c. 32.* See *Execution of Criminals.*

SUSPICION. A person may be taken up on suspicion where a felony is done, &c.

If a private person takes up one on suspicion of felony, he must do it of his own suspicion, not upon that of another; and he must have reasonable cause of it, &c. *Hale's Hist. P. C. 78.* See further, *Arrest, Bail, Constable, Commitment, &c.*

SUSPIRAL, from Lat. *suspirare*, i. e. *ducere suspiria*.] Is used for a spring of water, passing under ground towards a conduit or cistern. See 35 *Hen. 8. c. 10.*

SUTHDURE, Sax.] The south door of a church; it was the place where canonical purgation was performed; that is, if the fact charged upon a person could not be proved by sufficient evidence, the party accused came to the south door of the church, and there, in the presence of the people, made oath that he was innocent. And plaints, &c. were heard and determined at the suthdure; for which reason large porches were anciently built at the south doors of churches. *Gervast. Dorob. de Reparation. Ecclesie Cantuar'.*

SWAN, cygnus.] A noble bird of game; and a person may prescribe to have game of swans within his manor, as well as a warren or park. 7 *Rep. 17, 18.* A swan is a bird-royal (in England; but it seems not in Scotland, *Erskine, B. 2. tit. 6. § 15.*) All white swans not marked, which have gained their natural liberty, and are swimming in an open and common river, may be seized to the use of the king by his prerogative. But a subject may have a property in white swans not marked; as any man may have such swans in his private waters, and the property of them belongs to him, and not to the king; and if they escape out of his private waters into an open and common river, he may retake them; though it is otherwise if they have gained their natural liberty, and swim in open rivers, without such pursuit. Stealing swans marked and pinioned, or unmarked, if kept in a mote, pond, or private river, and reduced to tameness, is said to be felony. *H. P. C. 68.* See *Larceny, I. 1.*

No fowl can be a stray but a swan. 4 *Inst. 280.*

No person may have a swanmark except he have lands of the yearly value of five marks, and unless it be by grant of the king, or his officers lawfully authorised, or by prescription. 22 *Edw. 4. c. 6.*

By the 11 *Hen. 7. c. 17.* he that steals the eggs of swans out of their nests shall be imprisoned a year and a day, and be fined at the king's pleasure.

But this enactment was superseded by the 1 *Jac. 1. c. 27. § 2.* which declares that every person taking the eggs of swans out of their nests, or wilfully breaking or spoiling them, may, on conviction before two justices, on the oath of one witness, be committed to gaol for three months, unless he pay to the churchwardens, for the use of the poor, 20s. for every egg; or, after one month of his commitment, become bound with two sureties in 20l. a piece, before two justices, never to offend again in like manner.

SWANHERD. The king's swanherd, *magister deductus cygnorum.* *Pat. 16 R. 2.*

SWARF-MONEY. A custom or service; viz. one penny halfpenny, paid before the rising of the sun; the party must go three times about the cross, and say the swarf-money, and then take witness and lay it in the hole; and he is to do so well that his witness do not deceive him; for if it be not so paid, he shall pay a great forfeiture, viz. xxxs. and a white bull. This account was found in an old MS. containing the rents due to the Catesbys in Lodbrooke, and other places in Warwickshire. It seems to be a corruption from ward-money, and that again from guard-money; money paid in and out of the service of castle-guard.

SWATH, Sax. swatha.] A swathe; or, as in *Ken* a sweat, and in some parts a sward; a straight row of grass or corn, as it lies after the scythe at the first mowing. *it. Paroch. Antiq. 399.*

SWEARING, imprecatio.] Is an offence against God and religion; and a sin, of all others, the most extravagant and unaccountable, as having no benefit or advantage attending it. Several good laws and statutes have been made for punishing this crime. By the 21 *Jac. 1. c. 20.* it was enacted that if any person should profanely swear or curse in the presence of a justice of peace, or the same should be proved

before a justice, he should forfeit 1s. for every offence to the use of the poor, to be levied by distress; and for want of a distress, be set in the stocks, &c.

By the 19 Geo. 2. c. 21. which repeals all former statutes, if any person shall profanely curse or swear, and be convicted by the oath of any one witness before any justice of peace, &c. he shall forfeit as follows, viz. Every day labourer, common soldier, common sailor, and common seaman, 1s. (sailors are also punishable for this offence by a court-martial.) Every other person under the degree of a gentleman, 2s. Every person of or above the degree of a gentleman, 5s. A second offence double, and every other offence treble. If the offence be committed in the hearing of a magistrate, he may convict without further proof. If the offence be committed in the hearing of a constable, if the offender be unknown to him, he shall secure him, and carry him before a justice of peace; but if the offender be known to the constable, he shall make information against him before a justice of peace.

On information, a justice is to order the offender to appear, and if on conviction he do not pay or give security for the penalty, he shall be sent to the house of correction for ten days; or being a common soldier or sailor, be set in the stocks. On default of duty, justices to forfeit 5l. and constables 40s. All convictions are to be written on parchment, and returned to the next sessions. The penalties to go to the poor of the parish, and the offender to pay all charges of conviction, or be committed to the house of correction for six days extraordinary. All prosecutions to be within eight days. This act to be read in all churches four times a year, under the penalty of 5l. The justice's clerk may take for the information, summons, and conviction, 1s. and no more.

Each oath or curse being a distinct or complete offence, a person may incur any number of penalties in one day, 4 *Comm. c. n.* Though the conviction cannot be removed by certiorari, yet an information will lie against a magistrate corruptly convicting under it without hearing the defendant's witnesses. *Burn's J. title Swearing.*—Conviction for swearing 100 oaths, viz. "by G—," and 100 curses, viz. "G—d— you," is good, without repeating them 100 times in the conviction. 2 *Ld. Raym.* 1370; *Str.* 608.

SWEARING THE PEACE. See *Surety of the Peace.*

SWEEPAGE. The crop of hay got in a meadow, called also the swepe in some parts of England. *Co. Litt. fol. 4.*

SWEINMOTE, Court of the Swains or Countrymen. One of the Forest Courts, which is to be holden before the Verderers as judges, by the steward of the Sweinmote, thrice in every year, the swains and freeholders within the forest composing the jury. The principal jurisdiction of this court is, first, to inquire into the oppressions and grievances committed by the officers of the forest; and, secondly, to receive and try presentments, certified from the Court of Attachments, against offenders in vert and venison. 34 *Edw. 1. st. 5. c. 1.* And this court may not only inquire, but convict also, which conviction shall be certified to the court of justice-seat, under the seals of the jury; for this court cannot proceed to judgment. 4 *Inst.* 289. See *Forest.*

SWINDLER. A cheat; one who lives by cheating. It is a modern term.

To print of one that he is a swindler has been held libellous and actionable. 1 *T. R.* 748 but merely to say to another, "you are a swindler" has been denied to be actionable. 2 *H. Bl.* 501. See *Cheat False Pretences, Fraud, III. Larceny.*

SWINE. Shall not go unminged in woods, 35 *Hen. 8. c. 17.* See *Hogs, London, Nuisance, Police.*

SWOLING OF LAND, solinga vel swolunga terræ; Sax. swolung, from sul, aratrum, as to this day, in the west country, a plough is called a sul.] So much land as one plough can till in a year, a hide of land; though some writers say it is an uncertain quantity.

SWORN BROTHERS, fratres jurati.] Persons who, by mutual oath, covenanted to share each other's fortune: formerly, in any notable expedition, to invade and conquer an enemy's country, it was the custom for the more eminent soldiers to engage themselves, by reciprocal oaths, to share the rewards of their service: so, in the expedition of William Duke of Normandy into England, Robert de Oily, and Roger de Ivery, were sworn brothers and co-partners in the estate which the Conqueror allotted them. *Paroch. Antiq.* 57.

This practice gave occasion to our proverb of sworn brothers, or brethren in iniquity; because of their dividing plunder and spoil. See *Ward on the Law of Nations.*

SYB AND SOM, peace and security. *Ld. Eccl. Canuti, c. 17. Termes de la Ley.*

SYLVA CÆDUA. Wood under twenty years' growth: coppice-wood. 45 *Edw. 3. c. 3.* It is otherwise called in Law-french *subbois.* 2 *Inst. fol. 642.* See *Tithes, Wood.*

SYMBOLUM. A symbol, or sign in the sacrament; the creed of the apostles is often called by this name by our historians.

Property is in many cases transferred by the delivery of symbols: as copyholds in England by the rod. In Scotland, lands are resigned by a vassal to his superior by the staff and baton; and there in giving seisin, as in England in cases of *feoffment*, (see that tit. and tit. *Livery of Seisin*), the symbols are varied according to the nature of the subjects: thus in giving seisin of lands, the symbols are *earth and stone* of the lands; of an annual rent out of lands *earth and stone with a penny in money*; of fishings, *net and cobble*; of mills, *clap and hopper*; of houses, *hasp and staple*; of tithes, *a sheaf of corn*; of patronage, *a psalm book and the keys of the church*; of jurisdiction, *the book of court.*

SYNDICOS. An advocate or patron; a burgess or recorder of a town, &c. *Mat. Paris, anno 1245.*

SYNGRAPH, synographus.] A deed, bond, or writing, under the hand and seal of all the parties. See *Chirograph.*

SYNOD, synodus.] A meeting or assembly of ecclesiastical persons concerning religion; being the same thing in Greek as convocation in Latin.

Of synods there are four kinds: 1st. A general or universal synod or council, where bishops of all nations meet. 2ndly, A national synod, of the clergy of one nation only. 3dly, A provincial synod, where ecclesiastical persons of a province only assemble, being now what is called the convocation. 4thly, A diocesan synod, of those of one diocese, &c.

Our Saxon kings usually called a synod or mixed council, consisting of ecclesiastics and the nobility, three times a year; which is said to have been the same with our parliament. See *Convocation, King, V. 3.*

A synod in Scotland is composed of three or more Presbyteries.

SYNODAL, synodalc.] A tribute or payment in money, paid to the bishop or archdeacon, by the inferior clergy, at Easter visitation; it is called *synodale* or *synodicum*, quia in synodo frequentius dabatur. *Right, Clerg.* 59. They are likewise termed *synodics*, in the 34 *Hen. 8. c. 16.* And sometimes *synodale* is used for the synod itself; and synodals provincial, the canons or constitutions of a provincial synod. 25 *Hen. 8. c. 19.*

SYNODALES TESTES, Synods-men; thence corrupted to Sidesmen.] Were the urban and rural deans, whose office at first was to inform and attest the disorders of the clergy and people in the episcopal synod; and for which a solemn oath was given them to make their presentments. But when they sunk in this authority, the synodical witnesses were a sort of impanelled grand jury, composed of a priest and two or three laymen of every parish, for the informing of or presenting offenders: at length two principal persons for each diocese were annually chosen; till, by degrees, this office of inquest and information was devolved upon the churchwardens. (See that title.) *Paroch. Antiq.* 649.

T.

TAIL.

T. EVERY person convict of any felony, save murder, and admitted to the benefit of his clergy, was to be marked with a T. upon the brawn of his thumb. 4 Hen. 7. c. 13. repealed by 7 & 8 Geo. 4. c. 27.

TABARD, TABARDER. The bachelor scholars on the foundation of Queen's College, Oxford, are called tabiters or tabarders; and these scholars were named tabiters, from a gown worn by them, called a tabert, tabarr, or tabard. For Verstegan tells us, that tabert anciently signified a short gown that reached not farther than the middle of the leg; and it remains for the name of such in Germany and other countries, which, with the Teutonic and Saxon taber, signify all a kind of garment, &c.

TABARDUM. A garment like a gown; and used for an herald's coat, but generally taken for the gown of ecclesiastics. Matt. Paris, 164.

TABELLION, tabellio. A notary public. Matt. Paris, anno 1236.

TABLE-RENTS, redditus ad mensam. Rents paid to bishops, &c. reserved and appropriated to their table or housekeeping. See Board-land.

TACFREE. Is used, in old charters, as an exemption from payments, &c. Cum housbold & haybold & tacfree de omnibus propriis porcis suis infra omnes metas de C. that is, they paid nothing for their hogs running within that limit. Blount.

TACITE RELOCATION. Where the lessor suffers the lessee to continue after the lease is expired, paying as formerly during the lease, this is termed a tacite relocation, that is a silent or understood reletting of the premises. It is a Scotch term derived from the civil law.

TACK. A lease: tack-duty, the rent reserved on a lease. Scotch Law Diet.

TAIL; FEE-TAIL,

FEODUM TALLIATUM; from the Fr. *tailler*, to cut; either because the heirs general are by this means cut off; or because this estate is a part cut out of the whole. See Tenures, III. 6.

An estate in fee-tail is a limited fee, as opposed to a fee-simple: it is that inheritance whereof a man is seised to him and the heirs of his body, begotten or to be begotten; limited at the will of the donor. He that giveth lands in tail, is called the donor; and he to whom the gift is made, the donee. Litt. § 18. Estates in fee-tail are the (comparatively modern) offspring of the conditional fees at common law. Before the statute *de donis*, if lands were given to a man and the heirs of his body, it was interpreted to be a fee-simple presently by the gift, upon condition that he had issue; and if he had issue, the condition was supposed to be performed for three purposes, viz. to alien and disinherit the issue, and by the alienation to bar the donor or his heirs of all possibility of the reversion; to forfeit the estate for treason or felony; and to charge it with rent, &c. But, by the statute *de donis*, the will and intention of the donor is to be observed; as that

TAIL.

the tenant in tail shall not alien after issue had, or before, or forfeit or charge the lands longer than for his own life, &c. and the estate shall remain to the issue of the donee, or to the donor or his heirs, where there is no issue; so that whereas the donee had a fee-simple before, now he has but an estate-tail, and the donor a reversion in fee expectant upon that estate-tail. Co. Litt. 19. See post, III.

In this place, without further entering into the origin of these estates, (for which see *Tenures*, above referred to,) we shall consider,

- I. What things may or may not be entailed, under the statute *de donis*: Westm. 2. (13 Edm. 1. st. 1.) c. 1.
- II. The several species of estates-tail: and further, how they are respectively created.
- III. The incidents to an estate-tail; and the effect of the various statutes relating thereto.
- IV. The provisions of the recent statute, 3 & 4 Wm. 4. c. 74.

I. **TENEMENTS** is the only word used in the statute: and this Coke expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which savour of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as rents, estovers, commons, and the like. 1 Inst. 19, 20. Also officers and dignities, which concern lands, or have relation to fixed and certain places, may be entailed. 7 Rep. 38. But mere personal chattels, which savour not at all of the realty, cannot be directly entailed. Neither can an office, which merely relates to such personal chattels, nor an annuity, which charges only the person, and not the lands, of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee hath still a fee conditional at common law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner. 1 Inst. 19, 20. An estate to a man and his heirs for another's life cannot be directly entailed: for this is strictly no estate of inheritance, and therefore not within the statute *de donis*. 2 Vern. 225. Neither can a copyhold estate be entailed by virtue of the statute; for that would tend to encroach upon and restrain the will of the lord: but, by the special custom of the manor, a copyhold may be limited to the heirs of the body; for here the custom ascertains and interprets the lord's will. 3 Rep. 8.

If a term for years, or any personal chattel, (except an annuity, see that title, and tit. *Rents*.) be granted or devised by such words as would convey an estate-tail in real property, the grantee or devisee has the entire and absolute interest, without having issue; and as soon as such interest is vested in any one, all subsequent limitations, of consequence, become null and void. 1 Bro. C. R. 274; 1 Inst. 20. *Fearne*. See post.

Two things seem essential to an entail, within the statute

de donis. One requisite is, that the subject be land, or some other thing of real nature. The other requisite is, that the estate in it be an inheritance. Therefore neither estates *pur autre vie* in lands, though limited to the grantee and his heirs during the life of *cuius que vie*, nor terms for years, are entailable any more than personal chattels; because, as the latter, not being either interests in things real, or of inheritance, want both requisites; so the two former, though interests in things real, yet, not being also of inheritance, are deficient in one requisite.

However, estates *pur autre vie*, terms for years, and personal chattels, may be so settled as to answer the purposes of an entail, and be rendered unalienable for almost as long a time, as if they were entailable in the strict sense of the word. Thus estates *pur autre vie* may be devised or limited in strict settlement, by way of remainder, like estates of inheritance, and such as have interests in the nature of estates-tail may bar their issue and all remainders over, by alienation of the estate *pur autre vie*, as those who are, strictly speaking, tenants in tail may do by fine and recovery now abolished, (see *post*); but then the barring of issue is not an essential preliminary to the power of alienation, in the case of an estate *pur autre vie*, granted to out and the heirs of his body, as it is in the case of a conditional fee, from which the mode of barring by alienation was evidently borrowed.

The manner of settling terms for years and personal chattels is different from the above, for it then no remainder can be limited; but they may be entailed by executory devise, or by deed of trust, as effectually as estates of inheritance; if it is not attempted to render them unalienable beyond the duration of lives in being, and twenty-one years after, and perhaps, in the case of a posthumous child, a few months more: a limitation of time, not arbitrarily prescribed by our courts of justice, but wisely and reasonably adopted, in analogy to the case of feoffholds of inheritance, which cannot be so limited by way of remainder, as to postpone a complete bar of the entail by fine or recovery for a longer space. See *Executory Devise, Limitation, Remainder*.

It is also proper to observe, that in the case of terms of years and personal chattels, the very vesting of an interest, which in reality would be an estate-tail, bars the issue and all the subsequent limitation as effectually as fine and recovery (see *post*), in the case of estates entailable within the statute *de donis*, or a simple alienation in the case of conditional fees and estates *pur autre vie*, and farther, that if the executory limitations of personality are on contingencies too remote, the whole property is in the first taker.

Upon the whole, by a series of decisions within the two last centuries, and after many struggles in respect to personality, it is at length settled that every species of property is, in substance, equally capable of being settled in the way of entail; and though the modes vary according to the nature of the subject, yet they tend to the same point, and the duration of the entail is circumscribed almost as nearly within the same limits as the difference of property will allow.

As to the entail of estates *pur autre vie*, see 2 Vern. 184, 257; 1 P. Wms. 262; 1 Atk. 524; 2 Atk. 259, 376; 3 Atk. 461; and 2 Ves. 681. As to the entails of terms for years, and personal chattels, see *Manning's case*, 8 Co. 94; *Lambert's case*, 10 Co. 46 b; *Child v. Bailey*, W. Jo. 15; *Duke of Norfolk's case*, 9 C. C. 1. See also *Carth. 267*; 1 P. Wms. 1. And on the whole subject, *Fearne's Essay on Contingent Remainders and Executory Devises*; and 1 Inst. 20. in n.

II. ESTATES-TAIL are either general or special.

TAIL-GENERAL is where land and tenements are given to one and the heirs of his body begotten, which is called tail general, because how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail *per formam doni*. Litt. § 14, 15.

Tenant in TAIL-SPECIAL is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways. One is, where lands and tenements are given to a man and the heirs of his body, on Mary his now wife to be begotten: here no issue can inherit but such special issue as is engendered between them two; not such as the husband may have by another wife; and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his heirs) give him an estate in fee; but they being heirs to be by him begotten, this makes it a fee-tail; and the person being also limited on whom such heirs shall be begotten (*viz.* Mary his present wife), this makes it a fee-tail-special. See Litt. § 16, 27, 28, 29.

Estates in general and special tail are farther diversified by the distinction of sexes in such entails; for both of them may either be in TAIL-MALE or TAIL-FEMALE. As if lands be given to a man and his heirs male of his body begotten, this is an estate in *tail-male general*; but if to a man and the heirs female of his body on his present wife begotten, this is an estate in *tail-female special*. And, in case of an entail-male, the heirs female shall never inherit, nor any derived from them; nor, *et converso*, the heirs male, in case of a gift in tail-female. Litt. § 21, 22. Thus if the donee in tail-male hath a daughter, who dies leaving a son, such grandson in this case cannot inherit the estate-tail, for he cannot deduce his descent wholly by heirs male. Litt. § 24. And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore if a man hath two estates tail, the one in tail-male, and the other in tail-female; and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates, for he cannot convey his descent wholly either in the male or female line. 1 Inst. 25.

There are other estates-tail within the equity of the statute; as if lands are given to a man and his heirs males or females of his body begotten, the issue male or female shall only inherit according to the limitation. By virtue of the statute, here the daughter may be heir by descent, though there be a son. But in the case of a purchase, *Lord Coke* says there cannot be a heir female where there is a son who is right heir at law. 1 Inst. 24, 164. But this doctrine is now disputed, if not over-ruled. See *Heir, II. ad fin.* And where there is no heir to take according to the gift, as when issue fails, the land shall revert to the donor, or descend to him that is to have it after the estate tail is spent. 1 Inst. 25.

As the word heirs is necessary to create a fee, so in further limitation of the strictness of feudal donation, the word body, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make a state tail. As if the grant be to a man and his issue of his body, to a man and his seed, to a man and his children, or offspring; all these are only estates for life, there wanting the words of inheritance, *his heirs*. 1 Inst. 20. So, on the other hand, a gift to a man and his heirs male or female, is an estate in fee-simple, and not in fee-tail; for there are no words to ascertain the body out of which they shall issue. Litt. § 31. 1 Inst. 27. Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate tail may be created by a devise to a man and his seed, or to a man and his heirs male; or by any words which show an intention to restrain the inheritance to the descendants of the devisee. 1 Inst. 9, 27. See *Will*.

Further, as to the effect of particular words in creating estates-tail.

If lands are given to the husband and wife, and to the heirs of their bodies, both of them have an estate in special tail, by reason of the word heirs, for the inheritance is not

limited to one more than the other. Where lands and tenements are given to a man and his wife, and to the heirs of the body of the man, the husband hath an estate in general tail, and the wife an estate for life, as the word heirs relates generally to the body of the husband. And if the estate is made to the husband and wife, and to the heirs of the body of the wife by the husband begotten; there the wife hath an estate in special tail, and the husband for term of life only, because the word heirs hath relation to the body of the wife, to be begotten by that particular husband. If an estate be limited to a man's heirs which he shall beget on his wife, it creates a special tail in the husband; but the wife will be entitled to nothing, &c. *Litt. § 26, 28; Co. Litt. 22, 26.*

Lands given to a man and woman unmarried, and to the heirs of their bodies, will be an estate in special tail, for they may marry. *1 Inst. 25; 10 Rep. 50.* And though lands are given to a married man and another man's wife, and the heirs of their two bodies, it may be a good estate-tail, for the possibility of their intermarrying. *15 Hen. 7.*

A general tail and a special tail may not be created at one and the same time; if they are, the general, which is greater, will frustrate the special. *1 Inst. 28.*

It is the word body, or other words amounting to it, which makes the entail; and a gift to the heirs male, or heirs female, without any thing further, is a fee-simple estate, because it is not limited of what body; and hence a corporation cannot be seised in tail. *1 Inst. 18, 20, 27.*

In a devise or last will an estate tail may be created without the word body; also begotten shall be supplied and necessarily intended. *Noy's Max. 101; 1 Inst. 26.* If one gives lands to a man and his issue, or children of his body, without the words "his heirs" to convey the inheritance, he has but an estate for life; though such words may be good enough to convey the inheritance in a will; as estates-tail by devise are always more favoured in law than estates-tail created by deeds. *1 Inst. 20.*

The word heirs is necessary to create an estate-tail and inheritance by deed; and where an use was limited to A. B. and to his heirs male, lawfully to be begotten; these last words imply that it must be heirs male of his body, because no other heir male can inherit by virtue of his grant but such who are lawfully begotten by the grantor. *7 Rep. 41.* If a man makes a feoffment to the use of himself for life, remainder to the heirs male of his body, this is an estate-tail executed in him; and so it is if he covenanted to stand seised in the same manner. *1 Mod. 159.*

By a marriage settlement and fine levied, &c. to the use of the husband and wife for their joint lives, remainder to the heirs of the body of the wife by the husband to be begotten, remainder (the wife surviving the husband) to her for life, remainder to the right heirs of the husband; this was held to be an estate-tail executed in the wife. *Raym. 127; 3 Salk. 338.* Land is conveyed to the use of a man and his wife for their lives, and after to their next issue male in tail, then to the use of the husband and wife, and of the heirs of their bodies begotten, they having no male issue; by this conveyance husband and wife are tenants in special tail executed, and when they have issue male, they will be tenants for life, remainder to their son in tail, the remainder to them in special tail. *1 Inst. 28.*

Where a person having an estate in fee conveys it by lease and release to the use of himself for life, with remainder to trustees for their lives, and remainder to the heirs of his body, he hath an estate-tail in him; but he is only tenant for life in possession: it would be otherwise if there had been no intermediate estate in the trustees for their lives. *2 Ld. Raym. 855.* A man seised of land in fee makes a gift of it in tail, or lease for life, remainder to the right heirs male of the body of the donor; this remainder, it is said, will be a fee-simple, and not an estate-tail. *Dyer, 156. See Remainder.* If the gift or grant of the land be to J. S. and his heirs, to hold to him and the heirs of his body, &c. here he will have

an estate in tail, and a fee-simple upon it. *Litt. ch. 2; 1 Inst. 21.* Lands are given to two brothers, &c. and to the heirs of their bodies begotten; during their lives they shall have joint estates, so that the survivor will have all for his life; and after their deaths their heirs have estates in general tail by moieties in common one with another. *1 Inst. 25; 1 Rep. 140.*

When a remainder is limited to two, and the heirs male of their bodies, they have not joint but several estates-tail; and between baron and feme, it is said, several moieties may be of an estate-tail, as well as of a fee-simple. *Cro. Eliz. 220; Moor, 228; 2 Lil. Abr. 551.* A feoffment was made to the use of the feoffor for life, remainder to W. R. his son and his heirs; and for want of issue of him, remainder to the right heirs of the feoffor; adjudged W. R. hath only an estate in tail; for though the first words of the sentence, viz. to his son and his heirs, make a fee-simple, the subsequent words in the same sentence, i. e. for want of issue of him, make an estate-tail, by qualifying and abridging the same. *5 Mod. 266; 3 Salk. 337. See Helt. 57; Dyer, 834; and tit. Remainder.*

If a person gives land to A. for life, and after his death without issue, then to another person; though here is an express estate for life given to A. the subsequent words make an estate-tail. But where lands are devised to A. during life, the remainder to trustees, remainder to his first son, &c. and if A. dies without issue, then, &c. the limitation upon the devisee's death, it is said, will not give an estate in tail to A. but it shall be here intended, that if he died without having a son. *1 P. Wms. 605.* A father having two sons devised his lands to his youngest son, and if he died without heirs, then to his eldest son and his heirs; the youngest son had an estate-tail, because the devise to him, and if he died without heirs, is the same as if the testator had devised it in these words, viz. if he die without heirs of his body; for otherwise the remainder limited to the eldest son had been void, as the youngest son cannot die without heirs so long as the eldest is living. *1 Roll. Abr. 836. See also Executory Devise, Remainder.*

In ejectment the case was, the father, having three sons, devised his lands to his second son and his heirs for ever, and for want of such heirs, then to the right heirs of the father; then the father died, and his second son entered, and died without issue, leaving the eldest son; it was resolved, that the second son had but an estate-tail, and that the devise over by these words, "and for want of such heirs," is void in point of limitation, for the testator's intent was that the lands should descend from himself, and not from his second son; and the words "want of such heirs" could import no other than want of issue, &c.; so that the eldest son takes by descent in this case, and not by the will. *1 Salk. 250. See Executory Devise.*

A person devised land to his wife for life, remainder to his son, and his heirs for ever; and if he died without heirs, the same to remain to his two daughters: in this case it was held in equity, that the rule is, where a remainder over is to one who may be the devisee's heir at law, such limitation will be good, and the first construed an estate-tail; for the generality of the word heirs shall be restrained to heirs of the body, since the testator could not but know that the devisee would not die without an heir, while the remainder-man or any of his issue continued. But where the second limitation is to a stranger, it is merely void, and the first is a fee-simple. *Talbot's Chan. Ca. 2. See Executory Devise, Remainder.*

There is also another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates in *libero maritagio*, or frank-marriage. These are defined to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frank-marriage. *Litt. § 17.* Now by such gift, though nothing but the word frank-mar-

riage is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten, that is, they are tenants in special tail. For this one word, frank-marriage, does, *ex vi termini*, not only create an inheritance, like the word frankalmoign, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frank marriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee. *Litt. § 19, 20. See Frank-marriage.*

III. THE incidents to a tenancy in tail, under the *stat. Westm. 2.* are chiefly these—1. That a tenant in tail may commit waste on the estate-tail, by felling timber, pulling down houses, or the like, without being impeached or called to account for the same. 2. That the wife of the tenant in tail shall have her dower, or thirds, of the estate-tail. 3. That the husband of a female tenant in tail may be tenant by the curtesy of the estate-tail. 4. That an estate-tail might, until recently, be barred, or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir. 1 *Inst. 224; 10 Rep. 38; and may now be barred by deed under the provisions of the late statute, see post, IV.*

The establishment of this family law (as the statute *de donis* is properly styled by *Pigott*) occasioned, from time to time, infinite difficulties and disputes. Children grew disobedient when they knew they could not be set aside; farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then, under colour of long leases, the issue might have been virtually disinherited: creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth. Innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient books are full. And treasons were encouraged; as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded as the source of new contentions, and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm. *Co. Litt. 19; Moor, 156; 10 Rep. 38.* But as the nobility was always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature; and therefore, by the connivance of an active and politic prince, a method was devised to evade it. 2 *Comm. c. 7.*

About two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV., which were then openly declared by the judges to be a sufficient bar of an estate-tail. 1 *Rep. 111, 112; 10 Rep. 39.* For though the courts had, so long before as the reign of Edward III., very frequently limited their opinion that a bar might be effected upon these principles, yet it never was carried into execution; till Edward IV., observing in the disputes between the Houses of York and Lancaster, how little were protected by the sanctuaries of entails, gave his countenance to this proceeding, and suffered *Talbot's case* to be brought before the court, wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail should be an effectual destruction thereof. 1 *Year-book 1 Edw. 3, 14, 19; 10 Rep. 39; 20 Bro. Abr.; Ibid. 30; tit. Fine of Recover, in Value, 19; tit. Taille, 36.* See further, *Fine of Lands, Recovery.*

This expedient having greatly abridged estates-tail, with regard to their duration, others were soon invented to strip

them of other privileges. The next that was attacked was their freedom from forfeitures for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently resettled in a similar manner to suit the convenience of families, had address enough to procure a statute, (26 *Hen. 8. c. 13.*) whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason. 2 *Comm. c. 7.*

The next attack which they suffered in order of time, was by the 32 *Hen. 8. c. 28.* whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. See *Lease, II.* But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines, (4 *Hen. 7. c. 24.*) by 32 *Hen. 8. c. 36.* which declared a fine duly levied by tenant in tail to be a complete bar to him and his heirs, and all other persons claiming under such entail. This was evidently agreeable to the intention of Henry VII., whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favourably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *de donis* had expressly declared, that they should not be a bar to estates-tail. But the statute of Henry VIII., when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention. Yet, in order to preserve the property of the crown from any danger of infringement, all estates-tail created by the crown, and of which the crown has the reversion, were excepted out of this statute. And the same was done with regard to common recoveries, by the 34 & 35 *Hen. 8. c. 20.* which enacted, that no feigned recovery had against tenants in tail, where the estate was created by the crown, and the remainder or reversion continues still in the crown, should be of any force and effect. Which was allowing, indirectly and collaterally, their full force and effect with respect to ordinary estates-tail, where the royal prerogative was not concerned. 1 *Inst. 372; 2 Comm. c. 7.*

Lastly, by the 33 *Hen. 8. c. 39. § 75.* all estates-tail are rendered liable to be charged for payment of debts due to the king by record or special contract; as since, by the bankrupt laws, they are also subjected to be sold for the debts contracted by a bankrupt. See the clauses in the recent statute, *post, IV.* And by the construction put on the 43 *Eliz. c. 4.* an appointment by tenant in tail of the lands entailed, to a charitable use, was held good, without fine or recovery. See further, *Charitable Uses.*

Estates-tail, being thus by degrees unfettered, are reduced again to almost the same state, even before issue born, as conditional fees were in at common law, after the condition was performed, by the birth of issue. For, first, the tenant in tail was, until recently, enabled to alien his lands and tenements by fine, by recovery, or by certain other means, and he may now do so by deed, *post, IV.*; and thereby may defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the crown. Secondly, he is liable to forfeit them for high treason. And, lastly, he may charge them with reasonable leases, and also with such of his debts as are due to the

crown, on specialties, or have been contracted with his fellow subjects in a course of extensive commerce. 2 Comm. c. 7.

An estate-tail cannot merge by the accession of the fee-simple to it. But it has been adjudged, that two fees immediately expectant upon one another, (as where a man is tenant in tail and remainder in fee to the tenant in tail,) cannot subsist in the same person; and the statute *de donis* having made estates-tail a kind of particular estates, they must, like all other such estates, be subject to merger and extinguishing, when united with the absolute fee. 8 Rep. 74; 1 Salk. 388.

By the recent statute, base fees, when united with the immediate reversions, are to be enlarged instead of merging in the latter, as they formerly would have done. See *post*, IV.

IV. By the 3 & 4 Wm. 4. c. 74. fines and common recoveries have been abolished. See the clauses of the act applicable to each of these modes of assurance under the titles *Fine of Land*, and *Recovery*.

By § 14. all warranties of lands after the 31st December 1833, made or entered into by any tenant in tail thereof shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.

By § 15. after the 31st Dec. 1833, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee-simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate-tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including his majesty, whose estates are to take effect after the determination or in defeasance of any such estate-tail; saving always the rights of all persons in respect of estates prior to the estate-tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by the act authorized to be made. See § 40. *post*.

A tenant for life in possession, with a remote remainder in tail, could by a recovery with double voucher have barred such entail, but without prejudice to the intermediate interests between his estate for life and remainder in tail. 1 T. R. 738; 6 Br. P. C. 388.

§ 16. Provides that where, under any settlement made before the passing of the act, any woman shall be tenant in tail of lands within the provisions of the 11 Hen. 7. c. 20. the power of disposition therein-before contained as to such lands shall not be exercised by her except with such assent as would under the said act have rendered valid a fine or common recovery levied or suffered by her of such lands.

Provided (§ 17.) except as to lands in settlements before that act, the 11 Hen. 7. c. 20. shall be repealed.

§ 18. Provides that the power of disposition therein before contained shall not extend to tenants of estates-tail who, by the 34 & 35 Hen. 8. c. 20. (relating to lands where the reversion is in the crown,) or by any other act are restrained from barring their estates-tail, or to tenants in tail after possibility of issue extinct.

§ 19. After the 31st Dec. 1833, in every case in which an estate-tail in any lands shall have been barred and converted into a base fee, either before or on or after that day, the person who, if such estate-tail had not been barred, would have been actual tenant in tail of the same lands shall have full power to dispose of such lands as against all persons, including his majesty, whose estates are to take effect after the determination of the base fee into which the estate-tail shall have been converted, so as to enlarge the base fee into a fee-simple absolute; saving always the rights of all persons

in respect of estates prior to the estate-tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by the act authorized to be made.

§ 20. That nothing in the act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest which he may have as issue inheritable to any estate-tail therein.

§ 21. That if a tenant in tail of lands shall make a disposition of the same, under the act, by way of mortgage, or for any other limited purpose, such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as against whom such disposition is by the act authorized, notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition may be effected: provided that if the estate created by such disposition shall be only an estate *pour autre vie*, or for years absolute or determinable, or if, by a disposition under the act by a tenant in tail of lands, an interest, charge, lien, or incumbrance shall be created without a term of years absolute or determinable, or any greater estate, for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, &c., notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition may be effected.

By § 22. the owner of the first existing estate under a settlement, prior to an estate tail under the same settlement, is to be the protector of the settlement. And the following sections, from § 23. to 31. contain a variety of provisions with respect to whom shall be the protector of the settlement according to the circumstances of the case.

§ 32. Any settlor entailing lands may appoint, by the settlement by which the lands shall be entailed, any number of persons in esse, not exceeding three, and not being aliens, to be protector of the settlement in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector, and by means of a power to be inserted in such settlement to perpetuate during the whole or any part of such period the protectorship of the settlement in any one person or number of persons in esse, and not being an alien or aliens, whom the donee of the power shall think proper by deed to appoint protector of the settlement in the place of any one person or number of persons who shall die or shall by deed relinquish his or their office of protector; and the person or persons so appointed shall, in case of there being no other person then protector of the settlement, be the protector, and shall, in case of there being any other person then protector of the settlement, be protector jointly with such other person: provided that by virtue of any such appointment the number of the persons to compose the protector shall never exceed three. provided further, that every deed by which a protector shall be appointed under a power in a settlement, and every deed by which a protector shall relinquish his office, shall be void, unless inrolled in Chancery within six calendar months after the execution thereof: provided further, that the person who but for this clause would have been sole protector of the settlement may be one of the persons to be appointed protector under this clause, if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector if the other persons constituting the protector shall have ceased to be so by death or relinquishment of the office by deed, and no other person shall have been appointed in their place.

§ 33. In cases of lunacy of protectors, the lord chancellor, or lord keeper, or lords commissioners, or other persons intrusted with lunatics or in cases of treason or felony, &c. the Court of Chancery shall be the protector of the settlement.

§ 34. If at the time when any person, actual tenant in tail of lands under a settlement, but not entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, shall be desirous of making under this act a disposition of the lands entailed, there shall be a protector of such settlement, then the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is therein-before authorized to dispose of the same; but such actual tenant in tail may, without such consent, make a disposition under this act of the lands entailed, which shall be good against all persons who, by force of any estate tail which shall be vested in or might be claimed by, or whoa but for some previous act or default would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same, shall claim the lands entailed.

§ 35. Provided, where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail if the same had not been barred to exercise, as to the lands in respect of which there shall be such protector, the power of disposition thereinbefore contained.

§ 36. Any device, shift, or contrivance by which it shall be attempted to control the protector of a settlement in giving his consent, or to prevent him in any way from using his absolute discretion in regard to his consent, and also any agreement entered into by the protector of a settlement to withhold his consent, shall be void, and the protector of a settlement shall not be deemed to be a trustee in respect of his power of consent; and a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust.

§ 37. The rules of equity in relation to dealings and transactions between the donor of a power and any object of the power in whose favour the same may be exercised, shall not be held to apply to dealings and transactions between the protector of a settlement and a tenant in tail under the same settlement, upon the occasion of the protector giving his consent to a disposition by a tenant in tail under this act.

§ 38. When a tenant in tail of lands under a settlement shall have already created or shall hereafter create in such lands, a voidable estate in favour of a purchaser for valuable consideration, and shall afterwards under this act, by any disposition of the lands in which such voidable estate shall be created, such disposition, whatever its object may be, and whatever the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be enabled under this act of confirming the voidable estate to its full extent, then such disposition shall have the effect of confirming such voidable estate so far as such tenant in tail would then be enabled under this act of confirming the same without such consent: provided, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have received notice of the voidable estate, then the voidable estate shall not be confirmed as against such purchaser and persons claiming under him.

§ 39. If a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing of this act, or at any time afterwards, be united in the same

person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act, if such remainder or reversion had been vested in any other person.

§ 40. Every disposition of lands under this act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: provided, that no disposition by a tenant in tail shall be of any force either at law or in equity, under this act, unless made or evidenced by deed; and no disposition by a tenant in tail resting only in contract, either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this act, notwithstanding such disposition shall be made or evidenced by deed; and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as therein-after directed.

§ 41. Every assurance by a tenant in tail, except a lease not exceeding twenty-one years at a rack rent, or not less than five sixths of a rack rent, shall be inoperative unless enrolled in Chancery within six months.

§ 42. The consent of the protector may be given by the same assurance or by a distinct deed.

§ 43. And if the protector of a settlement shall, by a distinct deed, give his consent to the disposition of a tenant in tail, it shall be considered he has given an unqualified consent, unless in such deed he shall refer to the particular assurance by which the disposition shall be effected, and shall confine his consent to the disposition thereby made.

§ 44. The protector shall not revoke his consent.

§ 45. A married woman being protector may consent as a feme sole.

§ 46. The consent of a protector by distinct deed shall be void, unless enrolled with or before the assurance.

By § 47. courts of equity excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in courts of law would not be effectual.

§ 48. The lord chancellor, &c. where a protector is lunatic, shall have power to consent to a disposition by a tenant in tail, and to make such orders as shall be thought necessary; and if any other person shall be joint protector the disposition not to be valid without his consent.

And (§ 49.) the order of the lord chancellor, &c. shall be evidence of consent.

§ 50. All the previous clauses in the act, so far as circumstances and the different tenures will admit, shall apply to lands held by copy of court roll, except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate shall be an estate at law, shall be made by surrender, and except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate shall be merely an estate in equity, may be made either by a surrender or by a deed as thereinafter provided, and except so far as such clauses are otherwise altered or varied by the clauses thereinafter contained.

§ 51 & 52. relate to the verity of the consent of the protector of copyhold lands in the rolls of the manor.

§ 53. A tenant in tail of lands held by copy of court roll, whose estate shall be merely an estate in equity, shall have full power by deed to dispose of such lands under this act in the same manner as he could have done if they had been of freehold tenure; and all the previous clauses in this act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall

avail himself of this present clause; and the deed by which the disposition shall be effected shall be entered on the court rolls of the manor of which the lands thereby disposed of may be parcel; and if there shall be a protector to consent to the disposition, and such protector shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the equitable tenant in tail; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of the manor, or his steward, or the deputy of such steward, when required so to do, to enter such deed or deeds on the court rolls, and he shall indorse on each deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls: provided always, that every deed by which lands held by copy of court roll shall be disposed of under this clause, by an equitable tenant in tail thereof, shall be void against any person claiming such lands, or any of them, for valuable consideration under any subsequent assurance duly entered on the court rolls of the manor of which the lands may be parcel, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls of such manor before the subsequent assurance shall have been entered.

§ 44. Inrolment not necessary as to copyholds, otherwise than by entry on the court rolls.

§ 55. Repeals the bankrupt act, 6 Geo. 4. c. 16. § 65. so far as relates to estates tail, but is not to extend to lands of a bankrupt under a commission or fiat issued on or before the 31st of December, 1833, nor to revive former acts.

§ 56. The commissioner, in the case of an actual tenant in tail becoming bankrupt after the 31st of December, 1833, by deed may dispose of the lands of the bankrupt to a purchaser. If there be a protector who shall not consent, the estate created by the commissioners shall be as large as the bankrupt could have created without such consent.

§ 57. The commissioner, in case of a tenant in tail entitled to a base fee becoming bankrupt, and of there being no protector, is by deed to dispose of the lands of the bankrupt to a purchaser.

§ 58. relates to the consent of the protector in case of bankruptcy.

§ 59. requires, in cases of bankruptcy, the inrolment in Chancery of the deed of disposition of freehold lands, and the entry on the court rolls of the deed of disposition of copyhold lands; and of the deed of consent.

§ 60. If any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of any lands of any tenure of which the bankrupt shall be actual tenant in tail, and in consequence of there being a protector of the settlement by which the estate of such actual tenant in tail was created, and of his not giving his consent, only a base fee shall by such disposition be created in such lands, and if at any time afterwards during the continuance of the base fee there shall cease to be a protector of such settlement, then immediately thereupon, such base fee shall be enlarged into the same estate into which the same could have been enlarged under this act if at the time of the disposition by such commissioner as aforesaid there had been no such protector.

§ 61. If a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt at the time when there shall be a protector of the settlement by which the estate tail converted into the base fee was created, and if such lands shall be sold or conveyed under the present bankrupt acts, or either of them, or any other acts hereafter to be passed concerning bankrupts, and if at any time afterwards during the continuance of the base fee in such lands there shall cease to be a protector of such settlement, then immediately thereupon, the base fee in such lands shall be enlarged into the same estate into which the same could have been enlarged under this act if at the time of the adju-

dication of such bankruptcy there had been no such protector, and the commissioner acting in the execution of the fiat under which the tenant in tail so entitled shall have been adjudged a bankrupt had disposed of such lands under this act.

§ 62. A voidable estate created in favour of a purchaser by an actual tenant in tail becoming bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, shall be confirmed by the disposition of the commissioner, if no protector, or being such with his consent, or on there ceasing to be a protector; but not against a purchaser, without notice.

§ 63. All acts and deeds done and executed by a tenant in tail of lands of any tenure, adjudged a bankrupt, and which shall affect such lands, and which, if he had been entitled to such lands in fee simple absolute, would have been void against the assignees of the bankrupt's estate, and all persons claiming under them, shall be void against any disposition made of such lands under this act by such commissioner as aforesaid.

§ 64. Subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt tenant in tail shall retain his powers of disposition.

§ 65. The disposition by the commissioner of the lands of a bankrupt tenant in tail shall, if the bankrupt be dead, have in the cases therein mentioned the same operation as if he were alive.

§ 66. Every disposition by the commissioner of copyhold lands where the estate shall not be equitable shall have the same operation as a surrender; and the person to whom such land shall have been disposed of may claim to be admitted on paying the fines, &c.

§ 67. The rents of lands, of which any commissioner has power to make disposition under this act shall, until such disposition, or until it shall be ascertained that such disposition shall not be required for the benefit of the creditors of the bankrupt, be received by his assignees for the benefit of his creditors; and the assignees may proceed by action on debt for the recovery of such rents, or may distrain for the same, and in case trespass shall be brought for taking away such distress may plead thereto the general issue, and give this act or other special matter in evidence, and also, in case any such distress shall be replevied, shall have power to sue or make cognizance generally in such manner as any landlord may do by virtue of the 11 Geo. 2. c. 19. or by any other law now or hereafter to be made for the recovering of rent in arrear; and such assignees, and their bailiffs, agents, and servants, shall also have the same remedies, powers, privileges, and advantages of pleading, avowing, and making cognizance, and be entitled to the same costs and damages, and the same remedies for the recovery thereof, as landlords, their bailiffs, agents, and servants, are or hereafter may be by law entitled to have when rent is in arrear; and such assignees shall also have the same power of enforcing covenants, conditions, and agreements in respect of the lands of which such commissioner has the power of disposition under this act, and in respect of the rents thereof, and of entry into the same lands for the nonobservance of any such covenant, and of moving therefrom the tenants or other occupants thereof, and thereby determining the estate of the person who shall not have observed such covenants, &c. as the bankrupt would have had in case he had not been adjudged a bankrupt: provided, that this clause shall apply to all lands held by copy of court roll, but shall only apply to those lands of any other tenure which any commissioner acting in the execution of any such fiat as aforesaid may have power to dispose of under this act after the bankrupt's decease.

By § 68. all the provisions of the act in regard to bankrupts shall apply to their lands in Ireland.

And § 69. deeds relating to the lands of bankrupts in Ireland are to be inrolled in the Court of Chancery there.

§ 70. Repeals the 7 Geo. 4. c. 45. except as to proceedings

commenced before 1st Jan. 1834, but the 39 & 40 Geo. 3. c. 56. (passed for the relief of persons entitled to entailed estates to be purchased with trust moneys,) is not to be revived.

By § 71. the previous clauses, with certain variations, are to apply to lands of any tenure to be sold, where the purchase money is subject to be invested in the purchase of lands to be entailed, and also to apply to money subject to be invested in like manner. See *Trust*.

§ 72. As regards bankrupts the provisions of the last mentioned clause shall apply to lands of any tenure in Ireland, to be sold, where the purchase money is subject to be invested in the purchase of lands to be entailed, and also to money under the control of a court of equity in Ireland, subject to be invested in like manner.

§ 73. Any rule or practice requiring deeds to be acknowledged before enrolment shall not apply to any deed by this act required to be inrolled in the Court of Chancery in England or Ireland.

§ 74. And every deed required to be inrolled in Chancery in England or Ireland, by which lands, or money subject to be invested in the purchase of lands, shall be disposed of under this act, shall, when inrolled as required by this act, operate and take effect in the same manner as it would have done if the inrolment thereof had not been required, except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly inrolled under this act, if such subsequent deed shall be first inrolled.

See further, on the subject of estates tail, *Fine, Recovery, Tenure*.

TAILZIE OR **ENTAIL**, in Scotland, is applied to deeds whereby the legal line of succession is cut off, and an arbitrary one, according to the choice of the proprietor, substituted in its stead. In this view it appears very similar to the tail or fee-tail of the English law. But its operation is governed by very different and peculiar rules, dependent on the different forms of the Scottish law. See *Bell's Scotch Law Dict.* tit. *Entail*.

TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED, is where lands and tenements are given to a man and his wife in special tail, and either of them dies without issue had between them, the survivor hath an estate in tail after possibility of issue, &c. Also if they have issue, and the issue dies without issue, whereby there is none left who may inherit by force of the entail the survivor of the donees hath an estate tail after possibility. *Litt.* § 32. The estate of this tenant must be created by the act of God, viz. by the death of either party without issue: none can have this estate but one of the donees, or a donee in special tail; for a donee in general tail may by possibility have issue. *Litt.* § 32; 1 *Inst.* 28; 11 *Rep.* 80. And if one gives lands to a man and his wife, and the heirs of their two bodies in special tail, and they live till each of them are a hundred years old, and have no issue, yet doth the law see no impossibility of having children, and they continue tenants in tail. But if the wife die without issue, there the law seeth an apparent impossibility. 1 *Inst.* 28. See *Tenures*, III. 7.

This estate is considered by *Blackstone* as an estate for life of the legal kind, contradistinguished from such as are conventional. See *Life-Estates*. *Blackstone* also shows the propriety of the long periphrasis which the law makes use of, as absolutely necessary to give an adequate idea of the nature of this estate. 2 *Comm.* c. 8. p. 124.

This estate is, by the learned commentator, said to be of an amphibious nature, parting partly of an estate tail, and partly of an estate for life. The tenant is in truth only tenant for life, but with many of the privileges of a tenant in tail; or he is tenant in tail, with many of the restrictions of a tenant for life; as to forfeit his estate if he alien it in fee-simple: whereas such alienation by tenant

in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner, who is not concerned in interest till all possibility of issue be extinct. But in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life; which exchange can only be made of estates that are equal in their nature. See *Exchange of Lands*.

A tenant in tail after possibility of issue extinct having once been tenant in tail unto the other donee, and therefore punishable for waste, may not only commit waste, but convert to his own use the property wasted, and he shall not be restrained in equity except for malicious waste. 15 *Ves.* 427. See *Waste*. 2 *Comm.* c. 8 & n. See also 1 *Inst.* 27, 28. and the notes there; and 2 *P. Wms.* 240.

TAKING, felonious or unlawful. See *Felony, Fraud, Larceny*.

TALENT. A weight of sixty-two pounds; also a sum of money among the Greeks, of about 100*l.* value. *Merch. Dict.*

TALES, Lat.] A supply in case of a jury not appearing, or challenged as not indifferent, &c. of one or more such persons present in court as are equal in reputation to those that were impanelled, in order to make up a full jury. See *Jury*.

TALES-BOOK, name of the book in the King's Bench Office, of such persons as are admitted of the tales. 4 *Inst.* 93.

TALLAGE, *tallagium*, from the Fr. *taille*.] Is metaphorically used for a part or a share of a man's substance, carved out of the whole, paid by way of tribute, toll, or tax. *Stat. de tallagio non concedendo*, temp. Edw. 1.; *Ston's Ann.* 445. And according to Sir Edw. Coke, tallage is a general word for all taxes. 2 *Inst.* 532. See *Taxes*.

TALLAGERS. Tax or toll gatherers, mentioned by *Chaucer*.

TALLAGIUM FACERE. To give up accounts in the Exchequer, where the method of accounting was by tallies. *Mem. in Scacc. Mich.* 6 Edw. 1.

TALLEY, *tallea*; Fr. *taille*; Ital. *tagliare*, i. e. *scindere*.] A stick cut in two parts, on each whereof is marked, with notches or otherwise, what is due between debtor and creditor; as now used by brewers, &c. And this was the ancient way of keeping all accounts, one part being kept by the creditor, the other by the debtor, &c. Hence the tallier of the Exchequer, whom we now call the teller.

There were two kinds of tallies formerly used in the Exchequer; the one termed tallies of debt, which were in the nature of an acquittance for debts paid to the king, on the payment whereof these tallies were delivered to the debtors, who, carrying them to the clerk of the Pipe-office, had there an acquittance in parchment for their full discharge. 1 *R.* 2. c. 5. The other, tallies of reward or allowance, being made to sheriffs of counties, as a recompense for such matters as they had performed in their charge, or such money as was cast upon them in their accounts of course, but not leviable, &c. 27 *Hen.* 8. c. 11; 33 & 34 *Hen.* 8; 2 & 3 *Edw.* 6. c. 4.

The use of these tallies was abolished by the 23 *Geo.* 3. c. 82; but the old tallies were preserved in the Exchequer until recently, when, in consequence of a further change taking place in the keeping of the public accounts, under the provisions of the 4 & 5 *Wm.* 4. c. 15. they were ordered to be destroyed. They were accordingly employed to heat the stoves in the House of Lords, and are said to have been the cause, from having been burnt in too large quantities, of the fire which broke out in the month of October, 1834, and consumed the two Houses of Parliament.

TALLIA. Every canon and prebendary in our old cathedral churches had a stated allowance of provisions delivered to him *per modum tallia*; and thence their commons in meat and drink were called *tallia*. *Sta. Sti. Paul. Ann.* 1205.

TALWOOD, talliatura. Firewood cleft and cut into billets of a certain length; otherwise written talgwood and talshide, in the ancient stats. 34 & 35 Hen. 8. c. 3; 7 Edw. 6. c. 7; 43 Eliz. c. 14. (now repealed.)

TAM QUAM. See *Actions, Popular Information, Qui Tam.*

TANISTRY. Seems to be derived from *thanis*; and is a law or custom in some parts of Ireland; on which see *Dav. Rep.* 28; *Antiq. Hibern. p.* 38; 1 *Inst.*; and tit. *Gavelkind, ad fin.*

TANNERS. See *Leather.*

TARE AND TRET. The first is an allowance in merchandise, made the buyer for the weight of the box, bag, or cask, wherein goods are packed; and the last is a consideration in the weight, for waste in emptying and reselling the goods, by dust, dirt, breakage, &c. *Book Rates*

Tare is distinguished into real tare, customary tare and average tare. The first is the actual weight of the package; the second its supposed weight according to the practice among merchants; and the third is the medium tare, deduced from weighing a few packages and taking it as a standard for the whole. In Amsterdam and some other commercial cities, tares are generally fixed by custom; but in this country, the prevailing practice, as to all goods that can be unpacked without injury, both at the custom-house and among merchants, is to ascertain the real tare. *McCulloch's Comm. Dict.*

TARGET, from Lat. targus. A shield originally made of leather, wrought out of the back of an ox. *Blount.*

TARGIA, tarida. Was a ship of burden, since called a Tartan, and Tarita. *Knighton, anno, 1385.*

TARIFF. A table, alphabetically arranged, specifying the various duties, drawbacks, bounties, &c. charged and allowed upon merchandise exported and imported. See *Customs on Merchandise.*

TARTARON. A sort of fine cloth or silk. 4 Hen. 8. c. 6.

TAS, Fr.] A cock, heap, stack, or rick of hay or corn. *Law Fr. Dict.*

TASSALE, for casula. A priest's garment covering him over.

TASSUM. A mow of corn or hay, from the Fr. *tasser*, to pile up. *Tasser*, to mow or heap up; *ad tassum furcare*, to pitch to the mow. *Rot. Hil. 25 Edw. 3.*

TATH. In the counties of Norfolk and Suffolk, the lords of manors claimed the privilege of having their tenants' flocks or sheep brought at night upon their own demesne lands, there to be folded for the improvement of the ground; which liberty was called by the name of tath. *Spelm.*

TAVERN. See *Innkeeper.*

TAU. By *Seiden* in his notes upon *Eadmerus*, signifies a cross. *Mon. Angl. iii.* 121.

TAURI LIBERI LIBERTAS. In ancient charters, is used for a common bull; so called, because he is free and common to all the tenants within such a manor or liberty, &c.

TAXATIO ECCLESIASTICA, TAXATIO NORWICENSIS. The valuation of ecclesiastical benefices made through every diocese in England, on occasion of Pope Innocent IV. granting to King Henry III. the tenth of all spirituals for three years. Which taxation was first made by Walter, bishop of Norwich, delegated by the pope to this office in 38 Hen. 3. This taxation is sometimes called Pope Innocent's Valor.

In the year 1288, Pope Nicholas IV. granted the tenths to King Edward I., for six years, towards defraying the expense of an expedition to the Holy Land; and that they might be collected to their full value, a taxation by the king's precept was begun in that year, (1288,) and finished as to the province of Canterbury in 1291, and as to that of York in the following year; the whole being under the direction of John, bishop of Winton, and Oliver, bishop of Lincoln.

A third taxation, entitled "*nova taxatio*," as to some part of the province of York, was made A. D. 1318, (11 Edw. 2.) by virtue of a royal mandate directed to the bishop of Car-

lisle, chiefly on account of the invasion of the Scots, by which the clergy of those border counties were rendered unable to pay the former tax.

The taxation of Pope Nicholas is a most important record, because all the taxes, as well to our kings as to the popes, were regulated by it, until the survey made in the 26th year of Henry VIII.; and because the statutes of colleges which were founded before the Reformation, are also interpreted by this criterion, according to which their benefices under a certain value were exempted from the restriction in the 21 Hen. 8. c. 13. concerning pluralities.

Various detached parts of this record have been published in different county histories; but the whole was for the first time published in the year 1802 under the direction of the commissioners on the public records, from two MSS. in the king's remembrancer's office, Exchequer, collated with a Cottonian manuscript of much greater antiquity in the British museum, Tiberius C. X. which has unfortunately suffered some damage from the fire which happened to the Cottonian library whilst lodged in the dormitory at Westminster. The original rolls for several dioceses are still extant in the Exchequer, and these were also consulted in the above publication.

By a strange carelessness in the introductory note to the volume, published under such high authority, mention is made of Pope Innocent XXII. instead of Pope Innocent IV.

A new *valor beneficiorum* was instituted in 26 Hen. 8. when the first-fruits and tenths of every ecclesiastical promotion were annexed to the revenue of the crown, by 26 Hen. 8. c. 3. To ascertain their value, ecclesiastical surveys were taken by virtue of commissions in the king's name issuing under the great seal, 26 Hen. 8. c. 3. § 2. 9; and these surveys, preserved in the First-Fruits Office, are admitted as evidence of the amount at that period, although they are generally considered as estimating the value much too low. 3 *Gentl. Tithe Cases*, 856. 1240. These surveys are commonly called the king's books, according to which the value of livings is ascertained in case of pluralities. See *Plurality*. In like manner, and upon the same principle, surveys of the possessions of religious houses, previous to the dissolution of monasteries, are received in evidence, *Kellington, Vicar. v. Trinity Coll. Camb.* 1 *Wils.* 170; and these surveys are held admissible, although the commissions under which they were taken are not now to be found. See 1 *Wils.* 170; 2 *Gentl.* 542.

TAXERS. Two officers yearly chosen in Cambridge to see the true gauge of all weights and measures; though the name took rise from taxing or rating the rents of houses, which was anciently the duty of their offices.

TAX, taxa, from the Gr. *τάξις*, i. e. *ordo, tributio*] 4 tribute or imposition laid upon the subject, which being certain and orderly rated, was wont to be yearly paid into the king's Exchequer. It differs from what is commonly called a subsidy in this, that it is always certain, as it is set down in the exchequer book, and levied in general of every town, and not particularly of every man, &c. See *Rastall's Abridgment*, titles *Fifteenth, Subsidies, Taxes, Tenths, &c.* and 4 *Inst.* 26. 33.

A tax may now be defined to be a certain aid, subsidy, or supply, granted by the commons in parliament assembled, and confirmed by act of parliament; constituting the king's extraordinary revenue, and paid yearly towards the expenses of government. 1 *Comm. c.* 8. See *Liberty*.

Under title *King, V.* 4. the taxes are stated from *Blackstone*, as part of the king's extraordinary revenue, as applicable to the purposes of government they may, however, more properly be considered as the national revenue applicable to public purposes—the following is a very concise statement of their nature and amount. See more fully under the several titles, *Customs, Excise, &c.*

The taxes now levied on the subject are applicable to the

purpose of supplying the public expenses, resulting from the support of the navy, the army, the interest of the national debt, and the annual expenses of government. These taxes, in the accounts annually laid before parliament under the act 42 Geo. 3 c. 75, are distinguished under the two heads of Ordinary Revenues and Extraordinary Resources: the ordinary revenues are either annual or permanent: the annual revenues were heretofore those arising from the land tax, the excise on malt, and a duty on pensions and offices: since the land-tax has been made perpetual for the purpose of redemption, (see *Land Tax*), the annual duties are the excise on malt, the duties on pensions and offices, and certain duties of customs on sugar, tobacco, and snuff. The permanent ordinary taxes, are the customs, excise, stamps, and tax, assessed taxes, charging those on windows, servants, carriages, houses, dogs, and annual hearings, postage duties and other articles of trifling amount, such as duties to hawkers, pack-coaches, &c. A considerable annual revenue is also derived from the Post Office. The extraordinary resources during war have consisted of duties of customs or excise imposed, and also a duty on income, or the profits of property, added by annual loans and lotteries. The greatest part of these taxes are collected under the management of the commissioners of customs, of excise, or stamps, and of taxes. The two latter boards have been recently consolidated by the 4 & 5 Wm. 4 c. 60.

The annual amount of these taxes is fluctuating according to the periods of peace and war, and other contingencies: accounts of the produce and expenditure are annually laid before parliament in a paper, called *Geo. 3 c. 70*, &c. and are printed by order of the House of Commons. See *Account, Public*, and also *Public Accounts*.

The average expense of collecting the whole revenue has been computed at $\frac{1}{2}$ per cent. and of that of the excise, at $\frac{1}{4}$ per cent. which is less than any other branch of the revenue. The whole revenue is first deposited in the Exchequer, and is thence issued out to the respective officers for payment, and its application is annually accounted for to parliament, at what is commonly called the opening of the budget, that is, the statement of the national revenue and expenditure, by the Chancellor of the Exchequer, who, at the same time, calls for a supply, if necessary.

When the House of Commons have voted a supply to His Majesty, and secured the question on that supply, they usually resolve themselves into a committee of ways and means, to consider the ways of raising the means for paying the interest of the supply so voted. And in this committee, every member, though it is looked upon as the peculiar province of the Chancellor of the Exchequer, may propose such scheme of taxation as he thinks will be least detrimental to the public. The resolutions on this matter, when approved by a vote of the house, are in general esteemed to be (as it were) final and conclusive. For though the supply cannot be actually raised upon the subject of the loan, as a part of the whole parliament, yet a committee will seldom be prevailed to the government by a majority of the commons, though it can be yet passed to establish it. 1 Comm. c. 8. p. 307, 308.

The produce of the respective taxes formerly formed separate and distinct funds, being appropriated for the sums at which they were necessary, in order to avoid confusion as they increased yearly, to reduce the number of these separate funds, by uniting and blending them together; superadding the fifth or sixth part for the general service of the whole. They were therefore reduced to three capital funds, the Aggregate Fund, the General Fund, so called from saving the land-rent, and the South Sea Fund, being the produce of the taxes appropriated to pay the interest of some part of the national debts as was advanced by that company and its maintainers. All these were united together in the

Consolidated Fund, established by the 27 Geo. 3. c. 13 § 47. &c. and to which the Consolidated Fund of Ireland was added by the 56 Geo. 3 c. 58. forming one general Consolidated Fund of the whole United Kingdom, and charged indiscriminately, whether in the Exchequer of Great Britain or Ireland, with the whole of the interest of the consolidated national debt. The separate funds, thus united, are become mutual securities for each other, and the whole produce of them, thus aggregated and consolidated, is liable to pay such interest or annuities as were formerly charged upon each different fund: the faith of the legislature being moreover engaged to supply any casual deficiency; and though some of the taxes may have, now and then, proved less productive than was expected, the sum total has generally been more than sufficient to answer the charges upon them, and the surplus, in consequence, formed the sinking fund, originally destined to sink and lower the national debt. See *National Debt*.

The consolidated fund, above-mentioned, now stands mortgaged by parliament, to raise annuities for the maintenance of the king's household and civil list in Great Britain and Ireland. For this purpose, in Great Britain, previous to the reign of George III. the produce of certain branches of the excise and customs, the post-office, the duties on wine licences, the revenues of the remaining crown lands, the profits arising from courts of justice, (which articles include all the hereditary revenues of the crown, and also a great annuity of £100,000, was settled on the king for life, for the support of his household, and the honour and dignity of his crown. And as the amount of these several branches was uncertain, though in the reign of George II. they sometimes raised more than a million, if they did not arise annually to 800,000, the parliament engaged to make up the deficiency. But King George III. having, soon after his accession, spontaneously signified his consent, that his own hereditary revenue might be so disposed of as might best conduce to the utility and satisfaction of the public, and graciously accepted of the limited sum of 800,000, per ann. for the support of his civil list, the said hereditary and other revenues were carried into and made a part of the aggregate fund, and afterwards of the consolidated fund, which was charged with the payment of the whole annuity to the crown. This sum being found insufficient, application was, from time to time, made to parliament to discharge debt contracted of the civil list, and to assign the maintenance of the civil list. As to the sums granted to the late and present majesty for the payment of their civil lists &c., see *King, V. 1*.

A short statement of the ancient mode of rating property, or persons in respect of their property, either by tenths, or fifteenths, subsidies on land, hydages, scutages, or talliages, may assist the student in understanding our ancient laws and history. See 1 Comm. c. 8.

Tenth and fifteenth were temporary aids issuing out of personal property, and granted to the king by parliament. 1 Hist. c. 1. 2 Hist. 24. They were formerly the tenth or fifteenth part of all the moveables belonging to the subject, when such moveables or personal estates were a very different and a much less considerable thing than what they are at this day. Tenth and fifteenth had been first granted under Henry II. who took a voyage of the fashion he used for cruises to introduce his new taxation, in order to defray the expense of an expedition to Palestine; which he really, or seemingly, had projected against Saladin, emperor of the Saracens; whence it was originally denominated the Saladin Feck. *Hard. A D 1188. Carte, 1199. Hist. 1199*. But afterwards fifteenths were more usually granted than tenths. Originally the amount of these taxes was uncertain, being levied by assessments newly made at every fresh grant of the Commons, a commission for which is preserved by *Mutthen Paris, (A D 1337)*. But it was at length reduced to a certainty, in the eighth year of

Edward III.; when, by virtue of the king's commission, new taxations were made of every township, borough, and city in the kingdom, and recorded in the Exchequer; which rate was, at the time, the fifteenth part of the value of every township, the whole amounting to about 29,000*l.*; and, therefore, it still kept up the name of a fifteenth, when, by the alteration of the value of money, and the increase of personal property, things came to be in a very different situation. So that, when of later years, the Commons granted the king a fifteenth, every parish in England immediately knew their proportion of it; that is, the same identical sum that was assessed by the same aid in the eighth of Edward III.; and then raised it by a rate among themselves, and returned it into the royal Exchequer.

The other ancient levies were in the nature of the modern land-tax: for we may trace up the original of that charge as high as to the introduction of our military tenures; when every tenant of a knight's fee was bound, if called upon, to attend the king in his army for forty days in every year. But this personal attendance growing troublesome in many respects, the tenants found means of compounding for it, by first sending others in their stead, and, in process of time, by making a pecuniary satisfaction to the crown in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee, under the name of scutages; which appear to have been levied for the first time in the fifth year of Henry II., on account of his expedition to Toulouse; and were then, it seems, mere arbitrary compositions, as the king and the subject could agree. But this precedent being afterwards abused into a means of oppression, (in levying scutages on the landholders by the royal authority only, whenever our kings went to war, in order to hire mercenary troops and pay their contingent expenses,) it became thereupon a matter of national complaint; and King John was obliged to promise in his Magna Charta, that no scutage should be imposed, without the consent of the common council of the realm. This clause was, indeed, omitted in the charters of Henry III., where we only find it stipulated, that scutages should be taken as they were used to be in the time of King Henry II. (c. 37.) Yet afterwards by a variety of statutes under Edward I., and his grandson, it was provided, that the king shall not take any aids or tasks, any tallage or tax, but by the common assent of the great men and Commons in Parliament. See *Liberty*.

Of the same nature with scutages upon knights' fees were the assessments of hydragage upon all other lands, and of tallage upon cities and burghs. *Madox, Hist. Exch.* 480. But they all gradually fell into disuse upon the introduction of subsidies, about the time of King Richard II. and King Henry IV. These were a tax not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4*s.* in the pound for lands, and 2*s.* 8*d.* for goods; and for those of aliens in a double proportion. But this assessment was also made according to an ancient valuation; wherein the computation was so very moderate, and the rental of the kingdom was supposed to be so exceeding low, that one subsidy of this sort, did not, according to *Coke*, amount to more than 70,000*l.* 4 *Inst.* 33. Whereas the land-tax, at the same rate, before any part of it was redeemed, produced two millions, and the tax on income or produce of property at 10 per cent. or only 2*s.* in the pound, produced in the year ending 5th January, 1808, the sum of ten millions. It was anciently the rule never to grant more than one subsidy and two fifteenths at a time: but this rule was broken through for the first time on a very pressing occasion, the Spanish invasion, in 1588; when the parliament gave Queen Elizabeth two subsidies and four fifteenths. Afterwards, as money sunk in value, more subsidies were given; and we have an instance in the first parliament of 1640, of the king's desiring twelve subsidies of the Commons, to be levied in three years.

The grant of scutages, talliages, or subsidies by the Commons, did not extend to spiritual preferments, those being usually taxed at the same time by the clergy themselves in convocation, which grants of the clergy were confirmed in parliament, otherwise they were illegal, and not binding. A subsidy granted by the clergy was after the rate of 4*s.* in the pound, according to the valuation of their livings in the king's books; and amounted, as *Coke* states, to about 20,000*l.* 4 *Inst.* 33. While this custom continued, convocations were wont to sit as frequently as parliaments; but the last subsidies thus given by the clergy were those confirmed by 15 *Car.* 2. c. 10. since which another method of taxation has generally prevailed, which takes in the clergy as well as the laity. In recompense for which the beneficed clergy have from that period been allowed to vote at the election of knights of the shire; and thenceforward also the practice of giving ecclesiastical subsidies hath fallen into total disuse. *Dalt. of Sheriffs*, 418; *Gulb. Hist. Exch.* c. 4. And see *Convocation*.

The lay subsidy was usually raised by commissioners appointed by the crown, or the great officers of state; and, therefore, in the beginning of the civil wars between Charles I. and his parliament, the latter having no other sufficient revenue to support themselves and their measures, introduced the practice of laying weekly and monthly assessments of a specific sum upon the several counties of the kingdom; to be levied by a pound rate on lands and personal estates, which were occasionally continued during the whole usurpation, sometimes at the rate of 120,000*l.* a month, sometimes at inferior rates. After the Restoration, the ancient method of granting subsidies, instead of such monthly assessments, was, as it seems, once, and once only, renewed; viz. in 1663, when four subsidies were granted by the temporality, and four by the clergy; which was, in fact, the last time of raising supplies in that manner. For the monthly assessments being now established by custom, being raised by commissioners named by parliament, and producing a more certain revenue; from that time forwards we hear no more of subsidies, but occasional assessments were granted as the national emergencies required. These periodical assessments, the subsidies which preceded them, and the more ancient scutage, hydragage, and tallage, were to all intents and purposes a land-tax; and the assessments were sometimes expressly called so. Though a popular opinion has prevailed, that the land-tax was first introduced in the reign of King William III. See *Land-tax*.

The learned commentator is of opinion, that the last time of raising supplies by way of subsidy was in 1670; and he seems to have been misled by the title of 22 & 23 C. 2. c. 3. viz. "An Act to grant a Subsidy to his Majesty for supply of his Extraordinary Occasions." But although, among a great variety of other taxes, 1*s.* in the pound is to be raised upon land, yet the mode of collecting it is totally different from the former subsidy assessment; it is to be levied by exactly the same plan and arrangement as were afterwards adopted in 4 *Wm.* & 4 *M.* c. 1. All the material clauses in 22 & 23 C. 2. c. 3. are copied verbatim into 4 *Wm.* & 4 *M.* c. 1. The act of Charles II. is not printed in the common edition of the statutes at large; but is given at length in *Keble's* edition. See 1 *Comm.* c. 8. in n.

The modern war-tax on income, or the profits of property, bore a near resemblance to this ancient tax. It was first introduced under the title of a tax on income, and regulated by the 38 *Geo.* 3. c. 16; 39 *Geo.* 3. c. 18; 40 & 41 *Geo.* 3. c. 49. Afterwards, as a contribution on the profits of property, under the 43 *Geo.* 3. c. 42; 43 *Geo.* 3. c. 123, 45 *Geo.* 3. c. 15; 46 *Geo.* 3. c. 65. Under these latter acts, it was at first 5 per cent. and afterwards increased to 6½, and then to 10 per cent.; or 2*s.* in the pound. It proved a very productive tax; and if duly and equitably imposed, it would be the fairest and most desirable of all taxes.

The annual MALT-TAX is a sum raised every year by parliament, ever since 1697, by a duty on every bushel of malt. This is under the management of commissioners of excise; and is indeed itself no other than an annual excise. Permanent duties on malt are payable in Ireland equal to the amount of the annual and permanent duties in Great Britain. See *Malt*. And as to other duties, see *Tea*, &c.

The duty on salt is now entirely repealed. See *Salt*.

As to the duty on houses and windows.—As early as the Conquest, mention is made in *Domesday-Book* of fumage or fuge, vulgarly called smoke-farthings, which were paid by custom to the king for every chimney in the house. And we read that Edward the Black Prince, (soon after his successes in France,) in imitation of the English custom, imposed a tax of a florin upon every hearth in his French dominions. But the first parliamentary establishment of it in England was by 13 & 14 *Car. 2. c. 10*. whereby an hereditary revenue of 2s. for every hearth, in all houses paying to church and poor, was granted to the king for ever. And, by subsequent statutes for the more regular assessment of this tax, the constable and two other substantial inhabitants of the parish, to be appointed yearly, (or the surveyor, appointed by the crown, together with such constable or other public officer,) were once in every year empowered to view the inside of every house in the parish. But, upon the Revolution, by 1 *Wm. & M. st. 1. c. 10*. hearth-money was declared to be "not only a great oppression to the poorer sort, but a badge of slavery upon the whole people; exposing every man's house to be entered into, and searched at pleasure by persons unknown to him; and therefore, to erect a lasting monument of their majesties' goodness in every house in the kingdom, the duty of hearth-money was taken away and abolished." This monument of goodness remains among us to this day; but the prospect of it was somewhat darkened, (says *Blackstone*,) when, in six years afterwards, by 7 *Wm. 2. c. 18*. a tax was laid upon all houses (except cottages) of 3s.; and a tax also upon all windows, if they exceeded nine, in such house. Which rates have been from time to time varied and extended: and power is given to surveyors, appointed by the crown, to inspect the outside of houses, and also to pass through any house two days in the year, into any court or yard, to inspect the windows there. A pound rate was also imposed on every dwelling-house inhabited, together with the offices and gardens therewith occupied, (farm houses and cottages excepted); increasing according to the amount of the rent. See 1 *Comm. c. 8*.

Of late years, however, the window-tax has been reduced to one half its former amount; and houses containing not more than six windows, and not worth 5*l.* a year, have been exempted from its operation; while the duties on dwelling-houses have been altogether repealed by the 4 & 5 *Wm. 4. c. 19*.

The duties imposed on MALE SERVANTS, in every part of the United Kingdom, retained or employed in the several capacities specifically mentioned in the statutes for that purpose, extend to almost every sort of male domestic, except such as are actually employed only in husbandry or manufacture. With these are combined the duties on CARRIAGES, Horses and Dogs.

Of late individuals have been allowed to compound for their assessed taxes, that is, by paying a certain yearly sum to have the liberty of keeping as many servants, carriages, &c. as they think proper, and these compositions or contracts are by the 4 & 5 *Wm. 4. c. 54*. continued for five years longer; but compositions on articles kept for trade, by persons in partnership, or on carriages, horses, &c. let for hire, are not to be renewed.

The duty on OFFICES and PENSIONS in England, consisting of annual payments of 1*l.* in the pound, and 6*d.* in the pound, (over and above all other duties,) out of all salaries, fees, and perquisites of offices, and out of all pensions, and

gratuities payable by the crown, exceeding 100*l.* per annum, was first imposed by 31 *Geo. 2. c. 22*; and by the 38 *Geo. 3. c. 5*. was increased to the sum of 4*s.* in the pound; which has been the amount that has since been annually levied.

It is considered as a rule of construction of revenue-acts, in ambiguous cases, to lean in favour of revenue: this rule will be found to be agreeable to good policy and the public interests; particularly when it is considered that disputes as to the meaning and effect of revenue laws most generally arise in consequence of attempts, often wholly unjustifiable, to evade them. Beyond this, which may be regarded as established law, no one can ever be said to have an undue advantage in the courts of justice. See 1 *Comm. c. 8. in n.*

TAXT-WARD. An annual payment heretofore made to a superior in Scotland instead of the duties due to him under the tenure of ward-holding; now abolished. See *Tenures*.

TEA was hardly known in this country till after 1650. In 1660, however, it began to be used in coffee-houses, and was noticed in an act passed in that year, 12 *Car. 2. c. 15*. From its first introduction, down to 1833, the importation of tea was a monopoly, enjoyed by the East India Company; but by the 3 & 4 *Wm. 1. c. 85. § 3*. the company's exclusive right of trading to China for tea was taken away; and by the 3 & 4 *Wm. 4. c. 93*. the trade was thrown open under the restrictions imposed by that act. See a short outline of its provisions, *East India Company, VIII.*

Down to the 22d April, 1834, the duty on tea was an *ad valorem* one, being 90 per cent. on all teas under 2*s.* a pound, and 100 per cent. on all sold at or above that price.

The following are the present duties on tea imported into the United Kingdom for home consumption, as regulated by the 3 & 4 *Wm. 4. c. 101*:—

	s.	d.
Bohea	1	6 per lb.
Congou, twankay, hyson skin, orange ..	1	6
Pekoe, and campoi	2	2
Souchong, flowery pekoe, hyson, young hyson, gunpowder, imperial, and other tea not enumerated	3	0

TEAM, THEAME, from the Sax. *tyman*, *propagare*, to team or bring forth.] A royalty or privilege granted by the king's charter to the lord of a manor, for the having, restraining, and judging of bondmen and villeins, with their children, goods, and chattels, &c. *Glanvil, lib. 5. c. 2*. See *Villein*.

TEDING-PENNY, TETHING-PENNY, TITHING-PENNY. A small duty or payment to the sheriff from each tithing, towards the charge of keeping courts, &c. from which some of the religious were exempted by charter from the king. *Chart. Hen. 1*.

TEENAGE, from Sax. *tyuan*, to inclose or shut.] Is used in many parts of England for wood for fences and inclosures.

TEINDS, tithes; *teind-masters*, those who are entitled to tithes. *Scotch Law Dict.* See *Tithes*.

TEINLAND, TAINLAND, or THAINLAND. See *Thaneland*.

TELLERS. Officers in the Exchequer, of whom there were four. See *Exchequer, Offices, Public Accounts*.

TELEGRAPHIÆ, from Sax. *tellan*, *dicere*, Gr. *γραφω*, *scribo*, quasi a telling any thing by writing.] Written evidences of things past. *Blount*.

TELEGRAPHS, from *της* distant, and *γραφω*, to describe.] See *Signal Stations*.

TELLWORC. That work or labour which the tenant was bound to do for his lord, for a certain number of days, from the Saxon word *tellan*, numerare, and *worc*, opus. *Thorn. anno 1364*.

TEMENTALE or TENEMENTALE. A tax of 2*s.* upon every plough-land. *Hov. Hist. fol. 419*. A decennary. *Leg. Edm. Conf.*

TEMPLARS or KNIGHTS OF THE TEMPLE, *Templarii*. A religious order of knighthood, instituted about the year 1119, and so called because they dwelt in part of the buildings belonging to the Temple at Jerusalem, and not far from the sepulchre of our Lord. They entertained Christian strangers and pilgrims charitably, and in their armour led them through the Holy Land to view the sacred monuments of Christianity, without fear of Infidels; for at first their profession was to defend travellers from highwaymen and robbers. This order continuing and increasing for near two hundred years, was far spread in Christendom, and particularly here in England: but at length some of them at Jerusalem falling away (as some authors report) to the Saracens from Christianity, or rather because they grew too potent and rich, the whole order was suppressed by Clement V., anno 1307, by the Council of Vienna, 1312, and their substance given partly to the knights of St. John of Jerusalem, and partly to other religious. *Cassan de Gloria Mundi, par. 9. Consid. 4.* These flourished here in England from the time of Henry II. till they were suppressed, and their lands given to the knights hospitallers of St. John of Jerusalem. 17 *Edw. 2. st. 3.* And these last were suppressed in England and Ireland in the time of Henry VIII. See English stat. 32 *Hen. 8. c. 24* and Irish stat. 35 *Hen. 8. st. 3. c. 5*. They had in every nation a particular governor, whom *Bracton, lib. 1. c. 10.* calls *Magistrum Militie Templi*. The master of the temple here was summoned to parliament, 49 *Hen. 3. m. 11. in Scheduli*. And the chief minister of the Temple Church in London is still called Master of the Temple. Of these knights read Mr. *Dugdale's Antiquities of Warwickshire, fol. 706*. In ancient records they were also called *Fratres Militie Templi Solomonis. Mon. Angl. ii. 554 b.* About nine years after their institution, they were ordered by a council held at Trier to wear a white garment; and afterwards in the pontificate of Pope Eugenius, they wore a red cross on their garments. The Temples, which we now call the Inns of Courts, was the place where they dwelt, and in the Middle Temple the king's treasure was kept. *Conell.* Templars' lands shall be forfeit for erecting their crosses, *stat. Westm. 2. 13 Edw. 1. c. 33.* The jurisdiction of the conservators of their privileges restrained, *stat. Westm. 2. 13 Edw. 1. c. 43.*

TEMPLE. *Dugdale and Stow* both tell us that the Temple in London is a place of privilege from arrests, by the grant of the king; but this hath been denied by the Court of B. R. *Dugd. 317, 320; 3 Salk. 45. See Arrest.*

TEMPORALITIES or BISHOPS. The lay revenues, lands, tenements, and lay fees belonging to the see of bishops or archbishops, as they are barons and lords of parliament (including their baronies.) All things which a bishop hath by livery from the king, as manors, lands, tithes, &c. 1 *Roll. Abr. 881; 1 Comm. c. 8.* It was a custom formerly, that when bishops received from the king their temporalities, they did, by a solemn form in writing, renounce all right to the same by virtue of any provision from the pope, and acknowledged the receipt of them only from the king; which custom continued from the reign of Edward I. to the time of the Reformation; and this practice began by occasion of a bull of Pope Gregory VIII., wherein he conferred the see of Worcester on a certain bishop, and committed to him *administrationem spiritualium et temporalium episcopatus predicti.* Anno 31 *Edw. 1.*

The custody of these temporalities is stated by *Blackstone* as part of the king's ordinary revenue (see *King, V. 4.*) This, upon the vacancy of the bishopric, is immediately the right of the king, as a consequence of his prerogative in church matters, whereby he is considered as the founder of all archbishoprics and bishoprics, to whom during the vacancy they revert. And for the same reason, before the dissolution of abbeys, the king had the custody of the temporalities of all such abbeys and priories as were of royal foundation (but not of

those founded by subjects), on the death of the abbot or prior. 2 *Inst. 15.* Another reason may also be given why the policy of the law hath vested this custody in the king, because, as the successor is not known, the lands and possession of the see would be liable to spoil and devastation, if no one had a property therein. Therefore the law has given the king, not the temporalities themselves, but the custody of the temporalities, till such time as a successor is appointed, with power of taking to himself all the intermediate profits, without any account of the successor, and with the right of presenting (which the crown very frequently exercises) to such benefices and other preferments as fall within the time of vacation. 17 *Edw. 2. st. 1. c. 14; F. N. B. 32.* This revenue is of so high a nature that it could not be granted out to a subject before, or even after, it accrued; but by the 14 *Edw. 3. st. 4. c. 4. 5.* the king may, after the vacancy, lease the temporalities to the dean and chapter, saving to himself all advowsons, escheats, and the like. Our ancient kings, and particularly William Rufus, were not only remarkable for keeping the bishoprics a long time vacant, for the sake of enjoying the temporalities, but also committed horrible waste on the woods and other parts of the estate, and to crown all, would never, when the see was filled up, restore to the bishop his temporalities again, unless he purchased them at an exorbitant price. To remedy which, King Henry I. granted a charter at the beginning of his reign, promising neither to sell, nor let to farm, nor take any thing from the domains of the church, till the successor was installed. And it was made one of the articles of the Great Charter, that no waste should be committed in the temporalities of bishoprics, neither should the custody of them be sold. 9 *Hen. 3. c. 5.* The same is ordained by the *stat. Westm. 1. 3 Edw. 1. c. 21*; and the 14 *Edw. 3. st. 4. c. 4.* (which permits, as we have seen, a lease to the dean and chapter), is still more explicit in prohibiting the other exactions. It was also a frequent abuse, that the king would, for trifling or no causes, seize the temporalities of bishops, even during their lives, into his own hands; but this is guarded against by the 1 *Edw. 3. st. 2. c. 2.*

This revenue of the king, which was formerly very considerable, is now by a customary indulgence almost reduced to nothing; for at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalities quite entire and untouched, from the king, and at the same time does homage to his sovereign; and then, and not sooner, he has a fee-simple in his bishopric, and may maintain an action for the profits. 2 *Inst. 67, 341. See 1 Comm. c. 8.*

TEMPTATIO or TENTATIO. A trial or proof. *Chart. 20 Edw. 1.*

TEMPUS PESSONIS. Mast-time in the forest, which is from about Michaelmas to St. Martin's day, Nov. 11.

TENA. A coif worn by ecclesiastics. *Counc. Lambeth anno 1281.*

TENANT, tenens, from the Lat. *tenere*, to hold.] One that holds or possesses lands or tenements by any kind of title, either in fee, for life, years, or at will. The word in law is used with divers additions; thus, tenant in dower is she that possesses land by virtue of her dower. Tenant by statute-merchant, he that holds land by virtue of a statute forfeited to him. Tenant in frank-marriage, he that holds lands or tenants by virtue of a gift thereof made to him upon marriage between him and his wife. Tenant by the curtesy, he that holds for his life, by reason of a child begotten by him of his wife, being an inheritrix, and born alive. Tenant by *eligit*, that holds by virtue of the writ called an *elegit*. Tenant in mortgage, that holds by means of a mortgage. Tenant by the verge in ancient demesne, who is admitted by the rod in the court of ancient demesne. Tenant by copy of court-roll, who is admitted tenant of any lands, &c. within a manor, which time out of mind had been de-

misable according to the custom of the manor. Tenant by charter, that holdeth by feoffment in writing or other deed. There were also tenants by knights-service, tenant in burgage, tenant in socage, tenant in frank-fee, tenant in villeinage. So there is tenant in fee-simple; tenant in fee-tail; tenant at the will of the lord, according to the custom of the manor; tenant at will by the common law; tenant upon sufferance; tenant of estate of inheritance; tenant in chief, that he hath of the king in right of his crown, to wit, the king, he that holds of the person of the king, or has some honour; very tenant, that holds immediately of his lord, *Kitch. fol. 99*; tenant peravall, the lowest tenant of the fee, who is tenant to one who holds over of another. *F. N. B. 135.*

So there are also joint-tenants, that have equal right in lands and are tenants by virtue of one title; tenants in common, that have equal right, but hold by divers titles; particular tenant, as tenant for years, for life, &c. that holds only for his term; sole tenant, he that hath no other joined with him; several tenant, as opposite to joint-tenant, or tenant in common.

So there was tenant to the *præcipe*, in the case of fines and recoveries, and there is tenant in demesne, which is he that holdeth the demesnes of a manor for a rent, without service, tenant on service, he that holdeth by service; tenants by execution, that hold lands by virtue of an execution upon any statute, recognizance, &c. with divers others. *Cowell*

See this Dictionary, under the several titles relative to the estates of such tenants; and *Tenants*.

TENANTS IN COMMON are such as hold by several and distinct titles, but by unity of possession, because none knoweth his own severalty, and therefore they all occupy promiscuously. *Lit. § 292.*

This tenancy therefore happens, where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail or for life, so that there is no necessary unity of interest. One may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; so that there is no unity of title. One's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is is that of possession; and for this *Littleton* gives the true reason, because no man can certainly tell which part is his own; otherwise even this would be soon destroyed. *2 Comm. c. 12.*

Tenancy in common may be created, either by the destruction of two estates in joint-tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two estates mentioned, is intended such destruction as does not sever the unity of possession, but only the unity of title or interest: as if one of two joint-tenants in fee aliens his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common, for they now have several titles, the other joint-tenant by the original grant, the alienee by the new alienation; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. *Lit. § 293.* So if one joint-tenant give his part to A. in tail, and the other gives his to B. in tail, the donees are tenants in common, as holding by different titles and conveyances. *Lit. § 292.* If one of two parceners aliens, the alienee and the remaining parcener are tenants in common, because they hold by different titles, the parcener by descent, the alienee by purchase. *Lit. § 299.* So likewise if there be a grant to two men or two women, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances, because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to a man and a woman, and the heirs of their bodies begotten: and in this and the like cases their issues shall be tenants in common, because they must claim by different

titles, one as heir of A. and the other as heir of B., and those too not titles by purchase but descent. See *Lit. § 283.* In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common. *2 Comm. c. 12.*

A tenancy in common may also be created by express limitation in a deed. But here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common; and if one grants to another half his land, the grantor and grantee are also tenants in common: because joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed that it is impossible they should take a joint interest in the whole of the tenements. But a devise to two persons to hold jointly and severally, has been held to be a joint-tenancy, because that is necessarily implied in the word "jointly;" the word "severally" perhaps only implying the power of partition: and an estate given to A. and B. equally to be divided between them, though in deeds it hath been said to be a joint-tenancy (for it implies no more than the law has annexed to that estate, viz. divisibility), yet in wills it is certainly a tenancy in common, because the deviser may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. See *1 Eq. Abr. 291*; *1 P. Wms. 17*; *3 Rep. 39*; *1 Vent. 32.* And this nicety in the wording of grants makes it the most usual as well as the safest way (in them as well as in wills), when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A. and B., to hold as tenants in common and not as joint-tenants.

It is noticed under title *Joint-Tenants*, that their tenure, though formerly favoured in law, is now considered as odious. In consequence of this, in wills, the expressions, equally to be divided, share and share alike, respectively between and amongst, have been held to create a tenancy in common. *2 Atk. 121*; *2 Bro. C. R. 15*; *1 P. Wms. 14.* And there seems but little doubt that the same construction would now be put even upon the word severally. But these words certainly are only evidence of intention, and will not create a tenancy in common, where the contrary, from the other parts of the will, appears to be the manifest intention of the testator. *3 Bro. C. R. 215.*

The words, equally to be divided, make a tenancy in common in surrenders of copyholds, and also in deeds which derive their operation from the statute of uses. *1 P. Wms. 14*; *1 Wils. 341*; *2 Ves. 257.* And though it has formerly been suggested (see *1 P. Wms. 167*, *2 P. Wms. 54*) that these words are not sufficient to create a tenancy in common, in common law conveyances, yet there seems but little doubt that, in such a case, nothing but invincible authority would now induce the courts to adopt that opinion, and to decide in favour of a joint-tenancy. *2 Comm. c. 12. p. 194, n.* It is, however, to be observed, that though the words, equally to be divided, share and share alike, and such like, are in general construed to create a tenancy in common, yet it is not by force of the words merely, but because it appears to be the intention of the party that there should be no survivorship. *2 Roll. Abr. 90*; *Salk. 227, 392*; *2 Ves. 258.* See *Joint-tenants*.

As to the incidents attending a tenancy in common.—Tenants in common (like joint-tenants) are compellable by the *31 Hen. 8. c. 1*; *32 Hen. 8. c. 32.* to make partition of their lands, which they were not at common law. See *Joint-tenants*, III. They properly take by distinct moieties, and have no entirety of interest; and therefore there is no survivorship between tenants in common. Their other incidents

are such as merely arise from the unity of possession, and are therefore the same as appertain to joint-tenants merely upon that account. Such as being liable to reciprocal actions of waste, and of account, by the statutes *Westm. 2. c. 22*; *4 Ann. c. 16*; and see *8 T. R. 145*. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate; though, if one actually turns the other out of possession, an action of ejectment will lie against him. *1 Inst. 199, 200*. See *2 Comm. c. 12*.

For the clause of the recent statute of limitations, with respect to possession, or receipt of rent by one tenant in common, see *Limitation of Actions, II. 1*.

As for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest, (such as joining or being joined in actions, unless in the case where some entire or indivisible thing is to be recovered,) these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint, but several. *Litt. § 311*; *1 Inst. 197*; *2 Comm. c. 12*.

Estates in common can only be dissolved two ways. 1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty. 2. By making partition between the several tenants in common, which gives them all respective severalties. For indeed tenancies in common differ in nothing from sole estates, but merely in the blending and unity of possession.

A. and B., tenants in common, having agreed to divide their property, the occupier of the part allotted to A. (who after the agreement had paid his whole rent to A.) was not allowed, in ejectment brought against him by A., to object that a partition deed was not actually executed. *1 B. & B. 11*.

In a suit in equity for partition by lessees for years, it was held that no objection can be made to such partition from the minuteness of the interest, or inconvenience, or difficulty, or from the reluctance of the other tenants in common. *1 Ves. & B. 552*.

A tenant in common may devise or alien, or charge his part in the same manner and by the same deeds of conveyance as if he had been solely seised of the entirety.

A tenant in common cannot as such release to his co-tenant, as they hold, as already stated, by several and distinct titles, but he must convey his interest by lease and release, &c. as he would do to a perfect stranger.

See further, *Joint-tenants*.

TENANTS AT WILL. See *Will, Estates at*.

TENANTS BY SUFFERANCE. See *Sufferance*.

TENDE. To tender or offer; it is mentioned in our old books; as, to tend a traverse, an averment, &c. *Britton, c. 76*; *Staudf. Prærog. 16*.

TENDER, Fr. *tendre*.] The offering of money or any other thing in satisfaction; or circumspectly to endeavour the performance of a thing; as a tender of rent is to offer it at the time and place when and where it ought to be paid. Also it is an act done to save the penalty of a bond before action brought, &c. *Termes de la Ley, 557*. See *Pleading*, particularly *I. 4*; *Money into Court*. As to tender of rent, see *Rent*.

1. In what Actions allowed.—A tender may be made in actions of assumpsit and debt.

But a tender is not pleadable to an action for unliquidated damages. *4 N. & M. 200*; and see *Ld. Raym. 255*; *1 Saund. 33 (b)*.

So upon a bare covenant for the payment of money, the defendant may plead a tender. *7 Taunton, 486*.

So in some cases of involuntary trespasses to lands, not committed by the party himself, but by his cattle, a tender of amends may be made by the *21 Jac. 1. c. 16. § 5*.

There are a variety of statutes which authorize a tender of amends, where otherwise it would not have been allowable.

As *11 Geo. 2. c. 19. § 20*, in cases of distress for rent; *17 Geo. 2. c. 38. § 10*, in cases of distress for poor's rates; *24 Geo. 2. c. 44*, in actions against justices of the peace; *7 & 8 Geo. 4. c. 53*, in actions against excise officers; and *3 & 4 Wm. 4. c. 58*, in actions against custom-house officers.

2. To and by whom to be made.—Tender of money on a bond is to be made to the person of the obligee at the day appointed, to save the penalty and forfeiture of the bond, and it ought to be done before witnesses; though, if the obligor be sued afterwards, he must still pay it. But if the obligor be to do any collateral thing, or which is not part of the obligation, as to deliver a horse, &c. and the obligor offer to do his part, and the obligee refuseth it, the condition is performed, and the obligation discharged for ever. *1 Inst. 207, 208*.

A tender to one of several joint creditors is a tender to all. Thus, if A., B., and C., have a joint demand, and C. has a separate demand on D.; and D. offers A. to pay him both the debts, which A. refuses, without objecting to the form of the tender on account of his being only entitled to the joint demand, D. may plead this tender in bar of an action for the joint demand; and should state it as a tender to A., B., and C. *3 T. R. 684*.

A tender to an authorized agent is a tender to his principal. *1 Camp. 477*; and see *1 Esp. 349*. So a tender to a managing clerk is good though he should have received orders not to accept it. *1 Marsh. 55*; *S. C. 5 Taunt. 307*; and see *3 C. & P. 453*; *M. & M. 238*. But a tender made to the managing clerk, who at the time disclaims authority from his master to receive the debt, is insufficient. *1 N. & M. 398*.

It would seem that a tender must be taken to be made on behalf of the person who owes the money. *2 C. & P. 50*.

A tender by the agent of the defendant of the whole sum demanded by the plaintiff, by pulling out his pocket-book, and offering, if he would go into a neighbouring public-house, to pay it, which the plaintiff refused to take, is good, although the agent is only authorized by the defendant to tender a sum short of the whole sum demanded, and offers the rest at his own risk. *2 M. & S. 86*.

3. When and how it must be made.—Every tender at the common law, or which is given by statute, must be made before the writ sued out.

If a tender be in fact made before the bringing of the action, though, by the *teste* of the writ, it may appear to have been afterwards, (as if tender in vacation and *teste* of preceding term,) the exact time when the writ was in fact sued out may be shown in pleading, or sometimes given in evidence contrary to the *teste*. But if a writ be issued on the same day the tender is made, though subsequent thereto, it seems that the defendant can no way avail himself by pleading the prior tender; as there is no fraction of a day in law. See *Pleading, Process*.

It is no answer to a plea of tender before the exhibiting of the plaintiff's bill, that the plaintiff had before such tender retained an attorney, and instructed him to sue out a writ against the defendant; and that the attorney had accordingly applied, before the tender, for such writ, which was afterwards sued out. *8 T. R. 629*.

By the *56 Geo. 3. c. 68*, gold coin was declared to be the only legal tender; and no tender of silver coin is to be legal beyond *40s.*; but by the *3 & 4 Wm. 4. c. 6. § 98*, notes of the Bank of England, payable to the bearer on demand, are made a legal tender for any sum above *5l.* so long as the Bank continues to pay in gold, except at the Bank itself, and its branch establishments.

But although, strictly speaking, a legal tender must be either gold or Bank of England notes, according to the above statutes, yet a tender in country bank notes, if not objected to on that account, will be sufficient. *2 Tyr. 92*. And see *3 T. R. 554*; *1 Burr. 459*.

Tender may be of money in bags, without showing or telling it, if it can be proved there was the sum to be tendered; it being the duty of him that is to receive the money to put out and tell it. 5 Rep. 115. Though where the person held the money on his arm in a bag, at the time of offering, this was adjudged to good tender, for it might be counters or base money. *Noy*, 71.

If a tender is made of more than is due, it is good; and the party to whom tendered ought to take out what belongs to him. 5 Rep. 114. But tender of a larger sum, requiring change, is not a good tender for a smaller sum. 6 Taunt. 336; 2 D. & R. 305.

So a tender of a bank-note for 5*l*, desiring the creditor to take 3*l*. 10*s*. is clearly not a good tender. 3 Camp. 70.

But a tender of a larger sum, requiring change, is good, if the plaintiff objects only on the ground that he is entitled to more, and not because he has not change. 5 Dow. & Ryk. 289; and see 1 *Gow's Ca.* 111; *Peake's Ca.* 179.

The money must be actually produced at the time of tender, or the production must be dispensed with by the express declaration, or some equivalent act of the creditor. 10 East, 101; 2 M. & S. 86; 4 Esp. 68.

Thus, it has been held that if the defendant be willing to pay 10*l*., and a third person offers to go up stairs and fetch that sum, and is prevented by plaintiff saying, "he cannot take it," this is a good tender. 2 Carr. & P. 77; and see 7 Moo. 59; 2 C. & J. 15; 4 B. & Ad. 546; 1 Bng. N. C. 253.

A tender must be unconditional; and therefore, going with the money in hand to make a tender, and demanding whether the creditor has a receipt stamp, and receiving an answer in the negative, without an actual offer of the money, will not support a plea of tender. 7 D. & R. 119; and see 1 C. & P. 257.

So if a person tender money, but will not pay it unless he has a receipt in full of all demands, such a tender is bad. 1 C. & P. 419; 5 Esp. 48.

So a tender was held not good where the debtor at the time required the creditor to sign a receipt, expressing that the sum tendered was the balance due. *Gow*, 213; and see 4 Camp. 156; 6 C. & P. 237.

But if on a tender being made, the creditor insists on receiving a larger sum of money, he cannot afterwards object to the formality of the tender on account of the debtor having required a receipt. *Peake*, 179.

4. *Demand after Tender*.—A right to damages on account of the non-payment of a debt, or non-performance of a duty, may, after being taken away by a tender and refusal, be revived again by a demand subsequent to the tender and refusal; a new cause of action arises from the non-payment or non-performance thereof upon such demand. And therefore the plaintiff may reply *non est* subsequent demand and refusal by the defendant, which, if proved, the plaintiff must have a verdict. *Brownl.* 7.

But if to a plea of tender, the plaintiff replies a subsequent demand and refusal, it is incumbent on him to prove that, after the tender admitted in the pleadings, he demanded of the defendant the exact sum specified as having been before tendered and refused. 1 Camp. 181.

5. *Of pleading a Tender*.—Wherever the debt or duty arises at the time of the contract, and is not discharged by a tender and refusal, it is not enough for the party who pleads the tender, to plead a tender and refusal, and *uncore prist*, (that he is still ready,) but he must also plead *tout temps prut*, (that he was always ready). *Salk.* 622; 12 Mod. 152; *Carth.* 413.

On award, that the defendant should pay money on such a day, and at such a place; the defendant pleaded that he tendered the money at the day and place; and because he did not set forth that he continued there ready to pay it at the last instant of the day till after sun-setting, &c. it was held ill. 2 Cro. 243.

By the 4 & 5 Ann. c. 16. § 12. the plea of *solvit post diem* is granted to an action on bond; but a tender and refusal of principal and interest at a subsequent day cannot be pleaded, as not being within the equity of the statute. For such construction would be prejudicial; as it would empower the obligor, at any time, to compel the obligee to take his money without notice. *Bull. Ni. Pri.* 171.

A plea of tender after the day of payment of a bill of exchange, and before action brought, is not good; though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the whole money then due, owing, or payable to the plaintiff in respect of the bill, with interest from the time of the default, for the damages sustained by the plaintiff by reason of the non-performance of the promise. 8 East, 168.

Every requisite which is in a particular case necessary to the validity of a tender, must, in pleading such tender, be shown to have been complied with, else the plea is not good. *Salk.* 624.

A defendant cannot be permitted to plead *non assumpsit* as to the whole, and a tender as to part; because, if the general issue be found for the defendant, it will appear on record that no debt is due, though something is admitted by the defendant. 4 T. R. 194. But a tender to the whole declaration is good; and it is usual to plead, as to all, except the sum tendered, *non assumpsit*; and as to that sum, a tender. And a defendant may plead not guilty, and a tender of amends, in trespass. 2 Black. 1089; *Sellon's Pr.*

And a tender may be pleaded after a judge's order to plead issuably. 1 Burr. 59.

In case of a plea of tender as to part, and *non assumpsit* as to the residue, and the issue on the tender being found for the defendant, the balance proved is under 40*s*.; yet the defendant, though within the jurisdiction of the county court of Middlesex, is not entitled to costs, under 23 Geo. 2. c. 33. § 19. Nor in case of a set-off having the same effect. *Doug.* 448. See *Impey*, K. B.

To an avowry for rent, the plaintiff in replevin may plead a tender and refusal, without bringing money into court; because, if the distress were not rightfully taken, the defendant must answer the plaintiff his damages. *Salk.* 584. But if the distress were rightfully taken, the plaintiff cannot plead tender of rent and costs in bar of an avowry for rent in any case, unless the distress was made of corn, grass, &c. growing on the premises, and then such plea is given by 11 Geo. 2. c. 19. § 9.

There is a difference in pleading a tender in action of debt and in action on the case. In an action of debt, the defendant ought to conclude his plea by praying judgment, if the plaintiff ought to have or maintain his action to recover any damages against him; for, in this action, the debt is the principal, and the damages are only accessory. But, in *assumpsit*, the damages are the principal; and therefore, in pleading a tender, the defendant ought to conclude his plea with a prayer of judgment, if the plaintiff ought to have or maintain his action, to recover any more or greater damages than the sum tendered, or any damages by reason of the non-payment thereof. 2 *Salk.* 622; 1 *Lord Raym.* 254; 3 *Salk.* 344, 345.

Proof of a tender of 20*l*. 9*s*. 6*d*. in bank notes and silver is sufficient to support a plea of tender of 20*l*. 4 B. & Ad. 547; 1 N. & M. 393.

6. *Effect of a Tender*.—A tender admits the contract and facts stated in the declaration. 3 Taunt. 95. And after a plea of tender the plaintiff cannot be nonsuited. 1 Camp. 327.

On the other hand, if a creditor, after refusing payment when tendered, commences an action, the tender accompanied by a payment of the sum tendered into court will be a good defence, unless the creditor can prove a prior or subsequent demand and refusal. 1 Camp. 181; 5 B. & A. 630. And a

tender will prevent interest from afterwards running against the debtor. 3 *Camp.* 296; 8 *East*, 168.

The plaintiff may either admit the tender or not; if the latter, he should not take the money out of court; for, by taking it, he admits the same to be right, and judgment is given for the defendant to go quit as to that plea. But if he admits it, and goes for further damages, on the ground that the tender was not sufficient to cover his demand, he may take the money out of court, enter an acquittal as to the tender, or confess the same in his replication, and proceed on the general issue for the residue. *Ld. Raym.* 1744. If he admits the tender and enters an acquittal, without going for further damages, he must pay the defendant his costs. *Barnes*, 337. But the plaintiff may take the money out of court, though he reply that the tender was not made before action brought. 1 *Bos. & Pull.* 332.

The money cannot be taken out by the defendant, though he has a verdict. *Str.* 1027. On a tender being pleaded, and the money paid into court, the plaintiff replied a subsequent demand and refusal, whereupon issue being joined and tried, a verdict was found for the defendant. Whereupon he moved to have the money paid into court returned, in part of his costs; but the court was of opinion it could not be done. *Hardw.* 206.

In what cases tender and refusal shall discharge the debt, see 1 *Wils.* 117.

Tender of the money is requisite on contracts for goods sold, &c. to entitle the buyer to maintain an action of trover. See *Trover*. And a tender of stock sold for so much money, if it be well made, though not accepted, will entitle the party to the sum agreed to be paid. 3 *Salk.* 343; *Str.* 777, 882. See further *Bond, Money, payment of, into Court*.

TENEMENT, *tenementum*.] Signifies properly a house, or homestead; but, more largely, it comprehends not only houses, but all corporeal inheritances which are holden of another, and all inheritances issuing out of or exercisable with the same. *Co. Litt.* 6, 19, 154. A tenement may be said to be any house, land, rent, or other such like thing that is in any way held or possessed; but being a word of a large and ambiguous meaning, and not so certain as mesuage, therefore it is not fit to be used to express any thing which requires a particular description. 2 *Lill. Abr.* 566.

Tenement, in its original proper, and legal sense, signifies any thing which may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial and ideal kind. Thus *liberum tenementum*, frank-tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like. 1 *Inst.* 6. And as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements. *Inst.* 19, 20. See *Herediments*.

TENEMENTARY LAND. Was the outland of manors granted out to tenants by the Saxon thanes under arbitrary rents and services. *Spelm.*

TENEMENTIS LEGATIS. An ancient writ, lying to the city of London or any other corporation (where the old custom was, that men might devise by will lands and tenements as well as goods and chattels), for the hearing and determining any controversy touching the same. *Reg. Orig.* 244.

TENENDUM. That clause in a deed wherein the tenure of the land is created and limited. The office of a *tenendum* in a deed is to limit and appoint the tenure of the land which is held, and how, and of whom it is to be held. Before the statute called *quia emptores terrarum*, 18 *Edm.* 1. *st.* 1. the *tenendum* was usually of the feoffor and his heirs, and not of the chief lord of the fee, whereby lords lost their escheats, forfeitures, &c. But since the said statute, the *tenendum*, where the fee-simple passes, must be of the chief lord of the

fee, by the custom and services whereby the feoffor held; yet this statute does not extend to a gift in tail, for the donee shall hold of the donor. *Co. Litt.* 6 a; 2 *Inst.* 66, 67, 500, 501, 502, 505. See *Tail, Tenures*.

The *tenendum* seems now to be incorporated with the *habendum*; for we say, *To have and to hold*, in which clause the estate is limited, &c. See *Deed*, II. 4.

TENENDAS. That clause of a charter by which the particular tenure, as that of *feu-holding*, or *blanch-holding*, is expressed. *Bell's Scotch Law Dict.*

TENENTIBUS IN ASSISE NON ONERANDIS. A writ that formerly lay for him to whom a disseisor had alienated the land whereof he disseised another, that he should not be molested in assise for the damages, if the disseisor had where-with to satisfy them. *Reg. Orig.* 214.

TENHEDED, or TIENHEOFED, Sax.] *Decanus, Caput vel Princeps Decaniæ sive Decariæ. Leg. Edm. Conf.* c. 29.

TENOR, Lat.] Of writs, records, &c. is a transcript or copy. The word "tenor" implies that a correct copy is set out, and therefore the instrument must be set out correctly, even although the pleader need not have set out more than the substance of the instrument. 2 *East*, P. C. 376. The tenor of a libel hath been held to be a transcript, which it cannot be if it differs from the libel; and *juxta tenorem* imports it, but not *ad effectum*, &c. for that may import an identity in sense, but not in words. 2 *Salk.* 417. The word *effectum* by itself, however, implies that the substance only is set out. *Ibid.*

In action of debt brought upon a judgment in an inferior court, if the defendant pleads *nul tiel record*, the tenor of the record only shall be certified; and by *Hale*, chief justice, it may be the same on a *certiorari*. 3 *Salk.* 296. A return of the tenor of an indictment from London, on a *certiorari*, to remove the indictment, is good by the city charter: but in other cases it is usual to certify the record itself. 2 *Hawk.* P. C. c. 27. § 26, 70.

TENORE INDICTAMENTI MITTENDO, is a writ whereby the record of an indictment, and the process thereupon, is called out of another court into the King's Bench. *Reg. Orig.* 69. See *Certiorari*.

TENORE PRESENTIUM. The tenor of these presents, is the matter contained therein, or rather the intent and meaning thereof; as, to do such a thing according to the tenor, is to do the same according to the true intent of the deed or writing.

TENSERIE. A sort of ancient tax or military contribution. *Blackst. Magna Carta, Introd.* p. xxxvii. *in n.*

TENTATES PANIS. The essay or assay of bread. *Blount*.

TENTER. A stretcher or trier of cloth, used by dyers and clothiers, &c. mentioned in the (repealed) statutes 1 *Rich.* 3. c. 8; 39 *Eliz.* c. 20.

TENTHS, *decimæ*.] The tenth part of the annual value of every spiritual benefice, according to the valuation in the king's books; being that yearly portion or tribute which all ecclesiastical livings formerly paid to the king. They were anciently claimed by the pope to be due to him *jure divino* as high priest, by the example of the high priest among the Jews, who had tenths from the Levites. But they had been often granted to the king by the pope upon divers occasions, sometimes for one year, and sometimes for more, and were annexed perpetually to the crown by the 26 *Hen.* 8. c. 3; 1 *Eliz.* c. 4. And at last granted, with the first fruits, towards the augmentation of the maintenance of poor clergymen. 2 *Ann.* c. 11. See *First Fruits*. Collectors of this revenue are to be appointed by the king, by letters-patent, instead of the bishops; and an office is to be kept for management of the same in London or Westminster, &c. 3 *Geo.* 1. c. 10.

Tenths likewise signified a tax on the temporality, and also certain rents reserved and made payable to the king by such as held lands formerly belonging to dissolved monasteries.

See 33 Hen. 8. c. 39. The term *tenure* is sometimes used for *tithe*. See that title.

TENURE,

TENURE, from the Latin *tenere*.] The manner whereby lands or tenements are holden, or the service that the tenant owes to his lord. There can be no tenure without some service, because the service makes the tenure. 1 Inst. 1. 93. A tenure may be of houses and land or tenements; but not of a rent, common, &c.

Under the word *tenure* is included every holding of an inheritance; but the signification of this word, which is a very extensive one, is usually restrained by coupling other words with it; this is sometimes done by words which denote the duration of the tenant's estate; as if a man holds to himself and his heirs, it is called tenure in fee-simple. At other times the tenure is coupled with words pointing out the instrument by which an inheritance is held: thus if the holding is by copy of court-roll, it is called tenure by copy of court-roll. At other times this word is coupled with words that show the principal service by which an inheritance is held; as where a man held by knight-service, it was called tenure by knight-service. *Bac. Abr.*

Almost all the real property of the kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and holden of, some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*. Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is styled the lord paramount, or above all. Those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the most honourable species of tenure, but at the same time subjected the tenants to greater and more burthensome services than inferior tenures did; a distinction which runs through all the different sorts of tenure. 2 Comm. c. 5.

The above maxim, and the whole of the doctrine of tenures, being founded on the feudal system, some knowledge of that is absolutely necessary in order to comprehend the nature of tenures as they relate either to the ancient or present state of the English law. These subjects are admirably and clearly treated in chapters IV. V. and VI. of the second book of the *Commentaries*.

The following abridgment from Sir Martin Wright's *Introduction to the Law of Tenures* (frequently referred to by the learned commentator), with some extracts from the *Commentaries*, is submitted to the reader: having been arranged in the following order by the editor of this work, it is inserted in this place (not without some hesitation) principally because references are made to and from this title in and to very many titles throughout the dictionary. An acquaintance with this part of our law is so intimately connected with all that concerns real property, that even an imperfect attempt at this presenting it, in one arranged and connected view, must be attended with advantage to the student; and will, in a small degree at least, obviate the inconvenience arising from the disjointed nature of the information conveyed, under the several heads, scattered through the dictionary in alphabetical order.

The feudal system, once firmly fixed in this island, has never been wholly abolished. From this system we derived our laws relative to property, and to that we must have recourse in order to account for the origin and utility of many which might otherwise appear useless or unjust, and to which we must continually recur to explain and illustrate what might otherwise seem dictated only by caprice, to trace out their principle, their spirit, their purposes, and their effects. By recurring to this system did a celebrated writer on this subject (Gilbert) explain what on any other system would have

remained inexplicable. He rescued many of our laws from the imputation of barbarity and arbitrary imposition; he formed an *epocha* in this study by directing us where to discover their origin and principles: but he not only benefited the student, he also reflected honour on the nation and its laws. After his days many rose up in his spirit, and animated by his example, and encouraged by his success, pursued those paths which he had so arduously and sedulously explored. To the student there cannot be presented a more advantageous or more pleasing fund of information than their labours have produced. See *Watkins's Introduction to Gilbert's Law of Tenures*, who refers in a note to the productions alluded to, which merit the attention of all who would wish to be acquainted with the *rationale* of our law and constitution. Besides *Wright* and *Blackstone*, on whose works the following summary is founded, reference is made to the following now universally celebrated works:—*Stuart's View of Society in Europe*, and *Historical Dissertation on the Antiquity of the English Constitution*; *Sullivan's Lectures on the Laws of England*; *Home (Lord Kaim's) Historical Law Tracts*, and *Essays on British Antiquities*; *Dalrymple's Essay on Feudal Property*; *Squire's Essay on the Anglo-Saxon Government*; *Miller's Historical View of the English Government*; *Yorke's Law of Forfeiture*; to all which the works of Mr. Watkins himself now form a valuable addition, as the legacy of a deceased member of the profession, always to be valued and regretted.

I. The Law or Doctrine of FEUDS, as relates to the present purpose.

1. Definition.
2. Origin and Progress.
3. Doctrine of Descents.
4. Feuds Proper.
5. Feuds Improper.
6. Feudal Obligations—Fealty.
7. — Warrant.
8. — Aid. (And see II. 6.)

II. The Establishment of Feuds or Fees in England, and their Incidents.

1. First Introduction.
2. Effect thereof.
3. Consequence of Tenure—Wardship.
4. — Marriage.
5. — Relief.
6. — Aid.
7. — Escheats.
8. — Esuage.

III. The Principles, Qualities, and Rules of TENURE.

1. Principles.
2. Knight-Service.
3. 1. Socage * in Fee, or for Life.
5. Fee simple.
6. Fee tail.
7. Fee for life.
8. Fee for years.
9. Copyhold.
10. Forfeiture of Estates.
11. Burgage - Fee.
12. Gavelkind.
13. Copyholds.

*[Under this head of Socage is a short account of the abolition of the military tenures in England, Ireland, and Scotland.]

I. 1. FEUD, according to Somner, is a German compound, consisting of *feh*, *feo*, or *feoh*, (a salary, stipend, or wages,) and *hade*, *head*, or *hode*, (quality, kind, or nature; *feudum*, [*feh*, or] *fee*, or land holden in fee, is, therefore, (considered

in its primary acceptation,) what was holden in *fee hold*, by contraction, *feod*, or *feud*, i. e. in a *stipendiary*, conditional, mercenary way and nature, with the acknowledgment of a superior, and a condition of returning him some service for it, upon the withdrawing whereof the land was revertible unto the lord. *Somm. on Gav.* 106, 111. Allodial lands were such as the proprietor had the absolute property in; the term being derived from the Northern *odhal*, right; so called from *odh*, *proprietas*, and *all*, *totum*; the syllables being transposed. See 2 *Comm.* 44, and *n.* Others derive this word from *an* and *lot*, allotment; the mode of dividing what was not granted as stipendiary property. *Roberts. Char. V.*

Feuds, or *Feuda*, says Selden, are the same which, in our laws, we call *tenancies*, or *lands held*; *Feuda*, also, are possessions so given and held, that the possessor is bound to do service to him from whom they were given, *Seld. tit. Hon.* 273.

This service was originally purely military; and the possessor or feudatory's homage or fealty was, (as it seems,) in the infancy of feuds, a kind of military engagement, rather implied than expressed, to be faithful to his benefactor, and also assistant unto him. Spelman therefore calls a feud, *prædium militare*; and Somner says that every inheritance is improperly and corruptly called a *fief* or *fee*, that is not holden *militiæ gratia*, the ground of all fees. *Spelm. Feuds*, 6; *Id. Gloss. in n. Somm. Gav.* 49.

2. Feuds were originally a military policy of the Northern conquering nations, devised as the most likely means to secure their new acquisitions; and were large districts, or parcels of land, given or allotted by the conquering general to the superior officers of his army; and by them dealt out, in less parcels, to the inferior officers and most deserving soldiers. Thus a proper military subordination was naturally and rationally enough inferred and established; and an army of feudatories were as so many stipendiaries, always on foot, ready to muster and engage in defence of their country. So that the feudal returns of fealty or mutual fidelity and aid seem originally to have been political, or rather natural consequences, drawn from the apparent necessity these warlike people were under of maintaining their ground, with the same spirit, and by the same means, they had got it. *Wright's Law of Tenures*, 7—10.

As the princes of Europe were every day more and more alarmed by the progress of the Northern standard, many of them (and by degrees all) went into this or a like policy, as the strongest entrenchment; and, in imitation of it, they, reserving the *dominium* or property of the lands they gave, parcelled out some of their own possessions or territories under an express fealty; engaging their beneficiaries or feudatories to make them the like returns of fidelity and aid, as followed from the nature and design of an original feud. From hence, probably, the feudal obligations began to be considered as renders or services of render, calculated for the benefit of the proprietary; who was, in respect of the *dominium* remaining in him, thenceforth called *dominus*; and military aid or service (as now called) was understood to be the real or fictitious terms or conditions of all propriety or possession in Europe. *Wright Ten.* 10—13.

A different account, however, of the origin of the feudal system is suggested by a more modern writer, and advocated by a late editor of the *Commentaries*, Mr. Justice Coleridge. —It is this: That when the Germanic tribes poured down upon the empire, the conquerors made partition of the lands between themselves and the original possessors: some tribes taking larger, some a less portion to themselves. The estates of the conquerors were termed *allodial*; they were inheritable and subject to no burden but that of public defence. Besides these lands, others also were reserved out of the share of the conquered for the monarch; partly to maintain his dignity, and partly to supply his munificence. These were the *fiscal* lands, and for the greater part were gradually granted out

under the name of *benefices*; and though the donation might not be accompanied by any express reservation of military service, yet the beneficiary was undoubtedly more closely connected with the crown, and bound to more constant service than the allodial proprietor.

It is suggested that there is no satisfactory proof that these *benefices* were ever resumable at pleasure, but that from the beginning they were ordinarily granted for the life of the grantee; that very early they became hereditary, and that as soon as they did so, they led to the practice of sub-feudation; which on this supposition is to be deemed the true commencement of the system of feudal tenures.

Still at this period the far larger part of the land remained allodial; and the extension of the feudal system is therefore to be attributed to the forlorn state in which the allodial proprietor found himself, during the period of anarchy and private warfare which succeeded the death of Charlemagne. In those times the connexion between the beneficiary and the vassal was a protection to both; the former abstained from acts of violence against the latter, and both together protected each against the attacks of others; while the isolated allodialist, to whom the crown in its weakness could afford no succour, was left a common prey to all. This led to a voluntary subjection of themselves to feudal laws, upon feudal conditions, and to the gradual diminution, though not extinction of allodial estates.

Hallam alludes to a custom, called *commendation*, which, as occasioned by the same state of society, certainly adds some credit to this theory. This custom was a kind of personal feudality; the lord was bound to protect the person and his lands who so commended himself, after which he received a stipulated sum of money called *salvamentum*. The vassal performed homage, but the connexion had no reference to land, was not always burdened with the condition of military service, and seems to have been capable of dissolution at the pleasure of the vassal.

This manner of accounting for the rise of the feudal system may seem not unreasonable or unnatural, principally on two grounds: 1st. What is known of the composition of the Germanic armies who overran the empire, makes it very unlikely either that the general would be actuated by so refined a policy as that formerly supposed, or that the soldiery would have submitted to take their estates as gifts to be held of him, or their superior officers, on feudal conditions; or in fact upon any other footing than that of their being the respective proportions of the territory to which their own services had given them an independent title. 2ndly. The usual theory, assuming that the foundation of the feudal system was the public defence, appears rather a refined after-thought, not warranted by the fact. No doubt, even if the first conquerors took their land allodially, they were bound by those general principles which were among the very earliest in civil society, to come forward in defence of the public safety: but the feudal principle is a private one, of mutual defence from private dangers; it was adapted to meet that state of anarchy and private warfare in which individuals did not look to the crown or the laws, but to their own strength, (with their protectors and dependents) for safety, against violence and oppression. The vassal took his oath of fealty to his immediate lord, and to no other, and the oath was without any reservation. Accordingly it was a part of the law to define under what circumstances the vassal was bound upon pain of losing his fief to follow his lord, even in his wars against the monarch; and the very circumstances of a limitation of cases being made, seems to imply a time when he was bound to do so in all cases. In some districts, in fact, the vassal owed no service to the king; and in others he was only bound to follow the lord in his wars to the limits of the lord's territories.

The system, however, which has been adopted by English lawyers may be considered, as to them, natural and true. In

England the system, as a whole, was introduced at once by a public and powerful sovereign, who made or applied it as a great political means of military defence. William received the fealty, not only of his own vassals who held of him in chief, but of their vassals also, and thenceforward the oath of fealty to a subject, in England, was accompanied with the reservation to be found in *Littleton's Precedent*, § 85. "*Salve la foy qui jee doy a nostre Seigneur le Roy.*" See Coleridge's note on 2 *Comm.* p. 46, and Hallam's *Middle Ages*, and Robertson's *Charles V.* [As to the question whether the system might not have been introduced previous to the time of William I. see post, II. 1.]

3. Feuds were originally precarious, and held at the will of the lord: they next became certain for one year; and were, some time after, given for life. But though feuds were not at first hereditary, yet the vassals or feudal tenants were called *navi*, as if born such: and it was unusual, and even thought hard, to reject the heir of the former feudatary, provided he was able to do the services of the feud and the lord had no just objection against him. But though the lord did not remove the heir from the feud, yet it is not likely that he succeeded absolutely as of course, but that he paid a fine, or made some acknowledgment in the nature of relief for the renewal of the feud; and though that reason ceased, yet the fine was continued afterwards, became hereditary, and is well known at this day (though by several names) in most countries. *Wright*, 13—15. See post, II. 5.

Feuds were afterwards extended, beyond the life of the first vassal or feudal tenant, to his sons, or some or one of them whom the lord should name. In process of time, grandchildren succeeded to sons, and brothers also succeeded to brothers, if the feud was *antiquum aut paternum*; but not if it was *novum*, i. e. newly purchased or acquired; not having descended from the father to the brother first dying. At length, not only descendants in the direct line succeeded in *infantum*, but collaterals also, without regard to their degree, provided they were descended from and were of the blood of the first feudatary. *Wright*, 15—18. and the authorities there cited.—See the next division.

Spelman says, that these several conditions of feuds had their several denominations; while precarious, they were called *munera*; when for life, *beneficia*; and were first called *feuda*, when they began to be granted in perpetuity, and not before. *Spelman on Feuds*, 4. §. 9. Somner says, *feudum* was a word not known until about A. D. 1000. *Somner on Gav.* 102.

4. Feuds being thus originally in the hands of military persons, who were under frequent incapacities to cultivate their own lands, they found it necessary to commit part of them to persons who, having no feudal possessions of their own, were glad to possess them on any terms. To such persons small portions were let, reserving such returns of service, corn, cattle, or money, as might enable the proprietors to attend to the feudal duties uninterruptedly. By this means the feudal policy was considerably extended; as all persons accepting a feud were, under an express or implied fealty, obliged to answer the stipulated renders, and to promote the peace and welfare of the feudal society. From thence therefore arose the distinctions made by the feudists, of feuds proper and improper, and the many subdivisions of these terms. *Wright*, 19—26.

Proper feuds are such, and such only, as are purely military; and, at this time, hereditary; and such as in all respects preserve the nature of an original feud, as before explained. It was the military nature of these feuds that first rendered women and monks incapable of receiving or succeeding to feuds of this sort; and that restrained the alienation, devising, or incumbering of the feud by the feudatary, without the consent of the lord; and of the seignior by the lord, without the consent of the tenant; the obligations of the superior and inferior being mutual and reciprocal. The feudal

course of succession, in all proper feuds, belonged to the sons only, (exclusive of daughters,) and to them equally; until, by a constitution of the Emperor Frederic, honorary feuds became indivisible; and, as such, they (and, in imitation of them, military feuds in most countries,) began to descend to the eldest son only. *Wright*, 27—32.

5. Such feuds are termed *improper feuds*, as are sold or bartered for any immediate or contracted equivalent; or are granted free of all service, or in consideration of one or more certain services, whether military or not; or upon a *cense*, or *rent*, in lieu of service; and all such feuds also as, by express words in their creation or constitution, are alienable, or allowed to descend indifferently to males or females. *Wright*, 32. Of which sort most feuds are at this day.

They are distinguished from proper feuds, by such qualities only as are varied from or superadded to the feud by express provision of the parties; they must appear to be so from the words of the investiture; which solemnity is as necessary to this as to a proper feud. And the custom of the country where the feud lies must be accurately observed.

6. Few of the feudal obligations are, as such, of force with us. First mentioning *fealty*, those of *eviction* and *aid* may deserve some notice, as our laws of *warranty* and *aid* may be supposed to depend on them.

FEALTY, the essential feudal bond, is so necessary to the very notion of a feud, that it is a downright contradiction to suppose the most improper feud to subsist without it. *Craig de Jure Feud.* 45—7. 223; 1 *Inst.* 129, a; *Seld. Tit. Hon.* 273. See *Fealty*.

7. The feudal obligation upon *Eviction*, *ut vel feudum aliud, ejusdem bonitatis, restituat Dominus, vel satisfactionem præstet*, if considered as a penalty upon the lord for refusing or neglecting, when required, to protect or defend the feudatary's title to the fee, might be always reasonable; otherwise, it rather seems to have prevailed upon the reason of contracted and improper feuds, than by the nature of a pure original feud. And though none of the ancient feudists make any strict distinction, yet they must be understood to speak of the times in which they wrote; in which such improper feuds chiefly prevailed; nay, when almost all feuds were alienable and saleable as matters of merchandise. *Wright*, 39, 40.

8. *Aid*, as understood to import an obligation upon the feudal tenant to contribute to the private necessities or occasions of the lord, was not of direct feudal obligation; the original feudal aid seeming to have been purely military, binding the feudatary merely to concur with, and to assist his superior or lord, in defence of the feud, or feudal society. On this ground it can hardly be made out, that the several different aids which have been exacted, are to be inferred from the reason of feuds; but they rather seem to depend upon the usage or custom of the several countries where they are established. *Wright*, 40—42. See post, II. 6.

II. 1. It is difficult to determine precisely the time when feuds or tenures were first brought into ENGLAND: some have thought that they were planted here long before the conquest; others that they were introduced by William I. soon after. The authorities on both sides this question are numerous, and have been thus ranged: that feuds existed before the conquest is contended by the author of the *Mirror*; Lord Coke (1 *Inst.* 76, b.); *Selden* (*Tit. Hon.* 510.); the judges of Ireland in the cases of tenures; *Nat. Bacon* (*Hist. Engl. Gov.* 161.); Sir W. Temple (*Introd.* 171.); and Blackstone, though he does not admit that they were a part of the national constitution. That feuds were first introduced by William the First is asserted by *Mat. Paris*; *Bracton* (*lib. 2. c. 16. § 7.*); *Spelman* (*on Feuds*); *Dugdale*; *Wilkins*; Sir R. Cotton; *Lord Hale* (*H. C. L.* 107. 223.); *Craig* (*de Jure Feud.* 29.); *Somner* (*Gavelkind*, 100.); and *Wright* himself. See *Saint-John on the Crown Lands*.

One observation may be of service in deciding this ques-

tion; that William the First about the 20th year of his reign, just when the general survey of England, called Domesday book, is supposed to have been finished, and not till then, summoned all the great men and landholders in the kingdom to London and Salisbury, to do their homage, and to swear their fealty to him. Hence we may reasonably suppose, 1st. That this general homage and fealty was done at this time in consequence of something new; or else that engagements so important to the maintenance and security of a new establishment would have been required long before. 2ndly. That as this general homage and fealty was done about the time that Domesday book was finished, and not before, it may be supposed that that survey was taken upon or soon after our ancestors' consent to tenures, in order to discover the quantity of every man's fee, and to fix his homage. *Wright, 52—56.*

On the whole, therefore, it seems, that it may safely be assumed, that tenures first became a principal branch of the national policy in the time of William I.; for even in the Saxon times particular proprietors of large tracts of land, which they could not cultivate and manure themselves, might let some part of them to their neighbours, under various acknowledgments or returns of service, not altogether unlike some of the feudal tenures; especially as our Saxon ancestors may be supposed to have had some notion of such tenures, they being a colony or branch of the ancient Goths, who first brought the feudal policy into Europe. *Wright, 57, n.*

The question whether the law of feudal tenures can be said to have existed even before the conquest, is very ingeniously discussed by a modern writer of eminence, who at last allows that perhaps any attempt to decide it positively would end in a verbal dispute. In every political institution three things are to be considered, the principle, the form, and the name. The last (he admits) will not be found in any genuine Anglo-Saxon record; of the form, or the peculiar circumstances and incidents of a regular fief there is some, though not much appearance. But they who reflect upon the dependence in which free and even noble tenants held their estates of other subjects, and upon the privileges of territorial jurisdiction will (the writer thinks) perceive much of the intrinsic character (the principle) of the feudal relation, though in a less mature and systematic shape than it assumed after the Norman conquest.

This question was once famous at least, if not interesting. The position asserted by Spelman in his Glossary, that lands were not held feudally before the conquest, having been denied by the Irish judges in the great case of tenures, Spelman was compelled to draw up his Treatise on Feuds, in which it is more fully maintained. Several other writers, especially Hicks, Maddox, and Sir Martin Wright took the same side. But the author now alluded to thinks that names equally respectable might be thrown into the opposite scale: and that the prevailing bias of modern antiquaries is in favour at least of the modified affirmation above stated. See *Hallam's State of Europe in the Middle Ages, chap. 8. on the Anglo-Saxon Constitution.*

2. The establishment of tenures in England may be called an extraordinary alteration of the national policy; not only because it was such in many of its consequences, but likewise because it originally and immediately defeated all supposition or possibility of propriety in any other person than the king; inasmuch that it became a fundamental necessary maxim, principle, or fiction of our English law of tenures, (alluded to in the introduction to this title,) that the king is universal lord of his whole territories; and that no man doth or can possess any part thereof, or lands therein, but as either mediately or immediately derived from him. *Wright, 58. See also 1 Inst. 65, a.*

According to this position, of which the truth is undeniable, all the lands in England, except those in the king's hands, are feudal. This universality of tenures, if not quite peculiar to England, certainly does not prevail in several

countries on the continent of Europe, where the feudal system has been established; and it seems there are some few portions of allodial land in the northern part of our own island. As to Scotland, Lord Stair expresses himself rather ambiguously on the subject; for he says, that there remains little of allodial land in Scotland; but, in a few lines after, observes, that the glebes of the clergy: which seem to come nearest to allodials, are more properly mortified, or, as we should call them, Mortmain Fees. *Stair, Inst. See 1 Inst. 65, a. in n.*

As William I., however, notwithstanding the monkish relations, and the misapprehensions of some modern writers, did not claim or possess himself of the lands of England, as the spoils of conquest; so neither did he tyrannically and arbitrarily subject them to a feudal dependence; but as the feudal law was at that time the prevailing law in Europe, William, who had always governed by this policy, might probably recommend it to our ancestors, as the most obvious and ready way to put them upon a foot with their neighbours, and to secure the nation against any future attempts from them. We find accordingly, among the laws of William I. a law enacting the feudal law itself; not indeed *ex nomine*, but in effect; as it requires from all persons the same engagement to, and introduces the same dependence upon, the king, as supreme lord of all the lands in England, as were supposed to be due to a supreme lord by the feudal law. The law meant, is the 52d law of William I. (see *Wright, 65*); the terms of which are absolutely feudal, and are apt and proper to establish that policy with all its consequences. for it requires, "that all owners of land should expressly engage and swear that they would become vassals or tenants, and as such be faithful to William as their lord; and that they would, in consequence thereof, every where faithfully maintain and defend his, their lord's, territories and title, as well as person, and give him all possible aid and assistance against his enemies foreign and domestic." See also the 55th, 58th, 68th, and 69th laws of this king; and *Sir M. Wright's* ingenious observations upon the whole, in his book, p. 69, *et seq.*

3. Although it is certain that wardship could be no part of the law of feuds before they became hereditary, yet then, as they often descended on infants who were incapable of performing or engaging for the services of the feud, wardships of the land, i. e. the custody of the feud itself, was retained by the lord; that out of the profits he might provide a fit person to supply the infant heir's defect of services until he came of age to perform them. *Wright, 89.*

With respect to the custody or wardship of the body, there is no clear feudal reason to be given for it; and therefore we may suppose that our Norman ancestors might think it reasonable, rather in regard to the infant heir, than to the lord himself, that the lord, who had the custody of the feud, should likewise have the care and maintenance of the infant feudatory; who would thus be most likely to be qualified for the services of the feud. *Fortesc. de Li. Ang. c. 44; Smith de Rep. Ang. 264; Comel. Inst. lib. 1. tit. 17. § 2; 1 Inst. 75, b; Bacon. Hist. Eng. Gov. 148. See 2 Comm. c. 5 p. 67; c. 6. p. 87; and tit. Guardian.*

4. As for MARRIAGE, the lords of our English fees might possibly take the hint from Normandy: though, in the sense of our law, in which it meant the interest of the guardian in bestowing a ward in marriage, and was understood to be a beneficial perquisite of tenure, no express notices of it can be found earlier than the statute of *Merton, c. 6, 7. Hen. 3.* By the charter of Henry I., a daughter of any of the king's tenants was not, even in the life-time of her father, to be married without the king's privity; because otherwise she might marry a public enemy. But the king was to take nothing for his consent; nor could he restrain the father from marrying her to any that was not such enemy; but this charter says nothing of the marriage of males, nor does it

give the least colour or countenance to any private profit from the marriage of females. Our English lords, however, by an extraordinary construction of *Magna Charta*, took upon them, not only the absolute marriage of female wards, but of males too, which at length became one of the great feudal grievances. See *Ll. H. 1. c. 1*; *Spelman on Feuds*, 29; *Glanv. lib. 7. c. 12. p. 55, a*; *Bract. lib. 2. c. 37. § 6. p. 188, a*; *2 Comm. c. 5. p. 70. c. 6. p. 88.*

5. *RELIEF*; [*relevamen, relevatio, relevium*; intimating, that the inheritance, which, by the death of the former tenant, became *jacens*, or *caducum*, was thus *relevatus*, lifted or raised up again. See *Bracton, lib. 2. c. 36*; *Britton, c. 69*; *Spelm. Relevamen*.] was not a service, but a fruit of feudal tenure. *2 Roll. Abr. 511, D. 3*; *3 Rep. 66*; *1 Inst. 83, a*. These were not arbitrarily introduced by William I., but brought into England with feuds, according to the custom of the feudal law and other nations: and although Lord Coke (*2 Inst. 7, 8*; but see *1 Inst. 176, a*), supposes reliefs to have been certain at the common law, yet they were probably with us originally uncertain as by the feudal law; and were, no doubt, on this account, another of the great grievances of tenure; to remedy which several laws were made, fixing them at certain sums for all lands held by knight-service, till the expiration of that tenure, under the 12 Car. 2. c. 24. See *Ll. Wm. 1. c. 22*; *Ll. Hen. 1. c. 14*; *Magna Charta, c. 2*; *ante, I. 3.* and *Wright's Tenures*.

The relief of socage lands was fixed by the 40th law of William I. at one year's rent, and remains the same to this day: although it is not taken notice of in any of the charters of Henry I., John, or Hen. III. *Glanv. lib. 9. c. 4*; *Fleta, lib. 3. c. 17. § 11*; *Litt. § 126, 127*; *2 Inst. 232*; and see *1 Inst. 93, a. in n.*; and *tit. Relief*; and *2 Comm. c. 5. p. 65*; *c. 6. p. 87.*

6. *AIDS*, (see *ante, I. 8.*) called by *Spelman (Treatise on Feuds, 59.)* Tribute, and by our old authors *auxilia*, were mere benevolences, rendered by a tenant to his superior lord, in times of difficulty and distress. *Bracton, lib. 2. c. 16. § 8*; *Fleta, lib. 3. c. 14. § 9*. These were not of direct feudal obligation; but first obtained out of a regard to the person and occasions of the lord. The kind and quantum, therefore, of every aid was originally as various and uncertain as the occasion of the lord, and the abilities of the tenant. But as aids grew frequent, they became, in many countries, established renders of duty: thus, in Normandy, the three most used and frequent aids, 1st, to make the lord's eldest son a knight; 2dly, to marry his eldest daughter; and, 3dly, to ransom his person; became fixed and established. Besides these, there was one of an inferior nature, respecting only inferior lords, viz. an aid to enable the lord to pay his relief, therefore called *aid de relief*. To all these our ancestors were liable: and thus far went into the Norman notions on this subject, viz. they carried it farther; for in the time of King John inferior lords took aids to pay their debts, and in the time of King Henry II. it was doubted whether lords might not require aids toward their military expeditions; but at length these inferior aids, together with the *aid de relief*, and other illegal aids imposed by the king himself, were effectually abolished by a charter of King John, revived and restored by 25 Edw. 1. c. 5, 6; and the two first of the usual aids before-mentioned were fixed (by stat. *Westm. 1. c. 36.* extended by 25 Edw. 3. c. 11. to aids required by the king) as follows, viz. the aid of a knight's fee at 20s. and of socage lands of 20*l.* per annum at 20*l.* and so *pro ratâ*. These statutes do not regulate the third aid for ransom of the lord's person; this was less frequent, and by no means capable of certainty; it being of the highest consequence, with regard especially to the supreme lord, that he should at any rate be ransomed as often as he was taken prisoner of war. *Wright, 105—115.* See *2 Comm. c. 5. p. 63. &c. c. 6. p. 86.*

7. When a fee determines for want of heirs, or *propter delictum tenentis*, the land falling back to the lord is called an escheat [*escaeta*], and is as such reckoned by our English lawyers among the fruits or perquisites (though it might properly be considered as the absolute determination) of tenure. *Spelman on Feuds, 37.*

Spelman (ubi supra) divides escheats into regal and feudal; (in which he is followed by *Coke, 3 Inst. 111*; agreeable enough to the import of the word escheat from the French *escheoir*, to happen.) But, strictly speaking, such lands as are not held immediately of the king, and yet happen to him upon the commission of any treason, are not escheats, but forfeitures; which were given to the king by the common law, and do not depend upon the law of feuds or tenures, but upon Saxon laws made long before their introduction, and which prevail even now. *Lambard. Ll. Alf. c. 4*; *Ll. Canuti, c. 54.* See *Yorke's Law of Forfeiture*; and *tit. Forfeiture, II. 1.*

Though this forfeiture to the king may seem severe on the mesne lord, in defeating his seigniority, yet it seems a punishment inflicted on him for his want of caution in the choice of his tenant. The law having inflicted a similar penalty on the lord, where the tenant is guilty of felony only, the king, in this latter case, having the land a year and a day, to the prejudice of the immediate lord, to whom the estate in that case escheats. See *Magna Charta, c. 22. 31*; *1 Inst. 18. b. in n.*; *2 Inst. 36, 37*; *3 Inst. 111*; *St. de Prærog. Regis, 17 Edw. 2. c. 16*; *Stawford, P. C. l. 3. c. 30.* And for further matter, *2 Comm. c. 5, 6*; and *tit. Escheat*.

If lands be held of the king, as of an honour come to him by a common escheat, as the tenant's dying without heir, or committing felony, these lands are part of the honour; otherwise, if forfeited for treason, for then they come to the king by reason of his person and crown; and if he grants them over, &c. the patentee shall hold of the king in chief. *2 Inst. 64.*

It was found by special verdict, that the prior of Merton was seised of a house in Southwark, held of the Archbishop of Canterbury, as of his borough of Southwark, and (anno 30 of his reign) surrendered it to Henry VIII., who granted it and other lands to J. S. and his heirs, to hold of him in *libero burgagio*, by fealty, for all services and demands, and not in capite; and afterwards Queen Mary granted the manor and borough of Southwark to the mayor and commonalty of London; and the tenant of the messuage died without issue; and the question was, whether Queen Elizabeth or the patentees of the borough should have the escheat; and adjudged for the queen; for the first patentee of the messuage held it of the queen in socage, as of a seigniority in gross; and the words in *libero burgagio* are merely void: for the land out of the borough cannot be held in *libero burgagio*; and there shall not be several tenures, for one tenure was reserved by the king for all; therefore of necessity it shall be a tenure in socage of the king. *Cro. Eliz. 120.*

By a recent act of parliament the 4 & 5 Wm. 4. c. 23. (passed since the first volume of this work, containing the titles *Escheat* and *Forfeiture*, was printed off,) the law relative to the escheat and forfeiture of property real and personal, held in trust, has been amended.

§ 2. enacts, that if a trustee or a mortgagee of land die without an heir, the Court of Chancery may appoint a person to convey such land, &c. according to the provisions of the 11 Geo. 4. and 1 Wm. 4. c. 60.

§ 3. Lands, chattels, or stock, vested in any trustee, shall not escheat or be forfeited to the king, or any lord of a manor, by reason of the attainer or conviction of such trustee.

By § 4. the act is to extend to every case of a trustee having some beneficial estate or interest in the same subject, or some duty as trustee to perform, and also to every case of a trust by implication of law or construction of equity.

But § 5. provides that the act shall not prevent the escheat of forfeiture of any beneficial interest in such trustee.

§ 6. declares that where any trustee of lands, &c. shall have died without heirs, or have been convicted of an offence whereby the lands, &c. shall have escheated or been forfeited, such lands, &c. shall become subject to the control of the Court of Chancery, under the provisions of the said act of the 11 Geo. 4. and 1 Wm. 4. c. 60. But this clause is not to extend to lands, &c. vested in any person by a grant subsequent to such escheat or forfeiture, or which more than twenty years before the passing of the act have been reduced into possession by the party entitled, by virtue of such escheat or forfeiture.

8. ESCUAGE is reckoned by Lord Hale among the perquisites of tenure; and whether so or not, seems one of its most obscure and unintelligible branches.

Escuage, considered as a service, or species of tenure, was not, as Littleton intimates, (§ 95, 96,) a direct personal service of attendance upon the king in his wars; nor was it due upon all military occasions, as knight-service was: but it was a pecuniary aid, or contribution, reserved by particular lords instead, or in lieu, of personal service; the better to enable them to bear the extraordinary expense of their own attendance and warfare, when the king made war on Scotland or Wales, or upon any foreign country, if the tenure was so expressed. *Bract. l. 2. c. 16; Litt. § 95, 97, 100, 103, 155, 158; Mad. Hist. Exch. 452; Seld. Notes ad Hengham, 118.*

As the lord's service abroad was thus uncertain, the quantum of this aid was seldom ascertained by reservation; but was usually proportioned to the fine received by the king from his tenants in *capite* failing to attend in such expeditions. *Fleta, lib. 3. fol. 198.*

This aid and fine were both of them called *escuage à scuto* quod assumitur ad servitium militare (*Bract. ubi supra*); in respect of the *scutum* which ought to be borne both by lord and tenant in such wars.

In this view escuage was a specific service (of a different kind from knight-service), in respect whereof only the tenant, on account of its subserviency to the military policy of the nation, was esteemed a knight, or rather as a military tenant. *Wright, 126, 127.*

Escuage, however, it must be allowed, was anciently, as it is at this day, more generally understood to denote a mulct or fine for a military tenant's defect of service, as the feudal severities began to abate. *Mad. Hist. Exch. 433, 454, 457, 458, 462; 2 Roll. Abr. 509, § 1; Litt. § 102.*

Our kings anciently taking advantage of, or perhaps complying with, this humour of their tenants, which made their actual services precarious, did sometimes, on occasion of war, without summons, assess a moderate sum upon each knight's fee, as a scutage or escuage, by which they might be enabled to provide stipendiaries. But as escuage of this sort was a previous commutation for service really imposed at the king's will, and not incurred as a fine, it was not long submitted to: in the time of King John, it was not only insisted upon as an undoubted right of the king's tenants, but the barons urged, and the king, by his charter, declared, that no escuage should be imposed or assessed *nisi per commune concilium Regni*. See *Litt. § 97; 1 Inst. 72, a; Magna Charta, cap. 37.*

Escuage thus becoming the only penalty for defect of service, many lords, by agreement between them and their tenants, fixed it a certain sum, to be paid as often as escuage should be granted, without regard to the rate assessed by parliament. Thus ascertained, it was called escuage certain, and because it did in effect discharge the tenant from all military service, the persons who held by such escuage were looked upon as socage tenants, and no longer esteemed as tenants by knight-service. *Litt. §§ 98, 120; 1 Inst. 87, a.*

As to escuage, see also the notes on 1 *Inst. 73, 74.* And

now escuage is expressly taken away by the 12 Car. 2. c. 24. (See post, III. 3.); and had fallen into disuse long before: for there is no instance of parliament assessing it since the reign of Edward II. See further, 2 *Comm. c. 5. p. 74, &c.*

III. 1. IT IS SO ABSOLUTE A MAXIM, principle, or fiction, of the law of tenures, that all lands are holden either mediately or immediately of the king, that even the king himself cannot give lands in so absolute and unconditional a manner, as to set them free from tenure. And, therefore, if the king should grant lands without reserving any particular service or tenure, or if he should in express words declare, that his patentee should have lands *absque aliquo inde reddendo*; yet the law or established policy of the kingdom would create a tenure; and the patentee should anciently (before the 12 Car. 2. c. 24.) have held of him in *capite* by knight-service. 1 *Inst. 1. 65; 2 Inst. 501; Somn. on Gat. 126; 6 Rep. 6; 9 Rep. 123; Bro. Tenures, 3, 52.* And now, in such case, or, if the king release the services to the tenant, it will not extinguish the tenure; but the tenant shall, notwithstanding, hold by fealty, which, as was before observed, (I. 6.) is an incident essential to every tenure, and therefore cannot be released. 9 *Rep. 123; Law of Tenures, 196; 2 Comm. c. 6. p. 86.*

Lands thus holden are called *tenures*; which were principally divided, according to their services, into tenures by knight-service and in socage.

According to Blackstone, there seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services, or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either free or base services; in respect of their quantity, and the time of exacting them, were either certain or uncertain. Free-services were such as were not unbecoming the character of a soldier, or a freeman, to perform; as, to serve under his lord in the wars, to pay a sum of money, and the like. Base-services were such as were fit only for peasants, or persons of a servile rank; as, to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The certain services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The uncertain depended upon unknown contingencies; as, to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services. Or to do whatever the lord should command, which is a base or villein service. 2 *Comm. c. 5.*

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England till the middle of the 17th century; and three of which subsist to this day. Of these, Bracton (who wrote under Henry the Third) seems to give the clearest and most compendious account of any author ancient or modern, of which the following is the outline or abstract: "Tenements are of two kinds, frank-tenement, and villenage. And, of frank-tenements, some are held freely in consideration of homage and knight-service; others in free-socage with the service of fealty only." And again, "Of villenages some are pure, and others are privileged. He that holds in pure villenage shall do whatsoever is commanded him, and always be bound to an uncertain service. The other kind of villenage is called villein-socage; and these villein-socmen do villein services, but such as are certain and determined." See *Bract. l. 4. fr. 1. c. 28.* Of which the sense seems to be as follows: first, where the service was free, but uncertain, as military service with homage, that tenure was called the tenure in chivalry, *per servitium militare*, or by knight-service. Secondly, where the service was not only free, but

also certain, as by fealty only, by rent and fealty, &c. that tenure was called *liberum socagium*, or free-socage. These were the only free holdings or tenements; the others were villenous or servile. As, thirdly, where the service was base in its nature, and uncertain as to time and quantity, the tenure was *purum villenagium* absolute or pure villenage. Lastly, where the service was base in its nature, but reduced to a certainty; this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be still called socage, (from the certainty of its services), but degraded by their baseness into the inferior title of *villanum socagium*, villenous socage.

2. TENURES BY KNIGHT-SERVICE differed very little from proper feuds; but being now abolished by the 12 Car. 2. c. 24. and turned into free and common socage, inquiry shall be made at some length into that existing tenure. See *ante* I. 1; II. 1, 2; and 2 Comm. c. 5. I.

3, 4. TENURES IN SOCAGE are holdings by any certain conventional services that are not military; the word socage, according to *Sommer*, being derived of the Saxon word *soc* (a liberty, privilege, or immunity,) and *agium*, a legal termination, signifying service or duty. *Somm. Gav.* 133, 143, 141; *Litt.* § 17; 1 Inst. 80, a; *Britt. c.* c. 6. § 4. 5; *Plat.* lib. 1. c. 8.

It seems, however, more probable and consistent to derive socage from *soca*, a plough; or rather, ploughshare, (*soc*, Fr.) the ancient service reserved on this tenure being to plough the lord's land; but which is now changed into many other kinds of service. In this sense the tenure in socage is denominated, (like the tenure by knight-service,) simply from the name or nature of the service at first reserved. *Wright* 141, 4; 1 Inst. 86. (b); *Craig de jure Feud.* 65; 2 Comm. c. 6. and the notes there. But see *Socage, Socagers*.

By the degenerating of knight-service, or personal military duty, into escuage or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. These may be collected from the foregoing detail, and are very justly and feelingly stated in 2 Comm. c. 5, p. 75, 76.

Palliatives were from time to time applied by successive acts of parliaments, which assuaged some temporary grievances. Till at length the humanity of King James I. concerted, in consideration of a proper equivalent, to abolish them all, though the plan proceeded not to effect; in like manner as he had formed a scheme, and began to put it in execution, for removing the feudal grievance of heritable jurisdictions in Scotland; which has since been pursued and effected by the statute 20 Geo. 2. c. 43. 50. King James's plan for exchanging our military tenures seems to have been nearly the same as that which has since been pursued; only with this difference, that, by way of compensation for the loss which the Crown and other lords would sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the Crown, and assured to the inferior lords, payable out of every knight's fee within their respective shires; an expedient seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages, (having, during the usurpation, been discontinued,) were destroyed at one blow by the 12 Car. 2. c. 24. which enacts, "That the Court of Wards and Liveries, and all wardships, liveries, primer seisin, and ouster-le-mains, values and forfeitures of marriages, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienation of tenures by homage, knight's service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king in capite, be likewise taken away. And that all sorts of tenures, held of the king or others, be

turned into free and common socage; save only tenures in frankalmoigne, copyholds, and the honorary services of grand serjeanty." A statute which was a greater acquisition to the civil property of this kingdom than even *Magna Charta* itself: since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of King Charles extirpated the whole, and demolished both root and branches. 2 Comm. c. 5. *ad fin.*

The above expression, in the title and body of the act, as to tenures in capite, and which was also repeated by the speaker of the House of Commons in his address to the king on presenting the bill, is an inaccuracy of a very extraordinary nature. For tenure in capite signifies nothing more than that the king is the immediate lord of the land-owner; and the land might have been either of a military or socage tenure. See 2 Comm. c. 5. n.; *Mad. Bar. Ang.* 238; 1 Inst. 101, n. 5; and see *Serjeanty*.

The several changes made in the tenure of socage by this statute, 12 Car. 2. c. 24. (the benefits of which were fully extended to Ireland by the Irish act, 14, 15 Car. 2. c. 19.) are the following: viz. First, it takes away the aids *pur file marier* and *pur faire fitz chevalier*, which were incident to all socage tenures. 2. It relieves socage in capite from the burden of the king's *primer seisin*, and of fines of alienation to the king, to both of which socage in capite was equally liable with tenure by knight-service in capite, though not so to wardship. 3. It extends the father's power of appointing guardians to children of both sexes; and thus supplied the means of still further preventing guardianship in socage. See *Guardian*. In all other respects the tenure in socage seems to be under the same circumstances, and attended with the same consequences, as it was before the Restoration.

Having thus reformed and improved this favourite tenure, the statute, in the next place, provides for the extension of it throughout the kingdom. This it effectually secures, by converting into socage all tenures by knight-service, as mentioned above; and by taking from the Crown the power of creating any other tenure than socage in future. 1 Inst. 93. (b) in n.; and see *Id.* 85, (a) in n.

It appears that there is nothing, however, in the above statute which in the least varies the tenure in Frankalmoigne; it being expressly saved in the statute, § 7. See *Charitable Uses, Frankalmoigne, Mortmain*.—Neither does it appear in any way to affect the tenure by burgage. See *Burgage Tenure*.—And it leaves the tenure by villeinage as it was before; one of the provisos declaring, that it shall not be construed to alter or change any tenure by copy of court-roll, or any services incident thereto. § 7.

A short statement relative to the ancient tenures of lands in Scotland, and their abolition, may not be irrelevant in this place. The following information is chiefly abstracted and digested from *Bell's Dictionary of the Law of Scotland*, tit. *Feudal System, Tenures*.

The prevailing tenure by which most of the land of Scotland was held, was *ward-holding*. It was this tenure which in every case of doubt was presumed; and appears to have been similar to the English knight-service in capite; for it was a military tenure, by which the vassal was bound to attend his superior to battle, and the two casualties arising from this holding, viz. wardship, and marriage, had in view the security of the superior. The consequences of this tenure (like those of the tenure of knight-service in England) were greatly oppressive; and it was not till after the rebellion of 1745 that this tenure was abolished by the provision of the British act, 20 Geo. 2. c. 50; by which the lands held ward of the Crown, or of the prince, were converted into blanch holding; and those which were held ward of a subject were converted into feu-holding, at a rate appointed by the Court of Session, under authority given by the statute.

Fee-holding was a tenure known while ward existed, which obliged the vassal to return farm-produce to the superior: on the abolition of Ward-holding the whole country became under either fee-holding, composed of the original fee-rights, or of those introduced by the act 20 Geo. 2. and which now consist of a return of farm-produce or money; or blanch-holding, which has merely the semblance of a feudal-holding, by the payment of 1*d.* Scots, or some other elusory duty.

By these abolitions the effect of the feudal system was entirely done away in England, while in Scotland, from circumstances peculiar to the practice there, slight traces of it are preserved in their conveyancing; but attended with such inconvenience and evils to the land rights of that country, as now to require a remedy, and peculiarly to call for the attention of those who are desirous of approving and assimilating the jurisprudence of Scotland with that of England. This, according to the writer above quoted, is an object truly important to the landed interest of Scotland, and one which would touch and harmonize many jarring points of the two systems.

The difference produced in Scotland and England is stated to have been in a great measure owing to the different effects produced by a statute common to both countries, the statute *Quia Emptores*, 18 Edw. 1. introduced into Scotland by stat. 2. c. 24. of Robert I. the purport of which in both countries was to put a stop to subinfeudations, by declaring that a vassal might sell his lands, provided he sold them to be held of his superior lord by the tenure and services therefore due: the English act produced the full effect intended, the purchaser by means of the sale holding immediately of the superior: but in Scotland, a charter of confirmation expressing the consent of the superior is held necessary to complete the conveyance; and though the superior is compellable to give such consent, yet the time requisite for obtaining it has introduced modes and forms dangerous and inconvenient in their effect, and wholly unknown in English conveyancing: the transmission of land by the law of Scotland still continuing to be regulated by feudal principles.

All English fees, or holdings, now fall under the notion of *SOCAGE-TENURES*; which, though they vary in point of service, succession, &c. as improper feuds, yet retain the nature of feuds, as they are holden of a superior by fealty, and usually by some other certain service or acknowledgment; and as they are subject to relief and escheat. *Wright*, 144, 5. See further on the subject of socage, 37 Hen. 8. c. 20; *Bract. lib. 2. c. 8.* 85, 86; 2 *Comm.* c. 6.

The socage tenures are now divided by English lawyers, according to their duration, into estates in fee, for life, for years, and at will. In the present instance it may be sufficient to class them under estates in fee, and for life only.

Estates in fee are either fees-simple or fees-tail.

5. A *FEES-SIMPLE*, though it be, according to *Littleton* (§ 1.) *Hereditas pura*, is not so called because it imports an estate purely allodial, or free from all tenure; but in opposition to fees-conditional at common law, and fees-tail since the statute *de donis*. It imports a simple inheritance, clear of any condition, limitation, or restriction, to any particular heirs; and descendible to the heirs general, whether male or female, lineal or collateral. In the express language of our law "Tenant in fee-simple is he who hath lands or tenements to hold to him and his heirs for ever." *Litt.* § 1; *Inst.* 1; *Fleta. lib. 3. c. 8.*

In conveying, or conferring, these fees, or estates in fee, though they are now, contrary to the original purity of proper feuds, become vendible, the ancient form of donation is still preserved; and a feoffment, whether constituting or transferring a fief, or fee, retains even at this day the form of a gift. It is perfected and notified by the same solemnity of livery and seisin on investiture, as a pure feudal donation, and is still directed and governed by the same rules. 1 *Inst.*

9, c. 42, a; *Fleta. lib. 3. c. 15.* § 4, 5; *Bracton. lib. 2. c. 17.* § 1. See *Conveyance, Deed, Feoffment, Grant, &c.*

Tenures being thus derived from the feudal law, and partaking of their origin, fees, or estates in fee, could not, at common law, be aliened without the licence of the lord: (see *ante*, I. 4.) This introduced *sub-infeudations* by the tenant to hold of himself; which were so far restrained by *Magna Charta*, c. 32. as to compel the tenant of an inferior lord to keep in his own hands so much of the fee as would be sufficient to answer his services to the lord. The first statute that materially varied from this law of feuds, was the statute of *Quia Emptores*, 18 Edw. 1. c. 1. which enabled such tenants to sell all or part of their lands, to hold of their lords by the same services as the feoffor had held. The king's tenants were, however, under several disabilities of alienation, but which were all finally removed by 34 Edw. 3. c. 15; and fines for alienation were paid to the king by his tenants, till abolished by the 12 Car. 2. c. 24. already so often alluded to: See 1 *Comm.* c. 5. p. 71; c. 6. p. 89.

As a tenant could not alien, so neither could he subject the tenancy or fee to his debts, until the stat. *Westm.* 2. (13 Edw. 1. st. 1.) c. 18. subjected a moiety of lands to execution; leaving the other to enable the tenant to do the services of the tenure. But several other statutes, as 13 Edw. 1. st. 3. *de Mercatoribus*; 27 Edw. 3. c. 9; 23 Hen. 8. c. 8. were afterwards made, by which lands were subjected, in a special manner, to the particular liens created by those statutes. Vide 2 *Inst.* 394; and tit. *Execution*.

As tenants could not by the feudal or common law alien their tenancies without the licence or consent of the lord; so neither could the lord himself alien his seigniorship without the consent of his tenant. Hence sprung the doctrine of attornment, abolished by the 4 Ann. c. 16. § 9. See *Attornment*.

For the feudal restraints on devise, see *Wills*.

The rules which at present operate on the law of descent to the eldest son, and the general preference of males to females, as well as those which formerly excluded the immediate ascending line of relations, are all deducible from these feudal foundations of the law; and are very ably explained by Sir Martin Wright's treatise, pp. 173—185. See *Descent*; and further, tit. *Fee and Fee-simple*.

6. A *FEES-TAIL* (*feudum talliatum*), as distinguished from a fee-simple, is a fee limited and restrained to some particular heirs, exclusive of others. It is so denominated from the French, *tailleur*, to cut, or cut off, on account of the particular restriction by which the heir-general was often, and collateral or remote heirs were always cut off. *Fleta. lib. 3. c. 3; Bract. lib. 2. c. 5.* § 3; *Brit. c. 34; Litt.* § 13. 18; 1 *Inst.* 18, b; *Spelm. Gloss.* ad v. *Feodum*; and tit. *Tail*.

A fee thus limited was at common law known by the name of a fee conditional; so called from the condition expressed or implied in the gift or constitution of the fee, that in case the donee died without such particular heirs, the land or fee should revert to the donor. But our ancestors were after heir or issue had, suffered at common law to alien such fee, and to defeat the donor as well as the heir; on a supposition that the condition was, for this purpose, satisfied or performed by the donee's having issue. See 1 *Inst.* 19, a; *Plowd. Comm.* 242, 5, b; 247, a.

This practice being manifestly contrary to the intent of the gift, was restrained by stat. *Westm.* 2. (13 Edw. 1. st. 1.) c. 1; commonly called the Statute *De donis conditionalibus* (or, shortly, the Statute *De donis*), which required that the will and intent of the donor should be observed, and the fee so given should go to the issue, and for want of issue revert to the donor. So that, though *Littleton* says (§ 13.) that a fee-tail is by force of this statute, yet it is not to be understood as creating any new fee, but only severing and distinguishing the limitation from the condition, and restoring the effect of each; i. e. the limitation to the issue, and the reversion to the donor: yet as by means of this statute the limita-

tion was raised above the condition, the fee might thenceforth be denominated from the limitation, which thus became the substance, as it had before been the immediate end, of the gift. But this was at length eluded by the legal fictions of *Fines and Recoveries*. See that title, and also *Forfeiture*; and for further matter on this head of estates-tail, and the policy of making them alienable, see *Tail and Fee-tail*. *Wright*, 186, 9.

7. ESTATES FOR LIFE are either conventional or legal; of the former sort are such estates as are, in their creation, expressly given or conferred for life of the tenant only. These are of a feudal nature, held by fealty, and liable to conventional services. Of the other sort are, 1. Tenancies in tail after possibility of issue extinct. 2. Tenancies in dower, and by the curtesy. See the several titles, and also *Life-Estates*.

The first of these is distinguished by the particular description merely to suggest the legal disadvantages cast on such estate-tail, when turned to a hopeless inheritance. It arises where lands and tenements are given to a man and his wife in special tail, and either of them dies without issue had between them. The survivor is tenant in tail after possibility, &c. See *Litt.* § 32; 1 *Inst.* 28; 11 *Rep.* 80; and *ante*, *Tail after Possibility*, &c.

8. DOWER, called by *Craig*, *Triens*, and *Tertia*, and known to the feudists by several other names, was probably brought into England by the Normans, as a branch of their doctrine of fiefs or tenures; for we find no footsteps of dower in lands until the time of the Normans; but, on the contrary, provision is made by one of the laws of the Saxon king, Edmund, for the support of the wife surviving her husband, out of his goods only. *Wright*, 191, 192. See *Dower*.

9. TENANCIES BY THE CURTESY, or *per legem terræ*, though so called as if they were peculiar to England, were known not only in Scotland, but in Ireland, and in Normandy also; and the like custom is to be found amongst the ancient Almain laws; and yet it does not seem to have been feudal, nor does its original any where satisfactorily appear. Some English writers (*Mirror*, *Selden*, *Comell*) ascribe it to Henry I.; but *Nat. Bacon* calls it a law of counter-tenure to that of dower, and yet supposes it as ancient as from the time of the Saxons; and that it was therefore rather restored than introduced by Henry I. *Eng. Gov.* 105, 147. But as there are no notices of this curtesy among the laws of the Saxons, or among those we have of Henry I. we may, perhaps, with safety rely on *Craig's* conjecture, that it is derived from the civil law. *Craig de Jure Feud.* 312; *Wright*, 192, 195.

10. FORFEITURES of estates in fee, though they were very many by the feudal and common law, [vide *Spelm.* in v. *Richard*, & *Lt. H.* 1, c. 43; *Glanv.* l. 9, c. 4; *Bract.* l. 2, c. 35. § 11, 12.] are reduced, as the law now stands, to forfeitures by attainders of treason and for murder, and by *cesser*.

Of the former, enough has been said at present. *Ante*, II. 7; and titles *Treason*, *Forfeiture*, *Treason*.

The latter was introduced on true feudal principles, and introduced many feudal hardships, was at length regulated by the statute of Gloucester, 6 *Edw.* 1. c. 4; and *stat. Westm.* 2, 13 *Edw.* 1. c. 21. These statutes provided, that in case a tenant should cease to pay his rent for two years, and there should not, during that time, be sufficient distress on the land, the lord might have a *cessavit*; and by means thereof, if the tenant did not tender his arrears before judgment, the lord should, upon such *cesser* recover the land, or fee itself, and bar the tenant for ever. See 2 *Inst.* 295, 400, 460; *Booth's Real.* 41, 38, 134; *F. N. B.* 208, 209; *Wright*, 196—202; and *ante*, *Cessavit*, *Rent*.

Estates for life are also forfeitable by waste, and by all such acts as tend to defeat the reversion. 1 *Inst.* 251, 252. See *Life-Estates*.

There are yet two kinds of estates which, though they fall under the head of *socage*, are denominated and usually

treated as particular species of tenure, viz. *burgage* and *gavelkind*.

11. BURGAGE-TENURE, so called to denote the particular service or tenure of houses in ancient cities or boroughs, is certainly a species of socage-tenure; the tenements being holden by a certain annual rent in money, or by some service relating to trade; and not by military or other service that had no such relation. The qualities of this tenure vary according to the particular customs of every borough, and that without prejudice to the feudal nature of it. See *Wright*, 204, 235; *Mad. Firma Burgi*; *Litt.* § 162—167; *Co. Litt.* 109; *Somm. on Gav.* 142, 148; *Taylor on Gav.* 171; 1 *Inst.* 109 a; *Spelm.*; *Craig de Jure Feud.* 68; *Jenk. Cent.* 127; 2 *Comm.* c. 6, p. 82; and *ante*, *Burgage*.

12. The properties of GAVELKIND TENURE are so many, and the qualities of it so different from those of any other tenure, that it seems to have been doubted whether it be a tenure of feudal nature or not. The gavelkind tenant retains strong marks of propriety; as power to alien even at the age of fifteen, *Somm. Gav.* 8, 9; freedom from forfeiture for felony; and many other privileges unknown to persons holding their lands by any other kind of tenure.

It is however certain that the tenure is strictly feudal, and, like the more usual tenures by knight-service and socage, is denominated from the kind or nature of the prevailing service, which was, as the name imports, tributary or censual; the word gavelkind being (according to *Sommer on Gav.* 12, 35, 37; and see *Blount* in v.) a compound of the Saxon words *gavel*, *gafel*, or *gable*, a tribute, tax, or rent; and *gelynde*, kind, sort, or quality; thus directly importing that such lands are censual or rented; although they are also subject to other kinds of service, this tenure in fact being, like burgage, a kind of socage-tenure, and liable to the same feudal burdens and forfeitures. See *Wright*, 206—212.

As for the famous partable quality of most of the lands in Kent, [not all, see *Hale, Hist. C. L.* 225; 31 *Hen.* 8. c. 5; but see 1 *Mod.* 98; 2 *Sid.* 153; *Cro. Car.* 465; *Lutw.* 236, 754, by which it appears that all lands in Kent shall be presumed, without pleading, to be gavelkind; unless they can be proved to be disgavelled,] it was not a particular or proper effect of gavelkind tenure. But it was rather the ancient course of descent retained and continued in that county *Somm. on Gav.* 89, 90. And however particular this course of descent (whereby the lands of the father are equally divided among all the sons; and of a brother dying without issue, among all his brethren, *Litt.* § 210; *Co. Litt.* 140.) may now appear to us, yet if we consider gavelkind as a species of socage-tenure, and that all tenures by socage, or of that nature, were anciently in point of succession divisible, and that they might, without prejudice to their feudal nature, descend equally or otherwise, as best suited the genius and usage of every county; it will appear much more extraordinary that all other counties should depart from this, the more ancient and natural course of descent, than that this particular county should retain it. *Wright*, 213. See further, 2 *Comm.* c. 6; and *ante*, *Gavelkind*.

13. Under this head, tenure, something ought to be said of copyholds; though they are not reducible to any of the preceding divisions of the subject.

COPYHOLDS are the remains of villenage; which, considered as a tenure, was not entirely Saxon, Norman, or feudal, but a tenure of a mixed nature, advanced by the Normans upon the Saxon bondage, and which gradually superseded it. See *F. N. B.* 12. C.; 1 *Inst.* 58 a; *Bacon's Use of the Law*, 42, 43; *Litt. tit. Villenage*; *Old Ten.*; *Somm. Gav.* 65, 66.

The Normans, according to Sir William Temple, "finding among us a sort of people who were in a condition of downright servitude, used and employed in the most servile works, and belonging (they, their children, and effects) to the lord of the soil, like the rest of the stock or cattle upon it;" enfranchised all such as fell to their share; by admitting them to

fealty in respect of the little livings they had hitherto been allowed to possess, merely as the scanty supports of their base condition; and which they were still suffered to retain upon the like service as they had in their former servitude been used and employed in. But this possession, as now clothed with fealty, and by that means advanced into a kind of tenure, differed very much from the ancient servile possession, and was from henceforth called villenage. See *Temp. Introd.* 59; *Mirror*, b. 2. c. 28; *Bract. lib.* 2. c. 8. § 1; *Litt.* § 206, 207; *Leg. W.* 1. c. 29, 33; in which last the word *villain* seems first applied to such tenant. See also tit. *Villein*; and *Spelm. Gloss.* in v. *Servus*.

Our Saxon ancestors having submitted to the feudal law, which to them was a law of liberty, perhaps imitated the Normans in this particular; but neither did our Saxon or Norman ancestors mean to increase or strengthen the possession of their villeins; but to leave that altogether as dependent and precarious as before; save only that, as by their admission to fealty, their possession was put, in some measure, upon a feudal footing, the lords could not deal with them so wantonly as before; (*vide ante*, l. 4;) and at length the uninterrupted benevolence and good nature of the successive lords of many manors having, time out of mind, permitted them, or them and their children, to enjoy their possessions in a course of succession, or for life only, became customary and binding on their successors, and advanced such possession into the legal interest or estate we now call copyhold; which yet remains subject to the same servile conditions and forfeitures as before, they being all of them so many branches of that continuance or custom which made it what it is. *Somn. Gav.* 58; *Spelm. Gloss.* v. *Feudum*; *Bro. tit. Villenage*.

From this view of the origin and nature of copyholds we may possibly collect the ground of the great variety of customs that influence and govern those estates in different manors; it appearing that they are only customary estates, after the ancient will of the first lords, as preserved and evidenced by the rolls, or kept on foot by the constant and uninterrupted usages of the several manors wherein they lie. *Litt.* § 73, 75, 77; *Wright*, 220.

As to copyholds, see further, 2 *Comm.* c. 6. III; and titles *Ancient Demesne*, *Copyholds*, *Manors*, *Villeins*, &c.

From the above compendious view of the principal and fundamental points of the doctrine of tenures, both ancient and modern, may be observed the mutual connection and dependence that all of them have upon each other. And upon the whole it appears, that whatever changes and alterations these tenures, in progress of time, underwent, from the Saxon era to 13 *Cha.* 2. all lay-tenures are now in effect reduced to two species: free tenure in common socage, and base tenure by copy of court roll. There is one other species of tenure reserved by the statute of Charles II. which is of a spiritual nature, and called the tenure in Frankalmoinage. See that title.

TERCE, thirds: the Scotch term for dower.

TERM, *terminus*.] Signifies commonly the limitation of time or estate; as a lease for term of life, or years, &c. *Bract. lib.* 2. Term is also a space of time, wherein the superior courts at Westminster sit. See *Terms*.

TERMOR, *tenens ex termino*.] He that holds lands or tenements for term of years or life. *Litt.* § 100. See *Lease*, l. 1.

TERMS. Those spaces of time, wherein the courts of justice are open, for all that complain of wrongs or injuries, and seek their rights by course of law or action, in order to their redress; and during which the courts in Westminster-hall sit and give judgments, &c. But the High Court of Parliament, the Chancery, and inferior Courts, do not observe the terms; only the Courts of King's Bench, the Common Pleas, and Exchequer, the highest courts at common law.

Of these terms there are four in every year, viz. Hilary Term, which formerly began the 23d of January, and ended the 12th of February, (unless on Sundays and then the day

after); Easter Term, that began the Wednesday fortnight after Easter Day, and ended the Monday next after Ascension Day; Trinity Term, which began the Friday after Trinity Sunday, and ended the Wednesday fortnight after; and Michaelmas Term, that began the 6th of November, and ended the 28th of November, (unless on Sundays, and then the day after.) See *post*.

These terms are supposed by *Selden* to have been instituted by William the Conqueror: but *Spelman* hath clearly and learnedly shown, that they were gradually formed from the canonical constitutions of the church; being indeed no other than those leisure seasons of the year, which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. Throughout all christendom, in very early times, the whole year was one continual term for hearing and deciding causes. For the Christian magistrates, to distinguish themselves from the heathens, who were extremely superstitious in the observation of their *dies fasti et nefasti*, went into a contrary extreme, and administered justice upon all days alike; till, at length, the church interposed and exempted certain holy seasons from being profaned by the tumult of forensic litigations. As, particularly, the time of Advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring; the time of Pentecost, which produced the third; and the long vacation between Midsummer and Michaelmas, which was allowed for the hay time and harvest. All Sundays also, and some particular festivals, as the days of the Purification, Ascension, and some others, were included in the same prohibition: which was established by a canon of the church, a. d. 517, and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian code. *Spelm. of the Terms*.

Afterwards, when our own legal constitution came to be settled, the commencement and duration of our law terms were appointed with an eye to those canonical prohibitions; and it was ordered by the laws of King Edward the Confessor, (c. 3. *De temporibus et diebus pacis*;) that from the Advent to the octave of the Epiphany, from Septuagesima to the octave of Easter, from the Ascension to the octave of Pentecost, and from three in the afternoon of all Saturdays till Monday morning, the peace of God and of Holy Church shall be kept throughout all the kingdom. And so extravagant was afterwards the regard that was paid to these holy times, that though the author of the *Mirror* mentions only one vacation of any considerable length, containing the months of August and September; yet *Britton* is express, that in the reign of King Edward I. no secular plea could be held, nor any man sworn on the Evangelists, in the times of Advent, Lent, Pentecost, harvest, and vintage, the days of the great Litanies, and all solemn festivals. But he adds, that the bishops did nevertheless grant dispensations, (of which many are preserved in *Rymer's Fœdera*;) that assizes and juries might be taken in some of these holy seasons. And soon afterwards a general dispensation was established by *stat. Westm.* 1. 3 *Edw.* 1. c. 51. which declares, that, "by the assent of all the prelates, assizes of *novi discessus*, *mort d'ancestor*, and *darrein presentment*, shall be taken in Advent, Septuagesima, and Lent; and that at the special request of the king to the bishops." The portions of time, that were not included within these prohibited seasons, fell naturally into a fourfold division, and, from some festival day that immediately preceded their commencement, were denominated the Terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael; which terms were subsequently regulated and abbreviated by several acts of parliament: particularly Trinity Term by 32 *Hen.* 6. c. 21. and Michaelmas Term by 16 *Car.* 1. c. 6. and again by 24 *Geo.* 2. c. 48.

There were until recently in each of these terms stated days called days in banc (*dies in banco*), that is, days of appearance in the Court of Common Bench. They were

generally at the distance of about a week from each other, and had reference to some festival of the church. On some one of these days in banc, all original writs must have been made returnable; and therefore they were generally called the returns of that term: whereof every term had more or less, said by the Mirror to have been originally fixed by King Alfred, but certainly settled as early as the statute of 51 Hen. 3, st. 2. Easter Term had five returns; and all the other terms four. But though many of the return days were fixed upon Sundays, yet the court never sat to receive these returns till the Monday after; and therefore no proceedings could be held, or judgment could be given, or supposed to be given, on the Sunday. See *Salk.* 627; 6 *Mod.* 250; 1 *Jen.* 156, *Swan v. Broome*; *Bro. P. C.*

The first return in every term was, properly speaking, the first day in that term; as for instance the octave of St. Hilary, or the eighth day inclusive after the feast of that saint, which falling on the 13th of January, the octave therefore, or first day of Hilary Term, was the 20th of January; and thereon (one judge of) the court sat to take *essoigns* or excuses for such as did not appear according to the summons of the writ; wherefore this was usually called the *Essoign Day* of the Term. But on every return day in the term, the person summoned had three days of grace beyond the day named in the writ, in which to make his appearance; and if he appeared on the fourth day inclusive (*quarto die post*), it was sufficient.

The commencement and duration of these terms are now regulated by the 11 *Geo.* 4. and 1 *Wm.* 4. c. 70, which by § 10, enacts that in 1831 and afterwards, Hilary Term shall begin on the 11th and end on the 31st January; Easter Term begin on the 15th April and end 8th May; Trinity Term begin on the 22d May and end 12th June; and Michaelmas Term begin on the 2d and end on the 25th November: provided if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter Day shall fall within Easter Term, there shall be no sittings in Banc on any of such intervening days, but the term shall be prolonged for such number of days of business as shall be equal to the intervening days exclusive of Easter Day, and the commencement of the ensuing Trinity Term shall in such case be postponed, and its continuance prolonged for an equal number of days of business.

By the 1 *Wm.* 4. st. 2, c. 3, § 3, if any of the days above named for ending the terms fall on a Sunday, the succeeding Monday shall be the last day of the term.

Where, however, the fixed day of commencement is a Sunday, it must be considered the first day of term. 1 *D. P. C.* 63.

By § 7 of the same act it is enacted, that not more than twenty-four days, exclusive of Sundays, after Hilary Term and Michaelmas Terms (nor more than six days exclusive of Sunday, after Easter Term), to be reckoned consecutively or immediately after such terms, shall be appropriated to sittings at *Nisi Prius* in London and Middlesex: provided that in any trial at bar it shall be competent for the judges to appoint such day or days as they shall think fit; and such days, if in vacation, shall for the purpose of such trials, be taken to be a part of the preceding term; and any day not within the twenty-four days may be appointed for trials at *Nisi Prius*, with the consent of the parties.

The *essoign* or general return days were also provisionally altered by the above act, but are now fixed by the 1 *Wm.* 4. c. 3, § 2. See *Essoign Day of the Term*.

Formerly all process, whether mesne or final, and whether in real, mixed, or personal actions, must have been tested and made returnable, and many other proceedings in a cause could only be transacted, in term time; but by several recent statutes and rules of court (particularly by the 1 *Wm.* 4. c. 7; 2 *Wm.* 4. c. 39,) the distinction between term and vacation, with respect to the bringing and prosecution of personal

actions, has been abolished. See the various alterations enumerated in 3 *Chitty's General Practice*, c. 3.

But although all or the greatest part of the technical distinctions between term and vacation, *essoign* days, and general return days, or return days certain, are removed as they affected most personal actions, yet, with respect to such actions as are not within the Uniformity of Process Act, and as regards all matters that must be transacted in *Banc*, the distinction between term and vacation still exists. See 3 *Dowl. P. C.* 100.

Terms have been adjourned, and returns of writs and processes confirmed. 1 *W. & M. sess.* 1. c. 4.

The issuable terms are Hilary and Trinity Terms only; they are so called because in them the issues are joined and records made up of causes to be tried at the Lent and Summer Assizes, which immediately follow. 2 *Lil. Abr.* 568. See *Assizes*, &c.

The day for swearing the lord mayor of London is appointed for November 9th, unless it be Sunday, and then the next day. The Morrow of St. Martin yearly appointed for nominating sheriffs in the Exchequer.

The terms in Scotland are Martinmas, Candlemas, Whitsuntide, and Lammas, at which times the Court of Exchequer, &c. there is to be kept. 6 *Ann.* c. 6.

The terms of our universities for students are different in time from the terms of the courts of law.

TERMS OF THE LAW. Artificial or technical words and turns of art, particularly used in and adapted to the profession of the law. 2 *Hawk. P. C.* c. 25, § 87.

TERMS FOR PAYMENT OF RENT, OR RENT TERMS. The four quarterly feasts upon which rent is usually paid. *Cartular. Sti. Edmund.* 238. See *Lease, Rent*.

TERMS LEGAL AND CONVENTIONAL for payment of rents in Scotland. The legal terms are Whitsunday and Martinmas, at the former of which it is presumed that the crop has been fully sown, and therefore where the proprietor survives that term, one-half of the year's rent is supposed to be due; at the latter the whole crop is presumed to be reaped, and therefore the whole year's rent is taken as due; and these, for the purpose of settling the interest of heirs and executors, &c. are held to be the terms of payment, whatever may be the conventional terms for payment of the rent *de facto*. See as to the English law, *Apportionment, Rent*, &c.

TERMS FOR YEARS, to secure payment of mortgages and terms to attend the inheritance. See *Mortgage, Trust, Use*.

TERRA, In all the surveys in *Domesday Register*, is taken for arable land, and always so distinguished from *pratum*, &c. *Kennet's Gloss.*

TERRA AFFIRMATA. Land let to farm.

TERRA BOSCALIS. Woody lands, according to an inquisition anno 8 *Car.* 1.

TERRA CULTA. Land that is tilled or manured, as *terra inculta* is the contrary. *Mon. Angl.* i. 500.

TERRA DEBILIS. Weak or barren ground. *Inq.* 22 *R.* 2.

TERRA DOMINICA VEL INDOMINICATA. The demesne land of a manor. *Conell.*

TERRA EXCULTABILIS. Land which may be ploughed. *Mon. Angl.* i. 426.

TERRA EXTENDENDA. A writ directed to the escheator, &c. willing him to inquire and find out the true yearly value of any land, &c. by the oath of twelve men, and to certify the extent into the Chancery, &c. *Reg. of Writs*, 293.

TERRA FRUSCA. Fresh land, or such as hath not been lately ploughed; likewise written *terra frusca*. *Mon. Angl.* ii. 327.

TERRA HYDATA. Land subject to the payment of *hydate*, as the contrary was *terra non hydata*. *Selden.*

TERRA LUCRABILIS. Land that may be gained from the sea, or inclosed out of a waste, to a particular use. *Mon. Angl.* i. par. fol. 406.

TERRA NORMANORUM. Such land in England as in the beginning of Henry III. had been lately held by some noble

Norman, who, by adhering to the French king or dauphin, had forfeited his estate, which by this means became an escheat to the crown, and restored or otherwise disposed of at the king's pleasure. *Paroch. Antiq.* 197.

TERRA NOVA. Land newly asserted and converted from wood ground to arable, *terra noviter concessa*. *Spelman*.

TERRA PUTURA. Land in forests held by the tenure of furnishing man's meat, horse meat, &c. to the keepers therein. See *Putura*.

TERRA SABULOSA. Gravelly or sandy ground. *Inq.* 10 E. 3. n. 3.

TERRA TESTAMENTALIS. Land held free from feudal services in *allodio*, or in socage descendible to all the sons, and therefore called gavelkind, being devisible by will. Such land was thereupon called *terra testamentalis*, as the thane who possessed them was said to be *testamento dignus*. See *Spelman of Feuds*, c. 5.

TERRA VESTITA. Is used in old charters for land sown with corn. *Cowell*.

TERRA WAINABILIS. Tillable land. *Cowell*.

TERRA WARENNATA. Land that has the liberty of free warren. *Rot. Parl.* 21 Edw. 1.

TERRAGE, terragium. Seems to be an exemption à *precarie*, viz. boons of ploughing, reaping, &c., and perhaps from all land taxes, or from money paid for digging and breaking the earth in fairs and markets. *Cowell*.

TERRARIUS. A land-holder, or one who possesses many farms of land. *Leg. W.* 1.

TERRARIUS CŒNOBIALIS. An officer in religious houses, whose office was to keep a terrier of all their estates, and to have the lands belonging to the houses exactly surveyed and registered; and one part of his office was to entertain the better sort of convent-tenants when they came to pay their rents, &c. *Hist. Dunelm.*

TERRE-TENANT, TERTENANT, terræ tenens. He who hath the actual possession of the land: for example, a lord of a manor has a freeholder, who letteth out his freehold to another, to be possessed and occupied by him, such other is called the tertenant. *West. Symb. par.* 2; *Britton*, c. 29. In the case of a recognizance, statute, or judgment, the heir is chargeable as tertenant, and not as heir; because, by the recognizance or judgment, the heir is not bound, but the ancestor *concedit* that the money *de terris*, &c. *levetur*. 3 Rep. 12. Vide *Cro. Eliz.* 312; *Cro. Jac.* 506; and titles *Elegit*, *Excecion*, *Scire Facias*.

TERRIER, anciently called *terrar*; *terrarium, catalogus terrarum.* A land roll or survey of lands, either of a single person or of a town, containing the quantity of acres, tenants' names, and such like; and in the Exchequer there is a terrier of all the glebe lands in England, made about 11 E. 3. See 18 Eliz. c. 17.

Ecclesiastical terriers, which contain a detail of the temporal possessions of the church in every parish, are made by virtue of an Ecclesiastical Canon (87), which directs them to be kept in the bishop's registry; and it is not unusual to deposit a copy in the chest of the parish church. These being made under authority, are admissible evidence as a species of ecclesiastical memorials or records of the possessions of the church, and are as strong in their nature as any that can be adduced for such purposes. 3 Price, 380.

TERRIS, bonis et catallis rehabendis post purgationem. A writ for a clerk to recover his lands, goods, and chattels formerly seized, after he had cleared himself of the felony of which he was accused, and delivered to his ordinary to be purged. *Reg. Orig.* 68.

TERRIS et catallis tentis ultra debitum levatum. A judicial writ for the restoring of lands or goods to a debtor that is distrained above the quantity of the debt. *Reg. Judic.* 38.

TERRIS LIBERANDIS. A writ that lay for a man convicted by attain, to bring the record and process before the king, and take a fine for his imprisonment, and then to deliver him his

lands and tenements again, and release him of the strip and waste. *Reg. Orig.* 292.

It was also a writ for the delivery of lands to the heir, after homage and relief performed, or upon security taken that he should perform them. *Ibid.* 293, 313.

TERRITORY OF A JUDGE. The district within which he has right of jurisdiction, and of deciding the causes proper to him, beyond which his acts as a judge are null. See *Justices of Peace*.

TERTIAN. A measure of eighty-four gallons; so called because it is a third part of a tun. See (repealed) *statute*. 2 Hen. 6. c. 11; 1 Rich. 3. c. 13.

TEST. To bring one to the test is to bring him to a trial and examination, &c. For the Test Act, see *Non-Conformists, Oaths*.

TESTA DE NEVIL. An ancient document, in two volumes, in the custody of the king's remembrancer in the Exchequer of England, more properly called *Liber Feodorum*, supposed to have been compiled by John de Nevil, a justice itinerant in the 18th and 24th of King Henry III., or as others imagine by Ralph de Nevil, an accountant in the Exchequer. But it appears that the volumes were not compiled till near the close of the reign of Edward II. or the beginning of Edward III., and then partly from the inquests taken on the presentments of jurors of hundreds before the justices itinerant, and partly from inquisitions upon writs awarded to the sheriffs for collecting of scutages, aids, &c. The entries which are specifically entitled *Testa de Nevil* are evidently quotations, and form comparatively a small part of the whole; they were probably copied from a roll bearing that name, a part of which it still extant in the Chapter-house at Westminster, containing ten counties; this roll appears to be of the time of Edward I. and agrees *verbatim* with the entries in the books at the Exchequer.

These books contain principally accounts, 1, of fees holden either immediately of the king, or of others who held of the king *in capite*, and if alienated whether the owners were enfeoffed *ab antiquo* or *de novo*, as also fees holden in frank-almoigne, with the values thereof respectively: 2, of serjeanties holden of the king, distinguishing such as were rented or alienated, with the values of the same: 3, of widows and heiresses of tenants *in capite* whose marriages were in the gift of the king, with the values of their lands: 4, of churches in the gift of the king, and in whose hands they were: 5, of escheats, as well of the lands of Normans as others, in whose hands the same were, and by what services holden: 6, of the amount of the sums paid for scutage and aid, &c. by each tenant.

In the cover of each book is the following memorandum in an ancient hand "*Contenta pro evidentiis habeantur hic in Scacc'io et non pro recordo.*"

These volumes were printed under the authority of the Commissioners on the Records of the realm in the year 1807.

TESTAMENT, testamentum. Is defined by *Plowden* to be *testatio mentis*, a witness of the mind: but *Aulus Gellius lib.* 6. c. 12. denies it to be a compound word, and saith, it is *verbum simplex*, as *calceamentum, pluvium, &c.* And therefore it may be thus better defined: *Testamentum est ultimum voluntatis justa sententia, de eo quod quis post mortem suam fieri vult, &c.* See *Wills*.

Testament was anciently used (according to *Spelman*) *pro scripto charta vel instrumento, quo prædictum rerumque aliarum transactiones perficiuntur, seu dictum quod de re vel testimonium ferret vel testium nomina contineret.*—*Si quis contra hoc meæ autoritatis testamentum aliquid machinari impedimentum præsumpsit.*—*Charta Croylandiæ ab Æthelbaldo Rege, Anno Domini 716.* *Cowell*.

TESTAMENTARY CAUSES. A species of causes belonging to the ecclesiastical jurisdiction. They were originally cognizable in the king's courts of common law, viz. the county courts; and afterwards transferred to the jurisdiction of the

church by the favour of the crown, as a natural consequence of granting to the bishops the administration of intestates' effects. 3 *Comm. c. 7.* See *Courts Ecclesiastical*.

As observed by *Lindewode*, the ablest canonist of the fifteenth century, testamentary causes belong to the ecclesiastical courts, "*de consuetudine Angliæ, et super consensu regio et suorum procerum in talibus ab antiquo concessa.*" *Provincial. l. 3. t. 18. fo. 176.*

TESTAMENTARY GUARDIAN. See *Guardian, I. 4.*

TESTAMENTARY JURISDICTION IN EQUITY. See *Chancery*.

TESTATOR, [Lat.] He who makes a will or testament. See *Wills*.

TESTATUM-CAPIAS. See *Capias*.

TESTE. Witness. That part of a writ wherein the date is contained, which begins with these words, *Teste meipso*, &c. if it be an original writ; or, *Teste the Lord Chief Justice*, if judicial. See *Co. Litt. 134*; and tit. *Original Writs*.

TESTIMONIAL. A certificate formerly given under the hand of a justice of the peace, testifying the place and time when and where a soldier or mariner landed, and the place of his dwelling and birth unto which he was to pass. 39 *Eliz. c. 17.* (repealed.) Formerly testimonials were also to be given by mayors and constables to servants quitting their services, &c. 5 *Eliz. c. 4.* See *Servants*.

TESTIMONIALS OF CLERGY, are necessary to be made by persons present, that a clergyman inducted to a benefice has performed all things according to the Act of Uniformity; to evidence that the clerk hath complied with what the law requires on his institution and induction, which in some cases he shall be put to do. *Count. Pars. Comp. 24, 26.* See *Person, Ordination*.

TESTIMOIGNES, [Fr.] Witnesses. So *testimoignage*, testimony. *Law Fr. Dict.*

TESTON, or TESTOON, commonly called tester. A sort of money which among the French did bear the value of 18d.; but being made of brass lightly gilt with silver, in the reign of King Henry VIII. it was reduced to 12d. and afterwards to 6d. *Lownd's Ess. on Coins, p. 22.*

TEXTUS. A text or subject of a discourse. It is mentioned by several ancient authors to signify the *New Testament*, which was written in golden letters, and carefully preserved in the churches.

TEXTUS MAGNI ALTARIS, we read of in *Domesday* and *Cartular. S. Edmund.*

TEXTUS ROFFENSIS. An ancient manuscript containing the rites, customs, and tenures, &c. of the church of Rochester, compiled by Ernulphus, who became bishop of that see, anno 1115. It also contains some very ancient public instruments, among which is the charter of liberties granted by Henry I. A. D. 1101. See the charters prefixed to the Statutes of the Realm, published by the Commissioners of the Public Records.

THAMES. See *London, Police, Rivers, Watermen*.

THANAGE OF THE KING, *thanagium regia*.] Signified a certain part of the king's land or property, whereof the ruler or governor thereof was called *thane*. *Cowell*.

THANES, from Sax. *thenan*, *ministrare*, a word which sometimes implies a nobleman, sometimes a freeman a magistrate, an officer, a minister. *Lambard in verbo THANES.* Were those who attended the English-Saxon kings in their courts, and who held their lands immediately of those kings; and therefore in *Domesday* they were promiscuously called *thani et servientes regis*, though not long after the Conquest the word was disused; and instead thereof those men were called *barones regis*, who, as to their dignity, were inferior to earls, and took place next after bishops, abbots, barons, and knights. There were also *thani minores*, and those were likewise called barons; these were lords of manors, who had a particular jurisdiction within their limits, and over their own tenants in their courts, which to this day are called courts-baron; but the word signifies sometimes a nobleman, some-

times a freeman, sometimes a magistrate, but more properly an officer or minister of the king.—Edward King grete mine bisceops, and mine eorles, and all mine thegnes, on that shiren eður mine prestes in Paulus minister habband land. *Charta Edw. Conf. Pat. 18 Hen. 6. m. 9. per Inspect.* *Lambard*, in his *Exposition of Saxon Words*, verb. *Thanus*, and *Skene*, *De Verbor. Signif.* say, that it is a name of dignity, equal with the son of an earl.

This appellation was in use among us after the Norman Conquest, as appears by *Domesday*, and by a certain writ of Willm the First WILLIEMUS REX salutem Hermannum episcopum, et Stevenum, et Bridwi, et omnes Thanos meos in Dorcestrensi pago amicitabiliter. *MSS. de Abbatsbury.* *Camden* says, they were ennobled only by the office which they administered. *Thannus Regis* is taken for a baron in 1 *Inst. fol. 5. l. 1.* And in *Domesday*, *tenens, qui est caput nuncii.* See *Mills de Nobilitate*, fol. 132.

A thane, at first, (in like manner as an earl,) was not properly a title of dignity, but of service; but, according to the degrees of service, some of greater estimation, some of less. So those that served the king in places of eminence, either in court or commonwealth, were called *thani majores* and *thani regis*; those that served under them, as they did under the king, were called *thani minores*, or the lesser thanes. *Cowell.* See *Speelman of Feuds*, cap. 7; also 1 *Ellis's Domesday*, 45.

THANE-LANDS. Such lands as were granted by charter of the Saxon kings to their thanes; which were held with all immunities, except the threefold necessity of expeditions, repairs of castles, and mending of bridges. *Thance* signified also land under the government of a thane. *Skene.* See *Bockland, Reveland, Tenures*.

THASCIA. A certain some of money or tribute imposed by the Romans on the Britons and their lands. *Jug. Hen. l. c. 78.*

THEATRES. See *Play-houses*.

THEFT, *furtum*.] An unlawful felonious taking away of another man's moveable and personal goods, against the will of the owner. See *Larceny, Robbery*.

THEFT-BOTE, from the Sax. *theof*, i. e. *fur*, and *bote*, *compensatio*.] The receiving a man's goods again from a thief, after stolen, or other amends not to prosecute the felon, and to the intent the thief may escape; which is an offence punishable with fine and imprisonment, &c. *H. P. C. 130.*

In Scotland, by the act 1436, c. 137, sheriffs, justices, and barons, guilty of this crime, were to lose life and goods; and by the act 1515, c. 2, private persons found guilty were to be punished in the same manner as the thief.

See further, *Compounding of Felony, Misprision, Rewards*.

THELONIU, or BELVE ESSENDI QUIETI DE THELONIO. A writ that formerly lay for the citizens of any city, or burghesses of any town, that had a charter or prescription to free them from toll, against the officers of any town or market who would constrain them to pay toll of their merchandize, contrary to their said grant or prescription. *F. N. B. fol. 226.*

Abolished by the 3 & 4 Wm. 4. c. 27. § 36. See further, *Toll*.

THELONMANNUS. The toll-man or officer who receives toll. *Cartular. Abbat. Gluston. MS. 446.*

THELONIO RATIONABILI HABENDO; PRO DOMINIS HABENTIBUS DOMINICA REGIS AD FIRMAM. A writ that formerly lay for him that had any part of the king's demesne in fee firm, to recover reasonable toll of the king's tenants there, if his demesne had been accustomed to be tolled. *Reg. Orig. 87.*

THEM, or THEME. The right of having all the generation of villains, with their suits and cattle. *Termes de la Ley* See *Team*.

THEMMAGIUM. A duty or acknowledgment paid by inferior tenants in respect of theme or team. *Cowell*.

THEODEN. In the degrees or distinctions of persons among the Saxons the earl or prime lord was called thane, and the king's thane; and the husbandman or inferior tenant

was called theodan or under thane. See *Spelm.*; and *ante*, tit. *Thane*.

THEOWES. The slaves, captives, or bondmen, among our Saxons were called theowes and esnes, who were not counted members of the commonwealth, but parcels of their master's goods and substance. *Spelman of Feuds*, cap. 5.

THESAURUS. Was sometimes taken in old charters for *thesaurarium*, the treasury; and hence the *Domesday* register, preserved in the treasury or exchequer, when kept at Winchester, hath been often called *Liber Thesauri Chart. Queen Maud, wife of King Henry I.*

THETHINGA. A word signifying a tithing. *Tithingmannus*, a tithingman. Sax.

THEW, or THEOWE. See *Theowes*.

THIEF-TAKER. See *Felony, Rewards*.

THIGSTERS. A sort of gentle beggars. *Old Scotch Dict.*

THINGUS. The same with *thanus*, a nobleman, knight, or freeman. *Crompt. Jurisd.* 197.

THIRDBOROW. Is used for a constable by Lambard in his *Duty of Constables*, p. 6; and in the 28 Hen. 8. c. 10. See *Constable*.

THIRDINGS, i. e. the third part of the corn growing on the ground, due to the lord for a heriot on the death of his tenant, within the manor of Turfat in Com. Hereford. *Blount, Ten.*

THIRD-NIGHT-AWN-HINDE, *trium noctuum hospes.* By the laws of St. Edward the Confessor, if any man lay a third night in an inn, he was called a third-night-awn-hinde, for whom his host was answerable if he committed an offence. The first night, *forman-night*, or *uncuth* (Sax. unknown), he was reckoned a stranger; the second night, *two-night*, a guest; and the third night, an *agen-hinde*, or *awn-hinde*, a domestic. *Bract. lib. 3.*

THIRD-PENNY. See *Denarius Tertius Comitatus*.

THIRLAGE. A servitude or tenure in Scotland by which the possessor of certain lands is bound to carry all his grain growing on certain lands to a certain mill to be ground, for which he is bound to pay a proportion of the flour or meal, varying in different places from a 30th part to a 12th part, which is termed *multure*. Besides this, which is due to the miller or proprietor of the mill, there are smaller perquisites due to the servants termed *sequels*, called *knave'ship*, *bannock*, *lock*, or *gowpen*, uncertain in their amount, and ascertained only by the practice of the mill. Besides these there are services due to the mill, such as carrying home mill-stones, and repairing the mill-house, mill-dam, &c. This service was found to be hurtful to agriculture, not only by its weight, but by the circumstance of its continuing to increase with the additional produce of the farm. By the 39 Geo. 3. c. 55, therefore, provisions were enacted for commuting this servitude for an annual payment in grain, to be ascertained by the verdict of a jury after proof before the court of session of the nature and extent of the servitude in each particular instance. This act has been found advantageous, not only by ascertaining and commuting the amount of thirlage in cases where it heretofore existed, but also in preventing the institution of such a tenure or service in future cases.

THISTLE-TAKE. It was a custom within the manor of Halton, in the county palatine of Chester, that if, in driving beasts over the common, the driver permits them to graze or take but a thistle, he shall pay a halfpenny a beast to the lord of the fee. And at Fiskerton, in Nottinghamshire, by ancient custom, if a native or a cottager killed a swine above a year old, he paid to the lord a penny, which purchase of leave to kill a hog was also called *thistle-take*. *Reg. Priorat. de Thurgarton. Cowell.*

THOKES. Fish with broken bellies, which by the (repealed) statute 22 Edw. 4. c. 2. were not to be mixed or packed with tale-fish.

THORP, THREP, TROP. Either in the beginning or

end of names of places, signifies a street or village, as *Aldestrope*; from the Sax. *thorp, villa, vicus*.

THRAVE OF CORN, *trava bladi*, from the Sax. *thraev*, a bundle, or the British *drefa*, twenty-four. In most parts of England consists of twenty-four sheaves, or four shocks, six sheaves to every shock; 2 Hen. 6. c. 2; yet in some counties they reckon but twelve sheaves to the thrave. King Athelstan, anno 923, gave by his charter to St. John of Beverley's Church four thraves of corn from every ploughland in the East Riding of Yorkshire. *Cowell.*

THREATS AND THREATENING LETTERS.

Threats and menaces of bodily hurt, through fear of which man's business is interrupted, are a species of injury to individuals. A menace alone, without a consequent inconvenience, makes not the injury; but, to complete the wrong, there must be both of them together. The remedy for this is in pecuniary damages, to be recovered by action of trespass *vi et armis*, this being an inchoate though not an absolute violence. 3 Comm. c. 8. p. 120. And in certain cases by indictment; see 4 Comm. 126, and 6 East, 126, 140, *Rea v. Southerton*, from which it may be inferred that an indictment will lie at common law for extorting money by actual duress, or by such threats as common firmness is not capable of resisting. The threats must in every case be specified in the indictment.

A request intimating a threat to publish a libel, charging a party with murder if the request was not complied with, ruled to be a threat. *Robinson's case, East, P. C. c. 23. § 2.*

The sending of letters threatening death or the burning of the party's house, &c. was formerly high treason by the 8 Hen. 5. c. 6; 4 Comm. 144. And under the 9 Geo. 1. c. 2, and 27 Geo. 2. c. 15, the offence was for a long period made punishable as a capital felony. But by the 4 Geo. 4. c. 54. § 3. so much of the above acts as related to this offence was repealed, and it was enacted, that if any person shall knowingly and wilfully send or deliver any letter or writing with or without any name or signature subscribed, or with a fictitious name, &c. threatening to kill or murder any of his majesty's subjects, or to burn or destroy his or their houses, outhouses, barns, stacks of corn or grain, hay or straw, or shall procure or abet the commission of the said offence, or shall forcibly rescue any person being in lawful custody for such offence, he is guilty of felony, punishable with transportation for life or years, or with imprisonment, with or without hard labour, not exceeding seven years.

By the 7 & 8 Geo. 4. c. 29. § 8. if any person shall knowingly send or deliver any letter or writing, demanding of any person, with menaces, and without any reasonable or probable cause, any money, chattel, or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing accusing or threatening to accuse any person of any crime punishable by law with death, transportation, or pillory, or of any assault with intent to commit a rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as thereafter defined, with a view or intent to extort or gain from such person any chattel, money, or valuable security, the offender is declared guilty of felony punishable with transportation for life, or not less than seven years, or with imprisonment not exceeding four years, with or without whipping, in addition to the imprisonment.

For the two other clauses of the above act, see *Infamous Crime*.

The contents of the letter must be set out in the indictment. *Lloyd's case, East, P. C. c. 23. § 5.*

A letter charging one with taking away the life of the friend of the writer, who was come to revenge him, held evidence of a threat to murder. *Gridwood's case, East, P. C. c. 23. § 2, 4.*

THRENGES. *Quia vero non erant adhuc tempore Regis Willielmi milites in Angliâ, sed Threnges, præcipit res ut de*

et milites fierunt ad defendendum terram, fecit autem Lanfrancus Thengos suos milites, &c. Somner's Gavelk. 123, 210. They were vassals, but not of the lowest degree, of those who held lands of the chief lord. The name was imposed by the Conqueror; for when one Edward Svarnbourn of Norfolk, and others, were ejected out of their lands, they complained to the Conqueror, insisting that they were always on his side, and never opposed him, which upon inquiry he found to be true, and therefore he commanded that they should be restored to their lands, and for ever after be called *Drenches*. *Spelm. See Drenches, Sharnburn.*

THRISHING MACHINES. By the 2 & 3 Wm. 4. c. 72. the provisions of the 7 & 8 Geo. 4. c. 31. giving damages against the hundred in case of the destruction of the property therein mentioned by rioters, was extended to threshing machines. *See Hundred.*

THRIMSA, Sax. thrim, three.] An old piece of money of three shillings, according to Lambard, or the third part of a shilling, being a German coin passing for 4d. *Seld. Tit. Hon. 601.*

THRUTHING, thruthingane.] A division, consisting of three or four hundreds. *Stat. Merton, 2 Inst. 99. See Trithing.*

THUDE WEALD, Sax.] A woodward, or person that looks after the woods.

THWERTNICK. A Saxon word, which in some old writers is taken for the custom of giving entertainments to the sheriff, &c. for three nights. *Rot. 11 & 12 Ric. 2.*

TIDESMEN. Are certain officers of the custom-house, appointed to watch or attend upon ships till the customs are paid; and they are so called because they go aboard the ships at their arrival in the mouth of the Thames, and come up with the tide. *See further, Customs.*

TIERCE, Fr. tierce, a third.] A measure of wine, oil, &c. containing the third part of a pipe, or forty-two gallons. *2 Inst. 8. c. 14. repeated.*

TIGH, Sax. teag.] A close or inclosure, mentioned in ancient charters; which word is still used in Kent in the same sense. *Chart. Eccl. Cant.*

TILLA, Sax.] An accusation. *Il. Camuti.*

TILLAGE, agricultura.] Is of great account in law, as being very profitable to the commonwealth; and therefore arable land hath the preference before meadows, pastures, and all other ground whatsoever. And so carefully our law to preserve it, that a bond or condition to restrain tillage, or sowing of lands, &c. is void. *11 Rep. 53.* There are divers ancient statutes for encouragement of tillage and husbandry now become in a great measure, if not altogether, obsolete.

TIMBER. Wood fitted for building, or other such like use; in a legal sense it extends to oak, ash, and elm, &c. *1 Roll. Abr. 649.*

Lessees of land may not take timber-trees felled by the wind; for thereby their special property ceases. *1 Keb. 691.*

A variety of statutes relative to the wilful destruction of trees and woods were repealed by the 7 & 8 Geo. 4. c. 27. and other acts. *See Malicious Injuries, 7.*

By Scotch act, 1798, c. 15 all tenants and cottagers are required to preserve and secure all growing wood on the ground they possess, so that none shall be cut, broke, pulled up by the roots, or barked, on penalties of 10*l.* and 20*l.* (Scots.) which may be inflicted by the landlord.

In Ireland, tenants for life or in tail are entitled to the moiety of the value of such timber trees as they plant; leasees for life renewable for ever are entitled to trees planted by them; and tenants for life under settlement, &c. or for years, are entitled to others planted by them, and to hots out of timber trees, and to the trees planted, if duly registered, &c. *See Irish acts, 9 Geo. 2. c. 7; 5 Geo. 3. c. 17; 17, 18 Geo. 3. c. 35; 23, 24 Geo. 3. c. 39. See Tithes, Waste.*

TIMBER FOR THE NAVY. See act for the increase and preservation of timber within the forest of Dean, 20 Car. 2.

c. 8. And see 1 & 2 Wm. 4. c. 12. Two thousand acres of land in the New Forest to be inclosed for preserving timber for the navy royal, 9 & 10 Wm. 3. c. 36. *See Forests.*

TIMBERLODE. A service by which tenants were to carry timber felled from the woods to the lord's house. *Thorn's Chron.*

TIME and Place, are to be set forth with certainty in a declaration; but time may be only a circumstance when a thing was done, and not to be made part of the issue, &c. *5 Mod. 286. See Pleading.*

It has been held that an impossible time is no time; and where a day or time is appointed for the payment of money, and there is no such, the money may be due presently. *Hob. 189; 5 Rep. 22.*

If no certain time is implied by law for the doing of any thing, and there is no time agreed upon by the parties, then the law doth allow a convenient time to the party for the doing thereof, i. e. as much as shall be adjudged reasonable, without prejudice to the doer of it. *2 Lil. Abr. 572.* In some cases one hath time during his life for the performance of a thing agreed, if he be not hastened to do it by request of the party for whom it is to be done; but if in such case he be hastened by request, he is obliged to do it in convenient time, after such request made. *Hil. 22 Car. 1. B. R.*

Although it is an ancient maxim of the law, that there is no fraction of a day; *Co. Litt. 135; 4 T. R. 660; 11 East, 496;* yet that doctrine is not allowed to prevail when, by so doing, justice would be defeated. Thus if a tender be made at any time before a writ issues, although on the same day, it may be pleaded, *Chitty on Pl. 5th ed. 1222;* and if a sheriff actually seize the goods of a trader under a *feri facias*, at any period of the same day, but before an act of bankruptcy has been committed, the levy will be deemed complete and valid. *8 Ves. 80; 4 Camp. 197; 2 B. & A. 586.*

See 20 *Vin. Abr.*; and title *Year*, and other apposite titles.

TIME, COMPUTATION OF. In the computation of any given period of time in legal proceedings, the general rule is, that one day is to be reckoned inclusive and the other exclusive. Thus in cases of murder, where the law says, that no man shall be adjudged to kill another unless the death happens within a year and a day after the mortal stroke or wound is given, the day on which the hurt was done is to be reckoned the first. *1 Hawk. c. 31. § 9.* So, where any stated time is limited in a penal statute for the prosecution of an offender, the day on which the act is done is to be included in the reckoning. As where a statute provides, that all prosecutions for offences "shall be commenced within one month after the offence committed," the month begins with the day on which the offence was committed. *Doug. 461; 3 T. R. 623; 3 East, 407; 2 Camp. 296.*

Formerly, where the time was limited from the day of doing the act in question that day used to be excluded from the reckoning. But since the case of *Pugh v. Duke of Leeds*, *Comp. 714.* in which all the previous authorities were discussed by Lord Mansfield in a most luminous and elaborate judgment, these formal distinctions have been done away; which his lordship justly observes, were not much to the honour of the learned in Westminster Hall, thus to embarrass a point which a plain man of common understanding would have no difficulty in construing. The rule of good sense therefore is now established, that the word "from" may, in its vulgar use, and even in strict propriety of language, mean either inclusive or exclusive, according to the construction of a statute or the true intent and meaning of parties, in which ever case that term is used.

If the time be expressed in a statute by the year, or any aliquot part of one, as a half or a quarter of a year; the computation is by calendar months, of twelve to the year. See further *Month*.

The natural day, says Lord Coke, is divided in *luxem* light, which is *dies solaris*, and in *tenebras*, which is night; *3 Inst.*

63.; therefore the day is commonly accounted to begin at sunrise, and to end at sunset. But in cases of burglary, in mercy to the offender, it is not considered to be night, if there be daylight or *crepusculum* enough begun or left to discern a man's face withal. See *Burglary*.

By a rule of H. T. 2 Wm. 4, "in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned, exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good-Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also."

TIN. See *Stannaries, Staple*.

TINCKINGS, are signals given to forewarn people of the approach of the enemy. *Scotch Dict.*

TINEL LE ROY, *Fr.*] The king's hall wherein his servants used to dine and sup. 19 *Rich. 2. st. 1. c. 3.*

TINEMAN, or TIENMAN. A petty officer in the forest, who had the nocturnal care of vert and venison, and other servile employments. *Constitut. Forestæ Canuti Regis, cap. 4.*

TINET, *tinellum*.] Brushwood and thorns, to make and repair hedges. In Herefordshire to tine a gap in a hedge, is to fill it up with thorns, that cattle may not pass through it. *Chart. 21 Hen. 6.*

TINEWALD. The ancient parliament or annual convention of the people of the Isle of Man, of which this account is given: The governor and officers of that island do usually call the twenty-four Keys, being the chief commons thereof, especially once every year, viz. upon Midsummer-day at St. John's Chapel, to the court kept there, called the Tinewald Court; where, upon a hill near the said chapel, all the inhabitants of the island stand round about, and in the plain adjoining, and hear the laws and ordinances agreed upon in the chapel of St. John, which are published and declared unto them; and at this solemnity the lord of the island sits in a chair of state with a royal canopy over his head, and a sword held before him, attended by the several degrees of the people, who sit on each side of him, &c. *King's Descript. Isle of Man.* See *MAN, Isle of*.

TINKERMEN. Those fishermen who destroyed the young fry on the river Thames, by nets and unlawful engines, till suppressed by the mayor and citizens of London. Of which see *Stow's Survey of London, p. 18.*

TIN-MINES. See *Stannaries*.

TINPENNY. A tribute so called, usually paid for the liberty of digging in tin-mines. But some writers say it is a customary payment to the tithingman from the several friburgs, contracted from *Teding-penny*, which see.

TINSEL of the Feu. The loss of the estate held by feu duty in Scotland from allowing two years feu duty to remain unpaid. *Scotch Law Dict.* To tyne in Scotch is to lose.

TIPSTAFFS. Officers appointed by the marshal of the King's Bench, to attend upon the judges with a kind of rod or staff tipped with silver, who take into their custody all prisoners, either committed, or turned over by the judges at their chambers, &c. See *Baston*; and *stat. 1 Rich. 2.*

TITHES,

DECIMÆ, from the Sax. *Teotha*, i. e. tenth.] In some of our law-books are briefly defined to be an ecclesiastical inheritance, or property in the church, collateral to the estate of the lands thereof: but in others they are more fully defined to be a certain part of the fruit, or lawful increase of the earth, beasts and men's labour, which in most places, and of most things, is the tenth part, which by the law hath been given to the ministers of the Gospel, in recompense of their attending their office. 11 *Rep. 13; Dyer, 84.*

Tithes are classed by *Blackstone*, as a species of incorporeal hereditaments; and defined to be a tenth part of the increase, yearly arising and renewing from the profits of lands,

the stock upon lands, and the personal industry of the inhabitants: the first species being usually called predial; as of corn, grass, hops, and wood: the second mixed; as of wool, milk, pigs, &c. consisting of natural products, but nurtured and preserved in part by the care of man; and of these two sorts the tenth must be paid in gross: the third, personal; as of manual occupations, trades, fisheries, and the like, and of these only the tenth part of the clear gains and profits is due. 2 *Comm. c. 3.*

Tithes, with regard to value, are divided into great and small. Great tithes are chiefly corn, hay, and wood: small tithes are the predial tithes of other kinds, together with mixed and personal tithes. *Burn's Justice, tit. Tithes.*

The general rule of the common law merely declares that corn, grain, hay, and wood are great tithes, and that all other predial tithes, together with all mixed and personal tithes whatsoever, are to be accounted small tithes. 2 *Inst. 649; Degge, part. 2. ch. 1; Godolph. ch. 32. § 32; 2 E. & Y. 67, 172.* The books, it is true, furnish a great number of judicial decisions upon this head, and these have rendered it easy in almost every case to ascertain whether a particular thing is a great or a small tithe; but it does not appear that the line of distinction has ever been settled upon any clear and intelligible principles. 1 *Eagle on Tithes, 42.*

Great tithes generally belong to the rector; and small tithes to the vicar. *Cro. Car. 20.*

And for that reason great tithes are sometimes called *parsonage tithes*; small tithes, *vicarage tithes*; as being in general, payable the one to the parson, the other to the vicar.

Some things may be great or small tithes, in regard of the place; as hops in gardens are small tithes, and in fields may be great tithes; and it is said the quantity will turn a small tithe into a great one, if the parish is generally sown with it. 1 *Roll. Abr. 643; 1 Cro. 578; Wood's Inst. 162.*

In Scotland personal tithes have never been acknowledged; and the system of predial tithes is so regulated, that the proprietor of land, the heritor, can purchase his tithes in some cases at nine, and in others at six years' purchase, except such tithes as belong to the crown or to colleges or schools. Where the tithes exist, they are not in the hands of the clergy, who are all stipendiaries, and paid according to a stipend modified or regulated by the commission of tithes, whose powers in this respect are defined and regulated by 18 *Geo. 3. c. 138.* The oppression therefore which in certain instances may result from the system of tithes in England, (to which that of Ireland is in many instances similar,) is unknown in Scotland; while the liberal views of the commission and the legislature unite in supporting the clergy in their proper rank in society. See *Edinburgh Review, February 1823.*

For detailed reports of the several cases on this subject, and for a comprehensive view of the law resulting from such cases, see *Guthrie*, and *Eagle & Young's Collection*, and *Eagle on Tithes*. See also *Bacon's* and *Viner's Abridgments*.

- I. Of the Origin of Tithes; and to whom they are payable.
- II. Of what things Tithes are in general due; and of personal Tithes.
- III. Of predial Tithes; and herein of the Tithes of Agistment, Corn, Hay, and Wood.
- IV. Of mixed Tithes.
- V. Of recovering Tithes in the Ecclesiastical or Temporal Courts; or in a summary Way; against Quakers; and in London.
- VI. An alphabetical arrangement of the things for which Tithes are due.
- VII. Of Discharges and Exemptions from the Payment of Tithes.

1. *Bishop Barlow, Selden, Father Paul, and others, have observed, that neither tithes nor ecclesiastical benefices, (which are correlative in their nature,) were ever heard of for many ages in the Christian church, or pretended to be due to the Christian priesthood; and, as that bishop affirms, no mention is made of tithes in the grand codex of canons, ending in the year 451, which, next to the Bible, is the most authentic book in the world; and that it thereby appears, during all that time, both churches and churchmen were maintained by free gifts and oblations only. Barlow's Remains, p. 169; Selden of Tithes, 82. See Watson's Complete Incumbent, p. 3, 4, &c.*

Selden contends, that tithes were not introduced here into England till towards the end of the eighth century, i. e. about the year 786; when parishes and ecclesiastical benefices came to be settled; for, it is said, tithes and ecclesiastical benefices being correlative, the one could not exist without the other; for whenever any ecclesiastical person had any portion of tithes granted to him out of certain lands, this naturally constituted the benefice; the granting of the tithes of such a manor or parish being, in fact, a grant of the benefice; as a grant of the benefice did imply a grant of the tithes: and thus the relation between patrons and incumbents was analogous to that of lord and tenant by the feudal law. Selden of Tithes, 86, &c.

About the year 794, Offa, king of Mercia, (the most potent of all the Saxon kings of his time in this island,) made a law, whereby he gave unto the church the tithes of all his kingdom; which the historians tell us was done to expiate for the death of Ethelbert, king of the East Angles, whom in the year preceding he had caused basely to be murdered. But that tithes were before paid in England by way of offerings, according to the ancient usage and decrees of the church, appears from the canons of Egbert, archbishop of York, about the year 750: and from an epistle of Boniface, archbishop of Mentz, which he wrote to Cuthbert, archbishop of Canterbury, about the same time; and from the seventh canon of the general council held for the whole kingdom at Chalcut, in the year 787. But this law of Offa was that which first gave the church a civil right in them in this land, by way of property and inheritance; and enabled the clergy to gather and recover them as their legal due, by the coercion of the civil power. Yet this establishment of Offa reached no further than the kingdoms of Mercia, (over which Offa reigned,) and Northumberland, until Ethelwulf, about sixty years after, enlarged it for the whole realm of England. P. deaux on Tithes, 166, 167. See post.

It is said, tithes, oblations, &c. were originally the voluntary gifts of Christians, and that there was not any canon before that of the fourth council of Lateran, anno Dom. 1215, that even supposed tithes to be due of common right. 2 Wils. 182. But this seems very contrary to other opinions.

Blackstone says, he will not put the title of the clergy to tithes upon any divine right; though such a right certainly comes in, it is certainly considered with a view to the clergy. Yet an honourable and competent maintenance for the ministers of the Gospel is, undoubtedly, jure divino; whatever the particular mode of that maintenance may be. For, besides the positive precepts of the New Testament, natural reason will tell us, that an order of men, who are separated from the world, and excluded from other lucrative professions, for the sake of the rest of mankind, have a right to be furnished with the necessities, conveniences, and moderate enjoyments of life, at their expence for whose benefit they forego the usual means of providing them. Accordingly all municipal laws have provided a liberal and decent maintenance for their national priests or clergy; ours, in particular, have established this of tithes, probably in imitation of the Jewish law; and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the English clergy to found their title on the law of the land,

than upon any divine right whatsoever, unacknowledged and unsupported by temporal sanctions. 2 Comm. c. 3.

We cannot (continues the commentator) precisely ascertain the time when tithes were first introduced into this country. Possibly they were contemporary with the planting of Christianity among the Saxons by Augustin the monk, about the end of the sixth century. But the first mention of them in any written English law appears to be in a constitutional decree, made in a synod held A. D. 786, wherein the payment of tithes in general is strongly enjoined. Selden, c. 8. § 2. This canon, or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the Heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia and Northumberland, the bishops, dukes, senators, and people; which was a few years later than the time that Charlemagne established the payment of them in France, (A. D. 778,) and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy. Seld. c. 6. § 7; Spirit of Laws, b. 31. c. 12.

*The following more explicit account of the origin of tithes is extracted from Henry's History of Great Britain, book ii. chap. 2. § 4. Ethelwulf the eldest surviving son of Egbert, (the first monarch of England,) who succeeded his father in the throne A. D. 837, had been designed for the church; and was, we are told, a sub-deacon in the cathedral of Winchester when his father died. This prince did not forget his former friends and brethren of the clergy after his advancement to the throne; but continued to give them many substantial marks of his favour; of which the most considerable was, his famous grant of the tenth of all his lands to the church. The Christian clergy in England, as well as in other countries, began pretty early to claim the tenth of every thing, as the pope in Scotland by the law called the annuance of the ministers of religion; but it required a long time, and many laws both of church and state, to make this claim effectual. In the seventh and eighth centuries the English clergy had been supported, by the produce of the lands which had been given to the church by kings and other great men; by a church-scot or tax, of one Saxon penny on every house that was worth thirty Saxon pence of yearly rent; and by voluntary oblations of the people. These funds, in times of plenty and tranquillity, were abundantly sufficient: but in times of war and confusion, when their houses were burnt, and their slaves who cultivated their lands killed or carried away by the Danes; when the church-scot could not be regularly levied, and when the voluntary oblations of the people failed; the clergy were reduced to great distress and indigence. Ethelwulf, who was a religious prince, and seems to have placed his chief hopes of being preserved from that destruction with which he was threatened by the Danes in the prayers of the church, was desirous of delivering the clergy from their present distress, and of providing for their future support. With this view he called an assembly of all the great men of his hereditary kingdom of Wessex, both of the clergy and laity, at Winchester, in November, A. D. 844; and, with their consent, made a solemn grant to the church of the tenth part of all the lands belonging to the crown, free from all taxes and impositions of every kind, even from the *trinoda necessitas* of building bridges, fortifying and defending castles, and marching out on military expeditions. It was no doubt intended that this royal grant should be imitated, and probably it was imitated, by the nobility. In return for this noble donation, the clergy were obliged to perform some additional duties, viz. to meet with their people every Wednesday in the church, and there to sing fifty psalms, and celebrate two masses, one for king Ethelwulf, and another for the nobility, who had consented to this grant. What immediate benefit the clergy reaped from this donation we are not well informed, though*

it is probable that it was not very great, as a regulation of this kind could hardly be carried into execution in those distracted times. See *Anglia Sacra*, vol. 1. p. 200.

Though the presence of a prince with his people was never more necessary than in the reign of Ethelwolf, when his territories were every moment in danger of being invaded by the most cruel and destructive foes; yet this prince, prompted by the prevailing superstition of that age, left his kingdom in great confusion, and went to Rome, A. D. 854, where he spent much money in presents to the pope, the clergy, and the churches. After his return from Rome, he enlarged his former grant to the church, by extending it to the other kingdoms, which now compose the English monarchy. This was done in a great council at Winchester, A. D. 855, at which, besides Ethelwolf, Beorred, the tributary king of Mercia, and Edmund, the tributary king of East-Anglia, the two archbishops of Canterbury and York, with all the other bishops, the nobility, and chief clergy of England, were present. To give the greater force and solemnity to this donation, the charter containing the grant of it was presented by King Ethelwolf in the presence of the whole assembly, on the altar of St. Peter the apostle, in the cathedral of Winchester; and all the bishops were commanded to send a copy of it to every church in their respective dioceses. See *Chron. Saxon*. A. D. 854; *Spelm. Concil.* i. 348.

The next authentic mention of tithes is in the *Fædus Edwardi et Guthruni*, the laws agreed upon between King Guthran, the Dane, and Alfred and his son Edward, the elder, successive kings of England, about the year 900. This was a kind of treaty between those monarchs, which may be found at large in the Anglo-Saxon laws: wherein it was necessary, as Guthran was a Pagan, to provide for the subsistence of the Christian clergy under his dominion; and accordingly, we find the payment of tithes not only enjoined, but a penalty added upon non-observance, which law is seconded by the laws of Athelstan, about the year 930. And this is as much as can certainly be traced out, with regard to their legal original. See *Wilkins*, p. 51; 2 *Comm.* c. 3.

Upon the first introduction of tithes, though every man was obliged to pay tithes in general, yet he might give them to what priests he pleased, which were called arbitrary consecration of tithes; or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common. 2 *Inst.* 646; *Hob.* 296; *Seld.* c. 9. § 4. But, when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister; first by common consent, or the appointments of lords of manors, and afterwards by the written law of the land. *Lt. Edgar*, c. 1 & 2; *Canut.* c. 11.

However, arbitrary consecrations of tithes took place again afterwards, and became in general use till the time of King John. *Selden*, c. 11. This was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other orders, under Archbishop Dunstan and his successors; who endeavoured to wean the people from paying their dues to the secular or parochial clergy, (a much more valuable set of men than themselves,) and were then in hopes to have drawn, by sanctimonious pretences to extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected; since, for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever sung for his soul. But, in process of

years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by Pope Innocent III. about the year 1200, in a decretal epistle sent to the archbishop of Canterbury, and dated from the palace of Lateran, which has occasioned Sir Henry Hobart and others to mistake it for a decree of the council of Lateran, held A. D. 1179, which only prohibited what was called the infeodation of tithes, or their being granted to mere laymen, whereas this letter of Pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same pope in other countries. This epistle, says *Coke*, bound not the lay subjects of this realm; but, being reasonable and just, (and, he might have added, being correspondent to the ancient law,) it was allowed of, and so became *Lex Terræ*. 2 *Inst.* 641. This put an effectual stop to all the arbitrary consecrations of tithes; except some footsteeps which still continue in those portions of tithes, which the parson of one parish hath, though rarely, a right to claim in another; for it is now universally held, that tithes are due of common right to the parson of the parish unless there be a special exemption. *Regist.* 46. *Hob.* 296. This parson of the parish, we have formerly seen, may be either the actual incumbent, or else the appropriator of the benefice; appropriations being a method of endowing monasteries, which seems to have been devised by the regular clergy, by way of substitution to arbitrary consecrations of tithes. See 2 *Comm.* c. 3.

Where an endowment is lost, and it appears that the rector has not received any small tithes, but that the vicar has received all the small tithes which have been rendered, the court infers in favour of the vicar, that the endowment conferred upon him, by a general expression, all small tithes whatever, not only such as were then actually received, but such also as were at that time neglected or as came afterwards into existence by improvements in husbandry. But when the vicar has never received, nor been entitled to receive the whole of the small tithes, it cannot be so readily presumed that the endowment contained a gift to him in these general terms. If a certain tithe has been uniformly received by the vicar, and never by the rector, or any portioner, that fact ascertains that the endowment conferred the title upon him. 1 *Y. & J.* 17.

The tithes of a rectory which belonged to a dissolved abbey, are due to the grantee of the crown, and not to the incumbent of the parish as rector. 7 *Bro. P. C.* 7.

In extra parochial places, the king, by his royal prerogative, has a right to all the tithes. 2 *Rep.* 2, 34, 2 *Inst.* 64.

The tithes of all extra parochial lands belong *jure coronæ* to the king; and the title of the crown is not confined to such extra parochial lands only as were forest or part of forest land. *Att. Gen. v. Eardley*, (Ld.) 8 *Price*, 39.

II. In general, tithes are to be paid for every thing that yields an annual increase, as corn, hay, fruit, cattle, poultry, and the like: but not for any thing that is of the substance of the earth or is not of annual increase; as stone, lime, chalk, and the like: nor for creatures that are of a wild nature, as deer, hawks, &c.; whose increase, so as to profit the owner, is not annual, but casual: though for deer and rabbits tithes may be payable by special custom. 2 *Comm.* c. 3. § 2.

Tithes are due either *de jure*, or by custom: all tithes which are due *de jure*, arise from such fruits of the earth as renew annually; or from the profit that accrues from the labour of a man. Hence it follows, that such tithes can never be part of, but must always be collateral to, the land from which they arise. 11 *Rep.* 13, 14.

Nay, tithes due *de jure* are so collateral to every kind

of land, that if a lease is made of the glebe belonging to a rectory, with all the profits and advantages thereof; and there is besides a covenant, that the rent to be paid shall be in full satisfaction of every kind of exaction and demand, belonging to the rectory; yet, as the glebe is not expressly discharged of tithes, the lessee shall be liable to the payment thereof. 11 Rep. 13, 14; 1 Roll. Abr. 655, pl. 1; Cro. Eliz. 162, 261; Cro. Car. 362.

No tithe is due *de jure* of the produce of a mine or of a quarry; because this is not a fruit of the earth renewing annually, but is the substance of the earth, and has perhaps been so for a great number of years. F. N. B. 53; Bro. Dism. pl. 18; 2 Inst. 651; 1 Roll. Abr. 637; Cro. Eliz. 277.

No tithe is due *de jure* of any thing (generally) which is part of the soil, and does not renew annually; but it may be due by custom. Vide 2 Vern. 46; 1 Roll. Abr. 637, pl. 5; 2 Mod. 77; 1 Mod. 35; 1 Roll. Abr. 642. S. pl. 7, 8.

No tithes are due *de jure* of houses; for tithes are only due *de jure* of such things as renew from year to year. 11 Rep. 16, *Grant's case*. But houses in London are, by decree, which was confirmed by an act of parliament, made liable to the payment of tithes. 2 Inst. 659. See 37 Hen. 8. c. 12; 22 § 20 Car. 2. c. 15. Before this decree, houses in London were by custom liable to pay tithes; the *quantum* to be paid being thereby only settled as to such houses for which there was no customary payment. 2 Inst. 659; Hard. 116; Gilb. Eq. Rep. 193, 194. See post V. There is likewise in most ancient cities and boroughs a custom to pay tithes for houses; without which there would be no maintenance in many parishes for the clergy. 11 Rep. 16; Bunb. 102.

It was held by three barons of the exchequer, *Prich, Montague, and Page*, contrary to the opinion of *Bury*, chief baron, that two tithes may be due of the same thing, one *de jure*, the other by custom. Bunb. 43.

By a grant of all tithes, arising out of or in respect of farms, lands, &c. the tithes arising out of and in respect of common appurtenant to such farms or lands will pass. 7 T. R. 641.

Personal tithes are only payable by a special custom; and perhaps are now paid no where in England, except for fish caught in the sea, and for corn mills. 3 Burn's Eccl. Law, 473.

No personal tithe is due of the profit which a man receives without personal labour, or of the profit which one man receives from the labour of another. Roll. Abr. 656. pl. 1. pl. 2; 2 Inst. 621, 6, 9. If a man lets a ship to a fisherman, no personal tithe is due of the money received for the use of such ship; because this is a profit without personal labour. 1 Roll. Abr. 656, n. pl. 2. Vide 1 Roll. Abr. 656, n. pl. 3; 2 Bulst. 141.

In § 7, of stat. 2 & 3 Edw. 6. c. 13. common day-labourers are exempted from the payment of personal tithes. No personal tithes are due from servants in husbandry; for by their labour the tithes of many other things are increased. 1 Roll. Abr. 646, pl. 1. It was settled, by a decree of the House of Lords, upon an appeal from a decree of the Court of Exchequer, that only personal tithes are due from the occupier of a corn-mill. 1 Eq. Abr. 366; 2 P. Wms. 463; Bro. P. C.

The 9 Edw. 2. at. 1. c. 5. (as to occupiers of mills, paying tithes,) provides that new erected mills shall be liable to the payment of tithes. But, as nothing therein is said concerning ancient mills, there can be no doubt that such ancient mills, as before the making of this statute were liable to pay tithes, continued afterwards to be liable. 12 Mod. 243; 3 Bulst. 212.

The profits of mills are in their nature strictly personal; for they are produced wholly by the labour and industry of man, and therefore at the common law they are not

liable to the payment of tithes. Tithe, it is true, is payable for corn mills, but that is only *sub modo* in the case of new mills, and by the above statute of *articuli cleri*, ancient corn mills and all other mills, as fulling mills, paper mills, and lead mills, are not titheable except by custom or prescription. 1 Eagle on Tithes, 377.

III. Such tithes as arise immediately from the fruits of the earth, as from corn, hay, hemp, hops, and all kinds of fruits, seeds, and herbs, are called *Predial* tithes. 2 Inst. 649. They are so called because they arise immediately from the fruits of the farm, (*prædium*), or earth. 2 Inst. 647.

By the ecclesiastical law, many things are liable to the payment of predial tithes, which by the common law, or in the Courts of equity, are not held to be so. 2 Inst. 621; 4 Mod. 344. This may cause, and has caused, some confusion. In the former case, the last resort is to the Delegates, in the latter to the House of Lords. Shaw's Law of Tithes, 139. The canons must, in all cases, give way to the custom of the place. Id. 112.

The design, under this head, is to show what things are liable by the common law to pay predial tithes.

In doing this, it will appear that some things, which are in the general exempted therefrom, become by custom liable to the payment of predial tithes. 1 Roll. Abr. 637, E. pl. 2; 642, S. pl. 7, pl. 8.

It will also appear, that divers things, which are in the general liable thereto, are, under particular circumstances, exempted from the payment of such tithes. 1 Roll. Abr. 645, pl. 11; Cro. Eliz. 175; *Prich*, 55; 12 Mod. 255.

But wherever any fraud is used to bring a thing under those circumstances, by reason of which it would, if it had come fairly under them, have been exempted from the payment of predial tithes, it is by such fraud rendered liable thereto. Cro. Eliz. 175; *Prich*, 55.

The predial great tithes now appear to be corn, grain, hay, clover, grass (when made into hay,) wood, underwood, and beans and pease (when sown in fields). The predial small tithes are flax, hemp, madder, hops, garden roots, and herbs, as potatoes, turnips, parsley, cabbage, saffron; and the fruits of all kinds of trees, as apples, pears, acorns, &c. All kinds of seeds, as turnip-seed, parsley-seed, rape-seed, carraway-seed, aniseed, clover-seed, and beans and pease if sown in a garden. Shaw's Law of Tithes.

As it would be tedious to enumerate all the things which are liable to predial tithes, only those shall be mentioned concerning the tithes of which some question has arisen; but from such as will be mentioned, it may be easily collected of what other things predial tithes are due.

AGISTMENT.—Agistment, in the strict sense of the word, means the depasturing of a beast the property of a stranger. But this word is constantly used in the books for depasturing the beast of an occupier of land, as well as that of a stranger. 5 New Abr. 53. The tithe of agistment is the tenth part of the value of the keeping or depasturing such cattle as are liable to pay it. Agistment is derived from the French *gayer*, *gister* (*jacere*); because the beasts are levant and couchant during the time they are on the land. Agistment tithe seems rather a mixed than strictly a predial tithe.

In respect to the nature of agistment tithe it seems to have been long considered a matter of doubt, whether it was payable on account of the cattle, or the herbage on which they are depastured; but it is now fully settled that it is the tithe of the grass or herbage which is eaten, and not of the improvement of the cattle, and consequently is in its nature a predial tithe. 1 Anstr. 332; 3 Anstr. 760; 2 E. & Y. 429.

The parson, vicar, or other proprietor of the tithes, is entitled to agistment tithe *de jure*; because the grass which

is eat is of common right tithable. *Ld. Raym.* 137; 2 *Salk.* 655; 2 *Inst.* 651.

An occupier of land is not liable to pay tithe for the pasture of horses, or other beasts, which are used in husbandry in the parish in which they are depastured, because the tithe of corn is by their labour increased. 1 *Roll. Abr.* 646, pl. 2, pl. 3, pl. 6, pl. 7; *Cro. Eliz.* 446; *Ld. Raym.* 130. But, if horses or other beasts are used in husbandry out of the parish in which they are depastured, an agistment tithe is due for them. 7 *Mod.* 114; *Ld. Raym.* 130.

It seems to be the better opinion, that no tithe is due for the pasture of a saddle-horse which an occupier of land keeps for himself or servants to ride upon. 1 *Roll. Abr.* 642, pl. 4; *Cro. Jac.* 430; *Bulst.* 171; *Bunb.* 3. No tithe is due for the pasture of milk cattle, which are milked in the parish in which they are depastured; because tithe is paid of the milk of such cattle. 1 *Roll. Abr.* 646, pl. 2; *Ld. Raym.* 130; *Cro. Eliz.* 446.

Milk cattle which are reserved for calving, shall pay no tithe for their pasture whilst they are dry. But, if they are afterwards sold, or milked in another parish, an agistment tithe is due for the time they were dry. *Hell.* 100; *Ld. Raym.* 130. No tithe is due from an occupier of land, for the pasture of young cattle, reared to be used in husbandry, or for the pail. *Cro. Eliz.* 476. But if such young beasts are sold, before they come to such perfection as to be fit for husbandry, or before they give milk, an agistment tithe must be paid for them. *Hell.* 86.

An occupier of land is liable to an agistment tithe, for all such cattle as he keeps for sale. *Cro. Eliz.* 446, 476; *Jenk.* pl. 6; *Cro. Car.* 237; *Show. P. C.* 192. Vide *Cro. Jac.* 430; 1 *Roll. Abr.* 647, pl. 14.

But if any cattle which have neither been used in husbandry nor for the pail, are, after being kept some time, killed, to be spent in the family of the occupier of the land on which they were depastured, no tithe is due for their pasture. *Jenk.* 281, pl. 6; *Cro. Eliz.* 446, 476; *Cro. Car.* 237. It is in general true, that an agistment tithe is due, for depasturing any sort of cattle the property of a stranger. *Cro. Eliz.* 276; *Cro. Jac.* 276; *Bunb.* 1; *Freem.* 329. No tithe is due for the cattle, either of a stranger or an occupier, which are depastured in grounds that have in the same year paid tithe of hay. *Bunb.* 10, 79; *Poph.* 142; 2 *Roll. Rep.* 191.

No agistment tithe is due for such beasts, either of a stranger or an occupier, as are depastured on the head-lands of ploughed fields; provided that these are not wider than is sufficient to turn the plough and horses upon. 1 *Roll. Abr.* 646, pl. 19. No tithe is due for such cattle as are depastured upon land that has the same year paid tithes of corn. *Bro. Dism.* 18; 1 *Mod.* 216. If land, which has paid tithe of corn in one year, is left unsown the next year, no agistment is due for such land; because, by this lying fresh, the tithe of the next crop of corn is increased. 1 *Roll. Abr.* 642, pl. 9. But if land, which has paid tithe of corn, is suffered to lie fallow longer than by the course of husbandry is usual, an agistment tithe is due for the beasts depastured upon such land. *Shep. Abr.* 1008.

Sheep are considered profitable animals, in respect of the wool and lambs they produce, and the manurance of the land upon which they are folded; and therefore no tithe of agistment is due from sheep when they are sheared or drop their lambs in the same parish in which they are depastured: for the tithes of their pasturage is included in the tithes of the wool and lambs. 3 *Anstr.* 829; 1 *E. & Y.* 356, 578; 2 *E. & Y.* 128, 229, 284, 436. But it is to be observed, that regularly the year in tithing sheep is from shearing time in one year to shearing time in the next, 1 *E. & Y.* 566; 2 *Anstr.* 500; and that the payment of tithes of wool and lambs has merely a retrospective operation, covering the pasturage of the sheep up to the time of their lambing and

shearing, and that only within the same parish. *Amb.* 149. See 1 *E. & Y.* 356. And the rule is now perfectly established, that by the common law, tithe of wool and lambs may be due in one parish and tithe of agistment in another, *Gwill.* 1022, 1028, although upon general principles it would be clearly otherwise. 1 *Eagle on Tithes*, 296.

There is a peculiar difficulty attending the tithe of agistment, that cannot be taken in kind; custom is therefore the principal rule to go by in payment of it; and the old decisions on the subject vary so much, that it would be difficult to obtain any general inference from them. *Burn* says, in all cases, the tithe of agistment of barren and unprofitable cattle is to be paid according to the value of keeping each per week; and the value of the keeping of a sheep, beast, or horse, upon any particular lands, is easily ascertained from the usual prices given for their depasture per week in the neighbourhood, where profitable cattle are kept at the same time upon the lands, together with them, or not. 3 *Burn. Eccl. L.* 448.

In Ireland, in the year 1735, resolutions were made by the House of Commons against enforcing tithe for the agistment of dry and barren cattle. *Comm. J.* vi. 678, 672. And by the Irish act, 40 *Geo. 3. c. 23.* passed just before the Union with Great Britain, reciting that tithe agistment for dry and barren cattle had not been demanded for more than sixty years then last past, it is enacted, that no claim shall be allowed for tithe agistment for dry and barren cattle, nor shall any suit be entertained in any court of civil and ecclesiastical jurisdiction for recovery of the same. But this shall not exempt from payment of tithe any kind of cattle in any parish or place in which tithe had been usually paid within the last ten years.

CORN.—The common-law mode of tithing wheat is in the sheaf and not in the shock. 2 *Taunton*, 55. And it is not competent for a farmer, without a custom, before tithing, to put all the sheaves immediately when bound into shocks, and then withdrawing the tenth sheaf from each, to remove the remainder; for the parson has not then a reasonable opportunity of comparing the tenth with the other nine, as he is entitled by law. 13 *East*, 261. And see 12 *East*, 239.

It is laid down in some books, that no tithe is due of the rakings of corn involuntarily scattered. 1 *Roll. Abr.* 615, pl. 11; *Cro. Eliz.* 278; *Freem.* 335; *Moor*, 278. But if more of any sort of corn is fraudulently scattered than, if proper care had been taken, would have been scattered, tithe is due of the rakings of such corn. *Cro. Eliz.* 476; *Freem.* 335. And it has been said by *Holt*, Ch. J. that tithe is due of the rakings of all corn, except such as is bound up in sheaves. 12 *Mod.* 235. No tithes are due of the stubbles left in cornfields, after moving or reaping the corn. 2 *Inst.* 261; 1 *Roll. Abr.* 640, p. 14. See post, VI.

HAY.—The common-law mode of tithing hay is in the cocks into which the grass is first collected after cutting or tedding. In this case, (as in corn,) the farmer must leave his nine parts in the field a reasonable time for the parson to compare his tithe with them. 10 *East*, 5; 2 *Taunton*, 55. Tithe of hay is to be paid, although beasts of the plough or pail, or sheep, are to be foddered with such hay. *Cro. Jac.* 47, *Webb v. Warner*; 1 *Roll. Abr.* 650, pl. 12; 12 *Mod.* 17. But no tithe is due of hay grown upon the head-lands of ploughed grounds, provided that such head-lands are not wider than is sufficient to turn the plough and horses upon. 1 *Roll. Abr.* 646, pl. 19. See post, VI.

It is laid down in one old case, that if a man cuts down grass, and while it is in the swathes, carries it away and gives it to his plough cattle, not having sufficient sustenance for them otherwise, no tithe is due thereof. 1 *Roll. Abr.* 645, *Crawley v. Wells*, Mich. 8 *Car.* 1. In one case, the Court of Exchequer seemed to be of opinion, that no tithe is due of vetches or clover, cut green, and given to cattle in

husbandry. *Bunb.* 279. But in another case, it was afterwards held, that the right to tithe of hay accrues upon mowing the grass; and that the subsequent application of this, while it is in grass, or when it is made into hay, shall not, although beasts of the plough or pail are fed with it, take away this right. 12 *Mod.* 498. And the doctrine of this last case coincides with that of an old case, in which it was held, that tares cut green, and given to beasts of the plough, may, by special custom, be exempted from the payment of tithes; from whence it follows that such tares are not exempted *de jure*. 12 *Mod.* 498. See *post*, VI. as to such tithes, and also tithes of aftermath, or after-pasture.

Wood.—Tithe of wood is not due of common right, because wood does not renew annually: but it was, in very ancient times, paid in many places by custom. 2 *Inst.* 642; 12 *Mod.* 111; *Salk.* 656; *Comb.* 404; *Bunb.* 61.

A constitution was made, in the seventeenth year of the reign of Edward III., by John Stratford, archbishop of Canterbury, that tithes shall be paid within this province of *silva cædua*. 2 *Inst.* 642; *Palm.* 37, 38.

Several petitions having been presented to the king, complaining of the clergy in taking tithes of gross-wood and underwood, by virtue of this constitution; at length, a statute was made in these words: "At the compunction of the great men and commoners, shewing by the petition that when they sell their gross-wood, of the age of twenty or forty years, and of a greater age, to merchants, to their own profit, and to the aid of the king in his wars, the parsons and vicars of holy church do implead and trouble the said merchants, in court christian, for the tithe of the said wood, under the denomination of *silva cædua*, by reason of which they cannot sell their wood for the real value, to the great damage of themselves and the realm: it is ordained and established, that a prohibition in this case shall be granted, and upon the same an attachment, as it has hitherto been." 45 *Edw.* 3, c. 3.

From the petitions and answers, from this statute, and from books of the best authority, it appears plainly, that no title of gross-wood is due of the common law; and that the demand thereof as such, by virtue of the constitution made by the archbishop, was an encroachment. 2 *Inst.* 642; 45 *Edw.* 3, c. 3; *Plowd.* 470; *Bro. Paroch.* pl. 1; *Cro. Jac.* 100.

After the making of this statute, prohibitions were constantly granted to suits instituted in spiritual courts for tithes of gross-wood. But two questions often arose; what is gross-wood? and of what age gross-wood must be before it is exempted from the payment of tithe? 2 *Inst.* 643, 644, 645.

For the putting an end to these, it had long been settled, that gross-wood is not only small wood, but any wood, but such as is generally, or by the custom of a particular part of the country, (as beech, in Buckinghamshire,) used as timber; and that all such wood, if of the age of twenty years, is exempted from the payment of tithe. 2 *Inst.* 642, 643; *Cro. Eliz.* 1; 12 *Mod.* 534; *Bunb.* 127. Oaks, and chestnuts, being universally used as timber, it has been always held, that such trees, if of twenty years, are gross-wood. 2 *Inst.* 642. It hath been held, upon great deliberation, (notwithstanding what is laid down to the contrary in *Plowd.* 470,) that a hornbeam tree, if of the age of twenty years, is gross-wood, because this is used in building and repairing. It is also to be observed, that an aspen-tree, of the age of twenty years, is gross-wood. 2 *Inst.* 643.

In a recent case tithe was held to be payable for oak wood, springing or growing from the germins or stumps of trees formerly felled; though such wood was timber, of the growth of eighty years and upwards. And that by gross-wood in the 45 *Edw.* 3, is intended wood of the species of

timber of twenty years, or greater growth; but the statute does not point to the means of growth, whether it shall be from seed or germins; but according to the authorities, the growth must be from the former; and germins, of whatever age or size, are liable to tithe. *Evans v. Rome*, 1 *McClell.* & *Y.* 577. See *Eagle on Tithes*, 233, 260, where the propriety of the above decision is questioned in a very able argument.

With respect to trees which are clearly of a species to be denominated timber, the court have declared they would presume the trees to be above twenty years' growth, unless the plaintiff demanding the tithes prove the contrary. 2 *P. Wms.* 606; *Gwill.* 357.

Tithes are not in the general due of beech, birch, hazel, willow, sallow, alder, maple, or white-thorn trees, or of any fruit trees, of whatsoever age they are; because these are not timber. *Plowd.* 470; *Cro. El.* 477; 1 *Cro. Jac.* 193; 1 *Roll. Abr.* 640, pl. 5, pl. 6; *Brownl.* 94. But, if the wood of any of these trees is used in a particular part of the country, where timber is scarce, in building and repairing, no tithe is due of such wood, if of the age of twenty years, in that part of the country. *Hob.* 289; *Brownl.* 94. It is laid down in several old books, that if a timber tree, after it is of the age of twenty years, decays so as to be unfit to be used in building, no tithe is due of the wood of this tree, because it was once privileged. 11 *Rep.* 48; *Cro. Eliz.* 477; *Cro. Jac.* 100; 1 *Roll. Abr.* 640, pl. 2.

If the wood of a coppice has been usually felled for firing, such wood shall pay tithe, although it stand till it be forty years of age. *Sid.* 300; 1 *Lev.* 189.

If, when the wood of coppice is felled, some trees growing therein, which are of the age of twenty years, and have never been lopped, are lopped, and these loppings are promiscuously bound up in faggots with the coppice-wood, tithe must be paid on the whole, because it would be very difficult to separate the tithable wood from that which is not so, and the owner ought to suffer for his folly in mixing them. *Walton v. Tryon*, 5 *Bac. Abr.*; and see *Danes v. Mullins*, 2 *Leccs.* 79.

If the wood of a timber tree is sold for firing, it was determined in one case, that although the tree was of the age of twenty years, it was liable to pay tithe. *Bunb.* 99. *Greenaway v. The Earl of Kent*. The reporter of this case mentions four others, in which the same had been held; and says, that it was in one of them laid down, that the wood of timber-trees is only exempted from the payment of tithe, on the account of its being used in building. The contrary doctrine, however, of the old books, was confirmed by a subsequent case in the Court of Chancery. A bill being brought for tithe of the loppings of timber trees, which had been sold for firing, it was insisted that this wood, which would otherwise have been exempted from the payment of tithes, was liable thereto, because it was sold to be used for firing; and the cases just now cited were relied upon. But the bill was dismissed; and by *Hardwicke*, chancellor, in the case in 1 *Lev.* 189, and *Sid.* 300, the wood in question was coppice-wood, which had been usually felled for firing; and such wood, of whatever age it is, is always tithable. The case of *Greenaway* and *The Earl of Kent* is quite a singular one, and is not law; for in the case of *Bibye and Huxley*, 11 *Geo.* 1, it was agreed, that no tithe is due of the wood of a timber tree, which has been once privileged from the payment of tithe, although such wood is sold to be used for firing. *Walton v. Tryon*, *Mich.* 25 *Geo.* 2: 5 *Bac. Abr.*; *Gwill.* on *Tithes*, 818. See farther, *Bro. Dism.* pl. 14; 11 *Rep.* 4; *Cro. El.* 4; *Godb.* 175; *Roll. Abr.* 640, pl. 3. Held also in the said case of *Walton v. Tryon*, that wherever a tree has been lopped before it was of the age of twenty years, all future loppings, although ever so old, are liable to pay tithe. And see *Withington v. Harris*, *Gwill.* 584, 586; *Broke v. Rogers*, *Mo.* 908; *Gwill.* 833; 4 *M. & S.* 130.

IV. SUCH tithes as arise from beasts or fowls which are fed with the fruits of the earth, are called mixed tithes. 2 Inst. 649; 1 Roll. Abr. 635. Many things are, by the ecclesiastical law, liable to pay such tithes, which by the common law are not. 2 Inst. 621; 4 Mod. 344.

The design under this head is to show, of what mixed tithes are due by the common law.

The same general observations as to custom, frauds, and exemption, apply here as to the former kind of predial tithes.

The tithes of colts, calves, lambs, kids, pigs, milk, cheese, agistment or pasturage, eggs, chickens, &c. are mixed tithes. *Shaw's Law of Tithes*.

Tithes are in general due of the young of all beasts, except such as are *feræ naturæ*. But none are due of young hounds, apes, or the like, because such beasts are kept only for pleasure. *Bro. Dism. pl. 20*. No tithe is due of the young of deer, for these are *feræ naturæ*. 2 Inst. 651. And, for the same reason, none is due, but by custom, of young conies. 1 Roll. Abr. 635, C. pl. 3; *Cro. Car.* 339; 1 *Ventr.* 5.

The young of all birds and fowls, except such as are *feræ naturæ*, are in the general liable to pay tithes; unless the eggs of such birds or fowls have before paid tithes. 1 Roll. Abr. 642, pl. 6; 2 P. Wms. 463. But no tithes are due either of the eggs or young of any birds or fowls which are kept only for pleasure. *Bro. Dism. pl. 20*. No tithes are due of the eggs or young of partridges or pheasants, because these are *feræ naturæ*. *Moor*, 599; 2 P. Wms. 463. If a man keeps pheasants in an enclosed wood, whose wings are clipped, and from their eggs hatches and brings up young ones, no tithe is due of these young pheasants, although none was paid for their eggs; because the old ones are not reclaimed, and would go out of the inclosure if their wings were not clipped. 1 Roll. Abr. 636, pl. 5.

It was heretofore held, that neither the eggs nor young of turkeys are tithable, turkeys being *feræ naturæ*. *Moor*, 599. But it is now held that, as turkeys are now as tame as hens or other poultry, tithe is due of their eggs or young. 2 P. Wms. 463. No tithe is due of such young pigeons as are spent in the house of the person who breeds them. 1 Roll. Abr. 644, Z. pl. 4; pl. 6; 1 *Ventr.* 5; 12 *Mod.* 77; 12 *Mod.* 47. But if any young pigeons are sold, tithe is due of them. 1 Roll. Abr. 644, Z. pl. 5, pl. 6.

If a man pay tithe of young lambs at Marks-tide, and at Midsummer assizes shears the other nine parts of the lambs, tithe is due of the wool; for although there are but two months between the time of paying tithe-lambs which were not shorn, and the shearing of the residue, there is in this case a new increase. 1 Roll. Abr. 642, R. pl. 7; *Bunb.* 90. If a man shears his sheep about their necks at Michaelmas time, to preserve their fleeces from the brambles, no tithe is due of this wool; for it appears that this, which is done before their wool is much grown, can never be for the sake of the wool. 1 Roll. Abr. 645, pl. 16. If a man, after their wool is well grown, shear his sheep about their necks to preserve them from vermin, no tithe is due of the wool. 1 Roll. Abr. 645, pl. 14.

If a man, a little before shearing time, cuts dirty locks of wool from his sheep to preserve them from vermin, no tithe is due of such wool. 1 Roll. Abr. 646, pl. 17.

But in any of these cases, if more wool than ought to have been cut off is fraudulently cut off, tithe must be paid of the wool. 1 Roll. Abr. 645, pl. 15, 646, pl. 17. Tithe is due of the wool of such sheep as are killed to be spent in the house. 1 Roll. Abr. 646, pl. 18; *Cont. Litt. Rep.* 31.

Fish taken in a pond, or in any inclosed river, are liable to pay tithe. 1 Roll. Abr. 636, pl. 4, pl. 6, pl. 7. But no tithe is due, except by custom, of fish taken in the sea, or in any open river, although they are taken by a person who has a several fishery, because such fish are *feræ naturæ*.

Noy, 108; 1 Roll. Abr. 636, pl. 4, pl. 6, pl. 7; *Cro. Car.* 332; 1 *Leo.* 179; *Sid.* 278. Honey and bees-wax are both tithable. *Fitz. N. B.* 51; 1 Roll. Abr. 633, C. pl. 1; *Cro. Car.* 559. But where the tithe of their honey and wax has been paid, no tithe is due of the bees. *Cro. Car.* 404. No tithe is due of the milk spent in the house of a farmer, provided such house stands in that parish in which the cows are milked. *Id.* *Raym.* 129. See post, VI.

V. THE subtraction or withholding of tithes from the parson or vicar, whether the former be a clergyman or a lay appropriator, is among the pecuniary causes cognizable in the ecclesiastical court. But herein a distinction must be taken; for the ecclesiastical courts have no jurisdiction to try the right of tithes, unless between the spiritual persons; but in ordinary cases, between spiritual men and lay-men, are only to compel the payment of them, when the right is not disputed. 2 Inst. 364, 489, 490. By the statute, or rather writ, of *Circumspecte agatis*, it is declared, that the Court Christian shall not be prohibited from holding pleas, "*si rector parialis versus parochianos oblationes et decimas debitas et consuetas*." So that if any dispute arises whether such tithes be due and accustomed, this cannot be determined in the ecclesiastical court, but before the king's courts of the common law; as such question affects the temporal inheritance, and the determination must bind the real property. But where the right does not come into question, but only the fact, whether or no the tithes allowed to be due are really subtracted or withdrawn, this is a transient personal injury, for which the remedy may properly be had in the spiritual court: viz. the recovery of the tithes, or their equivalent.

By 27 Hen. 8. c. 20; 32 Hen. 8. c. 7. for due payment of tithes, upon complaint of the ecclesiastical judge, of any contempt or misbehaviour by a defendant in any suit for tithes, any privy councillor, or any two justices of the peace (or, in case of disobedience to a definitive sentence, any two justices of the peace,) may commit the party to prison, without bail or mainprise, till he enter into recognizance with sureties to give due obedience to the process and sentence of the court.

It now seldom happens that tithes are sued for at all in the spiritual court; for if the defendant pleads any custom, modus, composition, or other matter whereby the right of tithing is called in question, this takes it out of the jurisdiction of the ecclesiastical judges; for the law will not suffer the existence of such a right to be decided by the sentence of any single, much less an ecclesiastical, judge, without the verdict of a jury. 3 *Comm.* c. 7.

By 2 & 3 Edw. 6. c. 13. it is enacted, that if any person shall carry off his predial tithes, (viz. of corn, hay, or the like,) before the tenth part is duly set forth, or agreement is made with the proprietor, or shall willingly withdraw his tithes of the same, or shall stop or hinder the proprietor of the tithes, or his deputy, from viewing or carrying them away; such offender shall pay double the value of the tithes, with costs, to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws. By a former clause of the same statute, the treble value of the tithes, so subtracted or withheld, may be sued for in the temporal courts; which is equivalent to the double value to be sued for in the ecclesiastical; for one may sue for and recover in the ecclesiastical courts the tithes themselves, or a recompence for them, by the ancient law; to which the suit for the double value is superadded by the statute; but as no suit lay in the temporal courts for the subtraction of tithes themselves, therefore the statute gave a treble forfeiture, if sued for there; in order to make the course of justice uniform, by giving the same reparation in one court as in the other. 2 Inst. 650.

In an action on this statute, 2 & 3 Edw. 6. c. 13. for the

treble value of corn omitted to be set out, it is not enough for the defendant to show the existence in fact of a custom in the parish to set out the 11th instead of the 10th mow; for the validity as well as existence of such a custom is properly triable in this form of action, though penal in its nature; being given to the party grieved, and his only remedy at common law for subtraction of the tithe due to him. 8 *East*, 178; and see 16 *East*, 641.

Where the declaration was for not setting out predial and other tithes, as wool, &c. and a general verdict was given, judgment was arrested: the statute extending only to predial tithes. *Schw. N. P.* 1074. But the statute extends to small predial tithes as well as great. *Day v. Packwell, Moor*, 915. As to the right of way in the parson to be used for carrying the tithe, see 2 *New Rep.* 466. The validity of a prescription to be exempt from the penalties of this act, 2 & 3 *Edw. 6.* is proper to be tried in an action on the statute. 8 *East*, 178.

Where an occupier of land, who had been under composition for tithes, refused to pay the composition, or to set out tithes in kind, alleging that he was exempted by a *modus*; the Court of C. P. held, that in an action on 2 & 3 *Edw. 6. c. 18.* for the treble value of the tithe, it was not necessary to prove a notice to determine the composition; the occupier's denial of the rector's right to tithes in kind rendering such notice unnecessary. 1 *B. & B.* 4; and see *Fell v. Wilson*, 12 *East*, 83.

By 53 *Geo. 3. c. 127. § 5.* no action shall be brought for the recovery of any penalty for the not setting out of tithes, nor any suit instituted in any court of equity or ecclesiastical court to recover the value of any tithes, unless within six years from the time when such tithes became due. And this is extended to Ireland by 54 *Geo. 3. c. 68. § 5.*

Suits for tithes are generally instituted in the Court of Exchequer. See further, *Limitation of Actions II. 1.*

The following statutes, for the summary recovery of tithes before justices of the peace, have also operated to abridge the power of the ecclesiastical court.

By 7 & 8 *Wm. 3. c. 6. § 1.* it is, for the more easy recovery of small tithes, where the same do not amount to above the yearly value of 40s. from any one person, enacted, "that if any person shall fail in payment for twenty days after demand, the parson may make complaint in writing to two justices of the peace, (neither being patron, nor interested), who, after summoning the party, are to hear and determine the complaint, and give a reasonable allowance for the tithes, and costs, not exceeding 10s.

"If the person complained against insists on any prescription, composition, *modus decimandi*, or other title, delivers the same in writing to the justices, and gives to the party complaining sufficient security to pay costs at law, if the title is not allowed, the justices are not to give judgment. The justices have power to give costs, not exceeding 10s., to the party prosecuted, if they find the complaint false and vexatious. The act not to extend to tithes within the city of London, or in any other place where the same are settled by any act of parliament. An appeal is given to the sessions, and no proceedings or judgment, had by virtue of this act, to be removed or superseded, by any writ of *certiorari*, or other writ whatsoever, unless the title of such tithes shall be in question."

By 53 *Geo. 3. c. 127. § 4.* the remedy of this act 7 & 8 *Wm. 3.* is extended to all tithes where the value does not exceed 10*l.*, and the complaint may be received by one justice, who shall summon the party to be heard before two, as required by the act 7*Wm. 3.* And see 54 *Geo. 3. c. 68. § 4.* extending in like manner the power given to justices in Ireland under Irish act, 1 *Geo. 2. c. 12.*

By 7 & 8 *Wm. 3. c. 34. § 4.* where any Quaker shall refuse to pay, or compound for, his great or small tithes,

it shall be lawful for the two next justices of the peace of the same county, other than such justice of the peace as is patron of the church or chapel to which the tithes belong, or any ways interested, upon complaint, to convene before them such Quaker, and to examine upon oath the truth of the complaint, and to ascertain what is due from such Quaker, and by order under their hands and seals to direct the payment thereof, so as the sum ordered do not exceed 10*l.*; and, upon refusal of the Quaker to pay, to levy the money. Any person aggrieved may appeal to the next general quarter sessions.

No proceedings, or judgment, had by virtue of this act, shall be removed or superseded by any writ of *certiorari*, or other writs out of his majesty's courts at Westminster, or any other court whatsoever, unless the title to such tithes shall be in question.

The material point as to granting a *certiorari* is, whether the title to the tithes is really in question or not. The general denial of a right to tithes, by a Quaker, is not such a controverting the title, as shall enable him to have a *certiorari*. 1 *Burr.* 485.

By 1 *Geo. 1. st. 2. c. 6. § 2.* the like remedy is given for the recovery of all other ecclesiastical dues from Quakers, as by 7 & 8 *Wm. 3. c. 34.* is given for tithes to the value of 10*l.*

The justices of the peace, upon complaint of any parson, vicar, curate, farmer, or proprietor of such tithes, or other person who ought to have, receive, or collect any such tithes or dues, may proceed in a similar manner as directed by the former act, touching Quakers.

By 53 *Geo. 3. c. 127. § 6.* the provisions of the two last-mentioned statutes are extended to any tithes, &c. not exceeding the value of 50*l.*, and one justice may receive the complaint, and summon the party to appear before two to determine it. So in Ireland, under the Irish act, 1 *Geo. 3. c. 21.* as extended by 54 *Geo. 3. c. 68. § 6.*

The tithe of houses in London, which are regulated by 37 *Hen. 8. c. 12.* may be recovered in the Court of Exchequer. *Bennett v. Treppass, Bro. P. C.* Under 22 & 23 *Car. 2. c. 15.* the tithes of all the parishes in London, injured by the great fire in 1666, are settled, to be levied by an equal rate; and, on non-payment, the lord mayor is to grant a warrant of distress for the same; or, on his refusal the lord chancellor, or two barons of the Exchequer, may grant such warrant; and all courts ecclesiastical and temporal are ousted of their jurisdiction in this case by this statute. These tithes are a real charge on the houses, payable though they are empty, and leviable on the goods of the succeeding occupier; and appeal lies from the lord mayor to the lord chancellor. 3 *Atk.* 639.

By 32 *Hen. 8. c. 7. § 7.* where persons having any estate of inheritance, &c. in any parsonage, tithes or ecclesiastical profits admitted by law to be in temporal hands, shall be disseised by persons claiming title, the persons so disseised shall have their remedy in the temporal courts by such writs as the case shall require; and like provision is made in Ireland by 33 *Hen. 8. (I.) st. 1. c. 12.*; and by the Irish act 15 & 16 *Geo. 3. c. 27. § 3.* it is positively provided that ejectment may be brought for non-payment of rent (one year being in arrear) reserved on leases of great or small tithes.

Under the above act, 32 *Hen. 8. c. 7.* the inheritance of tithes, as well as of any other species of property, may be recovered by ejectment.

By 6 *Geo. 1. (I.) c. 14.* leases of tithes for longer time than during incumbency, are void against the successors. (See as to England, *Lease, II.*) and 39 *Geo. 3. (I.) c. 14.* declares void all leases of tithes made by lessees of rectors, &c. except leases to the actual occupiers of the land subject to the tithe.

IV. ACORNS, as they yearly increase, are liable to the
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payment of tithes; but this is where they are gathered and sold, and reduced to a certain profit; not when they drop and the hogs eat them. 2 *Inst.* 643; *Hell.* 27.

AFTER-MATH, OR AFTER-PASTURE, pays no tithes, except by custom; being the remains of what was before tithed. 2 *Inst.* 262, 652; 2 *Danv. Abr.* 589, tit. *Dismes*. F. N. B. 53; Bro. *Dismes*, pl. 16; 11 *Rep.* 16; *Cro. Jac.* 42; *Ld. Raym.* 243. But it is held in other books, that tithe is due of aftermowth hay. 1 *Roll. Abr.* 64, pl. 11; *Cro. Eliz.* 660; *Cro. Jac.* 116; *Cro. Car.* 403; 12 *Mod.* 498; *Bunb.* 10. And the principle upon which the doctrine that no tithe is due of aftermowth hay is founded is denied in some modern cases. In some of these it is laid down, that tithes shall be paid of divers crops grown upon the same land in the same year. *Bunb.* 19, 314. In others it is held, wherever there is, in the same year a new increase from the same thing, tithe is due. *Bunb.* 9; *Gillb. Rep. in Eq.* 231.

ACCOMMODATION of cattle upon pasture land, which hath paid no other tithes that year, pays tithe for the cattle. See *ante*, III.

ALDER trees pay tithes, notwithstanding they are above twenty years' growth, not being timber. Ash is timber; and therefore, if these trees are above twenty years' growth, they are tithe free. Asp or aspen trees are exempted, if beyond that growth, in places where they are used for timber. 2 *Cro.* 199.

BARK of trees is not tithable, if the trees whereon produced were timber. 11 *Rep.* 49.

BARREN LAND, which is so of its own nature, pays no tithe; where land is barren, and not manurable without some extraordinary charge, in respect of such charge, and for the advancement of husbandry, such land being converted to tillage, shall, for the first seven years after the improvement, be discharged from tithes, by construction of 2 & 3 *Edw. 6. c. 13. § 5*. But the barren land, during the seven years of improvement, shall pay such small tithes as have been accustomed to be paid before; and afterwards to pay the full tithe according to the improvement. If land be merely over-run with bushes, or become unprofitable by bad husbandry, it cannot properly be called barren land; and if it be grubbed, or ploughed and sowed, it immediately pays tithes. 2 *Inst.* 656; *Cro. Eliz.* 475. See also *Stockwell v. Terry*, 1 *Ves.* 115, and *Warwick v. Collins*, 2 *Maule & Selw.* 340, and *Selsea, Ld. v. Powell*, 8 *Taunton*, 297, that the proper enquiry seems to be whether the land was of such a nature in itself as to require extraordinary expense, either in manure or labour, to bring it into a proper state of cultivation: in which case it shall be exempt from tithes for seven years. See as to exemption of such land from tithes in Ireland, Irish acts, 5 *Geo. 2. c. 9. § 6, 7*; 33 *Geo. 3. c. 25. § 1, 5*.

BEECH TREES, where timber is scarce, and these trees are used for building, if above twenty years growth to be timber, are privileged from tithes, by 15 *Edw. 3. c. 3*, though this tree is not naturally timber, for it is necessity makes it so. 2 *Danv. Abr.* 589.—BEES are tithable for their honey and wax, by the tenth measure and tenth pound. It has been a question whether the tenth swarm can be demanded for tithes of bees, because bees are *feræ naturæ*; but when the bees are gathered into the hives, they are then under custody, and may pay tithe by the hive or swarm; but the tithe is generally paid in the tenth part of the honey. 1 *Roll. Abr.* 651; 3 *Cro.* 404, 559.—BIRCH WOOD is tithable though of above twenty years growth. 2 *Inst.* 643.—BRICKS pay not tithes, for they are made of parcel of the freehold, and are of the substance of the earth, not an annual increase. 1 *Cro.* 1.—BROOM shall pay tithe; but it may be discharged by custom, if burnt in the owner's house, or kept for husbandry. 2 *Danv. Abr.* 597.

CALVES are tithable, and the tenth calf is due to the parson, when weaned, and he is not obliged to take it before; but if in one year a person hath not the number of ten calves, the parson is not entitled to tithes in kind for that year, without a special custom for it, though he may take it in the next

year, throwing both years together; and it is a good custom to pay one calf in seven, where there hath been no more in one year; and where a man sells a calf to pay the tenth of the value, or for the parson to have the right shoulder, &c. 1 *Roll. Abr.* 648; *Raym.* 277.

CATTLE sold pay tithe, but not cattle kept for the plough or pail, which shall pay no tithe for their pasture, by reason the parson hath the benefit of the labour of plough-cattle in tilling the ground, by the tithe of corn, and tithe milk for those kept for the pail; yet if such cattle bought are sold before used, or if, being past their labour, the cows are barren, and afterwards fattened in order to sell, tithes shall be paid for them; though if the owner kill and spend the cattle in his own house, no tithe is due for them, being for his provision, to support him in his labour about other affairs for which the parson hath tithes. Cattle feeding on large commons, where the bounds of the parish are not certainly known, shall pay tithes to the parson of the parish where the owner lives; and if fed in several parishes, and they continue above a month in each parish, tithes shall be paid to the two parsons proportionably. 1 *Roll. Abr.* 635, 646, 647; *Hardr.* 35; 2 & 3 *Edw. 6. c. 13. § 3*.—CHALK and CHALK-PITS are not tithable, nor is CLAY or COAL, as they are part of the freehold, and not annual, to pay tithes. 2 *Inst.* 651.—CHEESE pays tithe by custom, where tithe is not paid for the milk; but if the milk pays a tithe, the cheese pays none; and it may be a good custom to pay the tenth cheese made in such a month, for all tithe milk in that year. 1 *Roll. Abr.* 651. See *Milk*.—CHICKENS are not tithable if tithe is paid for the eggs. 1 *Roll. Abr.* 642.—COLTS pay tithes in the same manner as calves. *Ibid.*—CONIES are tithable only by custom for those that are sold, not for such as are spent in the house. 2 *Danv. Abr.* 583.

CORN pays a predial tithe; it is tithed by the tenth cock, heap, or sheaf, which if the owner do not set out, he may be sued in an action upon the 2 & 3 *Edw. 6. c. 13*. And if the parishioner will not sow his land usually sown, the parson may bring his action against him. When tithe corn is set forth, the law gives the parson a reasonable time to carry it away; and if he suffer the same to lie too long on the land, to the prejudice of the owner thereof, he may be liable to an action; but the parson may not set out the tithes himself, or take them away without leave. 1 *Roll. Abr.* 644; 1 *Sid.* 283; 2 *Vent.* 48; *Ley.* 70.

DEER are not tithable, for they are *feræ naturæ*; though in parks, &c. they pay tithes by custom. 2 *Inst.* 651.—DOVES kept in a dove-house, if they are not spent in the owner's house, are tithable. 1 *Vent.* 5.

EGGS pay tithes when tithes are not paid for the young. 1 *Roll. Abr.* 642.—ELM TREES, being timber, are discharged from the payment of tithes, but not if under twenty years growth. 2 *Inst.* 643.

FALLOW GROUND is not tithable for the pasture in that year in which it lies fallow, unless it remain beyond the course of husbandry, because it improves and renders the land more fertile by lying fresh. 1 *Roll. Abr.* 642.—FENS being drained and made manurable, or converted into pasture, are subject to the payment of tithes. 1 *Roll. Rep.* 354. FISH taken in the sea or common rivers are tithable only by custom, and the tithe is to be paid in money, and not the tenth fish; but fish in ponds and rivers inclosed ought to be set forth as a tithe in kind. 2 *Danv. Abr.* 583, 584. FLAX; every acre of flax or hemp sown, shall pay yearly 5s. for tithe, and no more. 11 & 12 *Wm. 3. c. 16*. A former act (3 & 4 *Wm. & M. c. 3*) fixed the modus at 4s. The tithe of hemp is in like manner ascertained at 5s. an acre in Ireland, by the Irish act, 28 *Geo. 3. c. 29*; but no act has defined the tithe of flax sown in Ireland.—FOREST LANDS shall pay no tithes while in the hands of the king, though such lands in the hands of a subject shall pay tithes; and if a forest shall be disafforested, and within a parish, it shall pay tithes. 1 *Roll. Abr.* 655; 3 *Cro.* 94.—

FOWLS, as hens, geese, ducks, are to pay tithes, either in eggs or the young, according to custom, but not in both. So of turkeys it is now resolved that tithes are due of their eggs or young. 2 P. W. 463. FRUIT, apples, pears, plums, cherries, &c. pay tithes in kind when gathered, and ought to be set out according to the statute. 2 Inst. 621.—FRUIT TREES cut down and sold are not tithable if they have paid tithe-fruit that year before cut. Ibid. 652.—FURZES, if sold, pay tithe; not if used for fuel in the house, or to make pens for sheep &c. Wood's Inst. 166.

GARDENS are tithable as lands, and therefore tithes in kind are due for all herbs, plants, and seeds sowed in them; but money is generally paid by custom or agreement.—GRASS mown is tithable by payment of the tenth cock, or according to custom; but for grass cut in swaths for the sustenance of plough cattle only, not made into hay, no tithe is to be paid. Grass or corn, &c. when sold standing, the buyer shall pay the tithes; and if sold after cut and severed, the seller must pay it. The parson is not obliged to take tithe of grass the day it is cut, but may let it lie long enough to make it into hay. 1 Stra. 245; 1 Rol. Abr. 644, 645. See post, Hay.

HAZLE, HOLLY, and MAPLE TREES, &c. are regularly tithable, although of twenty years growth. 2 Danv. Abr. 589.

HAY pays a predial tithe; the tenth cock is to be set out and paid, after made into hay, by the custom of most places; and by custom generally, but not of common right, the parishioners shall make the grass cocks into hay for the parson's tithe; but if they are not obliged to make the tithe into hay, they may leave it in cock, and the parson must make it, for which purpose he may come on the ground, &c. A prescription to measure out and pay the tenth acre, or part of grass standing, in lieu of all tithe hay, may be good. And if meadow ground is so rich that there are two crops of hay in one year, the parson, by special custom, may have tithe of both. 1 Rol. Abr. 643, 647, 950.—HEADLANDS are not tithable if only large enough for turning the plough; but if larger, tithe may be, and generally is, payable. 2 Inst. 653.

HEMP, see Flax.—HERBAGE of ground is tithable for barren cattle kept for sale, which yield no profit to the parson. Wood's Inst. 167.—HONEY pays a tithe, see Bees.—HORS are tithable, and the tenth part may be set out after they are picked. It is now settled, on appeal to the House of Lords, that hops ought to be picked and gathered from the vines before they are tithable; and then measured in baskets, before being dried, and every tenth basket set out for the tithes; and no usage can vary this rule. Knight v. Halsey, 2 B. & P. 172; 7 T. R., K. B. 86; and see Bro. P. C. tit. Tithes.—HORSES kept to sell, and afterwards sold, tithes shall be paid for their pasture, though not where horses are kept for work and labour. Hut. 7.

HOUSES for dwelling are not properly tithable. A modus may be paid for houses in lieu of tithes of the land upon which they are built; and a great many cities and boroughs have a custom to pay a modus for their houses, as it may be reasonably supposed that it was usual to pay so much for the land, before the houses were erected on it. 11 Rep. 16; 2 Inst. 659. See London (Tithes), and ante, V.

KIDS pay a tithe as calves; the tenth is due to the parson. Wood, 167.

LAMBS are tithable in like manner as calves; but if they are yeanned in one parish, and do not tarry there thirty days, no tithe is due to the parson of that place. If there be a custom that the parishioners having six lambs or under shall pay so much for every lamb, and if he have above that number then to pay the seventh, it is good. 3 Cro. 403. The rector's right to the tithe of lambs vests at the time when they are yeanned, although the tithe cannot be set out until they are fit to be weaned. 1 B. & P. 81. The tithe of lambs is when the animals are dropped, but the farmer is bound to keep them until they are capable of living without the dam. 2 Y. & J. 575.

LEAD may pay tithe by custom, as it does in some counties; but it doth not without it. 2 Inst. 651.—By custom only LIME and LIME-KILNS are tithable. 1 Rol. Abr. 642.

MADDER is now tithable in kind; it was liable for twenty-eight years only, to a modus of 5s., but the statutes for that purpose are expired. 31 Geo. 2. c. 12; 5 Geo. 3. c. 18.—MAST of oak and beech pays tithes as under Acorns.

MILK is tithable when no tithes are paid for cheese, all the year round, except custom over-rides; and it is payable by every tenth meal, not tenth quart or part of every meal; and it was formerly held, that it was to be brought to the house of the parson, &c., in which particular this tithe differs from all others, which must be fetched by the receiver. But this is only where there is a special custom; and it seems now decided, that the tithe of milk is by setting out every tenth morning and evening's meal in clean vessels, belonging to the owner of the milk, and leaving the same therein till the vessels are again wanted by the owner; and if not fetched away by the parson prior to that time, the owner is at liberty to throw it on the ground; and in the intermediate time the owner is not answerable for any accident that may happen to it. Dr. Bosworth v. Lambrick, Bro. P. C. The tithe of milk is that of the whole of the tenth day morning and evening, and not the tenth meal; and the milk of a whole herd of cattle must be taken on the same day. 2 Y. & J. 575. In some places they pay tithe cheese for milk, and in others some small rate according to custom. Cro. Eliz. 609; 2 Danv. Abr. 596.

MILLS. As there are several sorts of them, the tithes are different; the tithes of corn-mills driven by wind or water have been paid in kind, every tenth toll-dish of corn to the parson of the parish wherein the mills are standing. But ancient corn-mills are tithe-free, being suggested that they are very ancient, and never paid tithes, &c. And it is questioned whether tithe is due for any corn-mills, unless by custom, because the corn hath before paid tithe; and it seems rather a personal tithe where due. The tithes of fulling-mills, paper-mills, powder-mills, &c. are personal, charged in respect to the labour of men, by custom only; and these are regarded more as engines of several trades than as mills. 1 Rol. Abr. 656; 2 Inst. 621. It is now settled, that tithes of all mills are personal tithes, and only a tenth part of the clear profits, deducting all charges and expenses, is payable as tithe. Newte v. Chamberlam, Bro. P. C.; and see 2 P. Wms. 11.

MINES pay no tithes but by custom, being of the substance of the earth, and not annually increasing. 2 Inst. 651.

NURSERIES of TREES shall pay tithes if the owner dig them up, and make profit of them by selling. 2 Danv. Abr. 585; 1 Co. 526; 2 Jon. 416; Godb. 481; Hard. 380.

OAK TREES are privileged as timber from the payment of tithes by the statute of Siba Ceodua, 45 Edw. 3. c. 3. if of or above twenty years growth; and if oaks are under that age, it is the same when they are apt for timber. Moor, 541. See ante, III.—OFFERINGS, &c. are in the nature of personal tithes. 2 Inst. 659, 661. See Offerings, Oblations.—ORCHARDS pay tithes both for the fruit they produce and the grass or grain, if any sown or cut therein. 2 Inst. 652.

PARKS are tithable by custom for the deer and the herbage; and when disparted and converted into tillage, they shall pay tithes in kind. The tithes of parks may be in part certain, and part casual; and 2s. a year, and a shoulder of every third deer hath been paid as tithe for a park. 1 Rol. Rep. 176; Hob. 37, 40.—PARTRIDGES and PHEASANTS, &c. as they are fera naturæ, yield no tithes of eggs or young. 1 Rol. Abr. 656.—PEASE, if gathered for sale, or to feed hogs, pay tithes; but not green pease spent in the house. 1 Rol. Abr. 647. Pease are generally a great tithe, but the vicar may be endowed of them. See Parl. Ca. tit. Tithes.—PIGEONS ought to pay tithes when sold; and this holds good if they lodge in holes about a house, as well as in a dove-house; and by custom, if spent in the house, they may be tithable, though

not of common right. 2 *Dano. Abr.* 588, 597. Pigs are tithable, as calves. *Ibid.*—**POLLARD TREES**, such as are usually lopped and distinguished from timber-trees, pay tithes. *Plowd.* 470.

POTATOES are a small tithe, wherever planted and in whatever quantities they are produced. The setting out the tithe of potatoes by the tenth basket as raised, and immediately removing the other nine parts, and so going on through the day, held not to be a setting out binding on the tithe-owner, and consequently no payment of tithe; a reasonable quantity must be raised before setting out the tenth for inspection and view. 2 *Hagg. Eccl. Rep.* 495.

QUARRIES OF STONE, &c. are not subject to pay tithes, because they are part of the inheritance, and tithes ought to be collateral to the land, and distinct from it. 1 *Roll.* 644.

RABBITS. See *Conies*.—**RAKINGS OF CORN** are not tithable, for they are left for the poor, and are properly the scatterings of the corn whereof the tithes have been paid, left after the cocks set out are taken away. *Cro. Eliz.* 660. See *ante*, III. (*Corn*.)

SAFFRON pays a predial and small tithe. 1 *Cro.* 467.—**SALT** is not tithable but by custom only. 1 *Bunb.* 10.—**SHEEP**, a tithe is paid for, of lambs and wool, and therefore they pay no tithe for their feeding. But see *ante*, III. *Agistment*. If sheep are in the parish all the year, they are to pay tithe wool to the parson; but if removed from one parish to another (without fraud), the parson of each parish to have tithe *pro rata*, where they remain thirty days in a parish; and if they are fed in one parish and brought into another to be shorn, the same tithing is to be observed. 1 *Roll. Abr.* 642, 647; 3 *Cro.* 237. It seems now that the rule is, that tithe of the wool shall be paid where the sheep are shorn, and agistment tithe in other parishes where they have been depastured. *Shaw's Law of Tithes*.—**STUBBLE** pays no tithe under aftermath. 2 *Inst.* 652.

TARES, vetches, &c. are tithable; but if they are cut down green, and given to the cattle of the plough, where there is not a sufficient pasture in the parish, no tithe shall be paid for them. 1 *Cro.* 139.—**TILES** are no yearly increase, and not tithable. 2 *Inst.* 651.—**TIMBER TREES**, such as oaks, ashes, and elms, and in some places beech, &c. above the age of twenty years, were discharged of tithes by the common law, before the 45 *Edw. 3. c. 3.* and the reason of it is, because such trees are employed to build houses, and houses when built are not only fixed to but part of the freehold; loppings of timber-trees above twenty years growth, pay no tithes, for the branch is privileged as well as the body of the tree, and the roots of such trees are exempted as parcel of the inheritance. Trees cut for plough-bote, cart-bote, &c. shall not pay tithes, although they are no timber; but all trees not fit for timber, and not put to those uses, pay tithes. 1 *Roll. Abr.* 650; *Cro. Eliz.* 477, 499. See *ante*, III.—**TURFS** used for fuel are part of the soil, and tithe-free. 2 *Inst.* 651.—**TURNS** are reckoned among small predial tithes; and the tithes of them shall be paid as often as they are sown, though twice or more on the same land and in the same year. So if eaten off the land by barren cattle. *Bunb.* 10. See III. *Agistment*.

UNDERWOOD is tithable, though the tithe is not of annual payment; and is set out while standing, by the tenth acre, pole, or perch; or when cut down, by tenth faggot or billet, as custom directs; and if he that fells the wood doth not set out the tithe, he is liable to the treble damages by 2 & 3 *Ed. 6. c. 13.* But if the underwood is used for firing in a house of husbandry, or to burn brick to repair the house, or for hedging and fencing the lands in the same parish, it may be discharged from tithe. 2 *Inst.* 642, 643, 652; *Hob.* 250; 2 *Dano. Abr.* 597.

WARRENS, where tithable, see *Conies*. **WASTE GROUND** whereon cattle feed, is liable to the payment of tithes. 2 *Dano. Abr.* **WOAD** growing in the nature of an herb is a

predial and small tithe. *Hutt.* 77; *Cro. Car.* 28. Wood is generally esteemed to be a great tithe. If wood grounds have likewise timber trees grown on them, and consist for the most part of such trees, the timber trees shall privilege the other wood; but if the wood is the greatest part, then it must pay tithes for the whole. 13 *Rep.* 13. If wood be cut to make hop-poles, where the parson hath tithe of hops, no tithe shall be paid for it. *Hughes's Abr.* 689. See *ante*, III.

WOOL is a mixt small tithe, paid when clipped; one fleece in ten, or in some places one in seven, is given to the parson. If there is under ten pounds of wool at the shearing, a reasonable consideration shall be paid, because the tithes are due of common right; and if less than ten fleeces, they shall be divided into ten parts, or an allowance be otherwise made. All sheep killed, and sheep which die, pay tithe-wool; and neck-wool cut off for the benefit of the wool, but not if it is to preserve the sheep from vermin, &c. Also the wool of lambs shorn at Midsummer, though tithe was paid for the lambs at Mark-tide, is tithable. 1 *Roll. Abr.* 646, 647; 2 *Inst.* 652. See *Sheep*, and *ante*, IV.

VII. LANDS, and their occupiers, may be exempted or discharged from the payment of tithes, either in part, or totally; first, by a real composition; or, secondly, by custom or prescription.

First. A real composition is when an agreement is made between the owner of the lands and the parson or vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of tithes, by reason of some land or other real recompense given to the parson in lieu and satisfaction thereof. 4 *Inst.* 490; *Regist.* 38; 13 *Rep.* 40. This was permitted by law, because it was supposed that the clergy would be no losers by such composition; since the consent of the ordinary, whose duty it is to take care of the church in general, and of the patron, whose interest it is to protect that particular church, were both made necessary to render the composition effectual; and hence have arisen all such compositions as exist at this day by force of the common law. But, experience showing that even this caution was ineffectual, and the possessions of the church being, by this and other means, every day diminished, the disabling statute, 13 *Eliz. c. 10.* was made; which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives or twenty-one years. So that now, by virtue of this statute, no real composition made since the 13 *Eliz.* is good for any longer term than three lives, or twenty-one years, though made by consent of the patron or ordinary.

Neither was a composition made since that statute binding on a succeeding incumbent, although sanctioned by the concurrence of all parties, and acquiesced in for 130 years. 2 *Wood.* 137; 7 *Br. P. C.* 44; 1 *E. & Y.* 543. But now, by the 2 & 3 *Wm. 4. c. 100. § 2.* every composition which has been confirmed by the decree of a court of equity, in a suit to which the ordinary, patron, and incumbent were parties, and which has not since been set aside, or departed from, is declared valid. See the other provisions of this statute, *post*.

Where, however, such a composition has been made, the land is for ever discharged from the payment of tithes, both at the common law and by the statutes of the 32 *Hen 8. c. 7.* and 3 *Ed. 6. c. 13.* the latter of which expressly provides that no person shall be sued for tithes of any description that are discharged by composition real. 2 *Inst.* 490; 3 *E. & Y.* 795.

No evidence is sufficient to support a real composition unless it bear some reference to a deed of composition. 2 *Bos. & Pull.* 172.

With regard to compositions entered into between the tithe-owner and any parishioner, for the latter to retain the tithe of his own estate, it has been decided that they are

analogous to leases from year to year between landlord and tenant; and if they are paid without or beyond an agreement for a specific time, they cannot be put an end to without six months' notice before the time of payment, and the parishioner may avail himself of the defect of notice, at the same time that he controverts the right of the incumbent, to receive tithe in kind: an objection not permitted to a tenant who denies the right of the landlord. See *Rent*, 2 Bro. C. R. 161. See *ante*, V.

Compositions for tithes cease on the death of the incumbent with whom they were made, at least as to his successor; but if the successor continue to receive the next payments due after the death of his predecessors, he can only be accountable to the executors for such portion of it as the nature of the tithes would have amounted to, if paid in kind, accruing due between the last composition received by the preceding incumbent and his death; and not *pro rata* according to the time which had run before his death from the last payment. 10 East, 269.

A parishioner who has compounded with the parson one year for his tithes, and has not determined the composition, cannot set up as a defence to an action for the next year's composition money, that the parson is *sinuatus*. 8 Taunt. 313.

The mode of making composition for tithes, either by portions of land applied to the purpose, or by corn rents adjudged from time to time on an average of a certain number of years, has of late been very extensively adopted in acts of inclosure; the provisions of many of which acts for this purpose extend not only to lands newly enclosed, but also to all tithes and moduses, and compositions for tithes throughout the whole of many parishes. Most of those acts are local; and many of them private and not printed, being considered as relative merely to the place over which they operate, without advertent to their effect on the general system of law in this particular.

By the 4 Geo. 4. c. 99. as amended by 5 Geo. 4. c. 63. and 8 Geo. 4. c. 60. provisions of a very extensive and detailed nature were made for the establishment of compositions for tithes in Ireland, by the co-operation of certain select vestries in each parish with the incumbent, in appointing commissioners for the purpose, who were empowered to agree in fixing the amount of the annual sum to be paid as a composition for all tithes, after due inquiry on the average amount paid, or agreed, or adjudged to be paid during seven years preceding November, 1821; such composition not to be lower than such average, nor to exceed it more than one-fifth. A power of appointing umpires was given; as also an ultimate superintending power to the lord lieutenant and privy council of Ireland.

Numerous compositions, extending to nearly one-half of the parishes of Ireland, were entered into under the above statutes, which have been further amended by the 2 & 3 Wm. 4. c. 119. and 3 & 4 Wm. 4. c. 100.

Secondly. A discharge by custom or prescription is, (but now see *post*.) where, time out of mind, such persons or such lands have been, either partially or totally, discharged from the payment of tithes. And this immemorial usage is binding upon all parties; as it is in its nature an evidence of universal consent and acquiescence, and with reason supposes a real composition to have been formerly made. This custom or prescription is either *de modo decimandi*, or *de non decimando*.

A *modus decimandi*, commonly called by the simple name of a *modus* only, is where there is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation, as two-pence an acre for the tithe of land; sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him; sometimes in

lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs, and the like. Any means, in short, whereby the general law of tithing is altered and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing.

Moduses are of two kinds, customary and prescriptive. The former is a *modus* which extends over a hundred, parish, township, hamlet, or other well known district, and is common to all the persons and lands within the place in general.

It is strictly a custom, and it is generally called a distinct or parochial *modus*.

The latter is a *modus* confined to a particular estate, farm, or other limited quantity of land, generally called a farm *modus*, and it is properly a prescription.

The only difference between a composition real and a *modus* is the time of their commencement; for a composition real, as contra-distinguished from a *modus*, necessarily implies an agreement made after the time of legal memory. See 2 Eagle on Tithes, 40.

To make a good and sufficient *modus*, the following rules must be observed. 1. It must be certain and invariable, for payment of different sums will prove it to be no *modus*, that is, no original real composition; because that must have been one and the same from its first original to the present time. 1 Keb. 602. 2. The thing given, in lieu of tithes, must be beneficial to the parson, and not for the emolument of third persons only: thus a *modus* to repair the church in lieu of tithes, is not good, because that is an advantage to the parish only; but to repair the chancel is a good *modus*, for that is an advantage to the parson. 1 Roll. Abr. 649. 3. It must be something different from the thing compounded for; one load of hay, in lieu of all tithe hay, is no good *modus*; for no parson would *bona fide* make a composition to receive less than is due in the same species of tithe; and therefore the law will not suppose it possible for such composition to have existed. 1 Lev. 179. 4. One cannot be discharged from payment of one species of tithe by paying a *modus* for another. Thus a *modus* of 1d. for every milch cow will discharge the tithe of milch kine, but not of barren cattle; for tithe is, of common right, due for both; and therefore a *modus* for one shall never be a discharge for the other. Cro. Eliz. 446; Salk. 657. 5. The recompense must be in its nature as durable as the tithes discharged by it; that is, an inheritance certain; and therefore a *modus* that every inhabitant of a house shall pay 4d. a-year, in lieu of the owner's tithes, is no good *modus*; for possibly the house may not be inhabited, and then the recompense will be lost. 2 P. Wms. 462. 6. The *modus* must not be too large, which is called a rank *modus*; as if the real value of the tithes be 60*l.* per ann. and a *modus* is suggested of 40*l.* this *modus* will not be established; though one of 40*s.* might have been valid. 11 Mod. 60. Indeed, properly speaking, the doctrine of rankness in a *modus* is a mere rule of evidence drawn from the improbability of the fact, and not a rule of law. Pyke v. Donling, Hil. 19 Geo. 3. C. B. For, in these cases of prescriptive or customary *moduses*, it is supposed that an original real composition was anciently made; which being lost by length of time, the immemorial usage is admitted as evidence that it once did exist, and that from thence such usage was derived. Now time of memory hath been long ago ascertained by the law to commence from the beginning of the reign of Richard the First; and any custom may be destroyed by evidence of its non-existence in any part of the long period from that time to the present; wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the tithes at the time of making it, if the *modus* set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the First, this *modus* is (in point of evidence) *felo de se*, and destroys itself. For, as it would be destroyed by any direct

evidence to prove its non-existence at any time since that era, so also it is destroyed by carrying in itself this internal evidence of a much later original.

To constitute a good *modus*, it seems necessary that it should be such as would have been a certain, fair, and reasonable equivalent or composition for the tithes in kind, before the year 1189; and therefore no *modus* for hops, turkeys, or other things introduced into England, since that time, can be good. *Burb. 307*. The question of rankness, or rather *modus* or no *modus*, is a question of fact which courts of equity will send to a jury unless the grossness of the *modus* is so obvious as to preclude the necessity of it. *2 Bro. C. R. 103*; *1 Bluck. Rep. 420*.

A custom to pay only a part of the tithe, without substituting any thing else in lieu of the remainder, is bad. But a custom to pay less than the whole tithe, may be good, where something in lieu of, and as a compensation for, the rest is paid to the parson. *7 T. R. 93*.

For the provisions of the recent statute respecting *moduses*, and other exemptions from tithes, see *post*.

A prescription *de non decimando* is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them. Thus the king by his prerogative is discharged from all tithes. *Cro. Eliz. 511*. So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesie*. *Cro. Eliz. 479, 511*; *Sav. 3*; *Moor. 910*. But these personal privileges (not arising from, or being annexed to the land) are personally confined to both the king and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally tithable. And, generally speaking, it is an established rule, that in lay hands *modus de non decimando non valet*. But it seems that the king's tenant at will shall not pay tithes. *1 Woodd. 100*.

Spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally discharged of tithes by various ways. *Hob. 309*; *Cro. Jac. 308*. As, 1. By real composition; 2. By the pope's bull of exemption; 3. By unity of possession; as when the rectory of a parish, and lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession; 4. By prescription; having never been liable to tithes, by being always in spiritual hands; 5. By virtue of their order; as the Knights Templars, Cistercians, and others, whose lands were privileged by the pope with a discharge of tithes. *2 Rep. 44*; *Seld. Tith. c. 13, § 2*. Though, upon the dissolution of the greater abbeyes by Henry VIII., most of these exemptions from tithes would have fallen with them, and the lands become tithable again, had they not been supported and upheld by the *1 Hen. 8. c. 13*, which enacts, § 17. (*vulgo 20.*) that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeyes themselves formerly held them. This provision is peculiar to this statute: and, therefore, all the lands belonging to the lesser monasteries, dissolved by *27 Hen. 8. c. 28*, are now liable to pay tithe. And from this original have sprung all the lands, which, being in lay hands, do at present claim to be tithe-free; for if a man can show his lands to have been such abbey lands, and also immemorably discharged of tithes by any of the means before-mentioned, this is now a good prescription *de non decimando*. But he must show both these requisites; for abbey lands, without a special ground of discharge, are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of tithes, unless it relates to such abbey lands. *2 Comm. c. 3*.

A like exemption of the land formerly belonging to monasteries in Ireland, is contained in the Irish act *35 Hen. 8. st. 2. c. 5*.

A catalogue of the greater monasteries, in respect of which exemptions may be claimed, is contained in *Tanner's Notitia*: from thence copied into *Burn's Eccl. Law*, title *Tithes*, and into the Appendix to *Toller on Tithes*.

[The following view of the law respecting such exemption is contained in a note on the statute, in *Evan's Collection of Statutes*.]

The exemption may be in respect, first, of unity of possession by the monastery of the parsonage, and the land tithable; and this exemption takes place as well when they are in the hands of a tenant, as when they are in the hands of the owner. The requisites to such exemption are, that the union must have been, 1. founded on the legal title; 2. equal with respect to the quantity of estate; 3. free from the payment of any tithes in any manner; 4. immemorial; and such immemorial possession must be proved, and is not to be presumed. *Christie v. Oram, Gwill. 1354*, but see *Ingram v. Thackstone, Gwill. 819*. Secondly, in respect of orders: Religious orders were by Pope Pascal II. exempted generally from tithes of lands, *dum propriis manibus excoluntur*. This exemption was confined by Pope Adrian IV. to the orders of the Cistercians, Templars, and Hospitallers, and was afterwards endeavoured by Innocent III. to be extended to the Præmonstratenses; but the extension has not been allowed in this country. By the Council of Lateran, in 1215, received as law in England, the exemption of religious houses was restrained to the lands of which they were at that time in possession. The Cistercians afterwards obtained bulls for the exemption of lands in the hands of tenants. Such exemptions were prevented for the future by *2 Hen. 4. c. 4*; but are valid as to privileges then existing. Lands, in respect of which the monasteries were entitled to exemption *ratione ordinis*, are exempted; although, at the time of the dissolution, they were in the hands of tenants, and as such tithable. *Conley v. Keys, Gwill. 1308*: but it is otherwise with respect to lands which previous to the dissolution had been granted in tail. *Farmer v. Shereman, Hob. 258*; *Gwill. 431*. The exemption extends in other cases only to lands in the hands of the owners. It may be claimed by a tenant in tail, or by a tenant for life under the limitation of a settlement, *Hett v. Mead, Gwill. 1515*; but not by a lessee for life, *semble, ib.* An absolute and not a qualified discharge was presumed in favour of lands that had never paid tithes, although belonging to a Cistercian abbey, and never in lease, and although tithes had been paid for other parts of the same farm when in the hands of tenants. *Ingram v. Thackstone, Gwill. 819*.

Lands of the order of St. John of Jerusalem, which came to the crown by *32 Hen. 8. c. 24*, are exempted from tithes under the authority of *31 Hen. 8. c. 13*. See *Toller, 175*.

It has been held that lands exempted by the statute are not chargeable, although they have paid tithes ever since it passed. *Clericourt, E. v. Denton, Ly., Gwill. 363*. Likewise that lands so exempt are not rendered liable by the general provision of an inclosure act, that tithes should be paid from the new inclosure, notwithstanding any *modus* or exemption in other parts of the parish. *3 Bro. P. C. 512*; *Gwill. 704*.

Where A. purchased an estate free from rectorial tithes, with a right of common annexed thereto, and the common was afterwards inclosed under an inclosure act, and certain land was allotted to him in lieu of his right of common, no tithe is payable in respect of the land so allotted. *5 B. & A. 22*.

Land exempted from tithes, as being part of the demesne of an ancient monastery, when inclosed by act of parliament, shall not be made liable to tithes by any general words of the act. *7 Bro. P. C. 12*.

In a suit for tithes there was no proof of payment for a very long period: all the evidence which could tend to prove a legal exemption (claimed by the occupier) was adduced at the hearing; but as that could not, in the opinion of the

court, justify a jury in finding for the exception, an issue was refused. *Ross v. Aglionby*, 4 Russ. 489.

By a recent statute (2 & 3 Wm. 4. c. 100,) the length of time requisite to support claims of *modus decimandi*, or exemptions from or discharge of tithes, has been most materially shortened.

By § 1. all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by the king, or any duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate whether temporal or spiritual, be sustained and be deemed valid in law, upon evidence showing, in cases of claim of a *modus decimandi*, the payment or render of such *modus*, and in cases of claim to exemption or discharge showing the enjoyment of the land, without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless in the case of claim of a *modus decimandi* the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality or quantity from the *modus* claimed, or in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by agreement for that purpose by deed or writing, and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence showing such payment or render of *modus* made or enjoyment had, as is therein-before mentioned, applicable to the nature of the claim. For and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: provided that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such payment or render of *modus* made or enjoyment had (as the case may be,) not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after as shall with such time make up the full period of sixty years, and also for the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by agreement by deed or writing.

By § 2. no *modus*, exemption or discharge shall be deemed to be within the act, unless such *modus*, &c. shall be proved to have existed and been acted upon at the time of or within one year next before its passing.

§ 3. Provided that the act shall not be available in any suit or action relative to any of the matters before mentioned, now or to be after commenced during the then session of parliament, or within one year from the end thereof.

§ 4. Provided that the act shall not extend to any case where the tithes of any lands, &c. shall have been demised by deed for any term of life or years, or where any composition for tithes shall have been made by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number

of years, and such demise or composition shall be subsisting at the passing of the act, and where any action or suit shall be instituted for the recovery of tithes in kind within three years next after the expiration, surrender, or other determination of such demise or composition.

§ 5. Where any lands or tenements shall have been or shall be held or occupied by any rector, vicar, or other person entitled to the tithes thereof, or by any lessee of any such rector, &c. or by any person compounding for tithes with any such rector, &c. or by any tenant of any such rector, or person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time therein-before mentioned.

§ 6. The time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, feme covert, or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods therein-before mentioned, except only in cases where the right or claim is hereby declared to be indefeasible.

§ 7. In all actions and suits to be commenced after the act shall take effect, it shall be sufficient to allege that the *modus* or exemption or discharge claimed, was actually exercised and enjoyed for such of the periods mentioned in the act as may be applicable to the case; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, deed, or writing hereinmentioned, or any other matter of fact or of law not inconsistent with the exercise and enjoyment of the matter claimed, the same shall be specially set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse of the matter claimed.

§ 8. In the several cases provided for by the act, no presumption shall be allowed in favour of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time than for the period mentioned in the act applicable to the case.

By § 9. The act extends to England only.

In consequence of the operation of the above act being deferred until a year after the determination of the session of parliament in which it was passed, a great number of suits were immediately instituted under an apprehension on the part of the plaintiffs, that they would be precluded from recovering the tithes they claimed, unless they prosecuted their claims within the period limited by the act. This led to another statute (4 & 5 Wm. 4. c. 83.) whereby, in order to give the defendants time, the proceedings in all suits commenced after the passing of the above act were suspended until the end of the next session of parliament, on the defendants paying the costs incurred by the plaintiffs into the Bank of England, to be placed to the credit of the suits. By § 5, however, judges may permit the actions to be proceeded with upon sufficient cause shown.

The abolition of tithes in Ireland, which have proved such a fruitful source of evil to that country, it is hoped, will be effected in the course of the present session of parliament (1835); and a measure for the abolition or commutation of tithes in England will in all probability shortly follow.

TITHING, *tithunga*, from the Saxon *Teothunga*, *Decuria*.] Was, in its first appointment, the number or company of ten men with their families held together in a society, all being bound for the peaceable behaviour of each other: and of these companies there was one chief person who was called *teothung-man*, at this day *tithing-man*; but the old discipline of tithings is long since left off. In the Saxon times, for the

better conservation of the peace, and more easy administration of justice, every hundred was divided into ten districts or tithings; and within every tithing the tithing-men were to examine and determine all lesser causes between villagers and neighbours; but to refer greater matters to the then superior courts, which had a jurisdiction over the whole hundred. *Paroc. Antiq.* 688. The subdivision of hundreds into tithings seems to be most peculiarly the invention of King Alfred. See 1 *Comm. Introd.*

TITHING-MEN, are now a kind of petty constables, elected by parishes, and sworn in their offices in the court-leet, and sometimes by justices of peace, &c. There is frequently a tithing-man in the same town with a constable, who is as it were a deputy to execute the office in the constable's absence; but there are some things which a constable has power to do, that tithing-men and head-boroughs cannot intermeddle with. *Dalt.* 3. When there is no constable of a parish, the office and authority of a tithing-man seems to be the same under another name. 13 & 14 *Car.* 2. c. 12. See *Constable*.

TITHING-PENNY. See *Teding-Penny*.

TITLE, *titulus*.] Is when a man hath lawful cause of entry into lands whereof another is seised; and it signifies also the means whereby a man comes to lands or tenements as by feoffment, last will and testament, &c.

The word title includeth a right, but is the more general word. Every right is a title, though every title is not such a right for which an action lies; so that *titulus est justa causa possidendi quod nostrum est*, and is the means of holding the lands. *Co. Litt.* 15. Blackstone defines it to be "the means whereby the owner of lands has the just possession of his property." 2 *Comm.* c. 13.

There are several stages or degrees requisite to form a complete title to lands and tenements: as, first, the lowest and most imperfect degree of title consists in the mere naked possession, or actual occupation of the estate, without any apparent right, or any shadow or pretence of right to hold and continue such possession; which naked possession, by length of time, and negligence of him who hath the right, may by degrees ripen into a perfect and indefeasible title; and at all events, without actual possession, no title can be completely good. 2d. The next step to a good and perfect title is a right of possession; which is either actual or apparent; and which may reside in one man, while the actual possession is in another. This actual possession may be recovered by him who has the right of possession, if sued for within a competent time: otherwise he will have nothing left in him.

There was formerly a third stage or degree, viz. the mere right of property, without even possession, or the right of possession. Thus, if a disseisor turned me out of possession of my lands, he thereby gained a mere naked possession, and I still retained the right of possession and the right of property. If the disseisor died, and the lands descended to his son, the son gained an apparent right of possession; but I still retained the actual right, both of possession and property. If I acquiesced for thirty years, without bringing any action to recover the possession of the lands, the son gained the actual right of possession, and I retained nothing but the mere right of property; and even this right of property failed, or at least was without a remedy, unless I pursued it within the space of sixty years. So also if the father were tenant in tail, and aliened the estate-tail to a stranger in fee, the alienee thereby gained the right of possession, and the son had only the mere right, or right of property. And hence it followed that one man might have the possession, another the right of possession, and a third the right of property. For if tenant in tail enfeoffed A. in fee-simple, and died; and B. disseised A.; then B. would have the possession, A. the right of possession, and the issue in tail the right of property. A. might have recovered the possession against B., and afterwards the issue in tail might evict A., and united in himself the possession, the right of possession, and also the right of property; in

which union consisted a complete title to lands, tenements, and hereditaments; for it was an ancient maxim of the law, that no title was completely good, unless the right of possession was joined with the right of property; which right was then denominated a double right, *jus duplicatum*, or *droit double*. *Mir.* l. 2. c. 27; 1 *Inst.* 266; *Bract.* l. 5. tr. 3. c. 5. And when, to this double right, the actual possession was also united; when there was, according to the expression of Fleta, (l. 3. c. 15. § 5.) *juris et seisinæ conjunctio*, then, and then only, was the title completely legal. See 2 *Comm.* c. 12.

Now by the recent changes that have been effected in the laws relating to real property, under the provisions of the 3 & 4 *Wm.* 4. c. 27, by the abolition of all real and mixed actions, with the exception of *quare impedit* and actions for dower, the stages or degrees requisite to complete the title to lands and tenements are reduced to two, viz. possession and a right of possession; for where the latter does not exist, or where in other words there is not a right of entry upon which an ejectment may be maintained, there are not only no means by which land may be recovered, but the above statute extinguishes with the remedy all right and title to the lands. See further *Limitation of Actions*, II. 1.

Title is generally applied to signify the right to land and real effects; as property is to signify that to mere personal estate. See title *Property*; and further, *tit.* *Dissaisin*; *Estate*; *Limitation of Actions*; *Release*, &c.

Title to lands, tenements, and hereditaments, is said to accrue either by descent or purchase. Purchase, in this sense, includes every mode of acquiring lands, except by descent. See *Descent and Purchase*.

Title by purchase may be either by escheat; occupancy; prescription; forfeiture, or alienation; which latter may be either by deed, matter of record, special custom, or devise.

Property in, or title to, things personal, may arise either by occupancy; prerogative, and forfeiture; by custom; by succession; marriage; judgment; gift; grant; contract; bankruptcy; will, or administration. See the several titles, as also *Executor*, and other apposite titles, and 2 *Comm.* *post* *tot.*

The law will not permit titles and things, in entry, &c. to be granted over; and the buying or selling any pretended rights, or titles, to lands, is prohibited by statute as a maintenance. See that title.

TITLE OF ACTS OF PARLIAMENT. See *Parliament VII.* *Statutes*.

TITLES, pretended, buying or selling. See *Champany*; *Maintenance*.

TITLE TO THE CROWN. See *King*, I.

TITLES OF CLERGYMEN, signify some certain place where they may exercise their functions. A title, in this sense, is the church to which a priest was ordained, there constantly to reside: and there are many reasons why a church is called *titulus*; one is because in former days the name of the saint to whom the church is dedicated was engraved on the porch, as a sign that the saint had a title to that church; from whence the church itself was afterwards denominated *titulus*. *Concil. London, Anno 1025*. Anciently, a title of clergy was no more than entering their names in the bishop's roll; and then they had not only authority to assist in the ministerial function, but had a right to the share of the common stock or treasury of the church: but since, a title is an assurance of being preferred to some ecclesiastical benefice, &c. See *Curate*, *Parson*.

TITLE-DEEDS. By 7 & 8 *Geo.* 4. c. 29. § 23, any person who shall steal any paper or parchment written or printed, or partly written and partly printed, being evidence of the title or of any part of the title to any real estate, shall be guilty of a misdemeanour punishable by transportation for seven years, or by fine or imprisonment. In any indictment for such offence, it shall be sufficient to allege the thing stolen to be evidence of the title legal or equitable to the estate mentioned;

and it shall not be necessary to allege the thing stolen to be of any value. By § 34. the conviction for the offence shall not affect any other remedy of the party injured, but shall not be given in evidence in any action, neither shall the party be convicted if he shall have disclosed the facts in consequence of my trial, &c.

The like enactments were made for Ireland by 9 Geo. 4. c. 55, § 23, 24.

TITLE OF ENTRY. Is when one seised of land in fee makes a feoffment thereof on condition, and the condition is broken; after which the feoffer hath title to enter into the land, and may do so at his pleasure; and by his entry the freehold shall be said to be in him presently. And it is called title of entry, because he could not have a writ of right against his feoffee upon condition, for his right was out of him by the feoffment, which cannot be reduced into entry; and the entry must be for the breach of the condition. *Cowell. See Entry.*

TITULARS OF ERECTION. Persons who, after popery was destroyed in Scotland, got a right to the parsonage tithes which had fallen to monasteries, because of several parishes that had belonged to them in mortmain. *Scotch Law Dict.* They are the same as impropiators in England.

TOALIA, a towel. There is a tenure of lands by the service of waiting with a towel at the king's coronation. *Inq. Ann.* 12, 13. *Johan. R. See Serjeanty.*

TOBACCO. By the 12 Car. 2. c. 34. (extended to Scotland by the 22 Geo. 3. c. 73.) tobacco is not to be planted in England or Ireland, on pain of forfeiting 40s. for every rod of ground thus planted; but this shall not extend to hinder the planting of tobacco in physic gardens.

By the 19 Geo. 3. c. 35. so much of former acts as prohibited the growth of tobacco in Ireland was repealed; but tobacco raised there was to be exported thence to England only.

But by the 1 & 2 Wm. 4. c. 16. the last-mentioned act was repealed, and the provisions of the 12 Ch. 2. c. 34. and of every other act passed since for prohibiting the growth of tobacco in Great Britain or Ireland, were revived; the culture of tobacco throughout the United Kingdom is forbid, except the places in and quantities and for the purposes mentioned in the prohibitory acts.

§ 4. Imposes a penalty of 100*l.* on any person having tobacco exceeding one pound in weight, of the growth of the United Kingdom, in his possession, &c.

Heavy duties are payable on the importation and manufacture of tobacco in Great Britain and Ireland, under the management of the commissioners of Excise; and the manufacture is subject to the control of the commissioners and officers of excise; every manufacturer taking out a licence, the licence being charged according to the quantity manufactured. Dealers also must take out licences. Repealed by 6 Geo. 4. c. 187.

The present duties on the importation of tobacco are regulated by the 3 & 4 Wm. 4. c. 56.

TOD OF WOOL. Twenty eight pounds, or two stone; mentioned in 12 Car. 2. c. 32.

TOFT, *toftum.* A messuage; or rather a place or piece of ground where a house formerly stood, but is decayed or casually burnt, and not re-edified. It is a word not in use in times, wherein we often read *toftum* and *croftum*, &c. *West. Synch. par. 2.*

TOFTMAN, *toftmanus.* The owner or possessor of a toft. *Reg. Priorat. Lem. p. 18.*

TOLLE, *Fr. i. e. Tola.* A net to encompass or take deer, which is forbid to be used unlawfully in parks, on pain of 20*l.* for every deer taken therewith. 3 & 4 P. & M. c. 10. But see *Deer.*

TOKENS, FALSE. See *Cheats.*

TOLERATION ACT. The st. 1 Wm. & M. st. 1. c. 18; as to which see *Dissenters.*

By 19 Geo. 3. c. 44, § 4. reciting that it had been doubted

[see 1 *Ld. Raym.* 20; 1 *Salk.* 147.] whether this act was a public or private act, it is positively declared to be a public act.

TOLL, or **To TOLL,** from Lat. *tollere.* To bar, defeat, or take away; as to toll the entry, i. e. to deny or take away the right of entry. 8 Hen. 6. c. 9. See *Entry.*

TOLL, *tolnetum vel thecolonium; tolne.* A Saxon word, signifying properly a payment in towns, markets, and fairs, for goods and cattle bought and sold. It is a reasonable sum of money due to the owner of the fair or market upon sale of things tollable within the same. 2 *Inst.* 220.

The word it used for a liberty as well to take, as to be free from toll; of which freedom from toll the city of Coventry boasts an ancient charter granted by Leofrick, Earl of the Mercians, in the time of King Edward the Confessor, who at the importunity of Godiva, his virtuous lady, granted this freedom to that city.

I. Of Fair and Market Tolls.

II. Of Exemptions from Fair and Market Tolls.

I. By the ancient law of this land, the buyers of corn or cattle in fairs or markets ought to pay toll to the lord of the market, in testimony of the contract there lawfully made; for toll was first invented that contracts in markets should be openly made before witnesses; and privy contracts were held unlawful.

Toll doth not of common right belong to a fair; though it hath been held, that some toll is due of common right, as appears from the immunities of several persons not to pay toll; which proves that, if it was not for those privileges, they ought to pay toll of common right; therefore where the king grants a market, toll is due, although it is not expressed in the grant what toll is to be paid; and is from the necessity of it, because the property of things sold in a market is not altered without paying toll. *Palm.* 76; 2 *Lutw.* 1377. But it is said, that toll is not incident of common right to a fair. If the king grants to a man a fair or market, and grants no toll, the patentee shall have no toll; for toll being a matter of private right for the benefit of the lord, is not incident to a fair or market, as a court of piepowder is, which is for the benefit of the public and advancement of justice, &c. Such a fair or market is free from toll; and, after the grant made, the king cannot grant a toll to such free fair or market, without some proportionable benefit to the subject. And if the toll granted with the fair or market be outrageous, the grant of the toll is void; and the same is a free market, &c. 2 *Inst.* 220; *Cro. Eliz.* 559. And see 1 *Wils.* 109; and tit. *Fairs, Markets.*

When the king grants a fair, he may likewise grant that toll shall be paid, though it be a charge upon the subjects, but then it must be of a very small sum. Toll is to be reasonable, for the king cannot grant a burdensome toll; and one may have toll by prescription for some reasonable cause; but such a prescription to charge the subject with a duty of toll must import a benefit or recompense for it, or some reason must be shown why it is claimed. *Cro. Eliz.* 559; 3 *Lev.* 421; 2 *Mod.* 143; 4 *Mod.* 323.

At this day there is not any one certain toll to be taken in markets; but if that which is taken be unreasonable, it is punishable by the 3 *Edw.* 1. c. 31. And what shall be deemed reasonable is to be determined by the judges of the law, when it comes judicially before them. Toll may be said to be unreasonable and outrageous, when a reasonable toll is due and excessive toll is taken; or when no toll is due, and toll is unjustly usurped, &c. 2 *Inst.* 222. If excessive toll be taken in a market town by the lord's consent, the franchise shall be seized; and if by other officers, they shall pay double damages, and suffer imprisonment, &c. *Stat. Westm.* 1. 3 *Edw.* 1. c. 31.

A toll of 1*d.* for every pig brought into a market, is not unreasonable. 4 *B. & Ad.* 116.

The remedy for taking toll where none is due, or for taking excessive toll, is by action of trespass, or an action on the case; and, in some cases, by indictment. See *Extortion*.

It seems that by common right toll was demandable only upon live cattle sold in a fair or market, and not upon the sale of victuals and other wares; *More*, 474; *Com. Dig.* tit. *Market* (F. 1); but by custom toll may be payable for every thing brought to market, and for the standing of the seller there; for the sale of victuals is for the good of the commonwealth. 1 *Leon*. 218.

The toll in fairs is generally taken upon the sale of cattle, as horses, &c.; but, in the markets, for grain only; and the lord may seize until satisfaction is made him. It is always to be paid by the buyer, unless there be a custom to the contrary; and nothing is tollable before the sale, except it be by custom time out of mind, which custom none can challenge that claim the fair or market by grant since the reign of King Richard II.; so that it is better to have a market or fair by prescription than grant. 2 *Inst.* 220, 221.

Owners of markets and fairs are to appoint toll-takers where toll is to be taken, under penalties. 2 & 3 *Ph. & M.* c. 7.

By the 57 *Geo.* 3, c. 108. for the regulation of levying tolls at fairs, markets, and ports in Ireland, it is enacted, that boards specifying the usual tolls, customs, or duties, required, shall be put up at every fair, market, and port. A penalty of 40s. is imposed on the levying any tolls not so specified, and 5l. on persons defacing the boards. Every person and corporation claiming any toll, custom, or duty, at any fair, market, or port, are required to deliver to the clerk of the peace a table or schedule of the tolls so required before levying them.

Where it appeared in evidence that a corporation were entitled under a general grant, explained by usage, to toll for all commercial goods passing in and out of the city on horses, or in carts or waggons, at a certain rate per horse, the court of K. B. held that any alteration of the carriage by which the goods were so conveyed, as by taking them in stage-coaches, instead of carts or waggons, did not vary the right of toll in proportion to the horses employed, although the number of horses was regulated rather by the passengers than the goods. 5 *East*, 2.

Whether a right to take toll on goods sold by sample in a market can be fully supported, appears not to be absolutely decided. See 4 *T. R.* 197; 1 *Bos. & Pull.* 100. In the case of *Tenchesbury Corp. v. Diston*, 6 *East*, 438, an action on the case by the owners of a market who had a prescriptive right of toll on all corn brought into the market to be sold, and there sold, alleging that the defendant, intending to deprive them of their toll, fraudulently bought corn in the market by sample, knowing that it was not in bulk there at the time of the sale, whereby they were prevented from taking their toll, was held by the Court of K. B. not to be sustained by evidence of the mere fact of such purchase by sample in the market, though with the knowledge of the plaintiff's claim of toll, coupled with the fact of not paying the toll on demand afterwards when the corn was delivered in the borough out of the market: and the court held that the fact of such purchase by sample in the market, though coupled with the subsequent delivery, did not sustain a count as for corn brought into the market, and there sold. But in a subsequent case, by the same corporation *v. Bricknell*, 2 *Taunt.* 120, it was held by the Court of C. P. that as the seller of corn by sample in a market is benefited by the market, as well as the seller of corn pitched there in bulk and sold, if he refuse to pay the same toll as was paid by the seller of corn in bulk, an action on the case could be maintained against him for the injury done to the market in selling by sample. And in the case of *Hill v. Smith*, 10 *East*, 476, confirmed in error 4 *Taunt.* 520, where the corporation of Worcester had for above forty years received toll upon

corn sold in their market by sample, and afterwards brought within the city to be delivered to the buyer; and for about sixty years back, as far as living memory went, when corn pitched in the market-place, or on market-day, was not then sold, it was usually put in store in the city, and only one bag brought into the next market for a sample, and when sold in that manner toll used to be taken on the whole; the Court of K. B. held this to be sufficient evidence to be left to the jury of a prescriptive right to take toll on corn sold in the market by sample, and afterwards brought into the city to be delivered to the buyer. And see also 4 *B. & Ald.* 559, and 4 *Bing.* 8.

The result of the above decisions is thus stated in a recent publication—*Gunning on Tolls*.

The owner of the market, therefore, has it seems no right to toll unless the goods in respect of the sale of which he claims it are actually brought into the market, and there sold. In markets in which the proper mode of selling corn, &c. is to have the bulk itself brought into the market for sale, and where the toll arises upon the sale of the article there, the seller cannot deprive the owner of his toll by selling by sample (the bulk itself not being brought into the market). If he does, the owner of the market may maintain a special action on the case against him not for the toll, but for the injury done to his market by such mode of sale. In such a case, however, no action lies against either the buyer or the seller for the toll to which the owner of the market would have been entitled had the bulk been brought into it, and there sold; nor can he seize any portion of the bulk for the toll, upon its being afterwards brought into the town to be delivered in pursuance of the contract of sale. And no action lies in such a case against the buyer, unless there is some trick or contrivance between him and the seller to deprive the owner of the market of his toll, by adopting the sale by sample instead of the ordinary mode of sale which prevails in the market.

Tolls may be recovered in assumpsit, although no proof be given of any thing like a contract by the party against whom the claim is made. Per Lord Tenterden, 3 *B. & Ad.* 412.

II. The king shall pay no toll for any of his goods; and a man may be discharged from the payment of toll by the king's grant.

Also tenants in ancient demesne are discharged of toll throughout the kingdom for things which arise out of their lands, or brought for manurance thereof, &c., not for merchandizes. *Horn's Mirr.* lib. 1; 2 *Inst.* 221; 2 *Roll. Abr.* 108.

Persons may be exempt from toll by prescription, or by the king's grant, and a city, borough, &c. may prescribe to be exempt. *F. N. B.* 226. 1.; *Com. Dig.* tit. *Toll*, (G. 1.)

It seems that the king cannot grant either to individuals or corporations, an exemption from toll in fairs or markets already in existence, and in which any person has a right to receive toll. See 2 *Inst.* 221; *F. N. B.* 227. A.; 2 *Shorr.* 34; 4 *Leon.* 168, 214.

The great question, as to the exemption of the citizens of London from toll under the charters granted to the city by Henry the First and Henry the Third, was, after a long contest determined, viz. that freemen of the city of London have a right to be exempt from the payment of all tolls and port-dues throughout England, (except the prizes of wines,) in whatever place they reside; and though they have obtained their freedom by purchase, 1 *H. Black.* 206. This judgment of the Court of Common Pleas was reversed by the Court of K. B. (see 4 *T. R.* 130), but affirmed in parliament, May 2, 1796. *London (Corporation) v. King's Lynn (Corp.)* 6 *T. R.* 778; 1 *Bos. & Pull.* 487; 7 *Bro. P. C.* 121.

They must, however, be resident inhabitants paying scot and lot. 1 *B. & P.* 522, n. (a.); 7 *Bro. P. C.* 121.

Where the party is exempt from toll, he might until recently have had his remedy on the ancient writ *De essendo quietum*

de Theolonia, now abolished by the 3 & 4 Wm. 4. c. 27. See *1st Edition of Actions*, II. 1.

And he may still have an action on the case for damages. 2 Leon. 190.

See further, *Prescription*.

PORT-TOLL. A prescription to have port-toll for all toll coming into a man's port may be good. 2 Lev. 96; 2 Lut. 1519. The liberty of bringing goods into a port for safety, implying a consideration in itself. 3 Lev. 37. Prescription of toll for goods landed in a manor, or to have port-toll for all goods coming into port, is a good prescription; but not to have toll of goods brought into a river, &c. 2 Lev. 96, 97. Toll may be appurtenant to a manor. 2 Mod. 144.

And see further as to port-tolls, and also as to canal and ferry tolls, *Gunning on Tolls*, 101.

RETURN-TOLL. See *Turn-Toll*.

TOLL-TRAVERS, or TRAVERSE. Is where one claimeth to have toll for every beast driven across his ground, for which a man may prescribe, and distrain for it in *viâ regis*. *Cro. Eliz.* 710.

Toll-Travel is properly when a man pays certain toll for passing over the soil of another man in a way not a high street. 22 Ass. 58. And for this toll a man may prescribe. 2 Roll. Abr. 522; *Cro. Eliz.* 710; *Moor*, 574.

It is also due in some cases for passage over the private ferry bridge, &c. of another. 1 Sid. 454.

Under certain circumstances this toll is payable for passing over the common highway; thus if a person claiming a toll for passing over a highway can show that the liberty of passing over the soil and the taking of toll for such passage are both immemorial, and that the soil and the tolls were, before the time of legal memory, in the same hands, though severed since, it will be presumed that the toll was originally granted to the public in consideration of the tolls; and such original grant is a good consideration to support the demand. 1 T. R. 660.

Unlike toll-thorough, a corporation or an individual may prescribe a toll traverse without alleging any consideration. *Per Curiam*, 2 Hils. 23; and the prescription will be good, for the owners of the soil in the person prescribing, is a sufficient consideration for such a toll; and the law supposes a reservation of the toll to have been made by the proprietor of the land at the time he first began to put the soil to private use over it. *Per Curiam*, See *Acton*, 17, pl. 2; 1 B. & C. 223; 13 B. & C. 288.

The reservation of a toll must be intended to be a toll for the use of the way to the public, 1 T. R. 660, *post*, and previous to the recent prescription. 2 S. Hils. 23, 71. It could not have been demanded unless it had been used to be taken time out of mind. *Per Curiam*, *Toll*, pl. 2. See the provisions of this statute, tit. *Prescription*, III.

TOLL-THOROUGH. Is when a town prescribes to have toll for such a number of beasts, or for every beast that goeth through their town, or over a bridge or ferry maintained at their cost; which is reasonable, though it be for passing through the king's highway, where every man may lawfully go, as it is for the ease of travellers that go that way. *Terms de la Ley*, 561, 562.

Toll-thorough is also defined by one author to be a sum demanded for a passage through a highway, *Com. Dig.* tit. *Toll* (C); and by another, a toll taken from men for passing through a vill in a high street. *Fin. Abr.* tit. *Toll* (A). And when highway and street are mentioned, it is to be understood that the definition and cases apply equally to a toll taken for passing along the sea or a public navigable river, or a public ferry, or bridge. See 1 Vent. 71; 1 Sid. 454; *Wilkes*, 111.

Persons may have this toll by prescription or grant; but it must be for a reasonable cause, which must be shown, viz. that they are to repair or maintain a causeway, or a bridge, or such like. *Cro. Eliz.* 711. The king granted to a man

to take such toll of persons that passed over certain bridges with their cattle, as was taken there and elsewhere in England, &c.; and it was held void for uncertainty. *Bridge*, 88.

The words toll-thorough and toll-traverse are used promiscuously. A man cannot prescribe to have thorough-toll of men passing through a vill in the high-street, because it is against the common law and common right, for the high street is common to all, without alleging of a special consideration, as the repairing the way. And the king cannot have such toll for passing in the high street, as in the case aforesaid for the cause aforesaid. 2 Roll. Abr. 522; 22 Ass. 58.

So a man cannot prescribe to have thorough-toll of men for passing through a vill in a place which is not the high street; for it is more than the law allows to go there. 2 Roll. Abr. 523; 22 Ass. 58.

A claim of toll-thorough cannot be supported without showing a beneficial consideration moving to the person of whom it is claimed, and the benefit to the public; or, in other words, the consideration for the toll must be co-extensive with the right claimed. Thus it has been held that the repair of some streets in a town is not a sufficient consideration to support a claim of toll thorough in all parts of the town. 10 B. & C. 508. And see 2 Wils. 296; 4 Taunt. 520.

TURN-TOLL. A toll paid for beasts that are driven to market to be sold, and do return unsold, 6 Rep. 46. There is also in toll and out toll, mentioned in ancient charters.

TOLLAGE. Is the same with tallage; signifying generally any manner of custom or imposition.

TOLL-BOOTH. The place where goods are weighed, &c.

TOLL-CORN. Corn taken for toll ground at a mill; and an indictment lies against a miller for taking too great toll. 5 Mod. 13; *Ld. Raym.* 159. See *Extortion*.

TOLL-HOP. A small dish or measure by which toll is taken in a market, &c.

TOLSESTER, tolcestrum. An old excise or duty paid by the tenants of some manors to the lord for liberty to brew and sell ale. *Cartular. Reading*, 221; *Chart.* 51 Hen. 3.

TOLSEY, from the Sax. tol, i. e. tributum, and see, sedes. The place where merchants meet in a city or town of trade.

TOLT, Lat. tollit, quia tollit causam. A writ whereby a cause depending in a court-baron is taken and removed into the county court. *Old Nat. Br.* 4. And as this writ moves the cause to the county court, so the writ *pone* removeth a cause from thence into the Court of Common Pleas, &c.

TOLTA. Wrong, rapine, extortion, any thing exacted or imposed contrary to right and justice. *Pat.* 48 Hen. 3. in *Brady Hist. Eng. Append.* p. 235.

TOMIN. A weight of twelve grains used by goldsmiths and jewellers.

TONGUE, CUTTING OUT OR DISABLING. See *Mahem*.

TONNAGE. In commercial navigation the number of tons burden that a ship will carry.

The mode in which the tonnage of British ships has heretofore been and is still ascertained, is specified in the Registry Act, 3 & 4 Wm. 4. c. 55. § 16, 17.

A duty on wine imported, according to a certain rate per tun. This, with poundage, which was a duty on every pound value of merchandize imported and exported, was formerly granted, together with subsidies on wool, &c. exported, to the monarch for life, by acts of parliament usually passed at the commencement of each reign. See *Customs on Merchandize*.

TOOLS. See *Machinery*.

TOP ANNUAL. An annual rent out of a house built in a burgh. *Scotch Diet.*

TORCARE, boves strigare et torcare. To comb and cleanse his oxen. *Fluta, lib.* 2. c. 75.

TORRA, Sax. tor. A mount or hill; as Glastonbury

Torre. *Chart. Abbat. Glaston. MS. p. 114.* So a variety of high hills in Derbysbire are called tor; but generally some epithet is prefixed, as Mam-tor, &c.

TORT, from the Lat. *tortus*.] A French word for injury or wrong; as *de son tort demesne*, of his own wrong. *Cro. Rep. fol. 20, White's case.* Wrong or injury is properly called *tort*, because it is wrested or crooked, and contrary to that which is right and straight. *Co. Litt. fol. 158.*

TORTFEASOR, Fr. *tortfaisieur*.] A wrong-doer, a trespasser.

TORTURE. The statute law of England doth very seldom, and the common law doth never, inflict any punishment extending to life or limb, unless upon the highest necessity; and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. "*Nullus liber homo*," says the Great Charter, (c. 29.) "*aliquo modo destruat, nisi per legale iudicium parium suorum aut per legem terre*." Which words, "*Aliquo modo destruat*," according to Sir Edward Coke (2 *Inst.* 48.) include a prohibition not only of killing and maiming, but also of torturing (to which our laws are strangers), and of every oppression by colour of an illegal authority.

The *peine forte et dure*, formerly inflicted on prisoners standing mute, and which was the only species of punishment, in the nature of torture, allowed by the common law, was repealed by 12 *Geo. 3. c. 20.* See *Mute*.

The rack or question to extort a confession from criminals, is a practice of a different nature, the *peine forte et dure* having been only used to compel a man to put himself upon his trial, that being a species of trial in itself. And the trial by rack is utterly unknown to the law of England. See *Rushw. Coll. i. 638; 4 Comm. c. 25.*

The torture was formerly applied in Scotland to discover crimes, but in the claim of right this was declared to be contrary to law; and by 7 *Ann. c. 21. § 5.* it was expressly prohibited.

TOTIES QUOTIES. As often as a thing shall happen, &c. 19 *Car. 2. c. 4, &c.*

TOTTED. A good debt to the king was by the foreign apposer or officer in the Exchequer formerly noted for such by writing the word tot to it; and that which was paid should be totted. *Tot pecunie regi debetur*,—so much money is due to the king. 42 *Edw. 3. c. 9; 1 Edw. 6. c. 15.*

TOURN. See *Turn*.

TOURNAMENTS. See *Justs*.

TOUT TEMPS PRIST ET UNCORE EST, i. e. always was and is at present ready. See *Tender*.

TOWAGE, *tonagium*, Fr. *tavage*.] The towing or drawing a ship or barge along the water by another ship or boat fastened to her; or by men or horses, &c. on land; it is also money which is given by bargemen to the owner of ground next a river where they tow a barge or other vessel. *Plac. Parl. 18 Edw. 1.*

TOWN, *oppidum, villa*.] A walled place or borough; the old boroughs were first of all towns; and upland towns, which are not ruled and governed as boroughs, are but towns, though inclosed with walls. *Finch. 80.* There ought to be in every town a constable, or tithing-man; and it cannot be a town unless it hath or had a church, with celebration of sacraments and burials, &c. But if a town is decayed so that it hath no houses left, yet it is a town in law. 1 *Inst.* 115. Under the name of a town or village, boroughs, and it is said cities, are contained; for every borough or city is a town. See *City*. Where a murderer escapes untaken in a town in the day-time, the town shall be amerced. 3 *Hen. 7. c. 1.* A township is answerable for felons' goods to the king, which may be seized by them. But by the 31 *Edw. 3. c. 3.* if it can allege any thing in discharge of itself, and by which another doth become chargeable, it shall be heard, and right administered.

TOWN-CLERK. How he is to deliver a schedule of fines,

&c. to the sheriff; and a duplicate into the Court of Exchequer. Discharging or concealing an indictment, &c. liable to a forfeiture of treble the penalty incurred by the original offence. 22 & 23 *Car. 2. c. 22.* May be amerced by the barons of the Exchequer; and which amercements are leviable according to the usual practice. 3 *Geo. 1. c. 15. § 12.*

TRABARLE. Little boats, so called from their being made out of single beams, or pieces of timber cut hollow. *Florence of Worcester, page 618.*

TRABES in churches, were what we now call branches, made usually with brass, but formerly with iron. *Cowell.*

TRACTUS. A trace by which horses in their gears draw a cart, plough, or waggon. *Paroch. Antiq. 549.*

TRADE. In general signification is traffic or merchandise: also a private art, and way of living.

Trading with enemies is generally prohibited by positive statutes in time of war. See *Treason*.

Trading with an enemy without the king's licence is illegal. 8 *T. R. 548.* But such trade is legalized by a royal licence. 5 *M. & S. 25; 13 East, 332;* the conditions of which, however, must be strictly observed. See 1 *East, 475.* But a subject of Great Britain, domiciled in a country at amity with ours, may exercise the privilege of a subject of that country by trading with one in hostility to ours. 1 *M. & S. 726.*

It was formerly held that none of the king's subjects might trade to and with a nation of infidels without the king's leave, because of the danger of relinquishing Christianity. And Sir Edward Coke said, that he had seen a licence from one of our kings, reciting, that he, having a special trust and confidence that such a one, his subject, would not decline his faith and religion, licensed him to trade with infidels, &c. 3 *Nels. Abr. 331.*

As to private trades, at common law, none was prohibited to exercise any particular trade, wherein he had not any skill or knowledge; and if he used it unskilfully, the party grieved might have his remedy against him by action on the case, &c. But by the 5 *Eliz. c. 4. § 31.* it was enacted that a man should serve seven years' apprenticeship before he set up a trade; that statute, however, was repealed by the 54 *Geo. 3. c. 96.* which also abolished all restrictions upon taking apprentices. See *Apprentice*.

If a bond or promise restrains the exercise of a trade, though it be to a particular place only, if there was no consideration for it, it is void; if there be a consideration, in such a case it may be good. 2 *Lill. Abr. 179; Ld. Raym. 1436; 2 Strange, 739.* See *Bond*.

Frequent acts are passed to enable soldiers and sailors, having served his majesty for certain terms, to exercise any trades in Great Britain, though not generally bred to them, or free of corporations or companies. See 42 *Geo. 3. c. 69; 52 Geo. 3. c. 67;* and *Navy, Soldiers*.

TRADERS, Debts from. See *Executors, Real Estate*.

TRADITION. See *Delivery*.

TRAGA. A waggon without wheels. *Mon. Ang. i. 851.*

TRAILBASTON. See *Justices of Trailbaston*.

TRAINED BANDS of London. See *Soldiers*.

TRAITOR, *traditor, proditor*.] A state offender, betrayer, &c. See *Treason*.

TRAITEROUS, *perfidiosus*.] Treacherous, or full of disloyalty. *Lat. Law Dict.*

TRAITEROUS POSITION, of taking arms by the king's authority against his person, and those that are commissioned by him, is condemned by the 14 *Car. 2. c. 3.*

TRANSCRIPT. Is the copy of any original writing, or deed, &c. where it is written over again, or exemplified. 34 & 35 *Hen. 8. c. 14.* (repealed.) See *Tenor*.

TRANSCRIPTO PEDIS FINIS LEVATI MITTENDO IN CANCELLARIUM, was a writ for certifying the foot of a fine levied before justices in eyre, &c. into the Chancery. *Reg. Orig. 669.*

TRANSCRIPTO RECOGNITIONIS FACTÆ CORAM JUSTICIARIIS ITINERANTIBUS, &c. An old writ to certify a recognizance taken by justices in eyre. *Reg. Orig.* 152.

TRANSGRESSIONE. A writ or action of trespass, according to *Fitzherbert*. See *Trespass*.

TRANSIRE, from *transire*.] A warrant from the custom-house to let goods pass. 14 *Car. 2. c. 11.* (repealed).

TRANSITORY. Is the opposite to *local*. Transitory actions are those that may be laid in any county or place; such as personal action of trespass, &c. See *Action, Venue*.

TRANSLATION, *translatio*.] In the common sense of the word, signifies a version out of one language into another; but, in a more confined acceptance, it denotes the removing from one place to another; so the removal of a bishop to another diocese, &c. is called translating; and such a bishop writes not, *anno consecrationis*, but *anno translationis nostræ*, &c.

A bishop translated is not consecrated *de novo*; for a consecration is like an ordination; it is an indelible character, and holds good for ever. 3 *Salk.* 72. But the bishop is to be anew elected, &c. 1 *Salk.* 137. See *Bishop*.

TRANSPORTATION. The banishing or sending away a criminal into another country.

It appears that exile was first introduced as a punishment by the legislature in the thirty-ninth year of Queen Elizabeth, when a statute (39 *Eliz. c. 4.*) enacted, that such rogues as were dangerous to the inferior people, should be banished the realm. *Barr. Ant. Stat.* 445. (5 *Edw.*) And that the first statute in which the word transportation is used, was the 13 & 14 *Car. 2. § 23.* by which justices at sessions were authorized to transport such rogues, vagabonds, and sturdy beggars, as should be duly convicted and adjudged to be incorrigible, to any of the English plantations beyond the seas. Then came the 18 *Car. 2. c. 3.* which gave a power to the judges, at their discretion, either to execute or transport to America for life the moss-troopers of Cumberland and Northumberland. 2 *Woodd.* 498. The act 18 *Car. 2.* was made perpetual by 31 *Geo. 2. c. 42.* See 1 *Comm. c. 9. p. 137. n.*

Transportation was first brought into general use as a punishment *anno* 1718, by the 4 *Geo. 1. c. 11.*; which statute allowed the court a discretionary power to order felons, who were by law entitled to their clergy, to be transported to the American plantations.

By these statutes the persons contracting for the transportation of convicts to the colonies, or their assigns, had an interest in the service of each, for seven or fourteen years, according to the term of transportation.

The system of transportation to the American colonies continued for fifty-six years; during which period, and until the commencement of the American war in 1773, great numbers of felons were sent, chiefly to the province of Maryland. The rigid discipline which the colonial laws authorized the masters to exercise over the servants, joined to the prospects which agricultural pursuits, after some experience, held out to these convicts, tended to reform the chief part; who, after the expiration of their servitude, mingled in the society of the country, under circumstances highly beneficial to themselves, and even to the colony. *Treatise on the Police of the Metropolis*.

The convicts having accumulated greatly in the year 1776, and the intercourse with America being then shut up, it became indispensably necessary to resort to some other expedient, and the choice of offenders the system of the hulks was suggested, and first adopted under the authority of a statute, 1 *Geo. 3. c. 43.*

This act was followed up three years afterwards by another statute: viz. 1 *Geo. 3. c. 71.* which had two very important objects in view. The first was to erect in some convenient common or waste ground in Middlesex, Essex, Kent, or Surrey, two large Penitentiary Houses. The second purpose

of this act regarded the continuation of the system of the hulks.

Subsequently the 34 *Geo. 3. c. 84.* was passed for erecting a penitentiary house or houses for confining and employing convicts. But it appears by the preamble to the 52 *Geo. 3. c. 44.* that none such were erected. This latter act (as amended by 53 *Geo. 3. c. 162.*) provided for the erection of a penitentiary house at Millbank near Westminster, for the purpose of confining offenders convicted in London and Middlesex. That penitentiary house being completed, it was by 56 *Geo. 3. c. 63.* made applicable to the kingdom at large; and further provisions were made for its regulation by 59 *Geo. 3. c. 136.*; 4 *Geo. 4. c. 82.*; 5 *Geo. 4. c. 19.*; and 7 & 8 *Geo. 4. c. 33.* As to the punishment by confinement to hard labour of offenders in Ireland, liable to transportation, see 51 *Geo. 3. c. 63.*

From the great difficulty of finding any situation after the independence of America, where the services of convicts could be rendered productive or profitable to merchants who would undertake to transport them, arose the idea of making an establishment for these outcasts of society on the eastern coast of New South Wales, more generally known by the name of Botany Bay, from a bay on the coast so named by Captain Cook, and where the first convicts were landed; to which remote region it was at length determined to transport atrocious offenders. Accordingly, in the year 1787, an act passed, 27 *Geo. 3. c. 2.* authorizing the establishment of a court of judicature for the trial of offenders who should be transported thither.

The governor of the settlement may remit the punishment of offenders there; and on a certificate from him, their names shall be inserted in the next general pardon. 30 *Geo. 3. c. 47.*

By 25 *Geo. 3. c. 46.* provision was made for the more effectual transportation of offenders in Scotland; and the removal of prisoners was authorized from gaols in Scotland to the gaols or hulks in Great Britain.

And see the recent statutes, *post*, which extend to the whole of Great Britain.

The statutes relating to transportation being about to expire, the 5 *Geo. 4. c. 84.* (amended by the 11 *Geo. 4.* and 1 *Wm. 4. c. 39.*) was passed to consolidate the law upon the subject.

By § 2. offenders adjudged for transportation are to be transported under the act; and whenever his majesty shall extend mercy to any offender convicted of any capital crime, upon condition of transportation beyond the seas, either for life, or years, and signified to the court before which such offender shall have been convicted, or any subsequent court with the like authority, such court shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender; and in case such intention of mercy shall be signified to any judge, such judge shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender, in the same manner as if such intention of mercy had been signified to the court during the term or session in or at which such offender was convicted.

§ 3. His majesty may appoint places of transportation; and a secretary of state may authorize persons to make contracts for transportation of offenders, &c.

§ 4. Sheriffs or gaolers, on receiving orders for removal of offenders for transportation, to deliver them over to the contractor, if free from distemper.

§ 5. Persons undertaking to transport offenders are to give proper security.

§ 6. That if any offender be guilty of misbehaviour or disorderly conduct on board of the ship in which he or she shall be transported, the surgeon may cause to be inflicted on such offender such moderate punishment or correction as may be authorized by the instructions received from a secretary of

state: provided, that no such punishment or correction shall be inflicted, unless the master of such ship shall first signify his approbation thereof in writing under his hand; and every such punishment, with the particulars of the offence for which the same is inflicted, and such written approbation, shall on the same day, in all cases, be entered by such master, upon the log book of the ship, under a penalty of twenty pounds.

§ 7. A secretary of state may nominate persons to have the custody of offenders transported in king's ships, without security being given for their transportation.

§ 8. The governor of the colony, &c. to have property in service of offender, and may assign him to any other person, who may assign him over.

§ 9. Provided that nothing in the act shall affect his majesty's prerogative of mercy.

§ 10. His majesty may appoint places of confinement of offenders in England.

§ 13. His majesty, by order in council, may direct convicts to be employed in any part of his majesty's dominions out of England, under the management of the superintendent and overseer.

§ 17. Convicts adjudged by courts out of the United Kingdom to transportation, and convicts pardoned on condition of transportation, may, when brought to England, be imprisoned and transported.

§ 18. Convicts may be kept to hard labour, and may be removed to House of Correction.

But § 19. the time of imprisonment shall be deemed part of term.

§ 20. Offenders may be carried through any county to the seaport.

And § 21. expenses of removal are to be paid by the county where conviction took place.

§ 22. Any person rescuing, or assisting to rescue, any offender from the custody of such superintendent or overseer, or of any sheriff or gaoler, or other person, conveying or removing him or her, or conveying any disguise, instrument for effecting escape, or arms to such offender, shall be punishable in the same manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted. See *Escape*.

§ 26. Every felon under sentence of transportation, who hath received or shall receive any remission of his sentence from the governor of any colony, authorized to grant the same, while residing in a place where he lawfully may reside under such remission, may maintain any action for the recovery of any property, real, personal, or mixed, acquired by such felon since his conviction, and for any damage or injury sustained by such felon since his conviction, not only in the courts of the colony or place where such felon shall lawfully reside, but also in the courts of the kingdom, and of all other his majesty's dominions.

By the 6 Geo. 4. c. 69. § 3. all powers and authorities, which by a former act of 4 Geo. 4. c. 96. were vested in the colonial courts of general and quarter sessions, for taking cognizance of and punishing all crimes and misdemeanors, not punishable with death, committed by any felons or other offenders, who had been or should be transported to New South Wales or its dependencies, and whose sentences had not expired or been remitted, or for taking cognizance of complaints made against such offenders for drunkenness, disobedience of orders, neglect of work, absconding or desertion, or other turbulent or disorderly conduct, or for punishing such offences, shall be vested in any one or more justices of the peace for the said colony, or any district thereof, to be exercised in a summary way. But no justice is to exercise such power where any court of general or quarter sessions shall be appointed to be held, within one

week after the complaint, at any place not more than twenty miles distant from where the offence was committed.

By § 1. his majesty in council may authorize the governors of colonies to appoint the place to which any offender committed in the colonies, and under sentence of transportation, shall be sent, and such offenders shall be subject to the same laws as shall be in force with respect to convicts transported from Great Britain.

By the 11 Geo. 4. and 1 Wm. 4. c. 39. it is enacted (§ 1.) that felons ordered to be put on shore in the one colony, but put on shore in the other, and those removed from one colony to the other, shall be subject to the same rules as the other convicts in the same colony.

§ 2. The governor of the one colony may receive felons who are ordered to be delivered in the other colony.

And § 3. the governor of one colony may remove felons to the other colony.

§ 4. Convicts while being removed from one colony to another are still liable to punishment for disorderly conduct.

§ 5. Convicts removed from one colony to another to be subject to the regulations of the colony to which they are removed.

§ 6. prohibits the supply of spirituous liquors to offenders under sentence of transportation.

By the 4 & 5 Wm. 4. c. 67. so much of the 5 Geo. 4. c. 84. as inflicted death upon persons returning from transportation, is repealed, and every person convicted of such an offence, or of aiding in or procuring the commission thereof, shall be liable to be transported for life, and previously shall be imprisoned with or without hard labour, in any gaol, house of correction, or penitentiary, for not exceeding four years.

TRANSPORTATION, of goods and merchandize, is allowed or prohibited, in many cases by statute, for the advantage of trade. See *Navigation Acts*.

TRANSUBSTANTIATION, *transubstantiatio*.] Is a converting into another substance: To transubstantiate, i. e. *quidpiam in aliam substantiam convertere*. *Lit. Dict.* A declaration against the doctrine of transubstantiation maintained by the Church of Rome was formerly required by the 20 Car. 2. st. 2. c. 1. See *Roman Catholics*.

TRANSUMPTS. On a summons wherein the complainant demands that his rights to certain lands should be exhibited, and copies judicially to be taken of them, these authentic copies are called *transumps*. *Scotch Dict.*

TRAVERSE, from Fr. *traverser*.] Is used in law for the denying of some matter of fact alleged to be done, in a declaration or pleadings; upon which the other side comes and affirms that it was done; and this makes a single and good issue for the cause to proceed to trial. See *Pleading*, l. 2.

And pleas in bar are divided into pleas by way of traverse and pleas by way of confession and avoidance.

Of traverses there are various kinds. The most ordinary kind is that which may be called a common traverse. It consists of a *tender of issue*, that is, of a denial accompanied by a formal offer of the point denied, for decision; and the denial that it makes, is by way of express contradiction, in terms, of the allegation traversed.

Besides this, the common kind, there is a class of traverses which requires particular notice. In most of the usual actions there is a fixed and appropriate form of plea for traversing the declaration, in cases where the defendant means to deny its whole allegations or the principal fact on which it is founded. This form of plea or traverse has been usually denominated *the general issue* in that action; and it appears to have been so called because the issue that it tenders, involving the whole declaration, or the principal part of it, is of a more general and comprehensive kind than that usually tendered by a common traverse. But as by the provisions of the recent rules of court (*Hil. 4 Wm. 4.*) a more limited effect will hereafter be allowed to such issues than formerly,

the term of general issue will become rather less appropriate. See further *Issue*.

There is another species of traverse which varies from the common form, and which, though confined to particular actions and to a particular stage of the proceedings, is of frequent occurrence. It is the traverse *de injuriâ sud propriâ alij* - *tali causâ*, or, as it is more compendiously called, the traverse *de injuriâ*. It always tenders issue, but on the other hand differs (like many of the general issues) from the common form of a traverse, by denying, in general and summary terms, and not in the words of the allegation traversed.

There is still another species of traverse, which differs from the common form, and which will require distinct notice. It is known by the denomination of a *special traverse*. It is also called a formal traverse, or a traverse with an *absque hoc*.

The affirmative of the special traverse is a denial of the negative part of the declaration, and those being the Latin words formerly used, and from which the modern expression, *without this*, is translated. The different parts and properties here noticed are all essential to a special traverse, which must always thus consist of an inducement, a denial, and a conclusion to the country.

The formal words of a special traverse are in our French *sa vece*, in Latin *absque hoc*, and in English *without this*, that such a thing was done or not, &c. *Kitch.* 217; *West. Symb.* part 2.

The conclusion to the country in a special traverse is a novelty introduced by the rules of court, *H. T. 4 Wm. 4*; for previously it always concluded with a verification, the effect of which was to postpone the issue to a later time, and to a place later than it would have been arrived at in the common form.

For examples of a special traverse, and an explanation of its use and object, see *Stephen on Pleading*.

A plea will be ill which neither traverseth nor confesseth the plaintiff's title, &c. And every matter in fact alleged by the plaintiff may be traversed by the defendant, but not matter of law, or where it is part matter of law and part matter of fact; nor may a record be traversed which is not to be tried by a jury. And if a matter be expressly pleaded in the affirmative, which is expressly answered in the negative, no traverse is necessary, there being a sufficient issue joined; also where the defendant hath given a particular answer in his plea to all the material matters contained in the declaration, he need not take a traverse; for when the thing is answered, there needs no further denial. *Cro. Eliz.* 755; *Yelv.* 173, 193, 195; *2 Mod.* 54.

Any fact which appears to be material is traversable, though it be only on suggestion; as in prohibition a suggestion or refusal by the spiritual court of a plea (which ought to be allowed) in a suit there for tithes, or other matter of their cognizance, is traversable, otherwise their jurisdiction might in any case be taken away by such suggestion. *2 Co.* 45 a. So any surmise which takes away the jurisdiction of the court, is traversable. *Cro. Eliz.* 511. But traverse of a thing not necessary to be alleged, is bad. *Cro. Car.* 328. So of matter of mere supposal or inducement. *Com. Dig.* tit. *Pleading*, (G. 13, 14.)

As one traverse is enough to make a perfect issue, a traverse cannot be regularly taken upon a traverse, if it is well taken to the material point, and goes to the substance of the action; but where the first traverse is not well taken, nor pertinent to the matter, there to that which was sufficiently confessed and avoided before, the other party may well take a traverse after such immaterial traverse taken before; and if special matter alleged in a foreign county in the defendant's plea be false, the plaintiff may maintain his action, and traverse that special matter; and in such case a traverse on a traverse hath been adjudged good; but a traverse after a traverse may be allowed; as in trespass in such a county, defendant pleads a concord for trespass in every other county, and traverses the county, the plaintiff may join issue on the

county, or traverse the concord. *1 Inst.* 252 b; *Mo.* 428; *1 Saund.* 32; *Poph.* 101.

These rules are to be observed in traverses: 1, the traverse of a thing not immediately alleged, vitiates a good bar; 2, nothing must be traversed but what is expressly alleged; 3, surplusage in a plea doth not enforce a traverse; 4, it must be always made to the substantial part of the title; 5, where an act may indifferently be intended to be at one day or another, there the day is not traversable; 6, in action of trespass, generally the day is not material; though, if a matter be to be done upon a particular day, there it is material and traversable. *2 Rol. Rep.* 37; *1 Rol. Rep.* 235; *Yelv.* 122; *2 Lil. Abr.* 313. If the parties have agreed on the day for a thing to be done, the traverse of the day is material; but where they are not agreed on the day, it is otherwise, and though it is proved to be done on another day, it is sufficient. *Palm.* 280.

Where a traverse goes to the matter of a plea, &c., all that went before is waived by the traverse; and if the traverse goes to the time only, it is not waived. *2 Salk.* 642. In action of trespass, a particular place and time were laid in the declaration; and in the plea there was a traverse as to the place, but not as to time. On averment that it was *eodem transgressio*, the plea was held good. *3 Lev.* 227; *2 Lutm.* 1452. Where a plea in justification of a thing is not local, a traverse of the place is wrong. *2 Mod.* 270.

The substance and body of a plea must be traversed. *Hot.* 232. But a traverse that a person died seised of land in fee, *modo et forma*, as the defendant had declared, was adjudged good. *Hutt.* 123. A lord and tenant differ in the services, there the tenure and not the seisin shall be traversed; but if they agree in the services, the seisin and not the tenure is traversable; and it is a general rule, that the tenant shall never traverse the seisin of the services without admitting the tenure. *March.* 116. That which is not material nor traversable, is not admitted when it is alleged and not traversed. *2 Salk.* 361. But the omitting a traverse where it is necessary, is matter of substance. *2 Mod.* 60. And a traverse of a debt is ill when a promise is the ground of the action, which ought to be traversed, and not the debt. *Leon.* 252.

A traverse should have an inducement to make it relate to the foregoing matter. And it is no good plea for the plaintiff to reply that a man is alive who is alleged to be dead, without traversing that he is not dead. *3 Salk.* 357.

Traverse may be in an answer in Chancery, replication, &c. In an action upon a bail-bond, the arrest is not traversable. *1 Stra.* 444. Traverse of a seisin in fee is ill, where a less estate would be sufficient. *2 Stra.* 818. Where the party confesses and avoids, he ought not to traverse. But it may be passed over and issue taken upon the traverse. *2 Stra.* 937.

Default of traverse where the plaintiff has not fully confessed and avoided, is only form, and aided on a general demurrer. And by the 4 & 5 Ann. c. 10. no exception shall be for an immaterial traverse, unless shown for cause of demurrer. But defect of a traverse, where there are two affirmatives, is not aided on a general demurrer; for by default of an issue the right cannot appear to the court. So if a traverse be necessary to make a good bar, the omission will be fatal on a general demurrer. And if the replication does not traverse the matter of the bar, which is not fully confessed and avoided, the defendant shall not be aided on a general demurrer. *Com. Dig.* tit. *Pleading*, (G. 22.) See further, *Stephen on Pleading*, and titles *Pleading*, *Trespass*.

TRAVERSE OF AN INDICTMENT OR PRESENTMENT. The taking issue upon, and contradicting or denying some chief point of it; as in a presentment against a person for a highway overflowed with water, for default of scowring a ditch, &c. he may traverse the matter, that there is no highway, or that the ditch is sufficiently scoured; or otherwise traverse the cause,

TREASON.

viz. that he hath not the land, or he and they whose estate, &c. have not used to scour the ditch. *Lamb. Eiren.* 521; *Book Entr.* See *Trial*.

In cases of misdemeanor, when a person appears and traverses, that is, pleads not guilty to an indictment found against him, and postpones the trial until the ensuing assizes or sessions, as in certain cases he may do (see *Misdemeanor*), he is said to traverse the indictment until such subsequent assizes or sessions.

TRAVERSE OF AN OFFICE is the proving that an inquisition made of lands or goods by the escheator, is defective and untruly made. See *Inquest of Office*. No person shall traverse an office unless he can make to himself a good right and title; and if one be admitted to traverse an office, this admission of the party to the traverse doth suppose the title to be in him, or else he had no cause of traverse. *Vaugh.* 641; 2 *Lil. Abr.* 590, 591. The traverse of an inquisition for the king is to be considered as a debt, and the prosecutor may carry down the record. 2 *Str.* 1208.

TRAVERSUM. A ferry. *Mon. Angl.* ii. 1002.

TRAWLermen. A kind of fishermen on the river Thames, who used unlawful arts and engines to destroy fish; of these some were termed *tinkermen*, others *hebermen* and *trawlermen*, &c. And hence comes to trowl or trawl for pikes. *Stow's Surv. Lond.* 19.

TRAYLBASTON. See *Justices of Trailbaston*.

T. R. E. Tempore Regis Edwardi. These initial letters in the *Domesday Register*, where the valuation of manors is recounted, refer to what it was in the time of Edward the Confessor, and what since the Conquest. *Cowell.* See *Domesday Book*.

TREASON,

FROM Fr. *trahir*, to betray; *trahison*, betraying, contracted into treason; Lat. *proditio*.] The crime of treachery and infidelity to our lawful sovereign.

In Scotland, since the Union with England, the law of treason has been regulated by the English law; the general principle was agreed to in the articles of union, and was carried into effect by the 7 *Ann.* c. 21. which declares that such crimes and offences which are high treason or misprision of high treason within England, shall be construed, adjudged, and taken to be high treason and misprision of high treason within Scotland; and that from thenceforth no crimes or offences shall be high treason or misprision thereof within Scotland, but such as are so in England; and the trial, pains, penalties, and forfeitures of this crime are declared to be the same in both countries.

In IRELAND, the provisions of the 25 *Edw.* 3. st. 5. c. 2. are in force; but those of several subsequent English acts do not extend to Ireland; and there are some Irish statutes in force which do not extend to England; and no act has been passed since the Union between Great Britain and Ireland to assimilate the laws of high treason throughout the United Kingdom. See more particularly under the several ensuing divisions; and see particularly Div. IV. *ad fin.*

I. Of Treason generally, and by the Common Law, previous to 25 *Edw.* 3. st. 5. c. 2.

II. Who may commit High Treason.

III. Of High Treason under 25 *Edw.* 3. st. 5. c. 2. and 36 *Geo.* 3. c. 7. and 57 *Geo.* 3. c. 6. as explanatory thereof.

1. Of compassing or imagining the Death of the King, Queen, or Heir Apparent.

2. Levying War against the King in his Realm.

3. Adhering to the King's Enemies, and giving them Aid, in the Realm or elsewhere.

4. The 36 *Geo.* 3. c. 7. 57 *Geo.* 3. c. 6. as applying directly or indirectly to the above Branches of Treason.

TREASON, I.

5. *Slaying the King's Chancellor or Judges in the Execution of their Offices.* See also *Judges*.

6. *Violating the Queen, the King's eldest Daughter, or the Wife of the Heir Apparent, or eldest Son.*

7. *Counterfeiting the King's Great or Privy Seal, &c.*

IV. Of other Treasons by Statutes subsequent to 25 *Ed.* 3.

V. Of the Proceedings and Judgment in Trials for High Treason.

1. *The Indictment and previous Steps.*

2. *The Process and Regulations previous to Trial.*

3. *The Trial and Judgment.*

I. TREASON, in its very name, imports a betraying, treachery, or breach of faith. It therefore happens only between allies, saith the *Mirror*; for treason is indeed a general appellation made use of by the law to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, civil, or even a spiritual relation, and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord; this is looked upon as proceeding from the same principle of treachery in private life as would have urged him who harbours it to have conspired in public against his liege lord and sovereign; and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these, being breaches of the lower allegiance, of private and domestic faith, were formerly denominated petit treasons; but by the 9 *Geo.* 4. c. 31. § 2. they are now declared to be murder only, and no greater offence. See *Homicide*. But when disloyalty so rears its crest as to attack even majesty itself, it is called by way of eminent distinction high treason, *alta proditio*, being equivalent to the *crimen læsæ majestatis* of the Romans, as *Glossville* denominates it also in our English law. 4 *Comm.* c. 6.

The greatness of this offence of treason, and severity of the punishment thereof is upon two reasons; because the safety, peace, and tranquillity of the kingdom are highly concerned in the preservation of the person and government of the king; and therefore the laws have given all possible security thereto, under the severest penalties; and as the subjects have protection from the king and his laws, so they are bound by their allegiance to be true and faithful to him. 1 *Hale's Hist. P. C.* 59.

As this is the highest civil crime which (considered as a member of the community) any man can possibly commit, it ought thereof to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone (says *Montesquieu*) is sufficient to make any government degenerate into arbitrary power. And yet, by the ancient common law, there was a great latitude left in the breast of the judges, to determine what was treason or not so, whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons, that is, to raise by forced and arbitrary constructions, offences into the crime and punishment of treason, which never were suspected to be such. Thus, in the reign of Edward I. appealing to the French courts in opposition to the king's, was in parliament solemnly adjudged high treason. 3 *Inst.* 7; 1 *Hale*, 79. And this under the idea of *subverting the realm*. Another charge, the *approaching or attempting to exercise royal power* (a very uncertain charge), was in the 21 *Edw.* 3. held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him 90*l.*, a crime, it must be owned, well deserving of punishment, but which seems to be of a complexion very different from that of treason. 1 *Hale's P. C.* 80. Killing the king's father or brother, or even his

messenger, has also fallen under the same denomination. *Britton, c. 22*; *1 Hawk. P. C. c. 17. § 1*. But, however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the *25 Edw. 3 st. 5, c. 2*. was made, which defines what offences only for the future should be held to be treason. See *post, III*.

Nothing can be construed to be treason under this statute which is not literally specified therein; nor may the statute be construed by equity, because it is a declarative law, and one declaration ought not to be the declaration of another; besides, it was made to secure the subject in his life, liberty, and estate, which by admitting constructions to be made of it, might destroy all. *1 Hawk. P. C. 31*; *3 Salk. 358*.

The statute, after reciting that divers opinions having been what cases should amount to high treason, enacts and declares that if a person doth compass or imagine the death of the king, queen, or their eldest son and heir; or if he do violate and deflower the king's wife or companion, or his eldest daughter unmarried, or the wife of the king's eldest son; or if he levy war against the king in his realm, or adhere to his enemies, give them aid and comfort in the realm or elsewhere, and thereof be probably (or proveably) attainted of open deed; and if a man counterfeit the king's great or privy seal, or his money, or bring false money into the kingdom, like to the money of England, to make payment therewith in deceit of the king and his people; or if he kill the chancellor, treasurer, or any of the king's justices in either bench, justices of assize, &c. being in their places, doing their offices; these cases are to be adjudged treason.

By the *13 Car. 2, c. 1*. (a temporary act which expired with the life of that king) it was enacted that if any person should compass, imagine, devise, or intend death or destruction to the king, or bodily harm leading to death or destruction, or imprisonment or restraint of the person of the king, or to deprive or depose him; and such compassings and imaginations should express, utter, or declare, by printing, writing, preaching, or malicious and advised speaking, he should be adjudged a traitor, and suffer death. Under this statute one *Stuyly* was convicted and executed in 1678. *State Trials, 6 Howell, 150, 152*; and see *Phillipp's State Trials, i. 329—350*.

II. EVERY subject of Great Britain, whether ecclesiastical or lay, man or woman, if of the age of discretion, and of sane memory, may be guilty of high treason. *1 Hawk. P. C. c. 17. § 4*. If a married woman commit high treason, in the company of her husband, or by his command, she is punishable as if unmarried; for in a crime of such magnitude, the presumption of coercion by the husband is no excuse. *1 Hawk. P. C. c. 1. § 11*; *1 Hal. P. C. 47*. A soldier cannot justify by the command of his superior officer; for, as the command is traitorous, so is the obedience. *Kely, 19*. Neither can a man justify, by acting as counsel. *Kely, 28*.

There are no accessories in treason: all are principals; and any person offending in treason, either by overt act or procurement, whereupon open deed has ensued, is adjudged by the law to be a principal traitor. *Dyer, 98 b. Throckmorton's case*; *State Trials, 1 Howell, 870, &c.* See *post, Div. V. 1*. of this title.

Madmen were heretofore punished as traitors, particularly by the *33 Hen. 8, c. 20*; but now they are not punishable, if the crime is committed during a total deprivation of reason. *1 Hal. P. C. 37*. And this has been confirmed in modern cases. See the provisions of the *39 & 40 Geo. 3, c. 94*. for the safe custody of insane persons charged with treason. *Idiota, VI*.

The husband of a queen regnant, as was King Philip, may commit high treason. So may a queen consort against the king her husband. Such were the cases of Queen Anne Boleyn and Catharine Howard; for the queen is considered,

in the eye of the law, as a distinct person, for many purposes. *3 Inst. 8*. See *post*.

Aliens may commit treason; for as there is a local protection on the king's part, so there is a local allegiance on theirs. *7 Rep. 6*. There is no distinction, whether the alien's sovereign is in amity or enmity with the crown of England. If during his residence here, under the protection of the crown, he does that which would constitute treason in a natural-born subject, he may be dealt with as a traitor. *1 Hal. P. C. 60*. So also if he resides here, after a proclamation of war; unless he openly removes himself, by passing to his own prince, or publicly renounces the King of England's protection, which is analogous to a *diffidatio*, or defiance; and then, under such circumstance, he is considered as an enemy. *1 Hal. P. C.* Thus the Marquis De Guiscard, a French Papist residing here, during a war, under the protection of Queen Anne, was charged with holding a traitorous correspondence with France. And two Portuguese were indicted and attainted of high treason, for joining in a conspiracy with Dr. Lopez to poison Queen Elizabeth. *7 Rep. 6*; *Dy. 141*.

If an alien, during a war with his native country, leaving his family and effects here, goes home, and adheres to the king's enemies, for the purposes of hostility, he is a traitor; for he was settled here, and his family and effects are still under the king's protection. *1 Salk. 46*; *1 Ld. Raym. 282*; *Fost. 185, 186*. In declarations of war, it has been frequently used to except, and take under the protection of the crown, such resident aliens as demean themselves dutifully, and neither assist or correspond with the enemy. In that case, they are upon the footing of aliens coming here by licence or safe-conduct, and are considered as alien friends. *Fost. 185*.

If an alien is charged with a breach of his natural allegiance, he may give alienage in evidence, for he is charged with a breach of that species of allegiance, which is not due from an alien. *4 St. Tr. 699, 700*.

Alien merchants are protected by the statute staple, in case of a war, which provides, that they shall have convenient warning, by forty days' proclamation, or eighty days in case of accident, to avoid the realm; during which time, they may be dealt with as traitors, for any treasonable act; if after that time they reside and trade here, as before, they may be either treated as alien enemies, by the law of nations, or as traitors, by the law of the land. *1 Hal. P. C. 93, 94*. See *Mag. Chart. c. 30*; *27 Edw. 3. st. 2, c. 2, 13, 17, 19, 20*.

Subjects of the king in open war or rebellion, are not the king's enemies, but traitors; and if a subject join with a foreign enemy, and come into England with him, if he be taken prisoner, he shall not be ransomed or proceeded against as an enemy, but as a traitor to the king; on the other hand, an enemy coming in open hostility into England, and taken, shall be either executed by martial law, or ransomed; for he cannot be indicted of treason, because he never was within the allegiance of the king. *3 Inst. 11*; *7 Rep. 6, 7*; *1 Hal. P. C. 100*.

A natural-born subject cannot abjure his allegiance, and transfer it to a foreign prince. Neither can any foreign prince, by naturalizing, or employing a subject of Great Britain, dissolve the bond of allegiance between that subject and the crown. *1 Comm. 369*. This was determined in the case of *Æneas Macdonald*, who was born in Great Britain, but educated from his early infancy in France; and being appointed commissary of the French troops intended for Scotland, was taken prisoner, tried, and found guilty of high treason. *Fost. 60*; *9 Stat. Tr. 585*.

It is a question, whether the general exemption of ambassadors from the cognizance of the municipal tribunal, extends to treason? On the one hand, there is a positive breach of local allegiance; on the other, an infringement of the privilege of personal inviolability, universally allowed by

the law of nations. Coke maintains, that if an ambassador commits treason, he loses the privilege and dignity of an ambassador, as unworthy of so high a place, and may be punished here, as any other private alien, and not remanded to his sovereign but of courtesy. 4 *Inst.* 153. Most writers agree that an ambassador, conspiring the death of the king, or raising a rebellion, may be punished with death. But it is doubted, whether he is obnoxious to punishment for bare conspiracies of this nature. 1 *Roll. Rep.* 185; 1 *Hale*, 96, 97, 99.

The bishop of Rosse, ambassador from Mary Queen of Scots, to Elizabeth, was committed to the tower as a confederate with the Duke of Norfolk, for corresponding with the Spanish ministry, to invade the kingdom; he pleaded his privilege, and afterwards, having made a full confession, no criminal process was commenced. 1 *Hal. P. C.* 97; 1 *St. Tri.* 105. But he was afterwards banished the country. The Spanish ambassador for encouraging treason, and the French ambassador for conspiring the same queen's death, were only reprimanded. Doctor Storey was condemned and executed; but he was an Englishman by birth, and therefore could never shake off his natural allegiance. *Dyer*, 298, 300; 3 *St. Tri.* 775.

From this view we may collect, that the right of proceeding against ambassadors for treason, in the ordinary course of justice, has been waved, from motives of policy and prudence: and that they have seldom been proceeded against further than by imprisonment, seizing their papers, and sending them home in custody. As was done in the case of Count Gyllenberg, the Swedish minister in George the Second's time. *Fost.* 187. See 1 *Comm.* 254; *Ward's Law of Nations*, where this subject is fully treated.

III. 1. THE first treason described by the 25 *Edw. 3. st. 5. c. 3.* is, "When a man doth compass or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir."—Under this description it is held that a queen regnant, (such as Queen Elizabeth or Queen Anne) is within the words of the act, being invested with royal power, and entitled to the allegiance of her subjects. 1 *Hal. P. C.* 101: but the husband of such a queen is not comprised within these words, and therefore no treason can be committed against him. 3 *Inst.* 7; 1 *Hal. P. C.* 106.

Though the compassing the death of the queen consort be treason, this must be intended during the marriage; for it doth not extend to a queen dowager. And the eldest son and heir of the king, that is living, is intended by the said act, though he was not the first son; but if the heir apparent to the crown be a collateral heir, he is not within the statute; nor is a conspiracy against such collateral heir treason by this act. 3 *Inst.* 8.

At common law, compassing the death of any of the king's children, and declaring it by overt act, was taken to be treason; though by this statute it is restrained to the eldest son and heir. 1 *Hal. P. C.* 125.

The king, intended by the act, is the king in possession, without any respect to his title; for it is held, that a king *de facto*, and not *de jure*, or in other words an usurper that hath got possession of the throne, is a king within the meaning of the statute; as there is a temporary allegiance due to him for his administration of the government, and temporary protection of the public; and therefore treasons committed against Henry VI. were punished under Edward IV, though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or king *de jure* and not *de facto*, who hath never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within this statute, against whom treasons may be committed. 3 *Inst.* 7; 1 *Hal. P. C.* 104. And a very sensible writer on the crown-law carries the

point of possession so far, that he holds that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him; a doctrine which he grounds upon the 11 *Hen. 7. c. 1.* by which it is expressly provided, that no person who shall attend upon the king for the time being in his person, and to do him true allegiance, or be in other places by the king's command in his wars, shall for such deed be convicted or attainted of high treason, nor of other offences, by act of parliament, or otherwise, whereby he shall forfeit life, or lands, &c.; but any act or process to the contrary shall be void. See *King*. This act is considered as declaratory of the common law. 1 *Hamk. P. C. c.* 17. § 14—18. But *Blackstone* observes, that *Hankin's* doctrine, founded on this act, seems to confound all notions of right and wrong; and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power (though not the name) of king, the people were bound in duty to hinder the son's restoration: and were a foreign king to invade this kingdom, and by any means to get possession of the crown, (a term by the way of very loose and indistinct signification,) the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry VII. does by no means command any opposition to a king *de jure*; but excuses the obedience paid to a king *de facto*. When, therefore, an usurper is in possession, the subject is excused and justified in obeying and giving him assistance: otherwise, under an usurpation, no man could be safe, if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay, farther, as the mass of people are imperfect judges of title, of which in all cases possession is *prima facie* evidence, the law compels no man to yield obedience to that prince, whose right is by want of possession rendered uncertain and disputable, till Providence shall think fit to interpose in his favour, and decide the ambiguous claim; and, therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is, according to *Hale*, no longer the object of treason. 1 *Hal. P. C.* 104. And the same reason holds, in case a king abdicates the government; or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution: since, when the fact of abdication is once established, and determined by the proper judges, the consequence necessarily follows, that the throne is thereby vacant, and he is no longer king. 4 *Comm. c.* 6.

Let us next see, what is compassing or imagining the death of the king, &c. These are synonymous terms; the word compass signifying the purpose or design of the mind or will, and not, as in common speech, the carrying such design into effect. 1 *Hal. P. C.* 107. And, therefore, it has been held that an accidental stroke, which may mortally wound the sovereign, *per infortunium*, without any traitorous intent, is no treason; as was the case of Sir Walter Tyrrel, who, by the command of King William Rufus, shooting at a hart, the arrow glanced against a tree, and killed the king upon the spot. 3 *Inst.* 6. But, as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some overt (*s. c.* open) act; and therefore it is necessary that there appear an open or overt act of a more full and explicit nature, to convict the traitor upon. The statute expressly requires, that the accused "be thereof, upon sufficient proof, attainted of some open act, by men of his own condition." Thus, to provide weapons or ammunition for the purpose of killing the king, is held to be a palpable overt act of treason, in

imagining his death. 3 Inst. 12. To conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compassing the king's death; for all force, used to the person of the king, in its consequence may tend to his death, and is a strong presumption of something worse intended than the present force by such as have so far thrown off their bounden duty to their sovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of princes. 1 Hal. P. C. 109. There is no question, also, but that taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the king, is a sufficient overt act of high treason. 1 Hawk. P. C. c. 17 § 21; 1 Hal. P. C. 119.

Mr. Justice Foster lays down generally, that the care the law hath taken for the personal safety of the king, is not confined to actions or attempts of the more flagitious kind, to assassination or poison, or other attempts immediately and directly aimed at his life: it is extended to every thing wilfully and deliberately done or attempted, whereby his life may be endangered. Post. 195.

It hath been adjudged, that he who intended by force to prescribe laws to the king, and to restrain him of his power, doth intend to deprive him of his crown and life; that if a man be ignorant of the intention of those who take up arms against the king, if he join in any rebellion with them, he is guilty of treason; and that the law constructeth every rebellion to be a plot against the king's life, and a deposing him, because a rebel would not suffer that king to reign and live, who will punish him for rebellion. Moor, 620; 2 Salk. 68.

How far mere words, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. Two instances occurred in the reign of Edward IV. of persons executed for treasonable words: the one a citizen of London, who said he would make his son heir of the crown, being the sign of the house in which he lived; the other a gentleman, whose favourite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly. These were esteemed hard cases; and the Chief Justice Markham rather chose to leave his place than assent to the latter judgment. 1 Hal. P. C. 115.

It was resolved in the trial of the regicides, that though a man cannot be indicted of high treason for words only, yet if he be indicted for compassing the king's death, these words may be laid as an overt act, to prove that he compassed the death of the king; and to support this opinion, the case of a person was cited who was indicted of treason, anno 9 Car. 1, for that he, being the king's subject at Lisbon, used these words: "I will kill the king, (innuendo, King Charles,) if I may come to him;" and afterwards he came into England for that purpose; and two merchants proving that he spoke the words, for that his traitorous intent, and the wicked imagination of his heart was declared by these words, it was held to be high treason by the common law, and within the statute of the 25 Edw. 3 c. 2. Cro. Car. 242; 1 Lev. 57.

But now it seems clearly to be agreed, that by the common law, and the statute of Edward III., words spoken amount only to a high misdemeanor, and no treason: for they may be spoken in heat, without any intention; or be mistaken, perverted, or misremembered by the hearers; their meaning depends always on their connexion with other words, and things; they may signify differently even according to the tone of voice with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason. And accordingly, in 4 Car. 1. on a reference to all the judges, concerning some very atrocious words spoken by one Pyne, they certified to

the king, "That though the words were as wicked as might be, yet they were no treason; for unless it be by some particular statute, no words will be treason." Cro. Car. 125. See 1 Hal. P. C. 111—120; 312—322; Foster, 196—207. From which authorities it may be concluded, that bare words are not overt acts of treason, unless uttered in contemplation of some traitorous purpose actually on foot or intended, and in prosecution of it: as if they are intended or followed by a consultation, meeting, or any act, then they will be evidence or a confession of the intent of such meeting, consultation, or act.

Ever since the revolution, it has been the constant practice, where a person, by treasonable discourses, has manifested a design to murder or depose the king, to convict him upon such evidence. And Chief Justice Holt was of opinion, that express words were not necessary to convict a man of high treason; but if, from the tenor of his discourse, the jury were satisfied he was engaged in a design against the king's life, this was sufficient to convict the prisoner. 4 State Trials, 172.

If the words be set down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treason; for *scribere est agere*. But even in this case the bare words are not the treason but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason; particularly in the cases of one Peacham, a clergyman, for treasonable passages in a sermon never preached; and of Algernon Sydney, for some papers found in his closet; which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt acts of that treason, which was specially laid in the indictment. Foster, 198. But being merely speculative, without any intention (so far as appeared) of making any public use of them, the convicting the authors of treason upon such an insufficient foundation has been universally disapproved. Peacham was therefore pardoned; and though Sydney indeed was executed, yet it was to the general discontent of the nation; and his attainder was afterwards reversed by parliament. There was then no manner of doubt, but that the publication of such a treasonable writing was a sufficient overt act of treason at the common law; though, of late, even that has been questioned. 1 Hal. P. C. 118; 1 Hawk. P. C. c. 17. § 32, 45. And see the provisions of the 36 Geo. 3. c. 7; and post, III. 4.

2. The next species of treason to be considered is, "if a man do levy war against our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion or the laws, or to remove evil councillors, or other grievances, whether real or pretended. 1 Hawk. P. C. c. 17. § 25. So it was held, in the case of Lord G. Gordon, that an attempt, by intimidation and violence, to force the repeal of a law, is a levying war against the king, and high treason. Dougl. 570. For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the high court of parliament. Neither does the constitution justify any private or particular resistance, for private or particular grievances; though, in cases of national oppression, the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people. To resist the king's forces, by defending a castle against them, is a levying of war; and so (it has been held) is an insurrection, with an avowed design to pull down all inclosures, all brothels, and the like; the universality of the design making it a rebellion against the state, and usurpation of the powers of government, and an insolvent invasion of the king's authority. 1 Hal. P. C. 182. But a tumult, with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a riot;

this being no general defiance of public government. So, if two subjects quarrel and levy war against each other, it is only a great riot and contempt, and no treason. Thus it happened between the Earls of Hereford and Gloucester, in 20 *Edw. 1.*, who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives; yet this was held to be no high treason, but only a great misdemeanor. 1 *Hale, P. C.* 136.

But in the case of a great riot in London by the apprentices there, some whereof being imprisoned, the rest conspired to kill the lord mayor, and release their comrades; and, in order to do it, to provide themselves with armour, by breaking open two houses near the Tower. They marched with a cloak on a pole, instead of an ensign, towards the lord mayor's house; and in the way, meeting with opposition from the sheriffs, resisted them: this was held levying of war, and treason. *Sid.* 358.

Those who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, are said to levy war against the king, although they have no direct design against his person; as they are for doing that by private authority, which he by public justice ought to do, which manifestly tends to a rebellion. For example; where great numbers by force endeavour to remove certain persons from the king, or to lay violent hands on a privy councillor, or revenge themselves against a magistrate for executing his office, or to deliver men out of prison, expel foreigners, or to reform the law of religion, see *post, Dio. 4.* But where a number of men rise to remove a grievance to their private interest, as to pull down a particular inclosure, they are only rioters; for there is a difference between a pretence that is public and general, and one that is private and particular. 3 *Inst. 9*; *H. P. C.* 14; *Kel. 75*; 1 *Hawk. P. C. c.* 17. § 25.

It was resolved by all the judges of England, in the reign of King Henry VIII., that an insurrection against the statute of labourers, for raising their wages, was a levying of war against the king; because it was generally against the king's law, and the offenders took upon them the reformation thereof. *Read. Statutes, vol. 5. p.* 150. It is to be observed however that many of the foregoing constructions of treason, in cases where the object, though extensive, was private, and not connected with the government of the country, are to be considered with great caution, and are not likely to be adopted as precedents: particularly since the 36 *Geo. 3. c. 7*; 57 *Geo. 3. c. 6. post, 4.* of this division; and see to this point, *Luders's Consideration on the Law of Treason.*

Not only such as directly rebel and take up arms against the king, but also those who in a violent manner withstand his lawful authority, or attempt to reform his government, do levy war against him; and therefore, to hold a fort or castle against the king's forces, or keep together armed men in great numbers against the king's express command, have been adjudged a levying of war, and treason. But those who join themselves to rebels, &c. for fear of death, and return the first opportunity, are not guilty of this offence. 3 *Inst. 10*; *Kel. 76.*

A person in arms was sent for by some of the council from the King, and to give in the names of those that were armed with him; but he refused, and continued in arms in his house; and it was held treason. Also, where one went with a troop of captains and others into London, to pray help of the city to save his life, and bring him to court to the queen, though there was no intent of hurt to her, was adjudged treason; and in them who joined with him, though they knew nothing but only a difference between him and some courtiers. So if any man shall attempt to strengthen himself so far, that the prince cannot resist him. *E. of Essex's Case, Moor, 620.*

A bare conspiracy to levy war does not amount to this species of treason; but, if particularly pointed at the person of the king or his government, it falls within the first, of

compassing or imagining the king's death. 3 *Inst. 9*; *Foster, 211, 213.*

By the common law, levying war against the king was treason. But as, in cases of high treason, there must be an overt act, therefore it is that a conspiracy, or compassing to levy war, is no overt act, unless a war is actually levied; though if a war is actually levied, then the conspirators are all traitors, although they are not in arms. And a conspiracy to levy war will be evidence of an overt act to maintain an indictment for compassing the king's death; but if the indictment be for levying war only, proof must be made that a war was levied, to bring the offender under this clause of the statute. 3 *Inst. 8, 9*; *H. P. C.* 14. If two or more conspire to levy war, and one of them alone raises forces, this shall be adjudged treason in all. *Dyer, 98.*

And see the provisions of the 36 *Geo. 3. c. 7. post, III. 4.*
3. "If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, he is also declared guilty of high treason. This must likewise be proved by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like. 3 *Inst. 10.* Sending intelligence to the enemy of the destinations and designs of this kingdom, in order to assist them in their operations against us, or in defence of themselves, is high treason, although such correspondence should be intercepted. 1 *Burr. 650.* So sending any intelligence to the enemy, in order to serve them in shaping their attack or defence, though its object be to dissuade them from an invasion, is high treason. 6 *T. R. 529.*

Officers or soldiers of this realm, holding correspondence with any rebel, or enemy to the king, or giving them any advice, information by letters, message, &c. are declared guilty of treason by the 2 & 3 *Ann. c. 20.* which does not extend to Ireland: but see *post, IV. ad finem.*

By enemies are here understood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers who may happen to invade our coast, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving them any assistance is also clearly treason; either in the light of adhering to the public enemies of the king and kingdom, or else in that of levying war against his majesty. *Foster, 219.* And, most indisputably, the same acts of adherence or aid which, when applied to foreign enemies, will constitute treason under this branch of the statute, will, when afforded to our own fellow-subjects in actual rebellion at home, amount to high treason, under the description of levying war against the king. 1 *st. 216.* But to relieve a rebel, fled out of the kingdom, is no treason; for the statute is taken strictly, and a rebel is not an enemy; an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England. 1 *Hawk. P. C. c.* 17. § 28. And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies in the kingdom, provided he leaves them whenever he hath a safe opportunity. *Foster, 216.* See *ante, I.*

The delivery or surrender of the king's castles or forts, by the captains thereof, to the king's enemy, within the realm or without, for reward, &c. is an adhering to the king's enemies. A lieutenant of Ireland let several rebels out of Dublin castle, and discharged some Irish hostages which had been given for securing the peace; and for this he was attainted of high treason in adhering to the king's enemies. 33 *Hen. 8.* Adhering to the king's enemies out of the realm is treason; but such adherence out of the realm must be alleged in some place in England. 3 *Inst. 10*; *H. P. C.* 14; *Dyer, 298, 310.* If there be war between the king of England and

France, those Englishmen that live in France before the war, and continue there after, are not merely upon that account adherents to the king's enemies, to be guilty of treason, unless they actually assist in such war; or at least refuse to return into England upon a privy seal, or on proclamation and notice thereof; and this refusal is but evidence of an adherence, and not so in itself. 1 *Hale's Hist. P. C.* 165. Adhering to the king's enemies is an adhering against him; and English subjects joining with rebel subjects of the king's allies, and fighting with them under the command of an alien enemy prince, are guilty of treason in adhering to the king's enemies. So cruising in a ship with intent to destroy the king's ships, without doing any act of hostility, is an overt act of adhering, comforting, and aiding; for where an Englishman lists himself and marches, this is treason without coming to battle or actual fighting. 2 *Salk.* 634.

By a temporary act, 38 *Geo. 3. c. 27.* (now expired,) it was enacted, that if any person residing, or being in Great Britain should, during the war with France, either on his own account or on account of any other person whatsoever, buy, sell, procure, or send, or assist in so doing, for the use of the French armies, or of any persons resident within the dominions of France, any ordnance stores, iron, lead, or copper, except cutlery ware, not being arms, and except buttons, buckles, japanned wares, toys, and trinkets; or any bank notes, gold, or silver; or any provisions whatever, or any clothing for the armies or fleets; or any leather wrought or unwrought, without licence from the king or privy council, he shall be guilty of high treason. And that every British subject, who should purchase, or enter into any agreement for any land or real property in France, should also be guilty of high treason. Temporary provisions were also made by various acts to prevent the intercourse and correspondence with France and other hostile countries during the war, viz. 38 *Geo. 3. c. 28, 45, 79*, the restraints imposed by which were removed by 42 *Geo. 3. c. 11.* and not renewed during the subsequent war.

4. The legislature, in the reign of Edward III., was not only careful to specify and reduce to a certainty the vague notions of treason that had formerly prevailed; but the statute goes on to state, that, "because other like cases of treason may happen in time to come, which cannot be thought of nor declared at present, it is accorded that if any other case, supposed to be treason, which is not above specified, doth happen before any judge: the judge shall tarry without going to judgment of the treason, till the cause be shown and declared before the king and his parliament, whether it ought to be judged treason, or other felony." Sir Matthew Hale is very high in his encomiums on the great wisdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this act; by not suffering them to run out (upon their own opinions) into constructive treasons, though in cases that seem to them to have a like parity of reason; but reserving them to the decision of parliament. This is a great security to the public, the judges, and even this sacred act itself; and leaves a weighty *memento* to judges to be careful and not over-hasty in letting in treasons by construction or interpretation; especially in new cases that have not been resolved and settled. 2. He observes, that as the authoritative decision of these *casus omisi* is reserved to the king and parliament, the most regular way to do it is by a new declarative act; and therefore the opinion of any one or of both houses, though of very respectable weight, is not that solemn declaration referred to by this act, as the only criterion for judging of future treasons. 1 *Hale, P. C.* 250; 4 *Comm. c. 6.*

Doubts having been entertained, how far the words of 25 *Edw. 3.* were applicable, with sufficient explicitness, to modern treasonable attempts to overturn the constitution, by means of tumultuous assemblies of the people; the publication and dispersion of inflammatory works and speeches against all

the branches of the legislature having increased to an enormous and very alarming degree, "with unremitted industry, and with a transcendent boldness;" the project of overawing parliament, by means of mobs and their leaders, having been repeatedly avowed; the legislature thought the following act necessary to explain and enlarge the clauses of the 25 *Edw. 3.* relative to the treasons enumerated in the three preceding divisions.

The 36 *Geo. 3. c. 7.* (the preamble of which alludes to the transactions just mentioned,) enacts, "That if any person shall, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the king, his heirs and successors. Or to deprive or depose him or them from the style, honour, or kingly name of the imperial crown of this realm, or of any other of his dominions. Or to levy war against his majesty, his heirs, and successors within this realm, in order, by force or constraint, to compel him or them to change his or their measures or councils, or in order to put any force or constraint upon, or to intimidate or overawe, both houses, or either house of parliament: or to move or stir any foreigner with force to invade this realm, or any other of his majesty's dominions; and such compassings, &c. shall express, utter, or declare, by publishing any printing or writing, or by an overt act or deed," the offender shall be deemed a traitor, and punished accordingly. The benefits of 7 *Wm. 3. c. 3*; 7 *Ann. c. 11.* (see *post*, V. 2.) are reserved to the offenders; and the act does not extend to prevent any prosecutions at common law.

This act at the time of its passing did not extend to Ireland; and the provision was temporary, during the king's life, &c. But by the 57 *Geo. 3. c. 6.* (passed after the union between Great Britain and Ireland,) these provisions are made perpetual, and by the recital of them in that act appear now to be extended to Ireland; and the like attempts to assault the person of King George IV. while prince regent, within the realm or without, were declared high treason.

The 36 *Geo. 3. c. 7.* is a very salutary law and was much needed. The 25 *Edw. 3.* had confined the law of treason within too narrow limits for the protection of the monarchy in a free, advanced, and populous condition of society. Judges had been induced to remedy the defect by a latitude of construction which certainly departed further from the letter of the law than in any other instance; and it is scarcely too much to say, that new treasons were, in fact, created by judicial authority, contrary to the express letter of the statute of Edward III. The act 36 *Geo. 3.* has, in effect, much curtailed the doctrine of constructive treason, by converting those dangerous and criminal acts of rebellion and sedition, which had been so often the subject of prosecution as overt acts of compassing the king's death, into specific treasons. The law is at once simplified and rendered certain: and the definitions of the crime are now so specific and unambiguous as, in a great measure, to exclude judicial construction from extending them by analogy.

5. The killing of the king's chancellor, treasurer, justices of either bench, &c. declared to be treason, relates to no other officers of state besides those expressly named; and to them only when they are in actual execution of their offices, representing the person of the king, and it doth not extend to any attempt to kill, or wounding them, &c. 3 *Inst.* 18, 38; *H. P. C.* 17. The places for the justices to do their offices, are the courts themselves, where they usually, or by adjournment, sit for dispatch of the business of their courts. 1 *Hale's Hist. P. C.* 232. See *Judges, Privy Council.*

By 7 *Ann. c. 21.* it is made high treason to slay any of the lords of session in Scotland, or lords of justiciary, sitting in judgment; or to counterfeit the king's seals appointed by the Act of Union. See *post*, 7.

6. It is also a species of treason, under the statute 25 *Edw. 3.* "if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir." By the king's companion is meant his wife; and by violation is understood carnal knowledge, as well without force as with it; and this is high treason in both parties, if both be consenting, as some of the wives of Henry VIII. by fatal experience evinced.

It is, however, observable, that as well in the instance of the alleged incontinence of Queen Ann Boleyn, as of the undoubted criminality of Queen Catharine Howard, both these queens were attainted of treason by special acts of parliament. 28 *Hen. 8. c. 7*; 33 *Hen. 8. c. 21*.

In the preamble of a bill in the House of Lords, "for depriving Caroline, the queen of King George IV. of the title and rights of Queen Consort," an adulterous intercourse was charged to have taken place between her (while Princess of Wales) and a foreigner in foreign parts. After the first reading of the bill, (and before proceeding to hear evidence,) the opinion of the judges was required, "Whether, if a foreigner, owing no allegiance to the crown, do in a foreign country violate the wife of the king's eldest son, and she consent to such violation, she thereby commits high treason within the meaning and true construction of the statute 25 *Edw. 3.*" to which the judges present unanimously gave their opinion in the negative. See *Journals, Dom. Proc. 17th August, 1820*.

After hearing evidence on this bill for thirteen weeks, (with an interval of about three weeks between the closing the evidence for the bill, and the opening of that against it,) and many debates in the committee on the bill, the third reading was carried by a majority of nine only; the contents being 108, non-contents, 99. After which the third reading was put off for six months; the bill being thereby virtually abandoned.

The plain intention of the law is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious; and, therefore, when this reason ceases, the law (generally speaking) ceases with it; for to violate a queen or princess dowager is held to be no treason. 3 *Inst. 9*. But it has been remarked that the instances specified in the statute do not prove much consistency in the application of this treason; for there is no protection given to the wives of the younger sons of the king, though their issue might inherit the crown before the issue of the king's eldest daughter; and her chastity is only inviolable before marriage, whilst her children would be clearly illegitimate. 4 *Comm. c. 6, n*.

The eldest daughter of the king is such a daughter as is eldest not married at the time of the violation, which will be treason, although there was an elder daughter than her, who died without issue; for now the elder alive has a right to the inheritance of the crown upon failure of issue male. Violating the queen's person, &c. was high treason at common law, by reason it destroyed the certainty of the king's issue, and consequently raised contention about the succession. *H. P. C. 16*.

As a queen dowager, after the death of her husband, is not a queen within the statute; for though she bears the title, and hath many prerogatives answering the dignity of her person, yet she is not the king's wife or companion. So a queen divorced from the king *à vinculo matrimonii*, is no queen within this act, although the king be living; which was the case of Queen Catharine, who, after twenty year's marriage with King Henry VIII. was divorced *causa affinitatis*. 1 *Hale's Hist. P. C. 124*.

7. "If a man counterfeit the king's great or privy seal," this is also high treason. But if a man takes wax bearing the impression of the great seal off from one patent, and fixes it to another, this is held to be only an abuse of the seal, and not a counterfeiting of it; as was the case of a certain

chaplain, who in such manner framed a dispensation for non-residence. But the knavish artifice of a lawyer much exceeded this of the divine. One of the clerks in chancery glued together two pieces of parchment; on the uppermost of which he wrote a patent, to which he regularly obtained the great seal, the label going through both the skins. He then dissolved the cement; and taking off the written patent, on the blank skin wrote a fresh patent, of a different import from the former, and published it as true. This was held no counterfeiting of the great seal, but only a great misprision; and Coke mentions it with some indignation, that the party was living at that day. 3 *Inst. 16*; 4 *Comm. c. 6*.

Counterfeiting the king's seal was treason by the common law; and the 25 *Edw. 3. st. 5. c. 2.* mentioned only the great seal and privy seal; for the counterfeiting of the sign manual, or privy signet, was not treason within that act, but by the 1 *Mary, st. 2. c. 6.* those who aided and consented to the counterfeiting of the king's seal were equally guilty with the actors.

The above two statutes, so far as they relate to this head of treason, are now repealed by the 11 *Geo. 4. and 1 Wm. 4. c. 66.* consolidating the laws relating to forgery, and which act § 2.) declares, that if any person shall forge or counterfeit, or utter, knowing the same to be forged or counterfeited, the great seal of the United Kingdom, his majesty's privy seal, any privy signet of his majesty, his majesty's royal sign manual, any of his majesty's seals appointed by the twenty-fourth article of the union to be kept, used, and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland, every such offender is guilty of high treason, and shall suffer death. Provided that nothing contained in 7 *Wm. 3. c. 3.* or 7 *Ann. c. 21.* shall extend to any indictment, or proceedings thereon, for any of the treasons thereinbefore mentioned. See *post, V. 2*.

But an intent or compassing to counterfeit the great seal, if it be not actually done, is not treason; there must be an actual counterfeiting, and it is to be generally like the king's great seal. 3 *Inst. 15*; *S. P. C. 3*; *H. P. C. 18*.

It was held that this branch of the 25 *Ed. 3.* did not extend to the affixing the great seal to a patent, without a warrant for so doing; nor to the raising any thing out of a patent, and adding new matter therein; yet this, like the taking off the wax impressed by the great seal, from one patent, and fixing it to another, though it was not a counterfeiting, was adjudged a misprision of the highest degree. And a person guilty of an act of this nature, with relation to a commission for levying money, &c. had judgment to be drawn and hanged. 2 *Hen. 4*; 3 *Inst. 16*; *Kel. 80*. Till a new great seal is made, the old one of a late king, being used and employed as such, is the king's seal within the statute; notwithstanding its variance in the inscription, portraiture, and other substantialia. When an old great seal is broken, the counterfeiting of that seal, and applying it to an instrument of that date wherein it stood, or to any patent, &c. without date, is treason. 1 *Hale's Hist. P. C. 177*. The adding a crown to a counterfeit privy signet, which was not in the true; and omitting some words of the inscription, and inserting others, done purposely to make a little difference, alters not the case, but it is high treason; being published on a forged patent to be true, &c. 1 *Hale, P. C. 184*.

There was also formerly another head of treason under the 25 *Ed. 3. st. 5. c. 2.* which was "where a man counterfeited the king's money, or brought false money into the realm counterfeited to the money of England, knowing the money to be false, to merchandize and make payment withal."

Or where, under the 4 *Hen. 7. c. 18.* and 1 *Mary, sess. 2. c. 6.* a man counterfeited foreign money made current here by the king's proclamation.

The parts of the above statutes relating to this offence have, however, been repealed by the 2 *Wm. 4. c. 24.* con-

solidating the laws against coining; and by this act the crime of counterfeiting the coin of the realm is reduced to felony.

IV. In consequence of the power, not indeed originally granted by the statute of Edward III., but constitutionally inherent in every subsequent parliament, (which cannot be abridged of any rights by the act of a precedent one,) the legislature was extremely liberal in declaring new treasons in the unfortunate reign of King Richard II.; as, particularly, the killing of an ambassador was made so; which seems to be founded upon better reason than the multitude of other points that were then strained up to this high offence. The most arbitrary and absurd of all which was by the 21 *Rich. 2. c. 8.* which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, high treason. And yet so little effect have over violent laws to prevent any crime, that within two years afterwards this very prince was both deposed and murdered. And in the first year of his successor's reign, an act was passed, reciting "That no man knew how he ought to behave himself, to do, speak, or say, for doubt of such pains of treason. And therefore it was accorded, that in no time to come any treason be judged, otherwise than was ordained by the statute of King Edward the Third." This at once swept away the whole load of extravagant treasons introduced in the time of Richard the Second. 1 *Hen. 4. c. 10.*

But afterwards, between the reign of Henry IV. and Queen Mary, and particularly in the bloody reign of Henry VIII., the spirit of inventing new and strange treasons was revived; among which we may reckon the offences of clipping money; breaking prison or rescue, when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welchmen; counterfeiting foreign coin; wilful poisoning; execrations against the king; calling him opprobrious names by public writing; counterfeiting the sign-manual or signet; refusing to abjure the pope; deflowering or marrying, without the royal licence, any of the king's children, sisters, aunts, nephews or nieces; bare solicitation of the chastity of the queen or princess, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her inebriety; judging or believing (manifested by any overt act) the king to have been lawfully married to Anne of Cleves; derogating from the king's royal style and title; impugning his supremacy; assembling riotously to the number of twelve, and not dispersing upon proclamation. All which new-fangled treasons were totally abrogated by the 1 *Mar. st. 1. c. 1.* which once more reduced all treasons to the standard of the 25 *Edw. 3.* Since which time, though the legislature became more cautious in creating new offences of this kind, yet the number was afterwards very considerably increased, but has of late years been again diminished.

For instance, the different treasons relating to persons exercising the Roman Catholic religion, namely, that created by the 5 *Liz. c. 1.* of defending the pope's jurisdiction in this realm; that created by the 27 *Eliz. c. 2.* of a popish priest tarrying here three days without taking the oaths; that created by the 3 *Jac. 1. c. 4.* of any natural-born subject being reconciled to the See of Rome, have long been obsolete; and indeed seem to be now virtually repealed by the two acts of the 31 *Geo. 3. c. 32.* and 10 *Geo. 4. c. 7.* the first for the relief, and the last for the final emancipation of the Roman Catholics. See *Roman Catholics*.

But there is one kind of treason declared by the 25 *Eliz. c. 1.* distinct from any treason of the last description, although the statute was ostensibly made against maintaining the authority of the See of Rome. For by § 2. persuading or withdrawing any subject from his natural obedience to the crown, is made high treason. And a provision of a similar nature is contained in the 3 *Jac. 1. c. 4.*

Such treasons as related to the offence of counterfeiting the coin have, as already observed, been reduced to felony. See *ante*, III. 7.

The only new head of treason (for that of counterfeiting the great seal, &c. also already noticed, is but an extension of the provisions of the 25 *Edw. 3.*) are such treasons as are created for the security of the Protestant succession to the throne in the house of Hanover. With respect to this latter it may be necessary to state something in this place, in addition to what is said under title *King, I.*

After the act of settlement (12 & 13 *Wm. 3. c. 2.*) was made for transferring the crown to the illustrious house of Hanover, it was enacted by 13 & 14 *Wm. 3. c. 3.* that the pretended Prince of Wales, who was then thirteen years of age, and had assumed the title of King James III., should be attainted of high treason; and it was made high treason for any of the king's subjects, by letters, messages, or otherwise, to hold correspondence with him, or any person employed by him, or to remit any money for his use, knowing the same to be for his service. And by the 17 *Geo. 2. c. 39.* it was enacted, that if any of the sons of the Pretender should land or attempt to land in this kingdom, or be found in Great Britain or Ireland, or any of the dominions belonging to the same, he should be judged attainted of high treason, and suffer the pains thereof. And to correspond with them, or to remit money for their use, was made high treason in the same manner as it was to correspond with the father. By 1 *Ann. st. 2. c. 17.* (*British*; 2 *Ann. c. 5.* *Irish*;) if any person shall endeavour to deprive or hinder any person, being the next in succession to the crown according to the limitations of the act of settlement, from succeeding to the crown, and shall maliciously and directly attempt the same by any overt act, such offence shall be high treason. And by 6 *Ann. c. 7.* (but to which there is no Irish act similar) if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that any other person hath any right or title to the crown of this realm, otherwise than according to the act of settlement; or that the kings of this realm, with the authority of parliament, are not able to make laws and statutes to bind the crown, and the descent thereof; such person shall be guilty of high treason. This offence (or indeed maintaining this doctrine in any wise, that the king and parliament cannot limit the crown) was once before made high treason, by 13 *Eliz. c. 1.* during the life of that princess. And after her decease it continued a high misdemeanor, punishable with forfeiture of goods and chattels, even in the most flourishing era of indefeasible hereditary right, and *jure divino* succession. But it was again raised into high treason, by the statute of Anne before-mentioned, at the time of a projected invasion in favour of the then Pretender; and upon this statute one Matthews, a printer, was convicted and executed in 1719, for printing a treasonable pamphlet intitled *Vox Populi Vox Dei*. 4 *Comm. c. 6.* See *ante*, III. 4, as to the statute 36 *Geo. 3. c. 7.*

No act similar to that of the English stat. 1 *Mary, st. 1. c. 1.* having passed in Ireland, the following Irish acts still remain in force there, by which the offenders are made guilty of treason: 18 *Hen. 6. c. 2.* against persons putting themselves into safeguard, or cornrick, or granting safeguard to thieves, robbers, and rebels; 18 *Hen. 6. c. 3.* against levying people or horses upon the king's subjects without their consent; 10 *Hen. 7. c. 2.* against receiving rebels coming into Ireland; 10 *Hen. 7. c. 13.* against procuring or stirring Irishry or Englishry to make war against the king's authority, or stirring the Irishry against the Englishry; 13 *Hen. 8. c. 1.* against the wilful burning of ricks of corn, and houses of the king's subjects.

By the 28 *Hen. 8. c. 7.* (which was taken from the English act, 26 *Hen. 8. c. 13.* repealed by 1 *Mary, st. 1.*) maliciously to wish, will, or desire, or to imagine, practise, or attempt any

bodily harm to the king, queen, or heir apparent, &c. or to slander the king, as a heretic, usurper, &c. or to withhold any fortresses, ships, ammunition, &c. is declared treason; and, finally, by 33 Hen. 8. st. 1. c. 1. doing any thing to the peril of the king's person, or in derogation to his title to the crown of Ireland, is treason. Perhaps all these acts (with the exception of the provision as to withholding fortresses, &c.) might be now safely repealed.

By the Irish act 11 Eliz. st. 3. c. 1. which attainted Shan O'Neyle, and vested in the crown the county of Tyrone, &c. it is enacted that to challenge or take the name of O'Neyle, or to claim or execute any superiority, jurisdiction, tributes, &c. usurped or taken by O'Neyle, shall be treason.

V. 1. THOUGH the offence of treason is not within the letter of the commission of justices of the peace; yet, because it is against the peace of the king and of the realm, any justice may upon his own knowledge, or the complaint of others, cause any person to be apprehended, and commit him to prison. And the justice may take the examination of the person apprehended, and the information of those who can give material evidence against him, and put the same in writing, and also bind over those who can give any material evidence to the justices of oyer and terminer, or gaol-delivery; and certify the proceedings to that court where he binds over the informers. 2 Hawk. P. C. c. 8. See *Justice of the Peace*.

By the ancient common law bail was allowed in all cases except for homicide previous to the 3 Edw. 1. c. 15. whereby bail was prohibited to be taken in treason and other heinous offences; but that statute and several other subsequent acts having been repealed by the 7 Geo. 4. c. 64. although the provisions of this statute allowing justices to take bail in cases of felony do not extend to treason, yet it would seem that they may, if they choose to incur the responsibility, under the old common law admit parties charged with treason to bail. See *Deacon's Crim. Law*, 102.

The Court of King's Bench, having power to bail in all cases whatsoever, may admit a person to bail for treason done upon the high seas; or a person committed for high treason generally, if four terms have elapsed, and no prosecution commenced. Holt, 83; 1 Stra. 2.

The commitment may be for high treason generally; and it is not necessary to express the overt act in the warrant.

The regular and legal way of proceeding in cases of treason, and misprision of treason, is by indictment. An information cannot be brought in capital cases, nor for misprision of treason. Anciently an appeal of high treason, by one subject against another, was permitted in the courts of common law, and in parliament; and if committed beyond the seas, in the court of the high constable and marshal. See *Appeal*. And as to proceedings by impeachment, see that title.

By the common law, no grand jurors can indict any offence whatsoever, which does not arise within the limits of the precincts for which they are returned; therefore they are enabled, by several statutes, to inquire of treasons committed out of the country.

The venue, or place laid in the indictment where the offence was committed, must generally be laid in that county where the offence was actually committed, unless a statute gives a power to the contrary. If treason is committed in several counties, the venue may be laid in any one of them. 4 Sta. Tri. 640. If treason is committed out of the realm, the venue may be laid by the statute law in any county within the realm where the treason is appointed to be inquired into. See further, *Indictment*, V.

Offenders guilty of high treason by being concerned in the rebellion in the first year of King George I. were to be tried before such commissioners of oyer and terminer and gaol-delivery, and in such county, as his majesty by any commis-

sion under the great seal should appoint, by lawful men of the same county, as if the fact had been there committed; this extended only to persons actually in arms. 1 Geo. 1. c. 33.

By 7 Ann. c. 21. if treason is committed by any native of Scotland, upon the high seas, or in any place out of the realm of Great Britain, it may be inquired of in any shire or county that is assigned by the commission. Therefore the venue may be laid in such county, as if the treason was actually committed there.

This 7 Ann. c. 21. also enacted, that the crimes of high treason, and misprision of treason, shall be exactly the same in England and Scotland; and that no acts in Scotland (except slaying the lords of session, &c. see *ante*, Div. 5.) shall be construed high treason in Scotland, which are not high treason in England. And all persons prosecuted in Scotland for high treason, or misprision of treason, shall be tried by a jury, and in the same manner as if they had been prosecuted for the same crime in England.

It has been resolved, that if treason is committed in Ireland, it may be laid and tried in England, in pursuance of 35 Hen. 8. c. 2. 1 Sta. Tri. 189. In the case of *Lord Maguire* the venue was laid in Middlesex, though the war was levied against the king in Ireland. 1 St. Tr. 950. But see *tit. Ireland*.

The indictment must be drawn with great form and accuracy: for there can be no conviction of treason, where the crime is not formally laid, even though the facts charged amount to treason. 2 St. Tri. 808, 809. The day laid in the indictment is circumstance and form only, and not material in point of proof. Therefore the jury are not bound to find the defendant guilty on that particular day; but may find the treason to be committed either before or after the time laid. 3 Inst. 230; *Kely*, 16.

There must be a specific charge of treason. And since the traitorous intent is the gist of the indictment, the treason must be laid to have been committed traitorously, this word being indispensably requisite. If the charge is for compassing the king's death, the words of the 25 Edw. 3. (or 36 Geo. 3. as the case may be) must be strictly pursued. The indictment must charge, that the defendant did traitorously compass and imagine, &c. And then proceed to lay the several overt acts, as the means employed for executing his traitorous purposes. Levying war may be charged as a distinct species of treason, according to the statute; or it may be laid as an overt act of compassing.

There must be an overt act laid. It is not necessary that the overt act be laid to have been committed traitorously, because that is not the offence; but if the treason consists not in the intention, but in the act, as levying war, then it must be laid to have been done traitorously. *Cranburn's case*, 2 Salk. 633. It has been doubted, whether an overt act is required for any other species, except that of compassing or imagining the king's death; but since the words of 25 Edw. 3. "and thereof be proveably attainted by overt act," relate to all the treasons, an overt act is required for each. 5 Sta. Tri. 21; 2 Salk. 634.

Though a specific overt act must be alleged, yet it is not necessary that the whole detail of evidence intended to be given should be set forth; it is sufficient that the charge be reduced to a reasonable certainty, so that the defendant be apprized of its nature. Neither is it necessary to prove the overt act committed on the particular day laid. *Foster*, 19; 9 Sta. Tri. 607.

The compassing is considered as the treason, and the overt act as the method of effecting it. As to what shall be considered as an overt act, see generally, *ante*, III. 1. And as to proof of overt acts not specifically laid in the indictment, see *post*, V. 3.

In indictments upon the clause of the statute for levying

war, which *Sir Matthew Hale* calls an obscure clause, it is not necessary to lay the day with precision. 9 *Sta. Tri.* 550. But there must be an overt act shown in the indictment, upon which the court may judge upon the question of fact, whether war is levied or conspired. And this is usually done by setting forth, that the insurgents were arrayed in a warlike manner, were armed, or were conspiring to procure arms for the purpose of arming themselves. 2 *Vent.* 316, *Harding's case*.

2. If the defendant is in custody before the finding of the indictment, the next step is the arraignment. But if he absconds or secretes himself, still an indictment may be preferred against him in his absence; and if it is found, process issues to bring him into court.

The first process is a *capias*. At common law, in cases of treason, there was but one *capias*; and as this has not been altered by statute, upon a *non est inventus* returned, an *exigent* is awarded, in order to proceed to outlawry. 2 *Hale, P. C.* 191.

But if the indictment is originally taken in the King's Bench, the 6 *Hen. 6. c. 1.* specially provides, that before any *exigent* awarded, the court shall issue a *capias* to the sheriff of the county where the indictment is taken, and another to the sheriff of that county where the defendant is named in the indictment, having six weeks' time or more before the return; and after these writs returned, the *exigent* to issue as before. 2 *Hale, P. C.* 195.

A *capias* and *exigent* may issue against a lord of parliament; although, in civil cases, they cannot. 2 *Hale, P. C.* 159.

If the offender is out of the realm, the process is of the same effect as if he was resident in the realm. *Com. Dig. tit. Indictment, p. 513.*

The punishment for outlawries, upon indictments for misdemeanors, is the same as for outlawries in civil actions. But an outlawry in treason amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender was found guilty by his country. By 5 & 6 *Edw. 6. c. 11. § 7, 8.* a party within one year after the outlawry for treason may surrender himself to the chief justice of England, and traverse the indictment, and being found thereon not guilty, shall be acquitted. See *Sir T. Armstrong's case, Philipps's St. Tr. ii.* 153.

Previous to arraignment and trial, the prisoner is entitled to many important privileges, conferred upon him by the 7 *Wm. 3. c. 3; 7 Ann. c. 21.* which are the standard for regulating trials in cases of treason and misprision, with the exceptions hereafter noticed.

By the 7 *Wm. 3. c. 3.* which extended to all cases of high treason, whereby corruption of blood may ensue, (except treason in counterfeiting the king's seals,) or misprision of such treason, it is enacted, first, that no person shall be tried for any such treason, except an attempt to assassinate the king, unless the indictment be found within three years after the offence committed; next, that the prisoner shall have a copy of the indictment, (which includes the caption,) but not the names of the witnesses, five days at least before the trial; that is, upon the true construction of the act, before his arraignment; for then is his time to take any exceptions thereto, by way of plea or demurrer. See *Fost. 250, 251; Doug. 590.* Thirdly, that he shall also have a copy of the panel or jurors two days before his trial: and, lastly, that he shall have the same compulsive process to bring in his witnesses for him, as was usual to compel their appearance against him. And by 7 *Ann. c. 21.* (which did not take place till after the decease of the late Pretender,) all persons, indicted (in Great Britain) for high treason or misprision thereof, shall have not only a copy of the indictment, but a list of all the witnesses to be produced and of the jurors impanelled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence

of two witnesses; the better to prepare him to make his challenges and defence. But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, is repealed by 6 *Geo. 3. c. 51*; else it had been impossible to have tried those offences in the same circuit in which they are indicted: for ten clear days, between the finding and the trial of the indictment, will exceed the time usually allotted for any session of oyer and terminer. *Foster, 250.*

By the 6 *Geo. 4. c. 50. § 21.* in indictments for treason in any other court than the King's Bench, the list of the petit jury is to be delivered ten days before the arraignment, but in the King's Bench it may be delivered after arraignment so as it is ten days before the trial. The provision does not extend to any treasons within the following statute or in counterfeiting the great seal, &c.

By 39 & 40 *Geo. 3. c. 93.* (extended to Ireland by 2 *Geo. 4. c. 24. § 2.* passed after several attempts to assassinate King George III. for which the offenders were tried for high treason according to the regulations of the foregoing acts,) it is provided, that in all cases of high treason in compassing or imagining the death of the king, and of misprision of such treason, where the overt act alleged shall be the assassination or killing the king, or any direct attempt against his life or person, the trial shall be as in cases of murder; and none of the provisions of the statutes 7 *Wm. 3.* and 7 *Ann.* shall extend to such cases; but, upon conviction, the judgment shall be as in cases of high treason.

The Irish act 5 *Geo. 3. c. 21.* directs that every person who shall be accused and indicted under the 25 *Edw. 3.* shall have a copy of the indictment five days before trial, and shall be admitted to make his full defence by counsel, not exceeding two.

It is the practice to deliver the copy of the indictment, and the list of witnesses and jurors, ten clear days, exclusive of the day of delivery and the day of trial, and of intervening Sundays, previous to the trial. *Fost. 2. 230.*

We cannot help inserting in this place the opinion of the just and venerable judge *Foster*, on the subject of the indulgence given to prisoners accused of high treason, by the above statutes. No one will dare to suggest that that eminent writer on crown law was in the least degree an advocate for oppression or arbitrary power.

The furnishing the prisoner with the names, professions, and places of abode of the witnesses and jury, so long before the trial, may serve many bad purposes, which are too obvious to be mentioned; one good purpose, and but one, it may serve. It giveth the prisoner an opportunity of informing himself of the character of the witnesses and jury. But this single advantage will weigh very little in the scale of justice or sound policy, against the many bad ends that may be answered by it. However, if it weigheth any thing in the scale of justice, the crown is entitled to the same opportunity of sifting the character of the prisoner's witnesses. *Fost. 250.*

Equal justice is certainly due to the crown and the public. For let it be remembered that the public is deeply interested in every prosecution of this kind, that is well founded. Or shall we presume that all the management, all the practising upon the hopes or fears of witnesses, lieth on one side? It is true, power is on the side of the crown: may it, for the sake of the constitutional rights of the subject, always remain where the wisdom of the law hath placed it. But in a government like ours, and in a most changeable climate, power, if in criminal prosecutions it is but suspected to aim at oppression, generally disarmeth itself. It raiseth and giveth countenance to a spirit of opposition, which falling in with the pride or weakness of some, the false patriotism of others, and the sympathy of all, not to mention private attachments and party connections, generally turns the scale to the favourable side, and frequently against the justice of the case. *Fost. 251.*

The following observations of a more modern writer arising from the impunity, which has in fact not unfrequently taken place, in consequence of the nice distinctions between treason and other offences of an inferior nature, are well deserving of attention. "The present method of trial in high treason sometimes gives an unfair advantage to the real and most dangerous criminal. Before the act of King William, the advantage was on the side of the prosecution, and so tyrannically exercised in general as to have given occasion to the contrary extreme in the new law. This evil is most likely to occur in the case of those popular commotions out of which the constructive treason of levying war is drawn. If they who direct a prosecution in such case think proper to risk the benefit of public justice by so doing, let them take the consequences: but I would have them allowed a choice, and the use of their discretion. Let no defendant, indicted for murder or misdemeanor, be allowed to object that his case amounts to a higher crime. Some state prosecutions for treason have been justified by the argument that they could not be instituted for a less crime." *Luders's Law Tracts*, i. 134.

The reason of giving the prisoner a copy of the panel is, that he may inquire into the characters and qualifications of the jury, and make what challenges he thinks fit. But the copy may be delivered antecedent to the panel returned by the sheriff. For if he has a copy of the panel arrayed by the sheriff, which is afterwards returned into court, and there is no variation from it, the end and intent of the act is entirely pursued. 4 *Sta. Tri.* 649, 663, 664; 2 *Doug.* 590.

If there is any objection to the copy, as if it does not appear before whom the indictment was taken, or that it was taken at all, or in what place, this must be objected to before the plea. For the copy is given the prisoner to enable him to plead; therefore, by pleading, he admits that he has had a copy, sufficient for the purpose intended by the act. 4 *Sta. Tri.* 668.

By the 7 *Wm. 3. c. 3.* before cited, the prisoner is allowed to make his defence by counsel. And the court is authorized to assign him counsel, not more than two in number, who shall have free access to him at all seasonable hours. The counsel are to assist him throughout the trial, to examine his witnesses, and to conduct his whole defence, as well in points of fact, as upon questions of law. And this indulgence is extended to cases of impeachment in parliament, by 20 *Geo. 2. c. 30.* And see the Irish act, 5 *Geo. 3. c. 21.* and the 2 *Geo. 4. c. 24.*

Upon a joint indictment against several, each is intitled to two counsel. 1 *East, P. C. c. 2. § 48, 51.*

3. The arraignment is the calling the prisoner to the bar of the court, to answer to the matter charged in the indictment. Upon this, the indictment being read, it is demanded of the prisoner what he saith to the indictment; who either confesses, stands mute, pleads, or demurs.

A plea to the jurisdiction is where the indictment is taken before a court that has no cognizance of the offence. *Fitzharris*, in the Court of King's Bench, pleaded to the jurisdiction of the court, that he was impeached of high treason, by the commons of England in parliament, before the lords, and that the impeachment was still in force. But the court, after taking time to consider, held that the plea was insufficient to bar the court of its jurisdiction. 3 *Sta. Tri.* 259, 260; 4 *Sta. Tri.* 167.

Lord Macguire, an Irish peer, pleaded his privilege of peerage, but the court resolved he might be tried here. 1 *Sta. Tri.* 950; 4 *Sta. Tri.* 415.

Lord Delamere was indicted for high treason, before the lord high steward, during a prorogation of parliament, and pleaded to the jurisdiction of the court, that, as the parliament was not dissolved, he ought to be tried by the whole body of peers; the plea was over-ruled. 4 *Sta. Tri.* 212, 215.

The 7 *Wm. 3. c. 3. § 9.* provides, that the indictment shall

not be quashed for mis-writing, mis-spelling, or false or improper Latin, unless the exception is taken before any evidence is given.

Pleas in bar are general or special. The general issue is Not Guilty. Upon which the defendant is not merely confined to evidence in negation of the charge, but may offer any matter in justification or excuse. In short, the general issue goes to say, that the prisoner, under the circumstances, has not been guilty of the crime imputed to him.

Special pleas in bar are such as preclude the court from discussing the merits of the indictment; either on account of a former acquittal, or of some subsequent matter operating in discharge of the defendant.

A pardon may be pleaded in bar, either on the arraignment, or in arrest of judgment, or in bar of execution. By 13 *Rich. 2. st. 2. c. 1.* no pardon of high treason is good, unless the crime is expressly specified. See *Pardon*, II.

Sir H. Lane justified that what he did was by authority of parliament; that the king was out of possession of the kingdom; and that the parliament was the only governing power. But this was overruled by the court. *Kelynge*, 14. Neither can a man plead, by way of justification, that what he did was *ex defensione*. 2 *Hale, P. C.* 258.

A man may plead specially the limitation of the 7 *Wm. 3. c. 3. § 5.* that no man shall be indicted, tried, or prosecuted for certain treasons unless within three years after they are committed. See *ante*, V. 2.

A demurrer admits the facts stated in the indictment, but refers the law arising upon them to the determination of the court. As if the prisoner insists that the fact as stated is no treason.

After plea, the jurors are sworn, unless challenged by the party.

A peremptory challenge of thirty-five jurors is at this day allowable in cases of high treason. For though the 33 *Hen. 8. c. 23.* enacted, that in cases of high treason or misprision of treason, a peremptory challenge should not be allowed: yet the 1 & 2 *P. & M. c. 10.* enacts, that all trials for any treason shall be according to the order and course of the common law, which allowed this privilege. 3 *Inst.* 27; 2 *Hale, P. C.* 269; and see 7 & 8 *Wm. 3. c. 3. § 2.*

But by 33 *Hen. 8. c. 12.* which seems to be still in force, for treasons committed in the king's household, and tried before the lord steward, all challenge, except for malice, is taken away. See 2 *Hale, P. C.* 272; and further, tit. *Jury*. See 35 *Hen. 8. c. 2.* that treasons, committed out of the realm, may be tried before the King's Bench, or by commission in any shire, as if such treasons had been committed within the realm.

If a person be indicted by a several indictment for receiving and harbouring a traitor, he shall not be tried until the principal be convicted: if he be indicted in the same indictment with the principal, the jury must be charged to inquire first of the principal offender; and if they find him guilty, then of the fact of having received him: for though in the eye of the law they are both principals in the treason, yet in truth the receiver is so far an accessory that he cannot be guilty if the principal be innocent. *Fost.* 345; *Hale, P. C.* i. 238; ii. 222.

After the jury are sworn, and the indictment opened, the next step is proceeding to evidence of the charge.

The 7 *Wm. 3. c. 3. § 2.* enacts, that no person shall be indicted, tried, or attainted for high treason or misprision, except upon the oaths of two lawful witnesses; either both of them to the same overt act, or one of them to one, and the other to another overt act of the same treason; unless the prisoner willingly without violence, in open court, confesses the same: or stands mute; or refuses to plead; or, in cases of high treason, peremptorily challenges more than thirty-five of the jury.

At common law, one positive witness was sufficient. But several statutes previous to the act of William required two;

but a collateral fact, not tending to the proof of the overt acts, may be proved by one. 5 St. Tr. 29.

If two distinct heads of treason are alleged in one bill of indictment, one witness produced to prove one of the treasons, and another witness to prove another of the treasons, are not two witnesses to the same treason, according to the intent of the act. In an indictment for compassing the king's death, the being armed with a dagger, for the purpose of killing the king, was laid as an overt act; and being armed with a pistol for the same purpose, as another overt act; it was held, that proving one overt act by one witness, and the other by a different witness, was good proof by two witnesses within the meaning of the act.

As there must be an overt act laid, so that which is laid must be proved; for if another act than what was laid was sufficient, the prisoner would never be provided to make his defence. But if more than one are laid, the proof of any one will maintain the indictment. Also if one overt act is proved, others may be given in evidence to aggravate the crime, and render it more probable. 1 Hale, P. C. 121, 122.

In *Sir Henry Vane's case* (*Howell's State Trials*, VI. 119, &c.) it was resolved that the treason laid in the indictment being the compassing of the king's death (which was in *Middlesex*), and the levying of war being laid only as one of the overt acts to prove the compassing of the king's death, though this levying of war were laid in the indictment to be in *Middlesex*, yet a war levied by him in *Surrey* might be given in evidence; for being not laid as the treason, but only as the overt act to prove the compassing, it is a transitory thing which may be proved in another county. But that if an indictment be for levying war, and that be made the treason for which the party is indicted, in that case it is local and must be laid in the county where in truth it was.

The rule here laid down is, that if the treason charged in the indictment be the compassing the death of the king, (which is one of the treasons specified in the 25 Edw. 3.) and the levying of war is laid as the overt act of such compassing in the county in which the prisoner is tried, other overt acts of levying war, besides those laid in the indictment, may be proved to have been committed in other counties, being overt acts of the same species of treason. On the authority of this and other cases, *East* in his *Treatise on the Pleas of the Crown*, states the rules in the following terms: "After proof of an overt act in the county in which the treason is laid, evidence may be given of any other acts of the same species of treason in other counties." *East*, P. C. 122, ad fin. citing *Parkin's case*, 4 St. Tr. 633, 13 *Howell*, 92, and *Layer's case*, 6 St. Tr. 240, 241. (16 *Howell*, 164, 291.) Again, in another passage, thus: "If one overt act be proved by one witness in the county in which the trial takes place, or which gives the grand jury jurisdiction to inquire, another overt act, of the same species of treason, proved by another witness in a different county, will make two witnesses within the statute." *East*, P. C. 130, citing *Layer's case*, and *Gavan's case*, 2 St. Tr. 879. (7 *Howell*, 405, 406.)

There is no doubt, (says Phillips in his *State Trials* reviewed, 289, &c.) that the reported language of the judges in the cases cited by *East*, and in many other cases of a much more recent date, fully warrants these statements. Yet on consideration it appears to be clear that the rule laid down in *Sir H. Vane's case*, and in most of the cases referred to, requires a very material limitation. The correct rule appears to be this; that any overt act of the prisoner, tending to prove the overt act laid in the indictment, may be given in evidence, whether committed in the same or in a different county. But if the overt act proposed to be proved is not itself laid in the indictment, nor tends to prove any other overt act which is laid, it ought not to be admitted in proof. Such is the principle laid down by *Holt*, C. J. in *Rookwood's case*, 13 *Howell*, St. Tr. 220, where the rule is much more correctly expressed than either in *Parkin's case* or *Layer's case*. *Holt*, in *Rook-*

wood's case, commenting on § 8. of 7 Wm. 3. c. 3. which enacts, "that no evidence shall be admitted or given of any overt act, that is not expressly laid in the indictment, against any person whatsoever," observes, that "the act does not exclude such evidence as is proper and fit to prove that overt act which is laid in the indictment. Therefore the question is," he adds, "whether the giving of the list (which was the overt act not laid, to the proof of which an objection had been taken) does not prove some overt act that is laid in the indictment." It may be remarked also, that in *Parkin's* as well as *Layer's case*, although the language of the court, as reported, is more extensive and general than the language of *Holt* in *Rookwood's case*, yet the overt act which had been committed in another county, and which was allowed to be proved, did directly tend and contribute to the proof of the overt act laid in the indictment. See *Foster*, 245. In the state trials of 1746, the rule frequently laid down and acted upon was, that acts of treason tending to prove the overt acts laid, though done in a foreign country, might be given in evidence. *Foster*, 10. On the other hand, *Vaughan's case* clearly establishes the converse of the proposition; namely, that unless the proposed evidence tend to the proof of some overt act laid in the indictment, it ought to be rejected. *Foster*, 246. and see *Harrison's case*, 1 *Phillips's St. Tr.* 255.

These remarks (continues Mr. Phillips) may not be without their use in preventing error and misconception on a point of some importance. The difference between the two rules here considered is very great, the one allowing proof of all overt acts, not laid in the indictment, provided only they are overt acts of the same species of treason as that described in the record; the other admitting only such proof as tends or contributes to prove some overt act which is charged. According to this latter rule, which appears to be the most correct, the prisoner is previously in the same situation on a trial for treason as in any other criminal proceeding; in which it is perfectly just, that any act done by him in any county (or in any part of the world) should be brought forward against him to prove the specific charge on which he is tried, and of which charge he has had notice. But according to the other rule, overt acts of a description the most irrelevant and extraneous may be proved in any number, and to any extent; subject only to this restriction, that they are not overt acts of a different species of treason. And when it is considered that although the treason is the crime, the overt act is the act charged to have been done in the prosecution of the traitorous intent, and is therefore substantially the charge on which he is to be tried, it is plain that if such evidence were to be admitted, the prisoner would be partly tried, and perhaps his conviction might in the result principally turn on the proof of facts entirely unconnected with the specific act charged, and brought forward at the trial for the first time. In this manner the accused might be taken by surprise, and thus be without any means of defence. Such a course would be inconsistent with the principle observed in other criminal proceedings. See *Phillips's State Trials*, i. p. 287. 292. &c. 1826.

As the levying of war is made by the 25 Edw. 3. a distinct and substantive act of treason, it has been contended that this is a strong ground for inferring that the mere conspiring to levy war ought not to be construed as an overt act of compassing and imagining the death of the king. But as the strongest of all proofs to evidence a design of killing would manifestly be the proof of an actual attempt to kill, so it cannot be disputed that the conspiring to kill is equally strong evidence of the same design. It is therefore an unreasonable conclusion that the person who designs the overthrow of the king, designs also his death. The same may be said of a conspiracy with foreigners to procure an invasion of the kingdom, and of a conspiracy to raise insurrection and rebellion, and to seize the king's guards, which were the overt acts in *Lord Russell's case*. These may therefore be properly laid as

overt acts of the imagining and compassing the king's death, and the proof of any one of these conspiracies is *competent evidence* of such traitorous design for the consideration of the jury, affording (not a presumption or absolute conclusion of law,) but a reasonable and natural presumption of *fact*, on which the jury are to determine whether the accused did in fact imagine and design the death of the king.

This question is not now of such general importance as formerly; the *st. 36 Geo. 3. c. 7*, (see ante, III. 4.) containing many more extensive provisions than the *stat. of Edw. 3.* has very materially narrowed such discussions by making some acts amount to *substantive acts* of treason which would only before be laid as overt acts. See *Phillips's State Trials reviewed*, vol. II. *Lord Russell's case and notes thereon*.

On an indictment for high treason in sending intelligence to the enemy, a letter sent by one of the conspirators in pursuance of the common design, with a view of reaching the enemy, is evidence against all engaged in the same conspiracy, 6 *T. R.* 527.

The same rules of evidence are observable in cases of parliamentary impeachments, as in the ordinary courts of judicature.

As to the confession, there have been doubts whether the 7 *Wm. 3. c. 3.* requires a confession upon the arraignment of the party; or a confession taken out of court by a person authorised to take such examination. Evidence of a confession proved upon the trial by two witnesses has been held sufficient to convict, without further proof of the overt acts. *Foster*, 241. See 1 *East's P. C. c. 2. § 66*. This point is however not clearly settled. But such confession out of court is evidence admissible, proper to be left to a jury, and will go in corroboration of other evidence to the overt acts.

We have seen that the prisoner is intitled by the act 7 *Wm. 3. c. 3.* to have a similar process of the court to compel witnesses to appear for him, to that which is usually granted to compel witnesses to appear against him; and by 1 *Ann. st. 2. c. 9. § 3.* the witnesses on the behalf of prisoners, before they give evidence, are to take an oath to depose the whole truth, &c. as the witnesses for the crown are obliged to do. And if convicted of wilful perjury in their evidence, they shall suffer the usual punishment.

The jury must be unanimous, and give their verdict in open court. No privy verdict can be given. 2 *H. P. C.* 300.

Upon the trial of peers in the Court of the Lord High Steward, a major vote is sufficient either to acquit or condemn; provided that vote amount to twelve or more. *Kelynge*, 56, 57. Therefore it has been usual to summon not less than twenty-three peers. See *Lord High Steward, Peers*.

After the trial and conviction, unless the prisoner has any thing to offer in arrest of judgment, the judgment of the court is awarded.

The punishment of high treason, in general, at common law, was very solemn and terrible. 1. That the offender should be drawn to the gallows, and not be carried, or walk; though usually (by connivance, at length ripened by humanity into law,) a sledge or hurdle was allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 2. That he should be hanged by the neck, and then cut down alive. 3. That his entrails should be taken out and burned, while he was yet alive. 4. That his head should be cut off. 5. That his body should be divided into four parts. 6. That his head and quarters should be at the king's disposal. 4 *Comm. c. 6*.

The king might, and often did, discharge all the punishment, except beheading, especially where any of noble blood were attainted; and now by 54 *Geo. 3. c. 146.* reciting the above punishment, it is enacted, that in all cases of high treason, in which, as the law then stood, the sentence or judgment ordered by law was such as before stated, the sentence in future shall be, that the offender shall be drawn on a hurdle to the place of execution, and there be hanged by the neck until he be dead; and that afterwards his head shall be severed from his body,

and the body, divided into four quarters, shall be disposed of as the king shall think fit. A proviso is added, that after sentence the king may by warrant, under the sign manual, direct that the offender shall not be drawn to the place of execution, but taken thither as may be directed, and that he may not be hanged but beheaded; and also to direct the disposal of the body, &c.

In the case of coining, which was formerly treason, but of a different complexion from the rest, the punishment was for male offenders to be drawn, and hanged by the neck till dead.

The punishment of women guilty of high treason was formerly to be burnt alive, and this was not altered till the 30 *Geo. 3. c. 48.* under which females are now to be drawn to the gallows, and there to be hanged.

Upon a writ of error to reverse an attainder in treason, because the party convicted was not asked what he had to say why judgment should not be given against him, the attainder was reversed: for he might have a pardon, or some matter to move in arrest of judgment. 2 *Salk.* 630; 3 *Mod.* 285. And the omission of any necessary part of the judgment for treason is error sufficient to reverse an attainder, as it is more severe and formidable in treason than for other crimes. 2 *Salk.* 632.

By 29 *Eliz. c. 2.* it was enacted, that no record or attainder for high treason, where the offender had been executed, should be reversed by the heirs of the offender for any error whatever.

The consequences of the judgment in treason are, attainder, forfeiture of all lands and tenements, and corruption of blood.

By the word proveably (or probably) attainted, in the 25 *Edw. 3.* a person ought to be convicted of the treason on direct and manifest proofs, and not upon presumptions or inferences; and the word attainted necessarily implies that the prisoner be proceeded against and attainted according to due course of law; wherefore, if a man be killed in open war against the king, or be put to death arbitrarily, or by martial law, and be not attainted of treason, according to the common law, he forfeits nothing; for which cause some persons, killed in open rebellion against the king, have been attainted by act of parliament. 3 *Inst.* 12.

See further *Descent, Forfeiture*, II. 1, *Tenures*.

TREASON, PETIT. Was where one, out of malice, took away the life of a subject, to whom he owed special obedience. It occurred only in three cases:—1. Of a servant killing his master or mistress. 2. A wife killing her husband. 3. A clergyman killing his superior. It was called petit treason in respect to high treason, which is against the king. 3 *Inst.* It is now abolished. See *Homicide*, III. 4.

TREASURER, *thesaurarius*.] An officer to whom the treasure of another is committed to be kept, and truly disposed of. The chief of these was the lord high treasurer of England, who was a lord by his office, and one of the greatest men of the kingdom. This great officer held his place *dum bene placito*, and was instituted by the delivery of a white staff to him by the king; and in former times he received his office by delivery of the golden keys of the treasury: he was also treasurer of the exchequer by letters-patent. Under the charge and government of the lord treasurer was all the king's wealth contained in the exchequer; he had the check of all the officers employed in collecting the customs and royal revenues: all the offices of the customs in all ports of England were in his gift and disposition; escheators in every county were nominated by him; and he made leases of all the lands belonging to the crown, &c. See 4 *Inst.* 104. The chancellor of the exchequer is under-treasurer, and a check on the treasurer. See *Under-Treasurer*.

By 31 *Edw. 3. st. 1. c. 12.* in writs of error the lord chancellor and lord treasurer shall cause the record and process of the exchequer to be brought before them, who are judges; but the writ is to be directed to the treasurer and barons, who have the keeping of the records. See *Error*.

If any one kill the treasurer, being in his place, doing his

office, it is high treason by 25 Edw. 3. c. 2. See *Judges, Treason*.

Besides the lord treasurer, there was a treasurer of the king's household, who was of the privy council, and with the comptroller, &c. had great power. A treasurer of the navy or war, see 35 Eliz. c. 4. and *post*. Treasurer of the king's chamber, 39 Hen. 8. c. 39. A treasurer of the wardrobe, 95 Edw. 3. c. 21.

The high and important post of lord high treasurer has of late years, like many other great offices, been esteemed too great a task for one person, and been generally executed by commissioners. The power of leasing the crown lands is now confided to the commissioners of woods, forests, and land revenues of the crown, under the direction of the commissioners of the treasury, in whom all the powers of lord high treasurer are vested by their commission.

By the 56 Geo. 3. c. 98. for consolidating the public revenues of Great Britain and Ireland, it is enacted, § 2. that the offices of lord high treasurer of Great Britain and lord high treasurer of Ireland shall be united into one office; and the person holding the same shall be called lord high treasurer of the United Kingdom of Great Britain and Ireland: and that whenever there shall not be any such lord high treasurer, his majesty may by letters-patent, under the great seal, appoint commissioners of his majesty's treasury, for executing the offices of treasurer of the exchequer of Great Britain, and lord high treasurer of Ireland: and that all officers and persons employed in the collection or management of the public revenue shall be in all respects subject to the control of such lord high treasurer or commissioners of his majesty's treasury.

By the same act, § 4. &c. his majesty is empowered to appoint a vice-treasurer for Ireland for the issuing money out of the exchequer of Ireland. See *Under-Treasurer*.

For regulating the office of treasurer of the navy, see the 1 Wm. 4. c. 42. by which all former acts relating to that office were consolidated and amended.

TREASURER, IN CATHEDRAL CHURCHES. An officer whose charge was to take care of the vestments, plate, jewels, relics, and other treasure belonging to the said churches. At the time of the reformation, the office was extinguished as needless in most cathedral churches; but is still remaining in those of Salisbury, London, &c.

TREASURER OF THE COUNTY. He that keeps the county stock. There are two of them in each county, chosen by the major part of the justices of the peace, &c. at Easter sessions: they must have 10*l*. a year in land, or 150*l*. in personal estate; and shall not continue in their office above a year; and they are to account yearly at Easter sessions, or within ten days after, to their successors, under penalties. The county stock, of which this officer has the keeping, is raised by rating every parish yearly; and is disposed to charitable uses, for the relief of maimed soldiers and mariners, prisoners in the county gaols, paying the salaries of governors of houses of correction, and raising poor rates, &c. The duty of these treasurers, with the manner of raising the stock, &c. is particularly specified in the 43 Eliz. c. 2; 7 Jac. 1. c. 4; 11 & 12 Wm. 3. c. 18; 5 Ann. c. 32; 7 Geo. 4. c. 64. &c. See further, *County-Rates, Poor*.

There are like officers in Ireland regulated by several acts of the Irish parliament.

TREASURER'S REMEMBRANCER. Was he whose charge is to put the lord treasurer and the rest of the judges of exchequer in remembrance of such things as were called on and dealt in for the king's behoof: he made process against all sheriffs, escheators, receivers, and bailiffs for their accounts. *Scotch Diet*. There was a like officer in the exchequer of England. See *Remembrancer*.

TREASURE-TROVE, *thesaurus inventus*; French, *trouvée*, found.] Money or coin, gold, silver, plate, or bullion, found hidden in the earth or other private place, the owner thereof being unknown.

In such cases, the treasure belongs to the king, and is part of his ordinary revenue; but if he that hid it be known, or afterwards found out, the owner, and not the king, is entitled to it. 3 Inst. 132; *Dalt. of Sheriffs*, c. 16. Also, if it be found in the sea, or upon the earth, it does not belong to the king, but to the finder, if no owner appears. *Brit.* c. 17; *Finch.* L. 177. So that it seems it is the hiding, and not the abandoning of it, that gives the king a property: Bracton defining it, in the words of the civilians, to be *vetus depositio pecunie*, L. 3. c. 3. § 4.

This difference clearly arises from the different intentions which the law implies in the owner. A man that hides his treasure in a secret place, evidently does not mean to relinquish his property; but reserves a right of claiming it again when he sees occasion: and if he dies, and the secret also dies with him, the law gives it to the king in part of his royal revenue. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it; and therefore it belongs, as in a state of nature, to the first occupant or finder; unless the owner appear and assert his right, which then proves that the loss was by accident, and not with an intent to renounce his property. 1 *Comm.* c. 8.

Formerly, all treasure-trove belonged to the finder. *Bract.* L. 3. c. 3; 3 Inst. 133; *Kitch.* 80. Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the king, which part was assigned to be all hidden treasure; such as is casually lost and unclaimed, and also such as is designedly abandoned, still remaining the right of the fortunate finder. And that the prince shall be entitled to this hidden treasure is now grown to be, according to Grotius, "*jus commune, et quasi gentium*;" for it is not only observed, he adds, in England, but in Germany, France, Spain, and Denmark. The finding of deposited treasure was much more frequent, and the treasures themselves more considerable, in the infancy of our constitution, than at present; and therefore the punishment of such as concealed from the king the finding of such hidden treasure was formerly no less than death, but now it is only fine and imprisonment. *Glanv.* l. 1. c. 2; 3 Inst. 133.

Nothing is said to be treasure-trove but gold and silver. It is every subject's part, as soon as he has found any treasure in the earth, to make it known to the coroners of the county, &c. *Britton*, cap. 17; *S. P. C.* 25. Coroners ought to inquire of treasure-trove, being certified thereof by the king's bailiffs, or others, and of who were the finders, &c. 4 Edw. 1. st. 2. And seizures of treasure-trove may be inquired of in the sheriff's torn. 2 *Hank. P. C.* c. 10. § 57.

But where it has been granted by the king to the lord of a manor or other liberty, the court-leet ought not then to inquire of such seizure, for it is contrary to law for the leet to take cognizance of trespasses done to the private damage of the lord, since that would be to make him judge in his own cause. 2 *Hank.* c. 10. § 57.

Larceny cannot be committed of treasure-trove before it is seized by the king or his grantee. See *Larceny*.

TREASURY. Signifies sometimes the place where the king's treasure is deposited; and at other times the office of treasurer. *Comell*.

TREATIES, LEAGUES, AND ALLIANCES. See *King*, V. 3.

TREBUCHET, TREBUCKET, TRIBUCH, *terbiche-tum*.] A tumbril or cucking-stool. Also a great engine to cast stones to batter walls. 3 Inst. 219; *Matt. Paris*, 1246; *Knighton*, An. 1332. See *Castigatory*.

TREES. See *Malicious Injuries*, 7; *Timber*.

TREET, triticum.] Fine wheat; mentioned in the 51 Hen. 3. See *Bread*.

TREMAGIUM, TREMESIUM, TERMISIUM. The season or time of sowing summer corn, being about March, the third month, to which the word may allude; and corn

sowed in March is by the French called *tremes* and *tremois*. Tremesium was the season for summer corn, barley, oats, beans, &c. opposed to the season for winter corn, wheat and rye, called *hibernagium*; and is thus distinguished in old charters. *Cartular. Glaston. MS.* 91.

TREMELLUM. A granary. *Mon. Ang.* i. 470.

TRENCHATOR, from Fr. *trancher*, to cut.] A carver of meat at a table. In the patent rolls, mention is made of a pension granted by the king to A. B. *uni trenchiatorum nostrorum*, &c.

TRENCHIA. A trench, or dike newly cut. *Peramb.* 33 Hen. 3.

TRENTAL, triennale; Fr. trentale.] An office for the dead, that continued thirty days, or consisting of thirty masses; from the Ital. *trenta*, i. e. *triginta*. 1 *Edw.* 6. c. 14.

TREPGET See *Trebuchet*.

TRESAYLE. Was the name of a writ sued on ouster by abatement on the death of the grandfather's grandfather. It has long been obsolete, and is now abolished. See *Assize of Mort d'Ancestor*.

TRESPASS,

TRANSRESSIO.] Any transgression of the law less than treason, felony, or misprision of either; but it is most constantly used for that wrong or damage which is done by one private man to another, or to the king in his forest, &c.: in which signification it is of two sorts,—trespass general, otherwise called trespass *vi et armis*, and trespass special, or upon the case. *Bro. Trespas; Bract. lib.* 4.

Trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property. Therefore beating another is a trespass, for which an action of trespass *vi et armis* in assault and battery will lie. Taking or detaining a man's goods are respectively trespasses, for which an action of trespass *vi et armis*, or on the case in trover and conversion, is given by the law: so also non-performance of promises or undertakings is a trespass, upon which an action of trespass on the case in *assumpsit* is grounded: and in general any misfeasance, or act of one man, whereby another is injuriously treated or damaged, is a transgression, or trespass in its largest sense, for which an action will lie. 3 *Comm.* c. 12. See *Action, Assault, Mayhem*, &c.

Trespass supposes a wrong to be done with force; and trespasses against the person of a man are of several kinds, viz. by menacing or threatening to hurt him; assaulting or setting upon one to beat him; battery being the actual beating of another; maiming of a person, so that he loses the use of his limbs; by imprisonment, or restraining him of his lawful liberty, &c.

Trespasses against a man's property may be committed in divers cases; as against his wife, children, or servants, or his house and goods, &c.; and against his land, by carrying away deeds and evidences concerning it, cutting the trees, or spoiling the grass therein, &c. *F. N. B.* 86, 87; *Finch.* 198, 201; 2 *Roll. Abr.* 545.

Trespass *vi et armis* may be brought by him that hath the possession of goods, or of a house, or land, if he be disturbed in his possession; for the disturbance, besides the private damage, is also a breach of the public peace. 1 *Inst.* 57; 6 *East*, 602.

It is a settled distinction, that where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis*; but where there is no act done, but there is only a culpable omission, or where the act is not immediately injurious, but only by consequence and collaterally, there no action of trespass *vi et armis* will lie, but an action on the special case for the damages consequent on such omission or act. 11 *Mod.* 180; *Ld. Raym.* 1402; *Stra.* 635; 3 *Comm.*

c. 8. p. 123; c. 12. p. 208. The distinctions in these cases are frequently very delicate. See the subject much considered in 2 *Black. Rep.* 892.

Where the defendant's servant was driving him in a gig and the horse ran away and did an immediate injury to the plaintiff's property, it was held that the action was well brought in trespass. 1 *C. & M.* 29.

It is a direct trespass to injure the person of another by driving a carriage against the carriage in which such person is sitting, although the last-mentioned carriage is not the property nor in the possession of the person injured. 7 *Taunt.* 698.

A court which is not a court of record cannot hold plea of trespass *vi et armis*. *F. N. B.* 85. Writs of trespass lie either to the sheriff to determine the matter in the county court, or returnable in B. R. or C. B. *F. N. B.* 88, 190. Trespass *quare vi et armis clausum fregit* was brought, wherein the plaintiff laid damage to the value of 20s. and the defendant demurred for that cause, alleging that B. R. could have no cognizance at common law, or by the statute of Gloucester, to hold plea in an action where the damages are under 40s. But it was adjudged that trespass *quare vi et armis* will lie in this court, be the damages what they will. 3 *Mod.* 275.

At common law, in trespass *vi et armis*, if the defendant was convicted, he was to be fined and imprisoned; but in other trespasses only amerced. *Jenk. Cent.* 185.

I. Of Trespass for Personal Injuries.

II. ——— for Injuries to Personal Property.

III. ——— for Injuries to Real Property.

IV. ——— under colour of Legal Proceedings.

V. Of the Pleadings, &c.

I. TRESPASS is the only remedy for a menace to the plaintiff, attended with consequent damages, 3 *Comm.* 120; and for an illegal assault, battery, and wounding, or imprisonment, when not under colour of process. 11 *Mod.* 180, 181. It lies also when the battery, imprisonment, &c. were in the first instance lawful, but the party, by an unnecessary degree of violence, became a trespasser *ab initio*, *Com. Dig. tit. Trespas*, C. 2; and for a wrongful imprisonment after the process is determined, *Cro. Jac.* 379; or for an assault after an acquittal for a felonious assault and stabbing, 12 *East*, 409.

So it lies for an injury to the relative rights occasioned by force, as for menacing tenants, servants, &c. and beating, wounding, and imprisoning a wife or servant, 2 *M. & S.* 436; whereby the landlord, master, or servant, hath sustained a loss, though the injury, the loss of service, &c. were consequential, and not immediate; and it lies for criminal conversation, 7 *Mod.* 81; 2 *Salk.* 552; 6 *East*, 387; seducing away a wife, *Fitz. N. B.* 89; 6 *East*, 387; or servant, 2 *Salk.* 552; 5 *T. R.* 361; or for debauching the latter, 3 *Wils.* 562, 18, 19; 2 *New Rep.* 476; 2 *M. & S.* 436; force being implied, and the wife and servant being considered as having no power to consent; and a count for beating the plaintiff's servant *per quod servitium amisit*, may be joined with other counts in trespass; 2 *M. & S.* 436, 2 *New Rep.* 476; and though it has been usual to declare in case for debauching a daughter, 2 *T. R.* 167; 6 *East*, 387, it is now thought preferable to declare in trespass; 2 *New Rep.* 476; 2 *M. & S.* 436. See 1 *Chitty on Pleading*.

II. TRESPASS lies for taking or injuring all inanimate personal property, and all domiciled and tame animals, as dogs and cats; 1 *Saund.* 84, n. 2, 3; *Cro. Eliz.* 125, 3 *T. R.* 37, 38; and all animals usually marketable, as parrots, monkeys, &c.; and in which case it is not necessary to show in the pleadings that they have been reclaimed; *Cro. Jac.* 262; but in the case of a hawk, pheasant, hare, rabbit, fish, or other

animal *feræ naturæ*, and not generally merchandizable, it should be shown in the pleadings that the same were reclaimed or dead, or at least that the plaintiff was possessed of them. *Bac. Ab. Tresp.* 1; *Cro. Jac.* 262; 1 *Ld. Raym.* 251. So it lies in some cases for taking animals *feræ naturæ*, and not reclaimed; as if a hare or rabbit be killed on the land of another, he having a local property *ratione soli* in such hare or rabbit, may support trespass for taking it, though the wrongdoer did not enter the land. 2 *Salk.* 556; 1 *Ld. Raym.* 251.

In trespass for taking goods, the plaintiff must allege a property in himself, because in such case there may be two intendments, one that they were the defendant's own goods, and then the taking is lawful; and the other, that they were the goods of the plaintiff, when the taking will be wrongful; but wherever the construction is indifferent, it shall always be most strong against the plaintiff. 2 *Lev.* 20; *Yelv.* 36.

With respect to the plaintiff's interest in the personal property affected, he must, at the time the injury was committed, have had an actual or constructive possession; 1 *T. R.* 480; 4 *T. R.* 496; 7 *T. R.* 9; and also a general or qualified property therein, which may be either, 1st, in the case of the absolute or general owner entitled to immediate possession; 2dly, the qualified owner coupled with an interest, and also entitled to immediate possession; 1 *B. & P.* 44; 7 *T. R.* 9; 3dly, a bailee with a mere naked authority, unaccompanied with any interest, except as to remuneration for trouble, &c. but who is in actual possession; or, 4thly, actual possession, though without the consent of the real owner, and even adverse.

In the first instance, the person who has the absolute or general property may support this action, although he has never had the actual possession, or although he has parted with his possession to a carrier, servant, &c. giving him only a bare authority to carry or keep, &c. not coupled with an interest in the thing; 7 *T. R.* 12; 12 *East*, 33; it being a rule of law that the general property of personal chattels *primâ facie*, as to all civil purposes, draws to it the possession. 2 *Saund.* 47, a, b, d; 2 *Bulstr.* 268; 7 *T. R.* 9. But if the general owner part with his possession, and the bailee, at the time when the injury was committed, have a right exclusively to use the thing, the interference of possession is rebutted, and the right of possession being in reversion, the general owner cannot support trespass, but only an action on the case, for an injury done by a stranger while the bailee's right continued. 4 *T. R.* 489; 7 *T. R.* 9; 15 *East*, 607. Nor can the general owner in such case support this action even against such bailee for mere abuse; though if a bailee destroy the thing, trespass may be supported if the injury were forcible. If however the general owner merely permit another gratuitously to use the chattel, such owner may sue a stranger for an injury done to it while it was so used. 2 *Camp.* 464; 3 *Camp.* 187; 16 *East*, 33.

In the second case also, that of the bailee who has an authority coupled with an interest, it should seem that trespass may be supported, though he never had actual possession, for any injury done during his interest; 1 *B. & P.* 45; 16 *East*, 33. As in the case of a factor or consignee of goods in which he has an interest in respect of his commission, &c. *But. N. P.* 33; 1 *Hen. Bla.* 81; 1 *T. R.* 113; 7 *T. R.* 359. The quantity or certainty of the interest is not material, and therefore a shopkeeper may maintain trespass for taking goods sent to him on sale or return. 2 *Camp.* 575. So a tenant for years has a qualified property in the soil growing, and may support trespass for cutting them down, unless they were excepted in the lease, though he cannot support this action for merely carrying the trees away; 2 *Camp.* 491; 2 *M. & S.* 499. And if a person have a right to cut all the thorns in such a place, he may sustain trespass against any one who cuts them down, even against the grantor; but if he have only estovers, and the grantor cuts the whole, the

remedy is case, and not trespass. 2 *Salk.* 638; 8 *East*, 394; 2 *M. & S.* 499. And a mere gratuitous bailee may support this action, 1 *B. & A.* 59; or an executor *de son tort*.

In the third instance, that of a bailee, &c. with a mere naked authority, coupled only with an interest as to remuneration, he may also support this action for any injury done while he was in the actual possession of the thing; as a carrier, factor, paynee, a sheriff, &c. 2 *Saund.* 47 b; 1 *Roll. Abr.* 551. But it is otherwise of a mere servant. *Owen*, 52; 3 *Inst.* 103; 2 *Comm.* 396; 2 *Saund.* 47 b, c, d.

However, the master of a fly-boat, hired by a canal company at weekly wages, may maintain trespass for an injury done to a rope belonging to the boat. 2 *B. & Ad.* 817. See also 1 *Salk.* 10.

An instance of the fourth description is the finder of any article, who may maintain trespass or trover against any person but the real owner. 2 *Saund.* 47 d; 4 *Taunt.* 547. And even a person having an illegal possession may support this action against any person but the legal owner. 2 *Saund.* 47 c; 3 *Wils.* 332; 1 *East*, 244. And a person in possession under an assignment, fraudulent as against creditors, may support trespass against a person who cannot show that he was justified in what he did as a creditor. 2 *Marsh.* 233.

With respect to the nature of the injury, it may be either by an unlawful taking of the personal chattel, or by injuring it whilst in the possession of the general owner, or of a person having a special property in it, as a bailee.

Trespass is a concurrent remedy with trover for most illegal takings. 3 *Wils.* 336. Thus even in the case of a distress for rent, where there has been an illegal taking, as for distraining when no rent was due, or taking implements of trade or beasts of husbandry when there was sufficiency of other property, 1 *Burr.* 579; 4 *T. R.* 565; or a horse while his rider was upon him, 4 *T. R.* 469; 6 *T. R.* 138; or if a distress be made, the outer door being shut; or if the party expel the tenant, or continue in possession without leave more than five days, trespass lies, 1 *East*, 139; 11 *East*, 395; for the 11 *Geo. 2. c. 19*, which enacts, that a party distraining for rent shall not be a trespasser *ab initio*, 1 *H. Bl.* 13, only relates to wrongs done after a lawful taking. 1 *Lyp.* 382.

So if a man voluntarily take away my goods or cattle, and keep them till I pay him money, on pretence that they are his heriot, &c. when they are not so, I may have action of trespass. *Bro. Tres.* 354.

This action also lies though there has been no wrongful intent, 1 *Camp.* 497; 2 *Camp.* 576; as if a sheriff or a messenger, on behalf of assignees of a bankrupt, by mistake take the goods of a wrong person. 2 *Camp.* 576.

Thus if the sheriff have a writ against the lands and goods of one man, and he by mistake execute it upon my lands or goods; this action lies against him, and it will be no excuse that the plaintiff or any other informed him they were the goods, &c. of the defendant. *Dyer*, 296; *Keilw.* 119, 129.

But it does not lie in the case of a levy under an execution after a secret act of bankruptcy, when trover only can be supported. 1 *T. R.* 480. If the sheriff or a stranger illegally take the goods of another in execution, and sell and deliver them to a third person, trespass cannot be supported against the latter, because they came to him without fault on his part. 2 *Roll. Abr.* 556, pl. 50. But if a second trespasser take goods out of the custody of the first trespasser, the owner may support trespass against such second taker, his act not being excusable. *Sid.* 438. This action may be supported against a bailee who has only a bare authority, as if a servant take goods of his master out of his shop, and convert them. 1 *Leon.* 87; *Cro. Eliz.* 781. So it is sustainable by an outgoing tenant against the incoming tenant for taking manure, though the latter had a right to it on paying for it. 16 *East*, 116. But in general trespass is not sustainable against a bailee who has the possession coupled with

an interest, unless he destroy the chattel; nor against a joint-tenant or tenant in common for merely taking away and holding exclusively the property from his co-tenant, 1 *T. R.* 658; *Comp.* 480; because each has an interest in the whole, and a right to dispose thereof. 1 *Lev.* 29; 8 *T. R.* 145. But if the thing be destroyed, trespass lies, and case may be supported for injuring the thing. 1 *Ld. Raym.* 737; 8 *T. R.* 145. A bailee of a chattel for a certain time, coupled with an interest, may support this action against the bailor for taking it away before the time; *Godb.* 173; and it lies, though after the illegal taking, the goods be restored. *Bro. Abr. Tresp. pl.* 221.

When the taking is unlawful, either the general owner or the bailee, if answerable over, may support trespass; but a recovery by one is a bar to an action by the other, 2 *Saund.* 47 *e*; and it will not lie for a refusal to deliver when the first taking was lawful, trover or detinue being in such case the only remedies. *Sir T. Ray.* 472; 2 *Ventr.* 170.

Trespass also lies for any immediate injury to personal property occasioned by actual or implied force, though the wrong-doer might not take away or dispose of the chattel, as for shooting or beating a dog or other live animal, or for hunting or chasing sheep, &c.; *Barnes*, 452; 3 *T. R.* 37; or for mixing water with wine; *F. N. B.* 88; or running down a ship or a carriage; 1 *Camp.* 497; 3 *East*, 593. But it is said, though without reason, that for a mere battery of a horse, not accompanied with special damage, no action can be supported.

In some instances trespass may also be supported for an injury committed to personal property whilst in the lawful adverse possession of the wrong-doer, as where he has been guilty of an abuse which renders him a trespasser *ab initio*. *Bacon's Abr. Tresp. B.* This obtains in general whenever the person who first acted with propriety under an authority or licence given by law afterwards abuses it, in which case the taking as well as the real tortious act may be stated to be illegal, as in the *Six Carpenters' case*, 8 *Co.* 146 *b*; or for cutting nets lawfully taken damage feasant; or for working a horse, &c. distrained. *Cro. Jac.* 147; 3 *Wils.* 20; 1 *T. R.* 12. But in the case of a distress for rent, we have seen that in general a party cannot become a trespasser *ab initio* by an irregularity when the caption was lawful. See 1 *Chitty on Pleading*.

III. TRESPASS, in a limited and confined sense, as relates to land, signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of *meum* and *tuum*, or property in lands, being once established, it follows, as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil; every entry therefore thereon, without the owner's leave, and especially if contrary to his express order, is a trespass or transgression, for satisfaction of which an action of trespass will lie; but the *quantum* of that satisfaction is to be determined by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage sustained. 3 *Comm. c.* 12.

Every unwarrantable entry on another's soil the law entitles a trespass, by breaking his close; the words of the writ of trespass commanding the defendant to show cause *quare clausum quarentis fregit*. For every man's land is, in the eye of the law, enclosed and set apart from his neighbour's; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for if no other

special loss can be assigned, yet still the words of the writ itself specify one general damage, viz. the treading down and bruising his herbage. *F. N. B.* 87, 88.

A man is answerable for not only his own trespass, but that of his cattle also; for if by his negligent keeping they stray upon the land of another, (and much more if he permits, or drives them on,) and they there tread down his neighbour's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages. And the law gives the party injured a double remedy in this case; by permitting him to distrain the cattle thus damage feasant, or doing damage, till the owner shall make him satisfaction; or else by leaving him to the common remedy by action. And the action that lies in either of these cases of trespass committed upon another's land, either by a man himself or his cattle, is the action of trespass *vi et armis*; whereby a man is called upon to answer, *quare vi et armis clausum ipsius A. apud B. fregit, et blada ipsius A. ad valentiam centum solidorum ibidem nuper crescentia, cum quibusdam averiis depastus fuit, conculcavit, et consumpsit, &c.* *Registr.* 94. For the law always couples the idea of force with that of intrusion upon the property of another. And herein, if any unwarrantable act of the defendant or his beasts, in coming upon the land be proved, it is an act of trespass for which the plaintiff must recover some damages; such however as the jury shall think proper to assess. 3 *Comm. c.* 12.

If A. is bound to fence his close against B., and he against C. a neighbour; and neither of them inclose against one another, so that the beasts of C., for want of inclosure, go out of the ground to that of B., and thence to A.'s ground, in this case A. shall have trespass against C., for he is bound only to fence against B., and every one ought to keep his cattle as well in open grounds, not inclosed, as in several grounds where there is inclosure. *Dyer*, 366; *Jenk. Cent.* 161.

In cases where a man misdemeanors himself, or makes an ill use of the authority with which the law entrusts him, he shall be accounted a trespasser *ab initio*: as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night, contrary to the inclinations of the owner; this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass. *Finch. L.* 47; *Cro. Jac.* 148; 2 *Roll. Abr.* 361. But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser; for this is only a breach of contract for which the taverner shall have an action of debt or *assumpsit* against him. 8 *Rep.* 147. So, if a landlord distrained for rent, and wilfully killed the distress, this, by the common law, made him a trespasser *ab initio*: and so indeed would any other irregularity have done, till the statute 11 *Geo. 2. c.* 19. See *Finch. L.* 47; and tit. *Distress*. But still, if a reversioner, who enters on pretence of seeing waste, breaks the house, or stays there all night; or if the commoner, who comes to tend his cattle, cuts down a tree: in these and similar cases the law judges that he entered for this unlawful purpose; and therefore, as the act which demonstrates such his purpose is a trespass, he shall be esteemed a trespasser *ab initio*. 8 *Rep.* 146.

Trespass lies generally for breaking a man's close; for chasing cattle, whereby they die or are injured; taking away pales, and breaking of fences, or of doors or windows of a house; for driving a cart and horses over the ground of another, where there is no way for it; fishing in another person's pond, and for breaking the pond; for eating the corn of another with cattle, and digging in any man's coal-mines, and carrying away coals; for taking away so much of the plaintiff's money; tearing a bond, &c. 1 *Bro. Ab.* 338; 1 *Saund.* 220; 2 *Cro.* 463; *Latch.* 144.

Trespass lies for setting the end of a bridge on another man's soil, though it be a highway; 2 *Strange*, 1004; and

for erecting a stall in a market without agreeing for stallage. *Ibid.* 1238.

It lies, however unintentional the trespass, 3 *Lev.* 27; 1 *Campb.* 497; 2 *Campb.* 576; and though the *locus in quo* were uninclosed, *Doc. & Stud.* 30; 7 *East*, 207; or the door of the house were open, if the entry were not for a justifiable purpose, *Bac. Ab. Trespass*, F; 2 *Roll. Abr.* 555, l. 15; and even shooting at and killing game on another's land, though without an actual entry, is in law an entry, 11 *Mod.* 74, 130; 1 *Stark.* 58; though in general, when the injury was committed off the plaintiff's land; or by causing something to be suspended over it, but not touching it, the remedy must be case, 2 *Burr.* 1114; 11 *Mod.* 74, 130; 1 *Stark.* 59. And a mere nonfeazance, as leaving tithe on land, is not sufficient to support trespass: and it should seem, that for the mere continuance of an injury, for the inception of which the plaintiff has already recovered damages, case, and not trespass, is the proper remedy. 1 *Stark.* 22

With respect to the nature of the injury to real property, trespass only can be supported when the injury is committed with force, actual or implied and immediate. As to these injuries in general, see *Com. Dig. Trespass*, A. 2; *Bac. Ab. Trespass*, F.

As to the person by and against whom this action may be supported, it seems that actual possession is necessary to support the action; and if the right of possession be in reversion, it clearly cannot be sustained. Trespass lies against a mere tenant at will for pulling down a house, or cutting trees during tenancy at will, the interest being thereby determined, *Cro. Eliz.* 784; 5 *Co. 13 b*; *Co. Litt.* 57 a; *Saville*, 84; but against a lessee for years trespass for cutting down trees does not lie, and case in the nature of waste is the only remedy for the cutting, unless the trees were excepted in the lease, *Atkyns*, 83; 1 *Saund.* 322, n. 5; 4 *Taunt.* 316; though if he afterwards take the trees away, trespass or trover lies; *id. ibid.*; 7 *T. R.* 13; and if the trees be excepted in the lease, and he cut them down, trespass *quare clausum fregit* lies for such cutting, *Bro. Trespass*, pl. 55; 1 *Saund.* 322, n. 5; *Bac. Ab. Trespass*, C. 3. A tenant for years cannot support trespass against a stranger merely for carrying away trees cut down during his term. 2 *Campb.* 491; 2 *M. & S.* 499.

One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass; or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land. *Dyer*, 285; *Mo.* 456; 6 *East*, 602. Thus, if a meadow be divided annually among the parishioners by lot, then, after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their closes; for they have an exclusive interest and freehold therein for the time. *Cro. Eliz.* 421.

There is a material distinction between personal and real property as to the right of the owner: in the first case we have seen that the general property draws to it the possession sufficient to enable the owner to support trespass, though he has never been in possession. 2 *Saund.* 47 a; *Bul. N. P.* 33. But in the case of land and other real property there is no such constructive possession, and unless the plaintiff had the actual possession by himself or his servant, 16 *East*, 33, at the time when the injury was committed, he cannot support this action. 5 *East*, 485—487; *Bac. Ab. Trespass*, C. 3. Thus, before entry and actual possession, a person cannot maintain trespass, though he hath the freehold in law, as a parson before induction, *Fin. Abr. Entry*, G. 4. and *Trespass*, S.; *Bac. Abr. Leases*, M.; *Plowd.* 528; or a donee of a fine, 2 *Leon.* 147; or a purchaser by lease or release, though the statute executes the use, *Carter*, 66; *Fin. Abr. Trespass*, S. pl. 13, 14; *Noy*, 73; or an heir, *Plowd.* 142; 2 *Mod.* 7 n. a; devisee against an abator, 2 *Mod.* 7; or a lessee for years before entry, *Bac. Ab. Leases*, M.; *Plowd.* 142.

But a parson, after induction, may maintain this action for glebe land, though he make no actual entry, for the induction puts him in possession of part for the whole, 2 *B. & A.* 470; and a disseisee may have it against a disseisor for the disseisin itself, because he was then in possession; but not for an injury after the disseisin, 2 *Roll. Abr.* 553; *Dyer*, 98; 3 *Bl. Can.* 210; until he hath gained possession by re-entry; and then he may support this action for the intermediate damage; for after the entry the law, by a kind of *jus postlimini*, supposes the freehold to have all along continued in him. *Fin. Abr. Trespass*, 6; 11 *Co.* 51 a; 3 *Comm.* 210. And after recovery in ejectment this action may be supported for mesne profits, though anterior to the time of the demise in the declaration in ejectment. *Run. Eject.* 442; 2 *Burr.* 66, 67; *Peake's Law of Evid.* 326.

By the common law, in case of an intrusion or forfeiture, the party kept out of possession could not sue the wrong-doer by a mode of redress which was calculated merely for injuries committed against the land while in the possession of the owner. But now, by the 6 *Ann. c. 18.* if a guardian or trustee for any infant, a husband seized *jure uxoris*, or a person having any estate or interest determinable upon a life or lives, shall, after the determination of their respective interests, hold over and continue in possession of the lands or tenements, without the consent of the person entitled thereto, they are adjudged to be trespassers. See also 4 *Geo. 2. c. 18.* and 11 *Geo. 2. c. 19.* as to tenants for years, &c. holding over; and *ante*, tit. *Distress, Rent, Suffrance*, &c.

A remainder-man, after entering upon a party in possession by intrusion, may maintain trespass against the intruders, though he retains possession. 1 *M. & R.* 220; 7 *B. & C.* 399.

A grant of part of the chancel of a church by a lay improprator to A., his heirs and assigns, is not valid in law; and therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down their pews there erected. 1 *B. & A.* 498.

The plaintiff conveyed a chapel to A. (under whom the defendant justified) by a deed, the validity of which was disputable. A. however took possession and gave the key to a servant, who, with A.'s permission, lent the chapel to the plaintiff to preach in. The plaintiff locked the chapel and retained the key, upon which the defendant ordered the chapel to be broken open. Held, that the plaintiff had not such a possession as would entitle him to sue in trespass. 4 *Bing.* 7.

IV. The application of the action of trespass to injuries committed under colour of a legal proceeding may be considered under the seven following heads:—

First.—In general no action whatever can be supported for any act, however erroneous, if expressly sanctioned by the judgment or direction of one of the superior courts at Westminster, or even by an inferior magistrate acting within the scope of his jurisdiction. 1 *Wils.* 232; 1 *T. R.* 545; 7 *T. R.* 634, n. a; 3 *M. & S.* 411. And no action will lie against a judge for what he does *judicially*, though it were done maliciously. 7 *State Trials*, 442; 3 *M. & S.* 425. And this action does not lie, though the magistrates were not duly qualified to act. 3 *B. & A.* 266.

So trespass does not lie against magistrates acting upon a complaint made to them on oath, by the terms of which it appeared that they had jurisdiction, though the real facts of the case might not have supported such complaint, if such facts were not laid before them at the time by the party complained against, having notice of such complaint, and being properly summoned to attend. 8 *East*, 113.

In the only exception to this rule, that of a judgment obtained by threats or undue influence, an action of trespass against the person guilty of such conduct appears to be the proper remedy. 2 *Black.* 1055; 1 *T. R.* 538. And when

in inferior courts the error in the proceeding is such as to render it an *excess* of jurisdiction, trespass may be supported for any thing done under such proceeding. *Sir W. Jones*, 178; 1 *Wils.* 292; 1 *T. R.* 545. And in case of an error by a ministerial officer, this action may be supported, if the injury complained of was committed with force and immediate. 1 *Ld. Raym.* 471; 1 *Salk.* 395.

Secondly.—When the court has no jurisdiction over the subject-matter, trespass is the proper form of action against all the parties for any act which, independently of the process, would be remediable by this action, or by trover, if goods have been taken; *Hardr.* 483; 1 *B. & B.* 432; as where commissioners find water to be wine; *Hardr.* 483. And it has been decided, that when the proceedings in the court, having no jurisdiction, are adopted by a party with an express malicious intent, though there be a demand recoverable elsewhere, an action on the case may be supported, 10 *Co.* 78 a; 2 *Stra.* 993; 3 *Wils.* 345; or where the party maliciously and unduly issues a second *feri facias*, *Hob.* 205, 206; and where a party maliciously procured a magistrate to grant an illegal warrant, it was held he was liable in case for the malice. 2 *Chit. R.* 304.

Trespass is also the proper remedy where an inferior court has jurisdiction over the subject-matter, but is bound to adopt certain forms in its proceedings, from which it deviates, and whereby the proceedings are rendered *coram non judice*. *Sir W. Jones*, 171; 1 *East*, 61. But it lies not for arresting a person privileged either *personally* or *locally*, but case is the only remedy. 10 *Co.* 76 b; *Doug.* 646; 3 *Wils.* 379.

Thirdly.—When a court has jurisdiction, but the proceeding is *defective*, as being irregular or void, trespass against the attorney and plaintiff is in general the proper form to action, 3 *Wils.* 341; 2 *Black.* 845; and where a judgment has been set aside for irregularity, this is the appropriate remedy for an act done under it, 1 *Stra.* 509; and in the 2 *T. R.* 225, it was decided that an action on the case could not be sustained against a magistrate for issuing an irregular warrant, though maliciously; and that the action should have been trespass, (see also 2 *Stra.* 710; 3 *M. & S.* 425, 627;) for in general no action can be supported against a magistrate for any thing done by him in that capacity on the ground of malice, 1 *Wils.* 292; 1 *T. R.* 545; and if there be an irregularity, that must be treated as such in an action of trespass. But with regard to a party issuing irregular process, there seems no reason why the person prejudiced should not be at liberty to support an action on the case against him where there was no cause of action, and the proceeding was malicious as well as irregular, *Styler*, 378; 2 *Wils.* 302; for it would be allowing him to take advantage of his own wrong, to suffer him to turn the plaintiff round on such an objection, after he had in an action on the case proved the malicious and unfounded conduct of the defendant; and where a party maliciously procured a magistrate to issue an illegal warrant, he was liable in an action on the case. 2 *Chit. R.* 304.

Fourthly.—When the process has been *misapplied*, as when A. or his goods be taken upon process against B. trespass is in general the only remedy, 2 *Wils.* 309; 2 *Black.* 835; or if there be a misnomer in the process, though it be executed on the person or goods of the party against whom it was in fact issued. 6 *T. R.* 234; 8 *East*, 328.

Fifthly.—When the process of a court has been *abused*, 2 *T. R.* 234, trespass against the sheriff and his officer, or other ministerial officer, 2 *B. & A.* 472, committing the abuse, is the proper action, if the conduct of the officer was in the first instance illegal, and an immediate injury to the body, personal or real property; as if the officer arrest out of the sheriff's bailiwick, *Sir T. Jones*, 214; 2 *Black.* 834; or after the return day of the writ, 2 *Esp.* 585; or if he break open an outer door, &c., *Comp.* 1; or seize under a *feri facias* fixtures of the defendant, who was a freeholder, 5 *B. & A.* 625. So, though the conduct of the officer was

in the first instance lawful, but he abused his authority, and thereby became a trespasser *ab initio*. 2 *Black.* 1218.

And in some cases, though the abuse be merely a nonfeasance, trespass is the proper remedy; as if a sheriff neglect to discharge the party out of custody when he ought to do so, as for fees not due. 1 *Wils.* 153. These rules also hold as to the ministerial officers of courts of inferior jurisdiction, who abuse the trust reposed in them. However, in general, when the act complained of consists of a mere nonfeasance, as if the sheriff, or a magistrate, &c. improperly refuse bail, or to act, when they should do so, an action of trespass is not the proper remedy, but case. 3 *B. & P.* 551; 3 *M. & S.* 421.

Sixthly.—When a ministerial officer proceeds *without warrant*, on the information of another, trespass, and not case, is the proper form of action against the informer, if the information turn out unfounded, 6 *T. R.* 316; and when an officer proceeds without warrant and without foundation, upon his own apprehension, though there was probable cause, trespass is the proper form of action against him. 1 *Salk.* 396; 1 *Ld. Raym.* 454.

Seventhly.—But no person who acts upon a regular writ or warrant can be liable to this action, however malicious his conduct; but case, for the malicious motive and proceeding is the only form of action. 3 *T. R.* 185; 6 *T. R.* 315.

Trespass will not lie against a ministerial officer for any thing done merely in pursuance of his duty, though it is somewhat in support of a wrong, but a wrong to which he is no way accessory or assenting. As, where a distress is tortiously taken and impounded, an action will not lie against the pound-keeper. *Comp.* 476.

If a constable show to a party a magistrate's warrant against him, and the party then voluntarily accompany the constable to a magistrate without any personal arrest, and the magistrate, on examination, dismiss the party, this is not such an arrest as will enable him to support a trespass and false imprisonment against the constable. 2 *New R.* 211; and see 3 *Comp.* 139.

So also where a sheriff's officer, to whom a warrant on a writ against A. was delivered, sent a message to A. and asked him to fix a time to call and give bail; and A. accordingly fixed a time and gave bail; it was held that this was not an arrest on which an action for a malicious arrest could be supported, although the plaintiff in the action had no cause of action against A. 6 *Barn. & C.* 528; and see *Ry. & Moo. Ca.* 26; *Moo. & Mal. Ca.* 246; and see *Ry. & Moo. Ca.* 321.

Under peculiar circumstances it may be lawful to lay hands on a party to serve him with process. 10 *B. & C.* 44.

Where in an action for false imprisonment against a justice the jury found that the commitment was *bona fide* and intended for re-examination, but that it was for an unreasonable time; and it was objected that case was the proper remedy, and that trespass was not maintainable for such a commitment without improper or indirect motives; the court held the action well brought, and intimated an opinion, that where the time is unreasonable, the commitment is void from the beginning. 10 *B. & C.* 28.

Executors may bring trespass for goods taken out of their possession, or for goods and chattels taken in the life of the testator. Also administrators shall have it for goods of intestates; and an ordinary may bring action of trespass for goods in his own possession to administer as ordinary, &c.

Trespass will not lie against the master or seamen of a king's ship or privateer for taking a vessel as prize on the seas, though the capture is afterwards determined to be illegal in the Court of Admiralty; for questions of prize or not prize belong exclusively to that court, which gives damages for the detention. *Rous v. Hassard*, *Doug.* 580. See 1 *Lev.* 243; *Sid.* 267; *Lindo v. Rodney*, *Doug.* 501.

With respect to officers in the excise and customs various acts of parliament have been made to protect them in the exercise of their duty, that they might not be harassed with

actions of trespass where they have acted *bona fide*. See 7 & 8 Geo. 4. c. 53; and 3 & 4 Wm. 4. c. 53.

V. The declaration in this action contains a concise statement of the injury complained of, whether to the person, or to personal or real property, and it should allege that such injury was committed *vi et armis* and *contra pacem*.

In all trespasses there ought to be a voluntary act, and also a damage; and in detinue and trover, where the thing itself is in demand, it should be particularly named; if trespass be laid in a declaration for the taking of goods, without expressing the quantity and quality of them, or the value, &c. it is bad upon a general demurrer; though, as to the omission of the value, it hath been held to be good after verdict. *Latch*. 13; *Styl*. 170, 230; *Lutw*. 1384; *Sid*. 39.

In trespasses of a permanent nature, where the injury is continually renewed, (as by spoiling or consuming the herbage with the defendant's cattle,) the declaration may allege the injury to have been committed by continuation from one given day to another; (which is called laying the action with a *continuando*;) and the plaintiff shall not be compelled to bring separate actions for every day's separate offence. 2 *Roll. Abr.* 545; *Ld. Raym.* 240. But where the trespass is by one or several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando*; yet if there be repeated acts of trespass committed, (as cutting down a certain number of trees,) they may be laid to be done, not continually, but at divers days and times within a given period. *Salk.* 638, 639; *Ld. Raym.* 823; 7 *Mod.* 152.

Things must lie in continuance, and not terminate in themselves, or a *continuando* will not be good. And where a trespass is alleged with a continuance, that cannot be continued, the evidence ought only to be to the first act. 2 *Salk.* 638, 639.

The best way to declare for such trespasses which lie in continuance, is for the plaintiff to set forth in his declaration that the defendant, between such a day and such a day, cut several trees, &c. and not to lay a *continuando transgressionis* from such a day to such a day; and upon such declaration, the plaintiff may give in evidence a cutting on any day within those days. 3 *Salk.* 360.

Now by the rules of *H. T.* 4 *Wm.* 4. several counts in trespass for acts committed at the same time and place are not to be allowed.

If the defendant makes the place where the trespass was done material by his plea, he must show it with great certainty; but if it be a trespass *quare clausum fregit* in *B.* and the defendant pleads that the place where is his freehold, which is the common bar in this case, so justifies as in his freehold, &c. if issue be taken thereon, the defendant may give in evidence any close in which he hath a freehold; though if the plaintiff had replied and given the close a name, defendant must have a freehold in that very close. 2 *Salk.* 473; *Cather's Rep.* 170.

By the rules above mentioned in actions of trespass *quare clausum fregit*, the close or place in which, &c. must be described in the declaration by name, abutals, or other description, in failure whereof the defendant may demur specially.

In actions *quare clausum fregit*, the plea of not guilty, shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially.

In actions of trespass, *de bonis asportatis*, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

Where in action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages and cattle and

on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified.

And where in an action of trespass *quare clausum fregit* the defendant pleads a right of common of pasture for divers kinds of cattle, *ex gr.* horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified. And in all actions in which such right of way or common as aforesaid, or similar right, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

A plaintiff may make a new assignment of the place where, &c. and then the defendant may vary from his first justification. As, for instance, an action of trespass assigned to be done generally in *D.*, the defendant justified the taking damage-feasant; and the plaintiff in his replication made a new assignment, upon which the defendant justified for a heriot; and it was adjudged good. *Moor*, 540. The defendant in his plea may put the plaintiff to the new assignment; and every new assignment is a new declaration, to which the defendant is to give a new answer, and he may not traverse it, but must either plead or demur; yet where trespasses are alleged to be done in several places, and the defendant pleads to some, and agrees to the places wherein the plaintiff alleged the trespasses to be done, there the plaintiff may answer that part of the plea by a traverse, and show a new assignment as to the rest. *Cro. Eliz.* 492, 812. See *Pleading, New Assignment*.

One action of trespass may be brought for a trespass committed in lands which lie in several towns or villis, if they are in one and the same county; for else they cannot receive one trial, as they are local causes of action triable in the county where done. 2 *Litt. Abr.* 595.

As trespass *quare clausum fregit* is a local action, trespass for breaking and entering a house in Canada in America will not lie in this country. 4 *T. R.* 503.

In some cases trespass is justifiable; or, rather, entry on another's land or house shall not in those cases be accounted trespass: as, if a man comes thither to demand or pay money there payable; or to execute, in a legal manner, the process of the law. Also a man may justify entering into an inn or public house, without the leave of the owner first specially asked; because, when a man professes the keeping of such inn or public house, he thereby gives a general license to any person to enter his doors. See *tit. Inns*. So a landlord may justify entering to distrain for rent; a commoner to attend his cattle, commoning on another's land; and a reversioner, to see if any waste be committed on the estate; for the apparent necessity of the thing. 8 *Rep.* 146. Also it hath been said, that, by the common law and custom of England, the poor are allowed to enter and glean upon another's ground after the harvest, without being guilty of trespass; but modern determinations have denied this right. See *Gleaning*.

The common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land; because the destroying such creatures is said to be profitable to the public. *Cro. Jac.* 321. But in the case of hunting the fox or the badger, a man cannot justify breaking the soil, and digging him out of his earth; for though the law warrants the hunting of such noxious animals for the public good, yet it is held that such things must be done in an ordinary and

usual manner; therefore, as there is an ordinary course to kill them, viz. by hunting, the court held that the digging for them was unlawful. *Cro. Jac.* 321. See further, *Game*.

If a man hurt my beasts in ground belonging to me, or some other person, he is liable to action of trespass. Though the owner of the land wherein cattle are doing this trespass, may gently by himself, or his dogs, chase them out, and justify the same. *Bro. Tresp.* 421; *8 Rep.* 67.

A man may also justify in an action of trespass, on account of the freehold and right of entry being in himself; and this defence brings the title of the estate in question. This is, therefore, one of the ways devised, since the disuse of real actions, to try the property of estates; though it is not so usual as that by ejectment, because that being now a mixed action not only gives damages for the ejectment, but also possession of the land: whereas in trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered; nothing being recovered but damages for the wrong committed. *3 Comm. c.* 12. See *Ejectment*.

One justification in trespass also arises from the leave or licence of the party complaining; and as to this, the following has been stated as the difference:

There is difference between a positive abuse of an authority or licence in fact, and of an authority or licence in law: the reason of this difference is in one book said to be, that the abuse in the latter case is deemed a trespass with force *ab initio*; because the law intends from the subsequent tortious act, that there was from the beginning a design to be guilty thereof. *8 Rep.* 146. The *Six Carpenters'* case.

But this reason, which equally applies to both cases, is by no means conclusive; for it may be as well intended in the former case, from the subsequent tortious act, that there was from the beginning a design of being guilty thereof. Perhaps the difference between the two cases may be better accounted for in the following manner: in the one, where the law has given an authority or licence, it seems reasonable that the same law should, in order to secure the persons, who are without their direct assent made the objects thereof, from all positive abuses of such authority or licence, whenever either of these is positively abused, make the same void from the beginning; and leave the abuser thereof in the same situation as if he had acted without any authority or licence. And this agrees perfectly with the maxim, *Actus legis nemini facit injuriam*. But in the other case, where a man, who was under no necessity of giving an authority or licence to any person, has thought proper to give one of these to a certain person, who is afterwards guilty of a positive abuse thereof, there is no reason that the law should interpose, and make all that has been done under the authority or licence by him so voluntarily given, void from the beginning; because it was his own folly to place a confidence in a man who was not fit to be trusted. *Bac. Abr. Trespass*.

Where a defendant justifies a trespass for preventing a tortious act of the plaintiff, if the plaintiff relies on a licence which rendered his act lawful, he ought to reply the licence. *7 Taunt.* 156.

In action of trespass against two persons for carrying away goods, &c. one lets judgment go by default, and the other justifies under a licence from the plaintiff, and has a verdict; this goes to the whole, and judgment shall be arrested as to the other defendant. *2 Ld. Raym.* 1372, 1374.

In the execution of a criminal process against any man in the case of a misdemeanor, it is necessary to demand admittance before the breaking of the outer door can be legally justified. It seems otherwise in the case of felony. *2 B. & A.* 592. See *5 Co. Rep.* 91; and tit. *Arrest*.

A private person may justify breaking and entering the house of another and imprisoning his person in order to prevent him from committing murder on his wife. *2 Bos. & Pull.* 260.

To trespass for assault and battery the defendant may

plead that the plaintiff, with force and arms, and with a strong hand, endeavoured forcibly to break and enter the plaintiff's close, whereupon the defendant "did then and there resist and oppose such entrance, and did then and there defend his possession, as it was lawful for him to do;" and if any damage happened to the plaintiff, it was in the defence of the possession of the said close. *8 T. R.* 78.

In trespass *quare clausum fregit*, where the defendant in his plea claims an interest in the land, a replication *de injuria* is bad on general demurrer. *1 C., M. & R.* 258; and see *3 Lev.* 65; *3 B. & Ad.* 2.

A subsequent assent makes the party a co-trespasser only where the trespass was committed for his benefit. *4 B. & Ad.* 614; *1 N. & M.* 409.

If the defendant, in trespass *quare clausum fregit*, disclaim any title to the land, and the trespass is involuntary, or by negligence, he may be admitted to plead a disclaimer and tender of amends before the action brought, &c. And if it be found for the defendant, the plaintiff shall be barred. *21 Jac. 1. c.* 16. See *Tender*.

In general the court will not stay proceedings in trespass upon payment of a sum of money and costs, not even in the action of trespass for mesne profits, because the damages in these cases cannot be ascertained without the intervention of a jury, *2 Stra.* 906; *7 B. & C.* 379; but under peculiar circumstances, proceedings have been stayed in this action. See *7 T. R.* 53.

In order to prevent trifling and vexatious actions of trespass as well as other personal actions, it is (*inter alia*) enacted by the *43 Eliz. c.* 8; *22 & 25 Car. 2. c.* 9. § 136. that where the jury, who try an action of trespass, give less damages than 40s. the plaintiff shall be allowed no more costs than damages, unless the judge shall certify under his hand that the freehold or title of the land came chiefly in question. But this rule now admits of an exception made by the *8 & 9 Wm. 3. c.* 11. which enacts, that in all actions of trespass, wherein it shall appear that the trespass was wilful and malicious, and it be so certified by the judge, the plaintiff shall recover full costs. Every trespass is wilful, where the defendant has notice, and is especially forewarned not to come on the land; as every trespass is malicious, though the damage may not amount to forty shillings, where the intent of the defendant plainly appears to be to harass and distress the plaintiff; as in cases of sportsmen warned to go off or not to come again on another's land. *Esp. N. P.* 4-5.

There was formerly another exception under the *1 & 5 W. & M. c.* 23, which gave full costs against any intruder, tradesman, apprentice, or other dissolute person, convicted of a trespass in hawking, hunting, fishing, or fowling, on another's land; but that statute has been repealed by the *1 & 2 Wm. 4. c.* 32. For the provisions of this act with respect to trespasses committed in pursuit of game, see *Game*, VII.

See further on this subject, *Chitty on Pleading*; and tit. *Issue, New Assignment, Pleading*.

TRESPASSER. One who commits a trespass. See *Trespass*.

TRESTORNARE. To turn or divert another way; *tornare viam*, to turn the road. *Conell*.

TREYTS, Fr.] Taken out or withdrawn, applied to a juror removed or discharged. *F. N. B.* 159.

TRIAL,

TRIATIO.] The examination of a cause civil or criminal, before a judge who has jurisdiction over it, according to the laws of the land. *1 Inst.* 124; *Finch. L.* 36.

I. Of the Course of Trial in Civil Cases.

II. ————— in Criminal Cases.

III. Of New Trials.

I. **TRIAL** is the examination of the matter of fact in issue of which there are many different species, according to the

difference of the subject to be tried: as for example, trial by record, by inspection or examination, by certificate, by witnesses, and by jury.

The first four of these species of trial are only had in certain special and eccentric cases, where the trial by the country, *per pais*, or by jury, would not be so proper or effectual. See *Certificate, Inspection, Record*, as to those trials.

There were formerly two other kinds of trial, by wager of battle and by wager of law; but the former was abolished by the 57 Geo. 3. c. 46. and the latter by the 3 & 4 Wm. 4. c. 42. See further, *Battle, Wager of Law*.

Trial by witnesses, *per testes*, without the intervention of a jury, is the only method of trial known to the civil law, and is adopted by depositions in Chancery; the judge is thus left to form, in his own breast, his sentence, upon the credit of the witnesses examined. But it is very rarely used at common law, which prefers the trial by jury before it, in almost every instance, save only that when a widow brings a writ of dower, and the tenant pleads that the husband is not dead; this being looked upon as a dilatory plea, is in favour of the widow, and for greater expedition allowed to be tried by witnesses examined before the judges: and so, saith *Finch*, shall no other case in our law. But *Coke* mentions some others, as to try whether the tenant in a real action was duly summoned, or the validity of a challenge to a juror, so that *Finch's* observation must be confined to the trial of direct, and not collateral, issues. And in every case *Coke* lays it down that the affirmative must be proved by two witnesses at the least. 1 *Inst.* 6; 3 *Comm.* c. 22.

With respect to the summoning and appearance of the jury on the trial of civil cases by jury, see *Jury, I.*

Trials by the country are at bar, *nisi prius*, or before the sheriff, under the 3 & 4 Wm. 4. c. 42. See *post*.

TRIALS AT BAR are those which take place before all the judges at the bar of the court in which the action is brought. Before the *stat. Westm. 2. 13 Edw. 1. c. 30.* civil causes were tried either at the bar of the court, or when of no great moment, before the justices in eyre, a practice having very early obtained, of continuing the cause from term to term in the court above, provided the justices in eyre did not previously come into the county where the cause of action arose; and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices at Westminster to that of the justices in eyre. See *Jury, I.* Afterwards, when the justices in eyre were superseded by the modern justices of assize, it was enacted by the above statute, "that inquisitions to be taken of trespasses pleaded before the justices of either bench, shall be determined before the justices of assize, unless the trespass be so heinous that it requires great examination; and that inquisitions of other pleas pleaded in either bench, wherein the examination is easy, shall be also determined before them: but inquisitions of many and weighty matters, which require great examination, shall be taken before the justices of the benches, &c.; and when such inquests are taken, they shall be returned into the benches, and there judgment shall be given, and they shall be inrolled." Since the making of this statute, causes in general are tried at *nisi prius*, trials at bar being only allowed in ejectment, and other causes which require great examination. This statute, extending only to the Courts of King's Bench and Common Pleas, whenever an issue is joined in the Exchequer, to be tried in the country, there is a particular commission, authorising the judges of assize to try it. *Bul. N. P.* 304.

When the crown is immediately concerned, the attorney-general has a right to demand a trial at bar. See 8 *B. & C.* 717. In all other cases it is entirely in the discretion of the court, governed by the circumstances of the case; even if the parties consent, such a mode of trial cannot be had without leave of the court. The grounds on which this trial ought

to be granted, are the great value of the subject-matter in question, the probable length of the inquiry, and the likelihood that difficulties may arise in the course of it. In ejectment, it is said, the rule has been not to allow a trial at bar except where the yearly value of the land is 100*l.*; and value alone, or the probable length of the inquiry, is not a sufficient ground for it, but difficulty must concur; and in order to obtain it upon that ground, it is not sufficient to say generally, in an affidavit, that the cause is expected to be difficult, but the particular difficulty which is expected to arise ought to be pointed out, that the court may judge whether it be sufficient. *Tidd's Prac.* and the authorities there cited.

If one of the justices of either bench, or a master in chancery, be concerned, it is a good cause for a trial at bar, be the value what it may; and it is said, that such trial was never denied to any officer of the court, nor hardly to any gentleman at the bar. The plaintiff may have a trial of this nature by the favour of the court, though he sue *in forma pauperis*. But where the plaintiff is poor, the court will not grant it to the defendant, unless he will agree to take *nisi prius* costs if he succeed; and if he fails, to pay *bar* costs. In London, it is said, a cause cannot be tried at bar, by reason of their charter, which exempts them from serving upon juries out of the city. But the great cause of *Lockyer* against *The East India Company* was tried at bar (*Mich. 2 Geo. 3.*) by a special jury of merchants of London. 2 *Salk.* 644; 1 *T. R.* 366. In that case, however, the jury consented to be sworn, and waived their privilege. 2 *Wils.* 136. And where the cause of action arises in a county palatine, it has been doubted whether the Court of King's Bench can compel the inhabitants of the palatinate to attend as jurors. *Tidd's Prac.*

A trial at bar is never granted before issue joined, except in ejectment; in which, as issue is very seldom joined till the term is over, it would afterwards be too late to make the application. This sort of trial should regularly be moved for in the term preceding that in which it is intended to be had, as in Hilary for Easter, and in Trinity for Michaelmas Term, except where lands lie in Middlesex; and it is never allowed in an issuable term, unless the crown be concerned in interest, or under very particular and pressing circumstances. In Easter Term they did not formerly allow more than ten trials at bar, and they must have been brought on a fortnight at least before the end of it, to allow sufficient time for the other business of the court. *Tidd's Prac.*

Now, by the 11 Geo. 4. and 1 Wm. 4. c. 70. § 7. the judges of the court may appoint such day or days for trials at bar as they shall think fit; and the time so appointed, if in vacation, shall, for the purpose of such trials, be deemed a part of the preceding term.

Anciently there was no other notice given of such trial than the rule in the office; but now there must be fifteen days' notice. The plaintiff, however, as in other cases, may countermand his notice, and prevent the cause from being tried at the day appointed; after which it cannot be brought to trial again, unless some new day be appointed by the court. And it is said that a second rule cannot be made for a trial at bar, between the same parties, in the same term. Previous to giving notice, the day appointed for the trial must be entered with the clerk of the papers; and it could not formerly have been on a Saturday or last paper day in term, except in the king's case. *Tidd's Prac.*

And by a rule of *H. T. 2 Wm. 4. c. 60.* "notice of trial at bar shall be given to the proper officer of the court, before giving notice of trial to the party."

A trial at bar is had upon the *venire facias* or *distringas*, &c. as at common law, without any clause of *nisi prius*; and it is mostly by a special jury of the county where the action is laid. But it may be had, by consent, by a jury of a different county; and in Berwick-upon-Tweed, &c. or where an impartial trial cannot be had, the jury must come from the next adjoining county where the king's writ of *venire* runs,

Six days' notice at least ought to be given to the jurors before the trial; and if a sufficient number do not attend to make a jury, the trial must be adjourned, and a *decem* or *octo tales* awarded, as at common law; for the parties in this case cannot pray a *tales* upon the statutes. See *Jury*. And no writ of *alias* or *pluries distringas*, with a *tales*, for the trial of issues at the bar, shall be sued out, before the precedent writ of *distringas*, with a panel of the names of the jury annexed, shall be delivered to the secondary of the court, to the intent that the issues, forfeited by the jury for not appearing upon the precedent writ, may be duly estreated.

The chief justice (or in his absence the senior judge) sums up the evidence; see 12 *St. Tri.* 426; and if any question of law arise, either collaterally or as forming a part of the case, each of the judges delivers his opinion upon it *seriatim*. *Id.* A bill of exceptions lies upon the reception of improper evidence on a trial at bar. 8 *B. & C.* 737. And each of the presiding judges may make such observations to the jury, upon the whole case, by way of direction, as he considers to be requisite. *Id.* In all other respects the trial at bar is the same as a trial at nisi prius; and after a trial at bar, if the parties be dissatisfied with the verdict, they may move for a new trial as in other cases. 1 *Burr.* 395.

TRIALS AT NISI PRIUS are always had in the county where the venue is laid, and where the fact was or is supposed to have been committed, except where the venue is laid in Berwick-upon-Tweed, &c. or in a county where an impartial trial cannot be had; in which cases the cause shall be tried in the next English or adjoining county where the king's writ of *venire* runs. *Tidd's Prac.* By 38 *Geo. 3. c. 52.* where the venue is laid in the county of any city or town corporate, the trial may be had by a jury of the county next adjoining, &c. See *Venue*.

In Wales, trials at nisi prius were formerly had in the next English county, but by the 11 *Geo. 4. and 1 Wm. 4. c. 70. § 19.* assizes shall be held for the trial and despatch of all matters criminal and civil within the county of Chester, and the several counties and county towns in Wales, under commissions of assize, oyer and terminer, gaol delivery; and other writs and commissions to be issued in like manner as for counties in England.

§ 20. regulates the manner in which such assizes shall be holden in North and South Wales. See *Wales*.

When the day of trial is fixed, the plaintiff or his attorney must bring down the record to the assizes, and enter it with the proper officer (the clerk of the papers), in order to its being called on in course. If it be not so entered, it cannot be tried; therefore it is in the plaintiff's breast to delay any trial by not carrying down the record, unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on the trial, giving proper notice to the plaintiff; which proceeding is called the *trial by proviso*, by reason of the clause then inserted in the sheriff's *venire*, viz. "Proviso, provided that if two writs come to your hands (that is, one from the plaintiff and another from the defendant), you shall execute only one of them." But this practice hath begun to be disused since the 14 *Geo. 2. c. 17.* which enacts that if after issue joined, the cause is not carried down to be tried according to the course of the court, the plaintiff shall be esteemed to be nonsuited, and judgment shall be given for the defendant as in case of a nonsuit. See *Nonsuit*.

Now, by the rules of *H. T.* no entry of the issue is necessary to entitle a defendant to take the cause down to trial by proviso; and by another rule of the same term, "no rule for trial by proviso shall be necessary;" and it is also ordered that "no trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made."

A defendant in a case where the king is party cannot carry down the nisi prius record to trial by proviso. 7 *T. R.* 661; and see 2 *East*, 202, 206, note.

In case the plaintiff intends to try the cause, he is bound to give the defendant (if he lives within forty miles of London) eight days' notice of trial; and if he lives at a greater distance, then fourteen days' notice, in order to prevent surprise; and if the plaintiff then changes his mind, and does not countermand the notice, six days before the trial, he shall be liable to pay costs to the defendant for not proceeding to trial, by the same last-mentioned statute. The defendant, however, or plaintiff, may, upon good cause shewn to the court above, as upon absence or sickness of a material witness, obtain leave upon motion to defer the trial of the cause till the next assizes. 3 *Comm. c. 23.*

The time when the countermand is to be given, is now regulated by the rules of *H. T. 2 Wm. 4.* By r. 61. "in country causes, or where the defendant resides more than forty miles from town, a countermand of notice of trial shall be given six days before the time mentioned in the notice of trial, unless that notice of trial has been given." And by r. 62. "in town causes, or where the defendant lives within forty miles of town, two days' notice of countermand shall be deemed sufficient." And by r. 57, such countermand notice may be given either in town or country, unless otherwise ordered by the court or judge.

The 14 *Geo. 2. c. 17.* only requires ten days' notice of trial; but at the sittings in London and Westminster, the former practice of fourteen days' notice was still continued. But in all country causes ten days' notice is sufficient. As where the commission day is on the fifteenth of any month, notice of trial must be given on or before the fifth. *Imp'ys Prac.*

Where a defendant residing in town at the issuing of the writ, changed his residence permanently into the country, at the distance of above forty miles from town, before the delivery of the issue, the Court of King's Bench allowed him to be entitled to fourteen days' notice of trial. 1 *East*, 688.

If a cause be made a *remand*, no new notice of trial need be given; but where the trial of a cause is put off to the ensuing sittings or assizes by rule of court, and even when a plaintiff gives a peremptory undertaking to try, a new notice of trial must be given. 8 *T. R.* 245; 1 *H. Bla.* 222.

Where there have been no proceedings within four terms, a full term's notice must be given previous to the assizes or sittings, unless the cause has been delayed by the defendant himself, by an injunction or other means. *Sutton's Prac.* 2 *Bla. Rep.* 784; 3 *T. R.* 530; and see 3 *East*, 1. If the defendant proceed to trial by proviso, he need not give a term's notice. 2 *B. & A.* 594. In cases where a term's notice of trial is required, by a rule of *H. T. 2 Wm. 4.* it may be given at any time before the first day of term. Sometimes the courts impose it as a condition upon the defendant, that he shall accept short notice of trial, which in country causes shall be given at least four days before the commission-day, one day being exclusive, and the other inclusive. 3 *T. R.* 660. And see the rule of *H. T. 2 Wm. 4. r. 58.* But in town causes two days' notice seems sufficient in such a case. *Tidd's Prac.*

There was formerly a difference in the practice of the courts as to the place of giving notice of trial, which by a rule of *H. T. 2 Wm. 4. r. 57.* shall now be given in town.

The old rule for entering causes in London and Middlesex was, that unless they were entered with the chief justice two days before the sittings upon which they were to be tried, the marshal might enter a *ne recipiatur* at the request of the defendant or his attorney. And this rule still holds with regard to trials at the sittings in term. But if a cause was to be tried at the sittings after term, no *ne recipiatur* could be entered until after proclamation made, by order of the chief justice, for bringing in the record; and then, if the record was not brought in, the defendant's attorney might enter a *ne recipiatur*. *Tidd's Prac.*

At present the practice with regard to entering causes for trial at the sittings after term or assizes stands thus: in

Middlesex, no record or writ of nisi prius will be received at any sitting after term, unless the same shall be delivered to and entered with the marshal within two days after the last day of every term; and in London no record of nisi prius will be received at any sittings after term, unless the same shall be delivered to and entered with the marshal the day before the day to which the sittings in London shall be adjourned, by nine in the evening. At the assizes the writ and record are entered together; and no writ and record of nisi prius shall be received in any county in England, unless they shall be delivered to and entered with the marshal before the first sitting of the court after the commission-day, except in the counties of York and Norfolk; and there the writs and records shall be delivered to and entered with the marshal before the first sitting of the court, on the second day after the commission-day, otherwise they shall not be received. And both in London and Middlesex, as well as at the assizes, every cause shall be tried in the order in which it is entered, beginning with *remnants* (those which have stood over from former sittings), unless it shall be made out to the satisfaction of the judge in open court, that there is reasonable cause to the contrary, who thereupon may make such order for the trial of the cause so to be put off, as to him shall seem just. *R. H. 14 Geo. 2.* Special jury causes are appointed for particular days; and in London and Middlesex no cause can be tried by a special jury, unless the rule for such jury be drawn up, and the cause marked as a special jury in the marshal's book, before the adjournment day after each term. *Reg. Gen. Tr. 30 Geo. 3.*

In town causes the special jury cases are always deferred until the sittings after term, after the common jury causes have been disposed of, unless the causes be undefended, in which case one or more days are sometimes appointed by the chief justice, in term, for the trial of them. *1 Stark. 31.*

For the length of the sittings after term under the statute of the 11 Geo. 4. and 1 Wm. 4. c. 70. see *Term*.

At the sittings at Nisi Prius, for Middlesex and London, in order to enable the plaintiff to obtain judgment of the term, it is the practice to appoint a particular day (usually the last sittings in the term) for the trial of all actions on bills of exchange and promissory notes, unless an affidavit of defence on the merits, or of other reasonable ground for delay, be produced before the trial; and on the appointed day, such actions, unless satisfactory cause be shown, will be tried; or if counsel appear to defend, then a farther day, usually at the first day of the sittings after term, will be given, on the terms that the plaintiff shall, if he obtain a verdict, have judgment of the term, if the judge shall think fit; and such causes are tried accordingly, unless, on the latter day, it be made appear that the trial ought to be further delayed; and the same practice has also been extended since the 1 Wm. 4. c. 7. to records in actions on bills, notes, and bonds, not entered for trial until the sittings after the term, and in which it is probable that the judge will certify, so as to entitle the plaintiff to execution during the sittings, although in the vacation.

At the sittings of Nisi Prius for Middlesex and London, there are written lists of the causes, usually thirty or forty, to be tried each day, fixed on the outside of the court, and the fact of a cause being in such list is deemed notice to the parties concerned in it, that it may be tried during the day. *3 B. & A. 188.* There are where a cause had been for several days in that list, and was at length tried out of its order, as an undefended cause, in the absence of the defendant's attorney, the court refused to grant a new trial, except on an affidavit of the merits, and upon payment of costs. *2 Chitly's R. 269; 3 Taunt. 384; 1 Archb. by Chitly, 321.*

The cause being entered, stands ready for trial at the bar of the court, or before the judge at Nisi Prius; and previous to its coming on, a brief should be prepared for each party, and delivered to counsel, containing a short abstract of the pleadings, a clear statement of the case, and a proper

arrangement of the proofs, with the names of the witnesses. The grand rule to be observed, in drawing briefs, consists in conciseness with perspicuity. *Tidd's Pract. K. B.*

If the cause be coming on, and you are not prepared to proceed in the trial, you may withdraw the record. This, however, can be done only by the party who entered the cause with the marshal; by the plaintiff in ordinary cases, or by the defendant if he have carried down the record by proviso, and entered it for trial. The record cannot be withdrawn by counsel who is merely retained in the cause, but to whom a brief has not been delivered. *2 Camp. 487; 3 Taunt. 225; 5 C. & P. 315.*

If the record be not withdrawn, the attorneys for the plaintiff and defendant should take care to be in court, to have their counsel in court, and their evidence and witnesses in readiness when the cause is called on; otherwise, if the plaintiff's attorney and witnesses be not in attendance, the plaintiff will be nonsuited, or the court will order the cause to be struck out of the list, and the plaintiff will have to pay the costs of the day; or if the defendant's attorney and witnesses be not in attendance, the defendant will lose the benefit of his defence, and the plaintiff will most probably obtain a verdict. The counsel for the plaintiff has a right, upon his cause being called on, to request the swearing of the jury to be suspended until a necessary witness has been called upon his subpoena, and it has been ascertained whether he be present; and upon finding he is absent, the counsel may then withdraw the record, and thus avoid a nonsuit, which, if the jury had been first sworn, he must have submitted to. *1 M. & M. 115.*

When the cause is called on in court in its turn, according to the list or paper, made out from the order in which the several causes are entered for hearing by the attorneys in each cause, the record is handed to the judge to peruse and observe the pleadings, and what issues the parties are to maintain and prove. If no plea *puis darrein continuance* (see *Pleading, I. 5.*) intervene, the jury being completed, sworn, and ready to hear the merits, in order to fix their attention the closer to the facts which they are impanelled and sworn to try, the pleadings are opened to them by counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question. The opening counsel briefly informs them what has been transacted in the court above; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings; and, lastly, upon what point the issue is joined, which is there sent down to be determined. Instead of which formerly the whole record and process of the pleadings were read to them in English by the court, and the matter in issue clearly explained to their capacities. The nature of the case, and the evidence intended to be produced, are next laid before them by counsel also on the same side; and, when their evidence is gone through, the advocate on the other side opens the adverse case, and supports it by evidence; and then the party which began is heard by way of reply. *3 Comm. c. 23.*

As to the nature of the evidence at the trial, see *Evidence, Jury, II.*

When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinions in matters of law arising upon that evidence: the jury then (unless the case be very clear) withdraw from the bar to consider of their verdict; and when they are unanimously agreed, return; and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement to which by the old law he

is liable, in case he fails in his suit, as a punishment for his false claim. To be amerced, or *à mercie*, is to be at the king's mercy with regard to the fine to be imposed; in *misericordia Domini Regis pro falso clamore suo*. The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be nonsuit, *non sequitur clamorem suum*. Therefore it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself; whereupon the crier is ordered to call the plaintiff; and if neither he, nor any body for him, appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason of this practice is, that a nonsuit is more eligible for the plaintiff, than a verdict against him; and he may elect to be nonsuited at any time before the jury have delivered their verdict. See *Nonsuit*; and further, *Jury*, II.

When a verdict will carry all the costs, and it is doubtful, from the evidence, for which party it will be given, and the action is trivial, though founded in strict law, it is a common practice for the judge to recommend, and the parties to consent, that a juror shall be withdrawn; and thus no verdict is given, and each party pays his own costs. *3 T. R. 657*.

The withdrawing a juror by consent of the parties is, it seems, no bar to a future action for the same cause. *R. & M. 402*; *3 B. & Ad. 349*. So discharging a jury by consent does not terminate the suit; and, in this respect, is like the withdrawing a juror. *3 B. & Ad. 349*.

If the plaintiff appears, the clerk asks the jury who they find for? and if for the plaintiff, what damages? The jury naming the sum, and what costs, or pronouncing for the defendant, the associate enters the verdict on the back of the panel of the jurors' names, and repeats it to the jury, which finishes the trial. The verdict, nonsuit, or whatever else passes at the trial, is entered on the back of the record of *nisi prius*; which entry, from the Latin word it began with, is called the *postea*; the substance of which is, that *postea*, afterwards, the said plaintiff and defendant appeared by their attorneys at the place of trial, and a jury being sworn, found such a verdict; or as the case may happen. This, being added to the roll, is returned to the court from which it was sent, and the history of the cause is thus continued. See *Pleading, Practice, Record*.

When the cause is tried at the sittings in London or Middlesex, the associate in the Court of K. B. delivers the record to the party for whom the verdict is given; and he afterwards indorses the *postea*, from the associate's minutes, on the panel: but when the cause is tried at the assizes, the associate keeps the record till the next term, and then delivers it, with the *postea* indorsed thereon, to the party obtaining the verdict. On a motion for a new trial, the *postea* was brought into court; and, after the new trial had been denied, the *postea* could not be found: the court, on debate, ordered a new one to be made out, from the record above, and the associate's notes. If the *postea* be wrong, it may be amended by the plea-roll, by the memory or notes of the judge, or by the notes of the associate or clerk of assize. *Tidd's Pract.*

After these proceedings, the party entitled proceeds to enter up his judgment; for which a certain period is allowed, and of which notice must be given to the opposite party by a rule of court; and within the time allowed by that rule, motion must be made for a new trial, (see *post*, III.) or in arrest of judgment, &c. See further, *Judgment, Motion, Practice, &c.*

As to the granting of speedy execution, under the 1 *Wm. 4. c. 7*. see *Execution*, III. 2.

Many deserved eulogies are bestowed on this mode of trial by jury in the Commentaries; where also some defects in it are suggested; as, the want of a complete discovery by the oath of the parties; the want of power to examine witnesses abroad, (but now see *Deposition*,) or to compel the

production of books and papers belonging to the parties; and the prejudices or inconveniences arising from the locality of trial and jurisdiction. All or most of these defects are, however, generally remedied in practice: and, on the whole, this mode of decision will be found (with all its unavoidable imperfections,) the best criterion for investigating the truth of facts ever established in any country. See *Jury*; and *3 Comm. c. 23*.

Formerly, trials were only at bar or at *nisi prius*; but by the 3 & 4 *Wm. 4. c. 42. § 17*. "in any action depending in any of the said superior courts for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed 20*l.*, it shall be lawful for the court in which such suit shall be pending, or any judge of any of the said courts (if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do,) to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record, for the recovery of debt in such county; and for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues by a jury to be summoned by him, and to return such writ with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues."

The above statute, it will be seen, extends only to actions for a debt or demand in which the sum sought to be recovered and indorsed on the writ of summons does not exceed 20*l.* It does not, therefore, extend to a case in which the action, though not exceeding 20*l.*, is commenced by a writ of *capias* or detainer, or to a case where the debt is not indorsed on the writ of summons, or to a claim for a tort. *2 C. & M. 150*; *2 Dowl. P. C. 215*.

When the jury have found their verdict, it is provided by § 18. that it shall be "as valid, and of like force, as a verdict of a jury at *nisi prius*; and the sheriff or his deputy, or judge, presiding at the trial of such issue or issues, shall have the like powers with respect to amendment of such trial as are thereafter given to judges at *nisi prius*; and by the same section, "at the return of such writ, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff, deputy, or judge before whom such trial shall be had, shall certify under his hand, upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court for a new trial; or a judge of any of the said courts shall think fit to order that judgment or execution shall be stayed until a day to be named in such order."

To procure the above certificate of the sheriff, or order of the judge, it is not unusual to make an affidavit of the facts, to induce him to grant it; but the plaintiff, unless otherwise ordered, may in this case get his costs taxed, and sign judgment directly after the verdict is obtained, even on the same day. *2 Dowl. P. C. 613*.

A motion for a new trial of a cause tried before the sheriff may be made to the court upon the production of the under-sheriff's notes, verified by affidavit. *2 Dowl. P. C. 613*.

And on being applied to for that purpose by one of the parties, the sheriff ought to produce his notes of the trial had before him. Where an under-sheriff refused to produce such notes, the court made him pay the costs consequent on his refusal. *2 Dowl. P. C. 611*.

II. The several methods of trial and conviction of offenders, established by the laws of England, were formerly more numerous than at present; and among them were reckoned the trial by ordeal, by corned, and by battel: all now obsolete or repealed. See those titles.

Generally with respect to the venue of indictments, or the places where offenders must be tried, see *Indictment*, V.

By 6 Hen. 8. c. 6. the justices of K. B. are empowered to remand and send down felons brought or removed before that court, and their indictments, into the counties where the offence was committed, there to be tried by justices of gaol delivery; who may pass sentence on them accordingly. See 4 M. & S. 442.

As to offences committed abroad, and made triable in England, see 28 Hen. 8. c. 15; title *Piracy*; and 46 Geo. 3. c. 54. Offences committed in the plantations, East Indies, &c. by persons in public employments, may be tried before the Court of K. B. See 11 & 12 Wm. 3. c. 12; 13 Geo. 3. c. 63; 24 Geo. 3. c. 25; 42 Geo. 3. c. 85; 55 Geo. 3. c. 155; and title *East India Company*, V.

The trial of peers, in cases of treason and felony, or misprision of either, is by the peers of Great Britain in the court of parliament, or the court of the lord high steward, when a peer is indicted. See *Lord High Steward, Peers*, IV.

The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter.

As to the mode of proceeding and giving the verdict, in the trial of criminal cases, see in general *Jury*, IV. 1, *Evidence* (*Introd.*), *Treason*, V.

The following summary will give a general idea of the nature of trial in criminal cases:

The bill of indictment against an offender having been prepared, the party, prosecutor, and others being bound over to give evidence, the grand jury having found the bill, the prisoner is brought to the bar of the court, and the crier, or clerk of the arraigns, says to him, "A. B. hold up thy hand; thou standest indicted by the name of A. B. for such a felony, &c. (reciting the crime laid in the indictment): how sayest thou, art thou guilty of this felony, &c. whereof thou standest indicted, or not guilty?" To which the prisoner answers, "Not guilty." Whereupon the clerk of the peace says, "Culprit (see *Pleading*, II.) how wilt thou be tried?" And the offender answers, "By God and my country."

This was formerly a very significant question and answer, when there were trials by battle and by ordeal, as well as by jury; and when the offender answered the question, "By God and his country," it showed that he made choice to be tried by a jury: but now there is no other way of trial of criminals. *Blount's Dict.*

When the prisoner has pleaded not guilty, (which is the common plea, it is to be recorded; and then the petit jury are called upon the panel, and a full jury appearing, the prisoner is told they are to pass upon his life and death, and that he may challenge any of them as they come to the book to be sworn, and before they are sworn; for not being indifferent, but partial, or other defect, &c. Then the jury are sworn well and truly to try the prisoner, and to bring in a true verdict. This being done, the indictment is recited, and the jury are acquainted with the particular crimes of which the prisoner stands indicted; and the clerk of the peace, addressing the jury, states the crime laid in the indictment; and adds, "to which indictment he hath pleaded not guilty, and for his trial hath put himself upon God and his country, which country you are: so that you (the jury) are to inquire whether he be guilty of the felony, &c. whereof he stands indicted, or not?" Formerly the clerk of the peace also added, "if you find him guilty, you are to make inquiry into what goods and chattels he had at the time that the said felony, &c. was committed, or at any time since: and if you find him not guilty, you shall inquire whether he did fly for it; and if he fled for it, what goods, &c. he had at the time of his flight: but if you find him not guilty, and that he did not fly, you shall then say no more." Now, however, by the 7 & 8 Geo. 4. c. 28. § 5. the jury are not to be charged either in treason or felony to inquire concerning the lands or goods

of the person indicted, or whether he fled for such treason or felony. Then the clerk of the peace swears the witnesses to give true evidence; to speak the whole truth, and nothing but the truth; and when the evidence is given to the jury concerning the prisoner, the jury (if they go out of the court to consider of their verdict) are to be kept in a room, by a sworn bailiff, appointed, without meat, drink, fire, or candle, and without any persons speaking to them, till they bring in their verdict. See *Jury*, II. All things being given in charge, the jury go to their room, and consider of the matter; when they are all agreed, and returned within or near the bar, the prisoner is brought forth, and the jury are called over; who all appearing, and the prisoner being set to the bar, the clerk of the peace says to them, "Look upon the prisoner, you gentlemen of the jury; how say you, is A. B. guilty of the felony, &c. of which he stands indicted, or not guilty?" If the jury say not guilty, it is recorded, and the prisoner taken away; if they say guilty, the clerk of the peace says, "Gentlemen of the jury, hearken to your verdict as the court hath recorded it; you say A. B. is guilty of the felony, &c. whereof he stands indicted;" to which they answer, "Yes." Then proclamation is made for all persons to keep silence, on which the prisoner is set to the bar, and sentence passed upon him, after which an order or warrant is made for his execution. Though this part of passing sentence only takes place immediately in cases of murder, the felons being all brought up together at the end of the sessions, to receive their several sentences, although this is discretionary with the judge.

It is not customary or agreeable to the general course of proceedings, (unless by consent of parties, or where the defendant is actually in gaol,) to try persons indicted for misdemeanors at the same court in which they have pleaded not guilty, or traversed the indictment. But they usually give security to the court to appear at the next assizes or sessions, and then and there to try the traverse, giving notice to the prosecutor of the same. 4 Comm. c. 27. p. 351.

Every defendant, indicted for a misdemeanor, should give full eight days' notice of trial to the prosecutor, before the assizes, if the trial is to be there; if at the sessions, it is usual to give two or three days' notice: or the justices at sessions fix, as a general rule, what time they think a reasonable notice in such cases. *Cro. Circ. Comp.* 17. 48.

And see further, as to the time when trials for misdemeanors are to take place, *Misdemeanor*.

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and enforced by the counsel for the crown or prosecution. But it is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise proper to be debated. This has been considered as so great a hardship, and so very inconsistent with the general principles of the English laws, that the judges never scruple to allow a prisoner counsel, to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact: but the counsel are not allowed to address the jury, except in cases of treason, under 7 Wm. 3. c. 3. See *Treason*, V. But in matters of law, or in the trial of issues, or collateral facts, prisoners are entitled to the full assistance of counsel. See 4 Comm. c. 27; see n. p. 355. *Post*, 232, 242.

A bill for allowing the counsel for felons to address the jury was introduced into the House of Commons during the last session, and is now (1855) again under consideration; but it is doubtful whether a measure, which is consistent with every principle of reason and justice, will at present be permitted to pass into a law.

If the jury find the prisoner Not guilty, he is then forever quit and discharged of the accusation. And upon such his acquittal or discharge, for want of prosecution, he shall

be immediately set at large, without payment of any fee to the gaoler. 14 Geo. 3. c. 20.

But if the offender is convicted, two collateral circumstances immediately arise. 1. On a conviction, (or even upon an acquittal, where there was a reasonable ground to prosecute, and in fact a *bona fide* prosecution,) the reasonable expenses of prosecution, and also, a compensation for their trouble and loss of time, are in all cases of felony, and in certain specified misdemeanors, by the 7 Geo. 4. c. 64. allowed to the prosecutor and his witnesses. See *Expenses*. 2. On a conviction of larceny, in particular, the prosecutor shall have restitution of his goods; as to which see *tit. Restitution*.

With respect to the carrying into execution of the sentence passed on offenders in capital cases, see *tit. Execution of Criminals*. Since the portion of this work containing that title has been printed, the 4 & 5 Wm. 4. c. 26. has been passed, whereby so much of the Anatomy Act (2 & 3 Wm. 4. c. 75. § 16.) as authorized the bodies of persons convicted of murder to be hung in chains, has been repealed. Criminals executed for that offence are in future to be buried within the prison, both in this country and in Ireland.

III. CAUSES of suspending the judgment, by granting a new trial, (which has been substituted in modern times for a bill of exceptions, see 3 B. & Ad. 372; and which is the only remedy the injured party has, except by writ of error *coram nobis* in some few cases,) are wholly extrinsic; that is, arising from matters foreign to or dehors the record. Of this sort are want of notice of trial; or any flagrant misbehaviour of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury among themselves; also, if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith, or if they have given exorbitant damages; or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict; for these, and other reasons of the like kind, it is the practice of the court to award a new, or second, trial. But if two juries agree in the same or a similar verdict, a third trial is seldom awarded; for the law will not readily suppose, that the verdict of any one subsequent jury can controvert the oaths of the two preceding ones. 3 Comm. c. 24. Though the court will grant any number of new trials in the same action, if the jury find verdicts contrary to the established law. 1 T. R. 167.

The exertion of these superintendent powers of the king's courts, in setting aside the verdict of a jury, and granting a new trial, on account of misbehaviour in the jurors, is of a date extremely ancient. There are instances in the Year-Books of the reigns of Edward III., Henry IV., and Henry VII. of judgments being staid, (even after trial at bar,) and new *venires* awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a jurymen before he was sworn. And upon these the Chief Justice Glynn, in 1655, grounded the first precedent that is reported in our books, for granting a new trial upon account of excessive damages given by the jury; apprehending, with reason, that notorious partiality in the jurors was a principal species of misbehaviour. *Sty.* 466. A few years before, a practice took rise in the Common Pleas, of granting new trials upon the mere certificate of the judge, (unfortified by any report of the evidence,) that the verdict had passed against his opinion, though Chief Justice Rolle (who allowed of new trials in case of misbehaviour, surprise, or fraud, or if the verdict was notoriously contrary to evidence) refused to adopt that practice in the Court of King's Bench. And at that time it was clearly held for law, that whatever matter was of force to avoid a verdict, ought to be returned upon the *postea*, and not merely surmised by the court; lest posterity should wonder why a new *venire* was awarded, without any sufficient reason

appearing upon the record. But very early in the reign of Charles II. new trials were granted upon affidavits; and the former strictness of the courts at law, in respect of new trials, having driven many parties into courts of equity, to be relieved from oppressive verdicts, they are now more liberal in granting them; the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another. 3 Comm. c. 24.

Formerly, the principal remedy for reversal of a verdict unduly given, was by writ of attain (now abolished); which was at least as old as the institution of grand assize by Henry II. in lieu of the Norman trial by battle; and as to which, see *tit. Attain*.

Next to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts, in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive; he would arraign the determination as manifestly unjust; and abhor a tribunal which he imagined had done him an injury without a possibility of redress. 3 Comm. c. 24.

Granting a new trial, under proper regulations, cures all these, and many other, inconveniences; and at the same time preserves entire, and renders perfect, that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other; and the subsequent verdict, though contrary to the first, imports no title of blame upon the former jury; who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject, and nothing is now tried but the real merits of the case. 3 Comm. c. 24.

A sufficient ground must however be laid before the court, to satisfy them that it is necessary to justice that the cause should be farther considered. If the matter be such as did not, or could not, appear to the judge who presided at *nisi prius*, it is disclosed to the court by affidavit; if it arises from what passed at the trial, it is taken from the judge's information, who usually makes a special and minute report of the evidence. Counsel are heard on both sides, to impeach or establish the verdict; and the court give their reasons at large, why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are, upon full deliberation, clearly explained and settled. 3 Comm. c. 24.

Notice of a motion for a new trial must be given to the judge two whole days before moving, as well in cases where a point has been reserved at the trial as in others. 7 Taunt. 257.

Nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new trial is not granted, where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right, or *summum jus*, where the rigorous exaction of extreme legal justice is hardly reconcileable to conscience. Nor is it granted where the scales of evidence hang nearly equal; that which leans against the former verdict ought always very strongly to preponderate. 3 Comm. c. 24.

And where a question was peculiarly fit for the considera-

tion of a jury (as the soundness or unsoundness of a horse,) the Court of C. P. refused to set aside a verdict on the ground of the preponderance of contrary evidence, 7 *Taunt.* 153.

And where evidence has been given on both sides, the court will seldom grant a new trial unless the evidence against the verdict very strongly preponderate. 2 *Str.* 1142; 3 *Wils.* 88, 69.

In granting such farther trial, (which is matter of sound discretion,) the court has also an opportunity, which it seldom fails to improve, of supplying the defects in this mode of trial, before shortly alluded to, by laying the party applying under all such equitable terms, as his antagonist shall desire, and mutually offer to comply with; such as, the discovery of some facts upon oath; the admission of others not intended to be litigated; the production of deeds, books, and papers; the examination of witnesses, infirm or going beyond sea; and the like. And the delay and expense of this proceeding are so small and trifling, that it seldom can be moved for to gain time, or to gratify humour. The motion must be made within the first four days of the succeeding term after the verdict, within which term it is usually heard and decided. And it is worthy observation, how infinitely superior to all others the trial by jury approves itself, even in the very mode of its revision. In every other country of Europe, and in those of our own tribunals which conform themselves to the process of the civil law, (the Scotch courts, for example,) the parties are at liberty, whenever they please, to appeal from day to day, and from court to court, upon questions merely of fact; which is a perpetual source of obstinate chicane, delay, and expensive litigation. With us, no new trial is allowed, unless there be a manifest mistake, and the subject-matter be worthy of interposition. The party who thinks himself aggrieved might formerly, if he pleased, have had recourse to his writ of attain after judgment; and in the course of the trial he may still demur to the evidence, or tender a bill of exceptions. And if the first were totally laid aside, long previous to its abolition, and the other two are very seldom put in practice, it is because long experience has shown, that a motion for a second trial is the shortest, cheapest, and most effectual cure for all imperfections in the verdict; whether they arise from the mistakes of the parties themselves, of their counsel or attorneys, or even of the judge or jury. 3 *Comm. c.* 24.

If the verdict of the jury be agreeable to equity and justice, the court will not grant a new trial, though there may have been an error in the admission of evidence, or in the direction of the judge. 4 *T. R.* 468; 1 *Bos. & Pull.* 338.

Where the plaintiff's counsel acquiesced in the judge's opinion at the trial, and the defendant took a verdict without going into his case, the court of C. P. refused afterwards to allow the plaintiff to move for a new trial on the ground of misdirection of the judge. 6 *Taunt.* 386.

A new trial may be granted on account of the misconduct of the jury, as if they have referred to chance to determine the party for whom the verdict was given: but the courts have frequently refused to hear any affidavit of such conduct from the jury themselves. 1 *T. R.* 11.

A new trial will not be granted merely because it has been discovered, after trial, that a witness examined was incompetent. 1 *T. R.* 717; 3 *East*, 471. But where a testimony of witnesses, on which a verdict was given, derived credit from particular circumstances, which were afterwards clearly falsified, a new trial was granted. 1 *Bos. & Pull.* 427.

When, upon the facts proved, an inference of law arose on a statute not recollected at the trial, the Court of C. P. granted a new trial, though the point was not taken at the trial. 7 *Taunt.* 309.

If the issue tried in any cause is not joined, it is not a good trial; except it be an issue in Chancery in the petit bag side, which is to be sent from thence to be tried in B. R.

Hil. 22 Car. It is a mis-trial for a thing to be tried before a judge, who hath interest in the thing in question; and if a cause is tried by a jury out of a wrong county, or there be any error in the process against the jurors, or it is directed to a wrong officer, &c. it is a mis-trial; likewise, where matter of record is tried by a jury, it will be a mis-trial; but if the matter of record be mixed with matter of fact, trial by jury is good. *Hob.* 124. A mis-trial is helped by the statute of jeofails. See further, *Amendment, Pleading, Variance.*

Where a common jury panel was returned together with a special jury panel, and no special jury man appearing, the cause was tried by a common jury, the trial was set aside. 4 *M. & S.* 467.

Excessive damages in all cases, except in actions for adultery, are a sufficient ground to grant a new trial. 5 *T. R.* 257. In aggravated cases, however, the court will direct that the verdict shall stand as a security for the damages which may be given on the second trial. 7 *T. R.* 529.

For excessive damages, the court will grant a new trial of course, or set aside the execution of a writ of inquiry, in all cases where the damages may be ascertained by mere calculation, 1 *Taunt.* 491; and in other cases of actions *ex contractu*, if it appear clearly that the damages are excessive. But in actions *ex delicto*, such as actions for trespass, 3 *Burr.* 1845; 1 *T. R.* 277; 5 *Taunt.* 442; 1 *Marsh.* 139, *S. C.*; for diverting a watercourse, 7 *T. R.* 529; 1 *Chit. Rep.* 729; for criminal conversation, 4 *T. R.* 651; 1 *Burr.* 609; 6 *East*, 244; seduction, 11 *East*, 23; 3 *Wils.* 18; battery, 5 *T. R.* 257; 2 *Wils.* 252; false imprisonment, 2 *Wils.* 160, 205, 244; or other personal torts, 2 *H. Bl.* 929; *Comp.* 230; malicious prosecution, 2 *H. Bl.* 1327; 1 *Comp.* 87; slander, 2 *Salk.* 641; or the like, 2 *T. R.* 166; a new trial is seldom granted on this account, unless the damages be outrageous, 7 *Bingh.* 316; 2 *H. Bl.* 942, 1327; 7 *T. R.* 529; 3 *Wils.* 61; or the court be satisfied that the jury acted under the influence of undue motives, or of gross error or misconception, 6 *East*, 244; and the same, as to the executions of writs of inquiry, 3 *Burr.* 1485; 3 *Wils.* 61, 63; 11 *East*, 23. It is very usual in cases of assault, where an excessive verdict has been given, for the judge to suggest to the counsel to agree on a sum, to prevent the necessity of a new trial. 7 *Bingh.* 320.

On the other hand, a new trial will not be granted, or the execution of a writ of inquiry set aside, on account of the smallness of the damages, 2 *Str.* 940, 1051; 2 *Doug.* 509, 510; unless it have arisen from some mistake in point of law, either upon the part of the court, 2 *Str.* 1259; 2 *Doug.* 510; or of the jury, 1 *Str.* 425; 7 *Bingh.* 349; or from some unfair practice upon the part of the defendant. 2 *Salk.* 647; 1 *Str.* 515. Also, the court will not grant a new trial, where the value of the matter in dispute, or the amount of damages to which the plaintiff would be fairly entitled, is too inconsiderable to merit a second examination, 2 *H. Bl.* 851; 1 *Burr.* 11; 2 *Burr.* 664; 1 *Taunt.* 495; and see 2 *T. R.* 113. The value or amount must be twenty pounds at least to induce the court to interfere, unless, perhaps, on trials before the sheriff, 2 *Dowl. P. C.* 642, *sed vide Id.* 767; 3 *M. & Scott*, 818, *S. C. contra*; or the verdict involve some particular right, independent of the damages, *Tidd*, 9th ed. 910; 1 *Chit. Rep.* 265; 1 *Y. & J.* 402; 2 *Y. & J.* 264; and this, whether the verdict be for the plaintiff or defendant. 2 *C. & J.* 14. The court will, however, sometimes grant a new trial on the ground of a misdirection of the judge, though the verdict be under twenty pounds, where they can grant it without costs. 1 *C. & M.* 26; 1 *C. & M.* & *R.* 93.

In an action brought under an order of the lord chancellor, a new trial may be moved for in the court where the action is depending, though the action could not be sustained without the aid of the chancellor's order. 4 *M. & S.* 192. But see *Barker v. Nixon*, 6 *Taunt.* 444. as to a new trial on

an issue directed out of a court of equity, in which case it was held that application must be first made to such court.

It would seem, however, from the cases, that the application may be either to the court of law or the court which directed the issue. See 1 *Archb. Pr. by Chitty*, 539.

The presence of all the defendants convicted on an indictment for a conspiracy is necessary, in order to move for a new trial on behalf of any of them. 3 *M. & S.* 9. and *Rex v. Cochrane, Ltd.*, *id.* p. 10. n.

In penal actions, if there be a verdict for the plaintiff, the court will grant a new trial as in other cases.

It is generally said, that there cannot be a new trial in penal actions and criminal prosecutions, when there is a verdict for the defendant; the principle of this being the great favour which the law shows to the liberty of the subject. But the rule does not extend to informations in the nature of *quo warranto*. See that title, and 2 *T. R.* 484; 5 *B. & Ad.* 52. Nor does it extend to an action on a penal statute, in which a verdict is given for the defendant in consequence of the misdirection of the judge. 4 *T. R.* 753; 1 *C., M. & R.* 310.

The Court of King's Bench refused to grant a rule nisi for a new trial, after verdict for the defendant upon an indictment for non-repair of a church-yard fence, which was moved on the ground of the verdict being against evidence. 6 *East*, 315.

And where the defendant was acquitted on an indictment for not repairing a road, the court refused to grant a new trial; but under special circumstances suspended the entry of the judgment, so as to enable the parties to have the question reconsidered upon another indictment, without the prejudice of the former judgment. *Rex v. Wandsworth*, 1 *B. & A.* 63; and see the case of *Kingston Bridge*, there cited. But the court will be cautious of such proceedings being drawn into a precedent to defeat the general rule. See *Rex v. Chigwell*, *par.* in a note in the case of *Wandsworth*.

So, after a verdict for the defendant upon Not guilty to an indictment for a nuisance to a highway, the Court of King's Bench refused a new trial. 4 *M. & S.* 337.

See further, *Tidd's Practice*, *Archbold's Pr. by Chitty*; and on this subject of trial in general, and as connected therewith, see *tit. Jury, Pleading, Practice*, and other applicable titles.

TRICESIMA. An ancient custom in a borough in the county of Hereford, so called, because thirty burgesses paid 1d. rent for their houses to the bishop, who is lord of the manor. *Lib. Niger, Heref.*

TRIDINGMOTE. The court held for a trading, or trithing. See *Trithing*.

TRILLION. A word used by merchants in accounts, to show that the word million is thrice mentioned. *Merch. Dict.* It signifies millions of millions of millions.

TRIMILCHI. The English Saxons denominated the month of May *trimilchi*; because they milked their cattle three times every day in that month. *Beda*.

TRINITY, Trinitas.] The number of three Persons in the Godhead, or Deity; heretofore supposed to be so peculiarly distinctive of the Christian religion, that the denying any one of the Persons in the Trinity to be God subjected the parties to divers penalties and incapacities under 9 & 10 *Wm. 3. c. 32.* But by the 53 *Geo. 3. c. 160.* the provisions of the above act, so far as related to the denying of the Trinity, were repealed: and the like provisions of an Irish act 6 *Geo. 1. c. 5.* were repealed by the 57 *Geo. 3. c. 70.*

TRINITY HOUSE. This society was incorporated by Henry VIII., in 1515, for the promotion of commerce and navigation, by licensing and regulating pilots, and ordering and erecting beacons, light-houses, buoys, &c. A similar society, for the like purposes, was afterwards established at Hull, and also another at Newcastle-upon-Tyne, in 1537; which three establishments, says *Hakluyt*, were in imitation

of that founded by the Emperor Charles V. at Seville, in Spain; who, observing the numerous shipwrecks in the voyages to and from the West Indies, occasioned by the ignorance of seamen, established, at the Casa de Contratacion, lectures on navigation, and a pilot major for the examination of other pilots and mariners, having also directed books to be published on that subject for the use of navigators.

Henry VIII., by his charter, confirmed to the Deptford Trinity House Society all the ancient rights, privileges, &c. of the shipmen and mariners of England, and their several possessions at Deptford, from which it is plain that the society had existed long previously. The corporation was confirmed, in 1685, in the enjoyment of its privileges and possessions, by letters-patent of the 1st of James II. by the name of the Master, Wardens, and Assistants, of the Guild or Fraternity of the most glorious and undivided Trinity, and of St. Clements, in the parish of Deptford Strand, in the county of Kent. At first, the corporation seems to have consisted of seamen only; but many gentlemen, and some noblemen, are now amongst its members, or elder brethren. It is governed by a master, four wardens, eight assistants, and thirty-one elder brothers: but the inferior members of the fraternity, named younger brethren, are of an unlimited number; for every master or mate, expert in navigation, may be admitted as such. Besides the power of erecting light-houses, and other sea-marks, on the several coasts of the kingdom, for the security of navigation, (see *Beacons*.) the master, wardens, assistants, and elder brethren, are invested by charter with the following powers: viz. the examination of the mathematical scholars of Christ's Hospital, and of the masters of his majesty's ships; the appointment of pilots to conduct ships into and out of the Thames; the amercement of such unlicensed persons as presume to act as masters of ships of war, or pilots, in a pecuniary fine; settling the several rates of pilotage; granting licences to poor seamen, not free of the city, or past going to sea, to row on the river Thames for their support; preventing aliens from serving on board English ships without licence; hearing and determining the complaints of officers and seamen of British ships, subject to an appeal to the Lords of the Admiralty, &c. To this company belongs the Ballast Office, for clearing and deepening the Thames, by taking up a sufficient quantity of ballast for the supply of all ships that sail out of the river, for which they pay certain rates. The corporation is authorized to receive voluntary subscriptions, benefactions, &c. and to purchase, in mortmain, lands, tenements, &c. to the amount of 500*l.* per annum. The ancient Hall of the Trinity House at Deptford, where the meetings of the brethren were formerly held, was pulled down in 1787, and an elegant building erected for the purpose in London, near the Tower. The gross revenue under the management of the Trinity House amounts to about 135,000*l.* a year, but the net revenue is rather less than the half of that sum.

By the 52 *Geo. 3. c. 115.* its jurisdiction is extended to light-houses round the coast of Ireland.

See further, *tit. Pilot*, and *McCutlock's Comm. Dict.*

TRINK. A fishing net or engine to catch fish. 2 *Hen. 6. c. 15.*

TRINOBANTES. The ancient inhabitants of Middlesex, Essex, Hertfordshire, &c.

TRINODA NECESSITAS. Signified the threefold necessary tax, to which all lands were liable in the Saxon times, i. e. for repairing of bridges; the maintaining of castles or garrisons; and for expeditions to repel invasions: and in the king's grants, and conveyances of lands, these three things were excepted in the immunities from other services, &c. *Paroch. Antiq.* 46; *Conell*; *Selden*, in *not. cadm.*

TRIOURS, TRIOURS, or TRIERS. Such as are chosen by the court, to examine whether a challenge made to the panel of jurors, or any of them, be just or not. *Broke*, 122. See *Jury*, II.

TRIONS, LORDS. See *Peers*, IV.

TRIONS OF JURORS. See *Jury*, II.

TRIPODIUM. *Leg. Hen. 1. c. 64. In quibus verbis causis triplicem ladam habet, et, feral judicium tripodum, i. e. c. 60. solat.* The meaning is, that as for a small offence, or for a trivial cause, the composition was twenty shillings; so for a great offence, which was to be purged *triplici ladd*, the composition was to be three times twenty shillings, viz. *tripodio*. *Conell*.

TRISTEGA. The uppermost room in the house; a garret or room three stories high. *Matt. Paris, an. 1247.*

TRISTIS, said to be from *Fr. traist, i. e. trust.* An immunity, whereby a man is freed from attendance on the lord of a forest when he is disposed to chase within the forest; and by this privilege he shall not be compelled to hold a dog, to follow the chase, or stand at any place appointed, which otherwise he is obliged to do, on pain of amercement. *Manwood, pur. 1, page 86.*

TRITHING; TRITHING-REEVE. The third part of a county, or three or more hundreds or wapentakes, were called a triding, or trithing; such sort of portions are the laths in Kent, the rapes in Sussex, and the ridings (corrupted from the word trithing) in Yorkshire; and those who governed these trithings were thereupon called trithing-reeves, before whom were brought all causes that could not be determined in the wapentakes or hundreds. See *Spelman of the ancient Government of England, p. 52.*

The term *trithing* is also used for the court held within the circuit of a *trithing*, of the nature of a court-leet, but inferior to the county-court, to which causes might be removed from them. *Magna Charta, c. 36.*

TRIUMVIR. A trithing-man, or constable of three hundreds. *Hist. Eliens.*

TRONAGE, *tronagium.* A customary duty or toll for weighing of wool: according to *Fleta, trona* is a beam to weigh with, mentioned in stat. *Westm. 2. c. 25.* *Tronage* being used for the weighing of wool in a staple or public mart, by a common *trona*, or beam; which, for the tronage of wool in London, was fixed at Lenden-Hall. *Fleta, lib. 2. c. 12.* The mayor and commonalty of London are ordained keepers of the beams and weights for weighing merchants' commodities, with power to assign clerks and porters, &c. of the great beam and balance; which weighing of goods and wares is called tronage; and no stranger shall buy any goods in London, before they are weighed at the king's beam, on pain of forfeiture. *Chart. King Hen. VIII.*

TRONATOR, from *trona, i. e. statera.* An officer in the city of London, who weighs the wool brought thither.

TROPER, *troperium.* A book of alternate turns or responses in singing masses; called *liber sequentiarum*, by *Lindewoode*. *Hoved. Hist. p. 283.*

TROPHY-MONEY. Money formerly raised and collected in London and the several counties of England, towards providing harness and maintenance for the militia, &c. See *Militia*.

TROVER, from the *Fr. trouver, to find.* An action which lies where one man gets possession of the goods of another, by delivery, finding, or otherwise, and refuses to deliver them to the owner, or sells or converts them to his own use, without the consent of the owner, for which the owner, by this action, recovers the value of his goods. *Esp. Ni. Pr. cap. 12; 2 Lill. Abr. 618.*

The action of trover and conversion was in its original an action of trespass on the case for recovery of damages against such person as had actually found another's goods, and refused to deliver them on demand, but converted them to his own use; from which finding and converting it is called an action of trover and conversion. The freedom of this action from wager of law, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of detinue, that, by a fic-

tion of law, actions of trover were at length permitted to be brought against any man who had in his possession, by any means whatsoever, the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion; for any man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property therein, unless the owner be for ever unknown: and therefore he must not convert them to his own use, which the law presumes him to do, if he refuses to restore them to the owner: for which reason, such refusal alone is, *prima facie*, sufficient evidence of a conversion. The fact of the finding, or trover, is therefore now totally immaterial: for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them; and, if he proves that the goods are his property, and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved: and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself; which nothing will recover but an action of detinue or replevin. (See those titles.) 3 *Comm. c. 9.*

Action of trover or detinue, at the plaintiff's election, may be brought for goods detained; for it is but justice that the party should have his goods detained if they may be had, or else damages to the value for the detaining and conversion of them. 2 *Lil. Abr. 618.* Action of trespass or trover lies for the same thing, though they cannot be brought in one declaration; and the allegation of the conversion of the goods in trespass is for aggravation of the damages, &c. *Cro. Jac. 50; Lutw. 1526. See Detinue, Trespass.*

In trover, the conversion is the gist of the action; and the manner in which the goods come to the defendant's hands is but inducement; the plaintiff may therefore declare upon a *devenerunt ad manus* generally, or specially by finding; (though in fact the defendant came to them by delivery;) or that the defendant fraudulently obtained them; as by winning them at cards from the plaintiff's wife: and this being inducement, need not be proved: but it is sufficient to prove property in the plaintiff; the possession of, and conversion by, the defendant. *Bull. N. P. 33; Esp. N. P. c. 12.*

I. For what Trover lies.

II. By and against whom it may be maintained.

III. Of the Interest requisite to support the Action.

IV. Of the Conversion, &c.

I. This action is confined to the conversion of some personal chattel, and it does not lie for fixtures *eo nomine*, nor for injuries to land or other real property, even by a severance of a part of what properly belongs to the freehold, unless there has also been an asportation; but the form of action should be trespass, (or case where the interest in the property is in reversion.) *Cro. Jac. 129; 2 Mod. 244; Bul. N. P. 44; Bac. Abr. Trover, B.; 4 T. R. 504, 505; Co. Lit. 145; 2 B. & A. 167; 7 Taunt. 188; 2 Marsh. 495.* And an in-coming tenant, though entitled to the growing crops, cannot support trover against the out-going tenant for taking them away; nor is that form of action proper to try a right to land. *16 East, 77, 79; 1 Price, 53; 2 B. & A. 165.*

But if after the severance from the freehold, as in the case of trees or fixtures, the property severed be taken away, or if coals dug in a pit be afterwards thrown out, trover may be supported. *Noy, 125; Sir Wm. Jones, 246; 3 Wils. 336; 7 T. R. 13; 4 B. & A. 206.*

So where a tenant during the tenancy removes virgin soil, it becomes, by operation of law, the property of the landlord, and he may maintain either trespass *de bonis asportatis* or trover. 6 *C. & P. 616.*

But where the assignee of a term in a house took forcible possession of the house and fixtures in it, it was held not to be a conversion of the fixtures. 4 *N. & M. 213.*

Trover does not lie for goods sold to a party, but not set apart by the vendor; for it is sustainable only for specific articles. 4 *Taunt.* 648.

So the purchaser of goods cannot maintain trover for them without paying the price; for though he acquires the right of property by the purchase, he can only acquire the right of possession by the payment or tender of the price; and in order to maintain trover he must have both the right of property and the right of possession. 7 *D. & R.* 396; 4 *B. & C.* 341.

So the buyer of a chattel ordered to be made for him, acquires no property in the chattel till it is finished and delivered to him; and therefore he can not maintain trover for it, though he has paid the price beforehand. 1 *Taunt.* 218.

Trover will not lie for goods irregularly sold, under a distress: the 11 *Geo. 2. c. 19. § 19.* having declared that the party selling shall not be deemed a trespasser *ab initio*, and having given an action on the case to the party grieved by such a sale. 1 *H. Blackst.* 13.

So trover does not lie for goods taken as a distress, if any rent be due, though the distress be irregular. 1 *M. & R.* 193.

But if a party pay money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrong doer. 6 *T. R.* 298.

Detinue doth not lie for money numbered; but trover and conversion lies for it: for though, in the finding and converting generally, the money of one person cannot be distinguished from that of another, all money being alike; yet the proof that the plaintiff lost, and the defendant converted so much, maintains the action, if the verdict finds it. *Jenk. Cent.* 208. Where money is given to a person to keep, though it be not in bags, action of trover will lie; because this action is not to recover the money, but damages. *Poph.* 91; 3 *Salk.* 365; 4 *Taunt.* 24.

But trover does not lie for money had and received generally. 5 *B. & A.* 652; 4 *Rep.* 92; 1 *New Rep.* 43.

Where however money has been paid by a debtor, in contemplation of his bankruptcy, by way of fraudulent preference to his creditor, it has been thought that the assignees should proceed for the recovery thereof in trover or by bill in equity, and not by action of assumpsit for money had and received, because by adopting the latter form of action, they might enable the defendant to avail himself of his original debt as a set-off. 4 *T. R.* 211; 2 *H. Bla.* 145; *Cullen*, 201, 202. But this doctrine seems questionable. 10 *East*, 378, 418; 16 *East*, 135. However, trover is preferable to an action of assumpsit, when the defendant has converted the produce of a bill, &c. and has become bankrupt, and obtained his certificate, because, to the former action, the certificate would afford no defence. 6 *T. R.* 695.

In other respects trover in general lies for the conversion of any personal property in which the plaintiff has a general or special property. *Com. Dig. Action, Case, Trover, C.*; *Bac. Abr. Trover, D.*; *Bul. N. P.* 32 to 49. But it does not lie for the conversion of a record, because a record is not private property; but it may be supported for the copy of a record which is private property. *Hardr.* 111.

So trover may be maintained for deeds. Thus, where one agreed to purchase the remainder of a term, and received the lease to get an assignment made out, but afterwards refused to accept such assignment, or to deliver up the lease on demand made, action of trover was held maintainable against him for the lease. 2 *Ros. & Pul.* 451.

It lies for an unstamped agreement. 4 *Taunt.* 861. And, it should seem, for a deed relating to land. 2 *T. R.* 708.

A person having three bills of exchange, applied to a country banker to give him a bill on London for the amount; this bill was afterwards dishonoured; the Court of King's Bench held, that this was a complete change of securities, and that trover would not lie for the three bills of exchange. 2 *B. & A.* 327.

II. TROVER lies for the finder of a jewel, against a goldsmith who defrauded him of it; 1 *Str.* 503; for possession alone gives a sufficient title to maintain this action against all persons, except against the actual owner. Drawing out part of a vessel, and filling it up with water, is conversion of all the liquor. 1 *Str.* 576.

An uncertificated bankrupt may maintain trover, for goods acquired by him after his bankruptcy, against all the world, except his assignees. 7 *T. R.* 391.

One tenant in common may maintain trover against his co-tenant, in case where the subject matter of tenancy (*e. g.* a ship) is actually destroyed mediately or immediately. 4 *East*, 110, 121; and see 1 *Taunt.* 241.

Where a lease was deposited by one with the authority of another, and received by the bailee on account of both, the Court of King's Bench held that one alone could not demand it of the bailee without the authority of the other, so as to maintain trover on the bailee's refusing to deliver it. 13 *East*, 197.

Where certain lands, together with woods, were conveyed under a marriage settlement to trustees, during the life of a married woman, in trust for her and her issue, and in default thereof to the use of her right heirs, the Court of Common Pleas held that the trustees could not maintain trover against a stranger for trees cut down by order of the woman's husband, and carried away by the defendant. 1 *New Rep.* 26.

In case a master delivers corn to his servant to sell, who does so, and converts the money, the master may bring trover against the servant. 2 *Bulst.* 307; 1 *Rob. Rep.* 59.

If goods are delivered to one to deliver over to another, and he to whom they were first delivered do afterwards refuse to deliver them over, and converts them to his own use, he is liable to action of trover, not only by him who first delivered them, but also by him to whom they were to be delivered; and a plaintiff may choose to have his action of trover against the first finder of goods, or any other who gets them afterwards by sale, &c. 1 *Bulst.* 68; 1 *Leon.* 183.

A servant may be charged in trover, although the fact of conversion may be done by him for the benefit of his master. 4 *M. & S.*

A. entrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. B. not being able to sell the goods in India himself, left them with an agent to be disposed of, directing the agent to remit the money to B. himself in England; the Court of Common Pleas held that A. could not maintain trover against B. for the goods. 2 *B. & P.* 438.

Trover doth lie against a common carrier for negligence in losing goods; though it doth not for an actual wrong: and if goods are stolen from a carrier, he may not be charged in trover and conversion; but by action upon the case on the custom of the realm, &c. 2 *Salk.* 655.

It is settled that trover does not lie against a carrier for a bare non-delivery; but it lies of the goods being in his possession, if he refuse to deliver them on demand. 1 *Taunt.* 391. But his assertion that he has delivered the goods to the consignee, which is false, is no evidence of conversion. 1 *Camp.* 409. So trover lies if he deliver them to a wrong person, though by mistake. *Peake's Ca.* 68; 4 *Bing.* 476. And it lies against a warehouseman under similar circumstances; 2 *B. & A.* 702; or where he delivers them under a forged order. 1 *Stark. Ca.* 104. And if a carrier refuse to deliver the goods without mentioning his lien, he cannot afterwards set up a lien as a defence to the action. 1 *Camp.* 410.

Where goods are stolen, and before prosecution of the offender by indictment the party robbed brings action of trover, it lies not; for so felonies might be compounded; but where A. steals the goods or money of B. and is convicted, and hath his clergy, upon the prosecution of B., if B. brings

trover and conversion for the money, and on not guilty pleaded this special matter is found, the plaintiff shall recover. 1 *Hale's Hist. P. C.* 546.

The owner of stolen cattle, who prosecutes the thief to conviction, may recover their value in trover from a person who purchased them from the thief by a *bond fide* sale, but not in market overt, and sold them again in market overt before the conviction, notice of the felony having been given to the defendant whilst the cattle was in his possession. *Peer v. Humphrey*, 1 *New Term Rep. K. B.* 28.

But if goods be obtained from A. by fraud, and pawned to B. without notice, and A. prosecute the offender to conviction, and get possession of his goods, B. may maintain trover for them; for this is distinguishable from the case of felony where the owner's right of restitution is given by positive statute. 5 *T. R.* 175. See *Restitution*.

Where the plaintiff lost a bank-note, which the defendant tortiously converted to his own use, but subsequently paid the plaintiff part of the proceeds; it was held, that the acceptance of such part did not waive the tort, but the plaintiff might notwithstanding sue for the note in trover, the amount received going in reduction of damages. 4 *Tyr.* 485.

III. In order to support this action, the plaintiff must, at the time of the conversion, have had a property in the chattel, either general or special. 3 *Campb.* 417; 2 *Saund.* 47 a, n. 1; 1 *T. R.* 56.

He must also have had the actual possession, or the right to immediate possession, at the time of such conversion. 3 *Campb.* 417. And therefore where goods leased as furniture with a house, or otherwise let to hire, were taken in execution and absolutely sold by the sheriff, it was decided that the landlord or letter to hire could not maintain trover against the sheriff pending the lease, but should have declared specially in an action on the case. 7 *T. R.* 9; 3 *Campb.* 187; 3 *Lev.* 209. So when A. paid a Bank of England note to B., who paid it to C., who presented it at the Bank, where it was stopped, C. only could sue, and not A. 3 *Campb.* 417; 2 *T. R.* 770. But a landlord has such an implied possession of timber wrongfully cut down during a lease, as to enable him to support trover if it be removed. 7 *T. R.* 15; 1 *Saund.* 322, n. 5; 2 *Campb.* 491; 2 *M. & S.* 424; 1 *Price*, 57. And a remainder-man may support this action against a tenant for life for taking away trees. *Com. Dig. Bians, H.*; 1 *T. R.* 55. So if corn be sown by the out-going tenant, and cut down and taken by him after the purchase of tenancy, under a mistaken claim to it as a way-going crop, the owner of the estate may support trover. 1 *Price*, 58.

The person who has the absolute or general, and not the mere special property in a personal chattel, may support this action, although he has never had the actual possession; for it is a rule of law, that the general property of personal chattels creates a constructive possession. 2 *Saund.* 47 a, n. 1; *Bac. Abr. Trover, C.*; 3 *Wils.* 136; 1 *B. & P.* 47. And where the plaintiff, as executor, declared on the possession of his testator, the court held it to be sufficient, because the property was vested in the executor, and no other person having the right of possession, the property drew after it the possession. *Latch* 211; 3 *Bac. Abr.* 58. And where a person has delivered goods to a carrier or other bailee, who has not the right to withhold the possession from the general owner, and so parted with the actual possession, yet he may maintain trover for a conversion by a stranger, for the owner has still the possession in law against a wrong-doer, and the carrier or other bailee is considered merely as his servant. 1 *Taunt.* 391; 7 *T. R.* 12; 2 *Saund.* 47 b. And this rule prevails in the case of a gratuitous loan, but not where there has been a letting to hire. 2 *Campb.* 464; 3 *Campb.* 187; 7 *T. R.* 9. And an executor or an administrator is by legal construction possessed of the goods of the testator or intestate from the

time of his death. 7 *T. R.* 13; *Latch.* 214; 2 *Saund.* 47 b, 47 k.

So a person having a special property in the goods, may support trover against a stranger who takes them out of his actual possession, as a sheriff, 2 *Saund.* 47; a carrier, 1 *Roll. Abr.* 4; 1 *Mod.* 31; 1 *Lord Raym.* 276; *Bul. N. P.* 33; a factor, consignee, pawnee, or trustee, or an agister of cattle, or a gratuitous bailee, 1 *B. & A.* 59; or an executor *de son tort*, or any other person who is responsible over to his principal, 2 *Saund.* 47 b; 11 *East*, 626; but a mere servant cannot support this action. *Owen*, 52; 1 *Campb.* 369.

In general also a special property is sufficient to support trover against a stranger, who has no better title; and the bare possession of goods, whether lawfully obtained or not, is *prima facie* evidence of property. 2 *Saund.* 46 c, d; 1 *East*, 244. And a party entitled to the temporary possession may support trover against the general owner. 2 *Taunt.* 268. And trover lies by a person possessed of a ship not registered. 2 *Taunt.* 302; 1 *East*, 246.

In general it has been considered that in the case of a special property it must have been accompanied with possession, in order to support trover. 4 *East*, 214. But where the person having such special property has also an interest in the goods, there are exceptions; and therefore it was observed by *Eyre, C. J.* 1 *B. & P.* 47 (and see 2 *Saund.* 47 d; see *Bac. Abr. Trover, C.*; 8 *T. R.* 22; 11 *East*, 626) that it is not true, that in cases of special property the party must once have had possession in order to maintain trover; for a factor to whom goods have been consigned, and who has never received them, may maintain such an action.

However, without such absolute or special property, this action cannot be maintained, therefore, as we have seen, trover cannot be supported by a party in a suit for a record, nor can a tenant in tail expectant on the determination of an estate for life, without impeachment for waste, bring trover for timber which grew upon and was severed from the estate; for such a tenant for life has a right to the trees immediately when they are cut down. 1 *T. R.* 55; 3 *Campb.* 417. And the plaintiff must not only prove that the goods which are the subject of the action are his property, but also that they were so when they were converted. 2 *T. R.* 750.

The plaintiff, an agent to P., held a bill of exchange for 3500*l.* as a security for 1000*l.* advanced by P. to E., by whom the bill was deposited, and who expressly authorized its detention till money due to the plaintiff from E. was also paid. The acceptor improperly obtained possession of the bill, and was sued by P., who, on the cause being referred, had damages awarded him to the amount of his advances. Held, that the plaintiff might also maintain trover, the general property in the bill being in him, notwithstanding the prior recovery by P. 4 *Bing.* 589.

In the case of a general as well as special property, the action may in most cases be brought either by the general or special owner, and judgment obtained by one is a bar to an action by the other. See 1 *Chitty on Pleading*.

IV. CONVERSION may be either, 1. by a wrongful taking a personal chattel; 2. by some other illegal assumption of ownership, or by illegally using or misusing it; or 3. by a wrongful detention.

The wrongful taking of the goods of another who has the right of possession, is of itself a conversion, and so is the compelling of a party to deliver up goods; and whenever trespass will lie for taking goods of the plaintiff wrongfully, trover will also lie. 3 *Wils.* 19; *Willes*, 83; 2 *Saund.* 47 k; *Cro. Eliz.* 824. Thus trover lies against the assignees under a commission of bankrupt, where they compel a party to deliver up his property when he was not subject to the bankrupt laws. 3 *B. & B.* 2; 6 *J. B. Moore*, 56, *S. C.* And if goods be wrongfully seized as a distress, though they be not

removed from the place in which they were, yet trover may be supported, because the possession in point of law is changed by their being seized as a distress. *Willes*, 56. And a seizure of goods under a *feri facias* after a party's bankruptcy, and a removal of them to a broker's, is a sufficient conversion. 3 *Campb.* 396. And this action may be supported after an acquittal of the defendant for the felonious taking of goods. 12 *East*, 409.

And where a toll-gatherer to the owner of a market, in taking toll of corn, varied from the regular mode so as to take a larger quantity, it was held trover was maintainable against him for the excess. 2 *B. & Ad.* 190.

In the case of a conversion by wrongful taking, it is not necessary to prove a demand and refusal. 1 *Sid.* 164; 6 *Mod.* 212; *Bul. N. P.* 44; 1 *Mark.* 173; 3 *B. & B.* 2; 6 *J. B. Moore*, 56, S. C. And the intent of the party is immaterial; for, although the defendant acted under a supposition that he was justified in what he did, he will be equally liable to this action. 4 *M. & S.* 260. But if the possession was obtained under colour of a contract, trover cannot be sustained, 3 *Campb.* 299, 352; 3 *Taunt.* 274; unless a case of fraud can be proved. 7 *Taunt.* 59; 1 *B. & C.* 514.

So the wrongful assumption of the property or right of disposing of goods, may be a conversion in itself, and render unnecessary a demand and refusal, 5 *East*, 407; 6 *East*, 540; 4 *Taunt.* 24; 2 *B. & B.* 2; 6 *J. B. Moore*, 56, S. C.; 4 *Taunt.* 799; as well as any tender of charges, 1 *Campb.* 410; 2 *M. & S.* 298; 3 *Campb.* 472, 473. Thus a sale of a ship, which was afterwards lost at sea, made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without showing a demand and refusal. 5 *East*, 407, 420.

So where a person entrusted with the goods of another, puts them into the hands of a third person, contrary to orders, it is a conversion. 4 *T. R.* 264. And if one tenant in common sell the other's goods without his consent, it is a conversion, and trover is maintainable, 5 *B. & A.* 395; and where a carrier, *Peake*, C. N. P. 49; 5 *Burr.* 2825; see 1 *Taunt.* 391; 1 *Campb.* 409, 439, *ante*; or a wharfinger, 2 *B. & A.* 702, by mistake, delivers goods to a wrong person, trover may be supported, though it would be otherwise if they were left by accident, *Id.* 41, n.; and if a person illegally make use of a thing found or delivered to him, it is a conversion in itself, *Cro. Eliz.* 219; or if a bailee, merely to keep or carry, and having no beneficial interest, misuse a chattel entrusted to him, *Id. ibid.*; as if a carrier draw out part of the contents of a vessel, and fill it with water, 1 *Str.* 576; or if a carrier or wharfinger break open a box containing goods, or sell them. 2 *Salk.* 655. So an irregularity in a distress taken damage feasant may amount to a conversion, *Cro. Jac.* 148; *Bac. Ab., Trover*, B.; though not in the case of a distress for rent, when we have seen trover cannot be supported, 1 *Hen. Bla.* 10; and a party will be personally liable for the conversion to the use of another, although he acted under a supposition that he was justified in what he did. 4 *M. & S.* 259.

But unless there be an illegal assumption of property, trover cannot in general be supported for a mere non-feasance, 6 *East*, 540; 2 *B. & A.* 704; and therefore if a carrier, or other bailee, by negligence, lose goods entrusted to his care, the remedy in general must be case or assumpsit, 5 *Burr.* 2825; 2 *Saund.* 47; *Peake*, C. N. P. 240; and an agent selling at an underprice is not liable to an action of trover, 3 *Taunt.* 117; and the retention of property under the decree of a court of competent jurisdiction, is no conversion. 4 *J. B. Moore*, 361.

In the preceding instances proof of the act of the defendant is sufficient without evidence of a demand and refusal, 4 *Taunt.* 801; but where the plaintiff is not prepared to prove

some such actual assumption of property, trover cannot be supported without proof of a demand and refusal, or at least a neglect to deliver the goods. *Bul. N. P.* 44; 2 *Saund.* 47 c.; 13 *East*, 177, 197; 1 *Campb.* 439; 5 *M. & S.* 105.

If in trover an actual conversion cannot be proved, then proof is to be had of a demand made, before the action brought, of the thing for which the action is commenced, and that the thing demanded was not delivered. In this case, though an actual conversion may not be proved, a demand, and refusing to deliver the things demanded, is a sufficient evidence to the jury that he converted the same, till it appears to the contrary. 10 *Rep.* 56, 491; 2 *Lil.* 619.

Where a defendant really comes to the possession by finding, denial is a conversion; but if he had the goods, &c. by delivery, there denial is no conversion, but evidence of conversion; and in both cases the defendant hath a lawful possession, either by finding or by delivery; and where the possession is lawful, the plaintiff must show a demand and a refusal, to make a conversion: though if the possession was tortious, as if the defendant takes away the plaintiff's hat, the very taking is a sufficient proof of the conversion, without proving a demand and refusal. *Sid.* 264; 3 *Salk.* 365.

By Holt, C. J., the denial of goods to him who hath a right to demand them, is a conversion; and after a demand and refusal, if the defendant tender the goods, and the plaintiff refuse to receive them, that will go only in mitigation of damages, not to the right of the action of trover, for the plaintiff may have that still. *Mod. Cas.* 212.

An action of trover and conversion may be brought for goods, although the goods came into possession of the plaintiff before the action is brought, which doth not purge the wrong, or make satisfaction for that which was done to the plaintiff by detaining the goods. If a man takes my horse and rides him, and afterwards delivers him to me, trover lies against him, for this is a conversion, and the re-delivery is no bar to the action. 1 *Dunn. Abr.* 21; 2 *Lil.* 618.

But it has been recently held, that a demand and refusal are evidence only, and are not conclusive of the fact of conversion, and they are cured by a subsequent tender of the goods before action brought. 1 *Moo. & Sc.* 459.

Where a trader, on the eve of his bankruptcy, made a collusive sale of his goods to the defendant, it was decided that the assignees could not maintain trover without proving a demand and refusal, 2 *Hen. Bla.* 135; 2 *Esp. Rep.* 96; or where the sheriff, having taken goods in execution after a secret act of bankruptcy, has not proceeded to sell. 3 *Campb.* 396; *sed vide* 4 *M. & S.* 268.

Such a demand and non-compliance are *prima facie* evidence of a conversion, and will induce a jury to find it, unless the defendant adduce evidence to negative the presumption; as that he being a carrier, &c. lost the goods by negligence, &c. *Bul. N. P.* 44; 2 *Saund.* 47 c.; *Peake's Law of Evidence*, 298; or that he had reasonable grounds for doubting the plaintiff's right, and offered to deliver them to the right owner. 3 *Campb.* 215 n.; 2 *Bulst.* 310; 5 *J. B. Moore*, 559, 286, n.; 2 *B. & P.* 464; 5 *B. & A.* 247. And where the demand of the things for which the action is brought is not made by the plaintiff himself, who is the owner, but by another person on his account, a refusal by the defendant, on the ground that he does not know to whom the things belong, or that the person who applies for them is not properly empowered to receive them, or until he is satisfied by what authority the application is made, this will not be such a refusal as to create a conversion. 1 *Esp. N. P. C.* 87; and see *J. B. Moore*, 259. In an action of trover against an agent, if the plaintiff rely on a refusal to deliver up the property as evidence of a conversion, it must amount to an absolute and not a mere qualified one; and on an agent's refusal to deliver up the goods without his master's directions, it is not sufficient to render him personally liable. 5 *B. & A.* 247; 2 *Mod.* 242.

A refusal by a bailee to deliver goods to the real owner without the authority of the bailor, who has in fact no lien, is sufficient evidence of a conversion. 1 B. & A. 450.

Where the plaintiff sold utensils in a brewhouse to T. who paid for them, and was to take them away, but the defendant being possessed of the brewhouse, the utensils were demanded of him by the plaintiff's attorney, accompanied by T., when the defendant said he would not deliver them to any body, and afterwards the plaintiffs repaid T. and brought trover for the goods: the Court of King's Bench held that this demand and refusal were sufficient evidence of conversion to support the action, without any new demand after the re-payment to T. 5 M. & S. 105.

A. brought an action of trespass against B. for taking away a filly; B. justified the taking as the servant of C.; the jury found a verdict for A., with damages, subject to a reference to D. one of the jurors, to ascertain to whom she belonged (which was to depend on whether a scar should appear on a certain part of her body, and in case it should, the verdict for A. was to stand; if not, it was to be entered for B.) The filly was delivered to D. by consent of all parties, and he made his award, and found her to belong to A., and accordingly ordered the verdict for him to stand. C., ten days after the award, demanded the filly of D., who refused to deliver her, and a fortnight afterwards C. brought an action of trover for her recovery: held that the detention of the filly by D. did not, under the circumstances, amount to a conversion; as C. was no party to the original action, and as it did not appear that he was authorized by B. to make the demand, to whom alone D. was bound to deliver her, he only being liable to the damages awarded to A. 5 Moore, 259; 2 B. & B. 417.

In trover against several defendants, all cannot be found guilty on the same count, without proof of a joint conversion by all. 1 M. & S. 588.

In trover for a bond, the plaintiff need not show the date, for the bond being lost or converted, he may not know the date; and if he should set out the date and mistake it, he would fail in his action. Cro. Car. 202. If the defendant find the bond and receive the money, action of account lieth against the receiver, and not trover. Cro. Eliz. 723.

Where the trover of goods is in one county, and the conversion in another county, the action brought for these goods may be laid in the county where the conversion was, or in any other county, as it is only a transitory action; and neither the place of trover nor conversion, are traversable. Pash. 23 Car. B. R.

Formerly under the general issue Not Guilty the special matter might have been given in evidence to prove the plaintiff had no cause of action, or to entitle the defendant to the thing in controversy. 2 Bulst. 313. Vide also 2 Salk. 654; Fete. 198; Cro. Car. 27; 2 Lil. 622.

But the plea of Not Guilty now operates as a denial only if the breach of duty or wrongful act alleged to have been committed by the defendant, and all other pleas in denial must take issue on some particular matter of fact alleged in the declaration. See further, Not Guilty.

The jury are not limited to find as damages the mere value of the property at the time of the conversion, but they at their discretion find the value at a subsequent time, as damages. 1 C. & P. 62.

In trover for a bill of exchange, the damages are to be calculated according to the amount of the principal and interest due upon the bill at the time of the conversion. 3 Campb. 477.

After a plaintiff had recovered damages under a writ of inquiry in trover for the conversion of his title-deeds, the court permitted satisfaction of the damages to be entered on the roll, on the terms of the defendant's delivering up the deeds and paying all the costs as between attorney and client incurred by the plaintiff in the cause, and placing the plaintiff

in as good a situation as he stood in before the cause of action accrued. 1 D. & R. 201.

None shall be held to special bail in action of trover or detinue without a judge's order. Reg. Gen. K. B. and C. P. III. 48 Geo. 3. 9 East, 325; 1 Taunt. 203.

TROY-WEIGHT, *pondus Trojæ*.] A weight of twelve ounces to the pound, having its name from Troyes, a city in Champaign, whence it came first to be used here. But see tit. *Pondus Regis* for a different etymology. See further, *Measure*.

TRUCE, *treuga*.] A league or cessation of arms. Anciently there were keepers of truces appointed; as King Edward III. constituted, by commission, two keepers of the truce between him and the king of Scots, with this clause, *nos volumus treugam prædictam quantum ad nos pertinet observari, &c.* Rot. Scot. 10 Edw. 3. See *Conservators of the Truce, Safe Conduct*.

TRUCK SYSTEM. A name given to the practice that has prevailed, particularly in the mining and manufacturing districts, of paying the wages of workmen in goods instead of money. The plan has been for the masters to establish warehouses or shops, and the workmen in their employment have either got their wages accounted for to them by supplies of goods from such depots, without receiving any money, or they have got the money with an express understanding that they were to resort to the warehouses or shops of their masters for the articles of which they stood in need. See further, *McCulloch's Com. Dict.*

This system of dealing, which was so susceptible of abuse, has very properly been abolished by the 1 & 2 Wm. 4. c. 52. For an outline of the principal provisions of the act, see *Servant*.

TRUG-CORN, *truga frumenti*. A measure of corn. At Leominster, at this day, the vicar hath trug-corn allowed him for officiating at some chapels of ease within that parish. *Liber Niger, Heref.*

TRUST AND TRUSTEE.

FIDUCIA, CONFIDENTIA.] A trust is a confidence which one man reposes in another; but, as generally used in law, it is a right to receive the profits of land, and to dispose of the land itself (in many cases) for particular purposes, as directed by the lawful owner, or pointed out by settlement, &c. or by that deed of conveyance which created the trust. A trust is but a new name given to an use.

For the origin of trusts, and their former and present connexion with uses, see tit. *Uses*. What follows here is chiefly miscellaneous information on the nature and property of trusts, and trust terms, and the duty of trustees; as to which see more at large *Fonblanque's Treatise of Equity*, in the notes *passim*; and particularly, as to trusts *Executory and Executed*, and the existing distinctions between them, *lib. i. c. 6. § 8*. As to who may be seised to use, or may be a trustee, *lib. ii. c. 6. § 1. in n.* What acts may or ought to be done by a trustee, to alter or perfect the intent of his trust, *lib. ii. c. 7. § 2. in n.* And on the whole of the subject, *Fin. Abr. tit. Trust*. And Mr. Butler's disquisition on this subject, in his note on 1 Inst. 290, b.

I. Of Trusts generally.

II. Of Trusts arising by implication of Law, &c.

III. Of Trustees; their Powers, Duties, and Liabilities, &c.

I. A TRUST, generally speaking, is a right on the part of the *cestui que trust* to receive the profits, and to dispose of the lands in equity. 1 Mod. 17. But there may be special trusts for the accumulation of profits, the sale of the estates, or the conversion of one trust-fund into another, which may prevent all power of interference on the part of the *cestui que trust* until such special trust be satisfied; and there is a distinction between trusts executed and executory.

A trust does not include every equitable interest. An equity of redemption is said to be a title in equity, and not merely a trust. And see *Hard. 465*. Lord Eldon, in *17 Ves. 133*, observes, that a trust-estate and an equity of redemption are, in many respects, most materially different.

Trusts may be created of real or personal estates, and are either express or implied; under which head of implied trusts may be included resulting trusts, and all such trusts as are not express. Express trusts are created by deed or by will; implied trusts arise in general by construction of law upon the acts or situation of parties. *1 Mad. Ch. 446*.

The courts of equity have an original, a peculiar, and an exclusive jurisdiction over a trust, which has been called a "creature of equity," see *2 Bulstr. 837*; and of which the courts of law take no cognizance. The ecclesiastical courts have no jurisdiction over trusts; and therefore, where a party sued as a trustee was arrested on a writ *de contumace capiendo*, the Court of King's Bench discharged him out of custody. *1 B. & C. 655*.

Trusts and legal estates are to be governed by the same rules; and this is a maxim which has universally prevailed. It is so in the rules of descent, as in gavelkind, and borough-English lands; and there was formerly a *possession fratris* of a trust, as well as of a legal estate. So the like rules prevail in limitations, and also in barring entails of trusts, as of legal estates; per the master of the rolls, who said he thought there was no exception out of this general rule, nor is there any reason that there should; and that it would be impossible to fix boundaries, and show how far, and no farther, it ought to go; and that perhaps in early times the necessity of keeping thereto was not seen, or thoroughly considered. *2 P. Wms. 645*.

In some cases, however, the assistance of the legislature has been required to preserve the uniformity between legal and trust-estates.

Declarations and creations of trust, of lands, tenements, or hereditaments, are to be in writing, signed by the party empowered to declare such trust, &c. *29 Car. 2. c. 3*. But it is provided that this shall not extend to resulting trusts, or trusts arising by implication or construction of law; which shall be of like force as before that act. See *post*, as to *Resulting Trusts*.

The statute does not extend to the declaration or creation of trusts of mere personality. *10 Mod. 404*; *3 Bro. C. C. 587*; *1 P. W. 9*.

By virtue also of the above statute, trust-estates are liable to executions upon judgments, statutes, and recognizances.

Previous to that statute the trust of an estate in fee simple was not assets at law or in equity, in the hands of the heir of the *cestui que trust*, to satisfy bond debts. See *Cha. Cas. 12*. But by the tenth section of that statute, the trust is now made legal assets. *2 Barn. 248*.

A trust may be devised with the solemnities required by the statute of frauds, upon the devise of legal estates. *2 Cox's P. W. 258, n. 1*; *3 Atk. 151*.

A fine and recovery of *cestui que trust* formerly barred and transferred a trust, as it did an estate at law, if it were upon a consideration. *Chanc. Rep. 49*. See titles *Fine of Lands*, *Recovery*; and *Treat. Eq. lib. i. c. 3. § 1. in n.*

It has been decreed, that a trust for a son, &c. shall pass with the lands into whose hands soever they come, and cannot be defeated by any act of the father or trustees. And though a husband and wife have no children in many years, and they and the trustees agree to sell the land settled, &c. it will not be permitted in chancery. *Abr. Cas. Eq. 391*; *1 Vern. 181*. A termor grants his lands in trust for himself for life, and to his wife for life, and after to his children for their lives, and then to A. B.; this trust to A. B. is good; though, if it had been to the heirs of their bodies, it would be otherwise. *Chanc. Rep. 230, 239*.

For much useful information as to the manner in which the

courts have remedied the mischiefs arising from the secret nature of trusts, both with respect to the *cestui que trust*, and the public at large, see *1 Inst. 290, b. &c.* and the long and learned note there.

This, with respect to the *cestui que trust*, has been effected, in some degree, by courts of equity having held that persons paying money to trustees, with notice of the trust, are, generally speaking, obliged to see it properly applied. It is perhaps to be wished that the operations and consequences of trusts had been confined to the trustee and *cestui que trust*; there is no doubt but the doctrine is, in many instances, of great service to the *cestui que trust*, as it preserves his property from the speculations, and other disasters, to which, if it were left solely to the discretion of the trustee, it would necessarily be subject. Yet it may be questioned whether the admission of it is not in general productive of more inconvenience than real good; for if the *cestui que trust* is a married woman, an infant, or otherwise incapable of giving assent to the payment of the money to the trustee, the persons paying it cannot be indemnified against the trustee's misapplication of it, but by paying it under the sanction of a court of equity. This retards and often absolutely impedes the progress of the business, involves the parties in an expensive and intricate litigation, and puts them to very great and, in other respects, useless expense. To avoid this, it is become usual to insert a clause in deeds or wills, that the receipts of the trustees shall, of themselves, discharge the persons to whom they are given, from the obligation of seeing to the application of money paid by them as purchasers, &c. See tit. *Purchase*; and further, *1 Inst. 290, b. in n.*

The prevention of the mischief arising from trusts, with respect to the public, has been effected in some measure by the rule laid down in courts of equity, that in any competition of claims, where the equity of the parties is equal, he who has the law shall prevail. If a person has the legal estate or interest of the subject matter in contest, he must necessarily prevail at law over him whose right is only equitable, and therefore not even noticed by the courts of law; this advantage he carries with him even into a court of equity, so far, that if the equitable claims of the parties are of equal force, equity will leave him who has the legal right in full possession of it; and not do any thing to reduce him to an equality with the other, who has the equitable right only. This very important rule of equity is most fully illustrated by an inquiry into the doctrine of courts of equity respecting trust terms of years attendant upon the inheritance; in this inquiry, the origin and effect of these terms, and the general rules as to the cases in which it is necessary that they should be from time to time assigned to trustees to attend the inheritance, and protect a purchaser from all mesne incumbrances, are very clearly and explicitly stated; though these rules must, from their nature, be subject to an endless variety of modifications. It is concluded by the learned writer, that, in all cases of this description, it is infinitely better to err by an excess of care, than to trust any thing to hazard. There is no doubt that the precautions used for the security of purchasers appear sometimes to be excessive, and satisfactory reasons cannot always be given for requiring some of them; yet the more a person's experience increases, the more he finds the reason and real utility of them; and the more he will be convinced that very few of the precautions required, by the general practice of the profession, are without their use, or can be safely dispensed with. *1 Inst. 290, b. 292, b. 294, b. in n.*; and see *Treat. Eq. lib. ii. c. 4. § 3. in n.*; and also tit. *Mortgage*.

By the operation of these long terms, the legal estate being separated from the beneficial interest, many inconveniences would have resulted from them, had not courts of equity interposed, and laid down certain rules, restrictive of the legal rights of the trustee. Hence it became a rule in equity, that where the tenant for years is but a trustee for the owner of

the inheritance, he shall not keep out his *cestui que trust*; nor, *pari ratione*, obstruct him in doing any act of ownership, or in making any assurances of his estates; and therefore, in equity, such a term for years shall yield and be moulded according to the uses, estates, or charges which the owner of the inheritance declares or carves out of the fee. See 1 T. R. 765. Courts of law, feeling the reasonableness of this rule, allow it to prevail as an exception to the general rule, which requires a plaintiff in ejectment to recover by the strength of a legal title; so that it is now established by many decisions, that, even at law, an estate in trust, merely for the benefit of the *cestui que trust*, shall not be set up against him: any thing shall rather be presumed. See *Comp. 46*; *Doug. 721*; *Bull. N. P. p. 110*; 1 T. R. 758; 2 T. R. 698.

By the 39 & 40 Geo. 3. c. 50. (the provisions of which were extended to Ireland by 58 Geo. 3. c. 46.) for relief of persons entitled to entailed estates to be purchased with trust-moneys, reciting that by the practice of courts of equity in cases where money was to be laid out in the purchase of lands to be limited to uses capable of being barred by fine, such courts directed the money to be paid to the party who could by fine bar the uses, without requiring the actual investment of the money in land; but nevertheless, in cases where a recovery was requisite to bar such uses, the said courts refused to direct the money to be paid to the party who might suffer such recovery; it was enacted that in future in all cases where money under the controul of a court of equity, or which any trustees should be possessed of or entitled to, should be subject to be invested in the purchase of freehold or copyhold premises to be settled in such manner that it would be competent to the first tenant in tail to bar estates tail and remainders, it should not be necessary to have such money actually invested; but the court, on the petition of the first tenant in tail, and the parties having any antecedent estates (being adults, or if females covert, separately examined,) might order such money to be paid to them, or applied as they should appoint. Funds or other securities in which such money was vested might be transferred under orders of the court.

By the 7 Geo. 4. c. 45, the above act was repealed, and its provisions re-enacted and extended; but by the recent statute for the abolition of fines and recoveries, the 7 Geo. 4. c. 45, is also repealed, and other provisions substituted. See *Tail*.

By the 39 & 40 Geo. 3. c. 98. to restrain trusts in deeds or wills, it is provided that no person by deed or will shall settle or dispose of any real or personal property, so that the produce shall accumulate for a longer term than the life of the settler, or twenty-one years after his decease, or during the minority of any party living at his decease, or the minorities of parties beneficially interested. See *Executory Devise, 1*.

As to trusts for charitable purposes, see statutes 59 Geo. 3. c. 81, 91. in addition to those mentioned under title *Charitable Uses*.

A trust of a fee-simple estate, or fee-tail, is forfeited by treason, under the 33 Hen. 8. c. 20. § 2. but not by felony; for such forfeiture is by way of escheat, and an escheat cannot be but where there is a defect of a tenant; and here is a tenant. *Hard. 495*. See *Jenk. Cent. 245*. A trust for a term is forfeited to the king in case of treason or felony; and the trustees in equity shall be compelled to assign to the king. *Cro. Jac. 513*. If a bond be taken in another's name, or a lease be made to another in trust for a person, who is afterwards convicted of treason or felony, they are as much liable to be forfeited as a bond or lease made in his own name, or in his possession. See *Forfeiture*; and *Treat. Eq. lib. ii. c. 7. § 1. in n.*

By the 39 & 40 Geo. 3. c. 88; 47 Geo. 3. st. 2. c. 24; and 59 Geo. 3. c. 94. his majesty was empowered to direct the execution of any trusts to which lands vested in him by escheat for want of heirs, or by forfeiture or alienage, might be subject, and to make grants for such purposes, or for restoring them

to the family, or to persons adopted as part of the family, or to carry into effect any grant, conveyance or devise, or for rewarding discoverers, &c. and that either unconditionally or on payment of any sum of money, or to grant to trustees to be sold, and the money applied as the crown should direct.

Now by the 4 & 5 Wm. 4. c. 23. § 2. if a trustee or a mortgagee of any land die without an heir, the Court of Chancery may appoint a person to convey it pursuant to the provisions of the 1 Wm. 4. c. 60; and by § 3. lands and chattels vested in any trustee or mortgagee shall not be escheated or forfeited by his attainer or conviction for any offence, but shall remain in such trustee, &c. or survive to his co-trustee, or descend to his representative.

Although the trust of an estate of inheritance is subject to curtesy, yet it was not until recently liable to dower. 2 Atk. 525; 1 Bro. 326. But now by the 3 & 4 Wm. 4. c. 105. § 2. a wife is entitled in equity to dower out of any land of which her husband died beneficially interested. See *Dower, II. 2*.

For the provisions of the recent statute of limitations, with respect to trust-estates, see *Limitation of Actions, II. 1*.

II. It was ruled by Lord Chancellor *Comper*, that the statute of frauds, 29 Car. 2. c. 3. § 8. which says, "That all conveyances, where trusts and confidences shall arise or result by implication of law, shall be as if that act had never been made," must relate to trusts and equitable interests, and cannot relate to any use which is a legal estate. 1 P. Wms. 112. See *Treat. Eq. l. ii. c. 5. § 8.* and note there.

Where a daughter's portion was charged upon the father's land, she, at the request of her father, had released her interest in the land, to the intent that he might be enabled to make a clear settlement thereof upon the son. It was declared by the Lord Keeper, that if this was done by the daughter without any consideration, there would be a resulting trust in the father, whereby he should be chargeable to the daughter for so much money. *Freem. 305*.

There are only two kinds of trusts by operation of law; either where the deed or conveyance has been taken in the name of one man, and the purchase money paid by another; or where the owner of an estate has made a voluntary conveyance of it, and declared the trust with regard to one part to be for another person, but hath been silent as to the other part: in which case he himself ought to have the benefit of that, it being plainly his intent. *Barnardist. 388*.

No rule is more certain than that if a man makes a conveyance in trust for such persons, and such estates as he shall appoint, and makes no appointment, the resulting trust must be to him and his heirs. The trust in equity must follow the rules of law in the case of an use; and that it would be so in the case of an use is undoubtedly true; and that was Sir *Edward Cleeve's* case, in 6 Rep. per Lord Chancellor. *Fitz-Gib. 223*.

If a man buys land in another person's name, and pays the money for the land, this will be a trust for him that paid the money, though there be no deed declaring the trust; because the statute of frauds extends not to trusts raised by the implication of law: and a bare declaration by parol, on a deed assigned, may prevent any resulting trust to the assignor. 2 Vent. Rep. 361; 2 Vern. 294. Where there has been fraud in gaining a conveyance from another, that is a reason of making the grantee considered as a trustee. 1 P. Wms. 113.

If a man purchase an estate and do not take the conveyance in his own name only, the clear result of all the cases, without a single exception is, that the trust of the legal estate, whether freehold, copyhold, or leasehold; whether taken in the name of the purchaser and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase money, unless such a result-

ing trust would break in upon the policy of an act of parliament. See 17 *Ves.* 251; and 3 *Ridg. P. C.* 106.

Where a trustee purchases lands out of the profits of the trust-estate, and takes the conveyance in his own name, it was formerly held, that though probably, if he could not make other satisfaction for the misapplication, these lands might be sequestered, yet they could not be declared to be a trust for *Cestui-que-Use*, no more than if *A.* borrows money of *B.* for it is not a trust in writing; and a resulting trust it could not be, because that would be to contradict the deed by parol proof, directly against the statute of frauds. But it was allowed, that if this purchase had been recited to have been made with the profits of the trust-estate, this appearing in writing might ground a resulting trust. And on appeal to the House of Lords, this decree was affirmed. *Kirk v. Webb*, *Chan. Prec.* 84, pl. 77. 2 *P. Wms.* 414.

So, where a testator empowered the executor to lay out the personal estate in land, and settled it on *A.* and his heirs; and the executor being about to purchase, told *A.*'s mother of it, and asked her consent, but took the conveyance in his own name, and no trust in writing was declared, but it was proved that he at several times declared it must be sold to make *A.* satisfaction; yet the court, (though inclined to decree a conveyance to *A.*, the executor being dead insolvent,) declared it could not, because there was no express proof of the application of the trust-money. *Chan. Prec.* 168, pl. 139. It has however been held, in more modern cases, that evidence *abundè* is admissible to show that the purchase was made with the trust-money; and that, upon such fact being clearly proved, a trust will result. See *Ambl.* 409.

But unless the trust arise on the face of the deed itself, the proofs must be very clear, 1 *Vern.* 366; 2 *Atk.* 71; and however clear they may be, it seems doubtful whether parol evidence be admissible against the answer of the trustee denying the trust. 2 *Freem.* 289; *Prec. Chan.* 103; 2 *Atk.* 155; 4 *East*, 571, n. (b). And in cases of this nature the claimant, in opposition to the legal titles, should not delay asserting his rights, as a stale demand would meet with little attention. 7 *Bro. P. C. by Tomlins*, 279.

Where the evidence is merely parol, although clearly admissible, it will be received with great caution. Evidence of naked declarations made by the purchaser himself is, as Sir *William Grant* observed, in all cases most unsatisfactory, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may alter the effect of the declaration.

So Lord Hardwick laid it down that parol evidence might be admitted to show the trust from the mere circumstances of the pretended owner of the real estate or inheritance which made it impossible for him to be the purchaser. 2 *Atk.* 71; and see 1 *Atk.* 59; *Ambl.* 413; 10 *Ves.* 511.

However, parol evidence will be allowed to prove the purchaser's intention that the person to whom the conveyance was made should take beneficially, and if satisfactory he will be entitled to the estate, 2 *East*, 534, n.; 1 *Ves. Sen.* 57; but the proof rests upon him to show that the name from whom the consideration moved did not mean to purchase in trust for himself, but intended a gift to him. 3 *Ridg. P. C.* 178.

Lord Hardwick appears to have been of opinion that this doctrine of resulting trust only extended to cases where the whole consideration is paid by one person, and the conveyance taken in the name of the other. See 9 *Mod.* 233. But in a more modern case the late vice chancellor following the true principle, decided in favour of the resulting trust, where joint purchase had been made by several individuals. 2 *Ves. & Beam.* 388. See *Sugden's Vendors*.

When an estate is subject to a trust or equitable interest, and a person purchases it for a valuable consideration with notice of the trust or equitable interest, the estate will be

subject to it in the hands of the purchaser, 2 *Vern.* 271; 3 *Atk.* 238; 16 *Ves.* 249; and a person acquiring an estate as a mere voluntary grantee, even without notice, see 1 *Coke*, 121, b; 2 *Salk.* 680; or as a devisee, 2 *P. W.* 200, will take it subject to every beneficial or equitable lien. The principle has been extended to that equitable lien which a vendor has for any part of his purchase money remaining unpaid. 15 *Ves.* 829; 2 *V. & B.* 306. See *Saunders on Uses*, 319.

With respect to the cases in which a trust shall result to the heir, where the particular purpose for which land was to be converted into money may have failed, see 3 *P. Wms.* 20. and Mr. *Cox's* note (1) there, where the cases are collected and referred to their respective principles.

III. A trust to pay portions, legacies, &c. out of the rents and profits of the lands, at the day prefixed, gives the trustees power to sell; if the annual profits will not do it within that time, then they may sell the land, being within the intention of the trust: and they cannot sell to raise the money, except it be to be paid at a certain time. *Rep. Chan.* 176. A trustee for sale of lands for payment of debts, paying debts to the value of the land, thereby becomes a purchaser himself. *Ibid.* 199. But where a trustee for paying portions pays one child his full share and the trust estate decays, he shall not be allowed such payment. 2 *Chan. Ca.* 132.

If one devises land to trustees until his debts are paid, with remainder over, and the trustees misapply the profits, they shall hold the land only till they might have paid the debts, if the rents had been duly applied; and after that the land is to be discharged, and the trustees are only answerable. 1 *P. Wms.* 519. A person having granted a lease of land to trustees, in trust to pay all the debts which he should owe at his death, in just proportion, without any preference; it was here declared, that the simple contract debts became as debts due by mortgage and should carry interest. *Ibid.* 229.

In a case where a power of sale was reserved to three trustees and their heirs, one of the trustees died, and the two surviving trustees executed the power: the Court of King's Bench held, that the power was not well executed, although the deed expressly provided that the money arising from the sale should be trusted to the trustees for the time being, and also reserved a power in case of death to appoint new trustees. 1 *B. & A.* 608.

A trust for sale vested in *A.* and his heirs is incapable of being delegated, and cannot therefore be executed by an assignee of *A.* although the deed declared that the receipts of *A.*, his executors, administrators, and assigns should be sufficient discharges for the purchase money. *Bradford v. Bulfield*, 2 *Sim.* 264.

A trustee for sale who has renounced is not a necessary party to the conveyance, or to the receipt of the purchase money. 5 *Mad.* 435.

In equity, trusts are so regarded, that no act of a trustee will prejudice the *cestui que trust*; for though a purchaser for valuable consideration, without notice, shall not have his title any ways impeached, yet the trustee must make good the trust; but if he purchases, having notice, then he is the trustee himself, and shall be accountable. *Abr. Cas. Eq.* 384.

The power of the trustee over the legal estate vested in him exists only for the benefit of the *cestui que trust*. He may indeed, by means of that power, prejudice the *cestui que trust*, by alienating the estate wholly or partially (as by a mortgage, 1 *P. Wms.* 279,) to a purchaser for a valuable consideration; for, as we have already seen, a voluntary conveyance would not have the effect; but such an abuse of trust can hardly occur, unless where a trustee is in possession of the trust-estate and of the title-deeds, and even then very rarely.

Where trustees in a settlement join with tenant for life in any conveyance, to defeat a remainder, before it comes in *esse*, this is a plain breach of trust; and those who claim under such deed, having notice of the trust, will be liable to make

good the estates. 2 *Salk.* 680. Yet in case a trustee joins with *cestui que trust* in tail, in a deed to bar the entail, as it is no more than what he may be compelled to, it is no breach of his trust. 1 *Chan. Cas.* 49, 213.

See the provisions of the recent statute appointing protectors of settlements, title *Tail*.

See further, as to the several modes by which prejudice may be induced by acts of the trustee, and of the interposition of courts of equity in favour of the trustee and *cestui que trust*, *Treat. Eq. lib. ii. c. 7. § 1*.

A judgment or a commission of bankruptcy against a trustee, 1 *P. Wms.* 278; 2 *P. Wms.* 318; 3 *P. Wms.* 187. will not in equity affect the estate; nor can his wife claim dower or freebench out of it, 2 *Ves.* 634, 8; 2 *Freem.* 43; nor can the husband of a female trustee be entitled as tenant by the curtesy. 1 *Atk.* 603; *S. C.* 2; *Eq. Abr.* 723.

With respect to the escheat or forfeiture, by the trustee of a trust-estate, see *ante*, II.

A trustee may devise the trust-estate, but the devisee takes the estate subject to the original trust. 8 *Ves.* 417. But though even under general words (1 *P. Wms.* 197.) the trust-estate may be devised, yet wherever the trusts under which the trustee's property is devised are inconsistent with the supposition that the trust-estate was meant to be included in the devise, it will be presumed it was not intended to pass, and will not pass. 8 *Ves.* 435; 8 *T. R.* 118.

A trustee cannot (without an express power for that purpose) alter the nature of the trust property, *Amb.* 211, either by converting land into money, investing money in the purchase of land, 1 *Ves.* 461; *Amb.* 370; or by taking a lease for lives instead of renewing a lease for years, 3 *P. Wms.* 99; 18 *Ves.* 214, so as to vary the right of succession to such property, unless it be under particular circumstances, and evidently for the benefit of the trust-estate. *Proc. Cha.* 5.; 3 *Brown*, 513; *Amb.* 417.

A trustee selling stock, and investing it in other stock, or annuities, for the purpose of increasing the income of tenant for life, at the expense of the remainder-man, was declared answerable for the original fund or the sum produced by the sale, at the option of the remainder-man, with interest or dividends according to his option. 4 *Russ.* 263.

Neither can trustees lend money on different securities than those authorized by the instrument creating the trust. And a power to lend trust money upon real or personal security does not enable trustees to accommodate a trader with a loan upon his land. *Coop.* 33. And wherever trustees take upon themselves to lend another's money on a private security, they are responsible for the failure of the security. 2 *Cor.* 1. So one trustee suffering the other to have trust money on a note of hand, is liable to make it good. 3 *Bro. C. C.* 112.

Courts of equity view purchases by trustees of trust-estates with great jealousy, and to set aside such a purchase it is not necessary to show they have made an advantage. 8 *Ves.* 348, 10 *Ves.* 393. There is however no rule that a trustee to sell cannot be the purchaser; but however fair the transaction, it must be subject to an option in the *cestui que trust*, if he comes in a reasonable time, to have a re-sale, unless the trustee, to prevent that, purchase under an application to the court. 5 *Ves.* 678.

When a trustee or guardian renews a lease, the new lease shall be subject to the trust affecting the old lease. 1 *Cha. Ca.* 191; 1 *Atk.* 430; 2 *Atk.* 597; 3 *Atk.* 538; 17 *Ves.* 228; 2 *Ves.* & *B.* 45; 18 *Ves.* 259, 274. And if a lease be settled upon *A.* for life, with remainders over, and *A.* obtain a renewal of the lease, the renewed lease shall be bound by the trusts of the will or settlement. *Amb.* 658, 715, 731; 1 *Bro.* 197; 2 *Bro.* 291; 4 *Bro.* 161; 11 *Ves.* 383; 15 *Ves.* 236. So, if one of three lessees, under a lease from a dean and chapter, surrender the old lease, and take a new lease to himself, it shall be a trust for all of them. 1 *Vern.* 276; *Cro.*

Eliz. 302. In these cases the rule of equity is enforced even against the express intention and contract of the lessor. *Sel. Ca. Chan.* 61; 3 *Mer.* 190, 347; 3 *Atk.* 2.

If a person jointly interested with an infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as trustee; and the infant may claim his share of the benefit: but if it do not prove beneficial, he must take it upon himself. 1 *Bos. & Pul.* 376.

Where an agent employed to purchase an estate buys it for himself, equity will consider him as a trustee for the principal. 1 *Russ. & M.* 53.

It is, generally speaking, a rule, that a trustee releasing or compounding a debt due to the trust-estate must answer for the loss occasioned by such release or composition. 1 *Vern.* 342; 1 *Chu. Rep.* 125. Yet the rule must always depend upon the particular circumstances of the case; for where a trustee, in releasing or compounding a debt, acts from prudential motives, and with a view to benefit the trust property, the courts will consider his conduct not only excusable, but in many instances laudable. 3 *P. Wms.* 381. On the other hand, where a trustee buys in an incumbrance for less money than is actually due, the trust-estate shall receive the benefit of the composition. 3 *P. Wms.* 251; 1 *Vern.* 49; 2 *Atk.* 54.

Trustees being obliged to join in receipts one, is not chargeable for money received by the other; in the case of executors it is otherwise. 1 *Salk.* 318; 2 *Vern. Rep.* 515.

But where trustees so join in a receipt, that it cannot be distinguished what was received by one, and what by the other, there they shall both be charged with the whole: so, where one trustee, having received the trust money, handed it over to his companion, he shall be charged; for where, by any act or any agreement of a trustee, money gets into the hands of his companion, whether a trustee or co-executor, they shall both be answerable. So, if a trustee be privy to the embezzlement of the trust-fund by his companion, he shall be charged with the amount. *Treat. Eq. lib. ii. c. 7. § 5, in n.*

Payment by bankers to one of several trustees, of the proceeds of stock sold out under a joint power of attorney from the trustees, does not discharge the bankers as against the other trustees, unless previously authorized by them. 1 *R. & M.* 361, (*N. P.*)

A clause in a settlement that trustees shall not be chargeable, except for money actually received, does not bind the trustees as a covenant, but is a cause of indemnity to take away that responsibility which each would otherwise be subject to for the acts of the others: and only leave each of them accountable for what he actually receives as for a simple contract debt. 1 *T. R.* 42.

Where a settlement directs that a new trustee shall be appointed, on any trustee retiring, and that the trust-property shall be vested in the new and continuing trustees, if a retiring trustee does not appoint a successor, but vests the trust property in the continuing trustee alone, this is a breach of trust; and the retiring trustee is liable for misapplication of the trust funds. 4 *Russ.* 272.

A trustee, robbed by his own servant, shall be discharged of it in account; though great negligence may charge him with more than he hath received in the trust. 2 *Cha. Ca.* 2; 1 *Vern.* 144.

It seems now to be settled, notwithstanding some old determinations to the contrary, that a trustee (or executor) is chargeable in equity with interest on the trust-fund in his hands, wherever it appears that he has made interest; and not only so, but that he appear to have employed the trust-money in trade, whence he has derived profits beyond the rate of interest, he shall account for the whole of such profits: and still further, if a trustee or executor retain money in his hands for any length of time, which he might by application to the court, or by vesting in the funds, have made

productive, he shall be charged with interest thereon. *Treat. Eq. in c. 7. § 6. in n. See Interest.*

A trustee is entitled to no allowance for his trouble in the trust; but he will be paid his costs in case of an unfounded suit against him. *Treat. Eq. ii. c. 7. § 3. in n.*

Where a corporation is in possession of funds arising from rates granted to them by act of parliament, and to be appropriated to certain beneficial purposes, they are as it seems, trustees; but at all events, they are accountable persons; and the act having provided that they should furnish parliament with an annual account of the sums received, this was held not to oust the jurisdiction of the Courts of Chancery, which in such a case can only be taken away expressly or by necessary implication. *Att. Gen. v. Dublin Corp. 1 Bligh, 312.*

The current of decisions, where a legatee might be construed into a trustee, has lately been against the creating such a trust, the question being purely matter of intention, to be collected from the words of the testamentary instrument; and in all the cases where a trust has been created, its objects have been defined. See *Meridith & al. v. Keneage & al. in Dom. Prec., 1 Sim. 542*; and also pp. 534, 540, 550, 565.

Where personal property is bequeathed to the executors, as trustees, the probate of the will is an acceptance of the trusts. 1 *Jac.* 198.

Lord Hobart is stated to have been of opinion, that an action at law might be maintained against a trustee for breach of trust. See 1 *Eq. Ab.* 384, in n. But this opinion is inconsistent with Lord Hardwicke's definition of a trust; which is, that it is such a confidence between parties, that no action at law will lie, but is merely a case for the consideration of courts of equity. 2 *Atk.* 612. That a trustee is liable in equity for a breach of trust, was expressly determined in *Vernon v. Vaudrey, Barn. C.* 303. But it is material to observe, that even in equity the *cestui que trust* is considered but as a simple-contract creditor, in respect of such breach of trust; unless the trustee has acknowledged the debt to the trust-estate under hand and seal. See 2 *Atk.* 119; *Forest.* 109.

There is no primary liability between the parties to a breach of trust, they are all equally liable; and it is no objection to a suit by parties seeking relief against a breach of trust, that one of the defendants against whom no relief is prayed may have been a party to such breach of trust. 1 *Milne & K.* 127.

Where trustees become bankrupt, the chancellor may, by the 6 *Geo. 4. c. 16. § 79.* order a conveyance or assignment of the trust estate to other trustees.

By the 11 *Geo. 4. and 1 Wm. 4. c. 60.* all former acts relating to the transfer of estates and funds vested in trustees and mortgagees were repealed with the view of giving to the courts of equity ampler powers than they before possessed, and of extending their jurisdiction to cases, as, for instance, constructive trusts, which were not within the former statutes.

By § 3. where trustees or mortgagees of land are lunatic, the lord chancellor may direct the committees of such persons to convey such land to such persons as he shall think proper.

Or (§ 4.) he may direct the committee or other person to transfer stocks or funds standing in the name of a lunatic trustee, and receive and pay over the dividends.

And by § 5. the lord chancellor, before inquisition, may appoint a person to convey or transfer.

By § 6. infant trustees or mortgagees are empowered to convey by the direction of the Court of Chancery.

By § 7. infant trustees or mortgagees of land within the jurisdiction of the courts of Lancaster and Durham, may convey by the direction of such courts.

§ 8. When trustees of real estates are out of the jurisdiction, or it is uncertain whether they be alive or who may

be the heir, the Court of Chancery may appoint a person to convey.

§ 9. When trustees of leasehold estates are out of the jurisdiction of Chancery, or it shall be uncertain whether the trustee last known to have been possessed as aforesaid be living or dead; or if any trustee, or the executor of any such trustee, shall neglect or refuse to assign or surrender such land for twenty-eight days, after a proper deed shall have been tendered for his execution, the Court of Chancery may direct any person whom such court may think proper to appoint, to assign or surrender such land to such person and in such manner as the court shall think proper.

And by § 10. a provision nearly similar is made for the transfer of stocks or funds standing in the names of trustees out of the jurisdiction, &c.

§ 11. Directions or orders of the Court of Chancery, or by the lord chancellor, &c. under the authority of the act, are to be made upon petition.

But (§ 12.) the lord chancellor or court may direct a bill to be filed to establish the right.

§ 13. Any committee, infant, or other person directed by the act to make or join in making any conveyance or transfer or receipt or payment, shall be compelled, by the order to be obtained as therein-before is mentioned, to make and execute the same.

§ 14. Mortgage money belonging to infants is to be paid into the bank, or as the court shall direct.

§ 15. The act is to extend to trustees having an interest, or having duty to perform.

§ 16. The representatives of vendors are to be trustees within the act, after a decree for specific performance; and persons in whose names purchases are made to be such trustees.

So (§ 17.) tenants for life, &c. of estates devised in settlement, and contracted to be sold, may be directed to convey, after a decree for specific performance.

§ 18. The act is to extend to other constructive and resulting trusts, when declared by decree.

§ 19. Husbands of female trustees to be deemed trustees within the act.

§ 20. The provisions as to lunacy are to extend to all persons compellable to convey.

§ 21. The act is to extend to petitions in cases of charity and friendly societies.

§ 22. The lord chancellor or Court of Chancery may appoint new trustees, upon petition, although there is no power in any deed or instrument creating or declaring the trusts of land or stock to appoint new trustees.

By § 23. the Court of Chancery is empowered to appoint new trustees of charities.

§ 24. Enacts the manner of proceeding where trustees, defendants in equity, cannot be found.

§ 26. And the powers and authorities given by the act to the lord chancellor of Great Britain, intrusted as aforesaid, shall extend to all land and stock within any of the dominions, plantations, and colonies, belonging to his majesty (except Scotland and Ireland).

§ 27. The powers and authorities given by the act to the chancellor of Great Britain may be exercised in like manner by the lord chancellor of Ireland, intrusted as aforesaid, with respect to all land and stock in Ireland.

§ 28. The powers given to the lord chancellor are to extend to the lord keeper and commissioners.

§ 29. The powers and authorities given by the act to the chancery in England shall extend to all land and stock within any of the dominions and colonies belonging to his majesty (except Scotland).

And (§ 30.) may be exercised by the Court of Exchequer.

§ 31. The powers given to courts in England may be exercised by the same courts in Ireland.

§ 33. The act is to be an indemnity to the bank and other companies.

See further, *Uses and Trusts*.

TUB. A measure containing sixty pounds' weight of tea; and from fifty-six to eighty-six pounds of camphire, &c. *Merch Dict.*

TUB-MAN. See *Pre-audience*.

TUMBRELL, Tumbrellum, Turbichetum. Is an engine of punishment, which ought to be in every liberty that hath view of frank-pledge, for the correction of scolds and unquiet women. *Kitchin, 13.* See *Castigatory; Pillory*.

TUN, Sax. In the end of words, signifies a town, or dwelling-place.

TUN, Lat. Tunellum. A vessel of wine and oil, being four hogsheads. *1 Rich. 3. c. 12.* (repealed). A tun of timber is a measure of forty solid feet, cut to a square. *12 Car. 2. c. 18.* (repealed). See *Measure*.

TUNGREVE, Sax. tungereva, i. e. villæ præpositus. A town-reeve or bailiff; qui in villis (et quæ decimus maneris) domini personam sustinet, ejusque vice omnia disponit et moderatur. *Spelman.*

TURBAGIUM. The liberty of digging turfs. *Mon. Ang. i. 632.*

TURBARY, turbaria, from turbus or turba, an obsolete Latin word for turf. A right to dig turfs on a common, or in another man's ground. *Kitch. 94.* Also it is taken for the place where turfs are dug. See *Common of Turbary*.

TURKEY COMPANY. The trade to the Levant subsisted under a charter in the 3d year of King James I. confirmed by letters patent of *13 Car. 2.* The incorporation was by the name of The Governor and Company of Merchants of England trading into the Levant Seas. The qualifications for admission to this company were these: they were to be mere merchants; and no person residing within twenty miles of London was to be admitted, unless he was made free of the city. The fee of admission was, by the charter of *Jac. 1. 25l.* for those under twenty-six years old, and *50l.* for those above that age. The greatness of this fee, and the peculiarity of the description of candidates, were thought unnecessary restraints: and by *26 Geo. 2. c. 18.* it was enacted, that every subject of Great Britain might be admitted, upon proper application, into The Turkey Company, upon paying the sum of *20l.* By *20 Geo. 3. c. 18.* the like privileges were extended to the Irish traders. By *32 Geo. 3. c. 65.* British subjects resident in foreign parts might be admitted into the company, on taking the oaths before persons whom the company are enabled to appoint for that purpose.

The limits of this trade were mentioned very generally in the first charter granted in 1581; the liberty there given was "to trade to Turkey." In the 2d charter in 1593, the trade was specified more particularly; namely, "to Venice, Zante, Cephalonia, Candia, and other Venetian territories, the dominions of the grand seignior, by land and sea, and through his countries over land to the East Indies."

This company was abolished by the *6 Geo. 4. c. 33.* and all its property at Smyrna or elsewhere vested in the crown.

TURN, or TOURN. The great court-leet of the county, or the county-court is the court-baron; of this the sheriff is judge, and this court is incident to his office; wherefore it is called the sheriff's tourn: and it had its name originally from the sheriff's taking a turn or circuit about his shire, and holding this court in each respective hundred. See *4 Comm. 279; 2 Hawk. P. C. c. 10.*

The nature of the jurisdiction of this and the court-leet are exactly the same, the former being only a larger species of the latter, extending over more territory; but not over more causes. Much of the business of both has now, (we will not say whether properly or not,) by degrees devolved on the court of quarter sessions. See *County-Court, Court Leet;* and *2 Hawk. P. C. ubi supra;* and *Comm. Dig. tit. Leet.*

The turn is a court of record; and, by the common law, every sheriff ought to make his turn or circuit throughout all the hundreds in his county, in order to hold a court in every hundred for redressing common grievances, and preservation of the peace; and this court might be holden at any place within the hundred, and as often as the sheriff thought fit: but this having been found to give the sheriff too great power of oppressing the people, by holding his court at such times and places at which they could not conveniently attend, and thereby increase the number of his amercements; by the statute of *Magna Charta, c. 35.* it was enacted, that no sheriff shall make his turn through a hundred but twice in a year, viz. once after Easter, and once after the feast of St. Michael; and at the place accustomed. Also a subsequent statute ordained, that every sheriff shall make his turn yearly, one time with the month after Easter, and another time within the month after Michaelmas; and if they hold them in any other manner, they shall lose their turn for that time. *31 Edw. 8. st. 1. c. 15.*

Since these statutes, the sheriff is indictable for holding this court at another time than what is therein limited, or at an unusual place: and it has been held, that an indictment found at a sheriff's turn, appearing to have been holden at another time, is void. *Dalt. Sher. 390, 391; Dyer, 151; 38 Hen. 6.*

At common law, the sheriff might proceed to hear and determine any offence within his jurisdiction, being indicted before him, and requiring a trial, till sheriffs were restrained from holding pleas of the crown by *Magna Charta, cap. 17.* But that statute doth not restrain the sheriff's turn from taking indictments or presentments, or awarding process thereon; though the power of awarding such process being abused, was taken from all the sheriffs, (except those of London,) by *1 Edw. 4. c. 2.* and lodged in the justices of peace at their sessions; who are to award process on such indictments delivered to them by the sheriff, as if they had been taken before themselves, &c. *2 Hawk. P. C. c. 10.*

The sheriff's power in this court is still the same as anciently it was in all cases not within the statutes above-mentioned; he continues a judge of record, and may inquire in his turn of treasons and felonies, by the common law; as well as the lowest offences against the king, such as purprestures, seizure of treasure-trove, of weights, estrays, goods wrecked, &c. All common nuisances and annoyances, and other such like offences; as, selling corrupt victuals, breaking the assise of beer and ale, or keeping false weights or measures, are here indictable; also all common disturbers of the peace, barretors, and common oppressors; and all dangerous and suspicious persons, &c.

The sheriff, in his turn, may impose a fine on all such as are guilty of contempts in the face of the court; and upon a suitor to the court making a default, or refusing to be sworn on the jury; or on a bailiff not making a panel; or a tithing man neglecting to make his presentment; or a person whose constable refusing to be sworn, &c. He may amerce for offences; which fines and amerciements are leviable and recoverable by distress, &c. See *2 H. P. C. c. 10.*

TURNPIKES. See *Ways*.

TURPIS CAUSA. A base or vile confederation, on which no action can be founded. See *Fraud, Wager.*

The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating, or otherwise, the action appears to arise *ex turpi causa*, or the transgression of a positive law of the country, then the court says he has no right to be assisted: it is upon this ground that the court goes, not for the sake of the defendant, but because they will not lend their aid to a plaintiff in such a cause. *Spelman v. Johnson, Comp. 341.*

Contracts with a view to future prostitution are illegal;

but an engagement by way of reparation for past seduction will be supported, if not accompanied with any purpose of future cohabitation. 2 *P. W.* 939; 3 *Burr.* 1568; 2 *Ves.* 160.

Every contract, the object of which is the violation of a public or private duty, is void; such are bribes for appointment to offices of trust; private engagements that an office shall be held in trust for a person by whose interest it was procured; agreements to stifle a prosecution for any crime of a public nature; bonds to recompense the procuring marriage. 2 *H. Bl.* 322, 327; 8 *T. R.* 89; 2 *Wils.* 347. As to marriage bonds, &c. see *Marriage*.

TUTOR. See *Schoolmaster*. Tutor is the Scotch law term for guardian.

TWAITE. A wood grubbed up, and converted to arable land. *Co. Lit.* 4.

TWANIGHT GESTE, *hospes duarum noctium*.] A guest at an inn a second night. See *Third-Night-Awn Hinde*.

TWELFHINDI, Sax.] The highest rank of men in the Saxon government, who were valued at one thousand two hundred shillings; and if any injury were done to such persons, satisfaction was to be made according to their worth. *Ll. Alf. c.* 12, 13; *Hen. I. c.* 76.

TWYHINDI, Sax.] The lower order of Saxons, valued at 200s. as to pecuniary mulcts inflicted for crimes. *Ll. Alf. c.* 12.

TYHTLAN. An accusation, impeachment, or charge of any trespass or offence. *Ll. Ethelred, c.* 2.

TYLWITH, Brit. from *tyle*, the scite of a house, or a place fit for a house, or *tylath*, a beam.] It is applied to families; a tribe or family branching forth of another, called in the old English heraldry second or third houses; so that, in case the great paternal stock branched itself into several tylwiths or houses, they carry no second or younger houses further. The use of these tylwiths was to show not only the originals of families as to the pedigree, but the several distinctions and distances of birth, that in case there should be a failure in any line, the next in degree may claim their interest according to the rule of descent, &c. *Cowell.* See *Descent*.

TYNMOUTH. In the honour of Tynmouth, is a customary descent of lands, that if any tenant in fee hath issue two or more daughters, the land shall go to the eldest daughter for life only, and after, to the cousin of the male line; and for default thereof, to escheat. 2 *Keb.* iii. 114.

TYTHES. See *Tithes*.

U.

UND

UDAL, is the same as Allodial; and is applied to rights or property possessed independently of any superior. Thus the Udal lands in Orkney and Zeilund require no infestment, charter or sasine, and hold of no superior: though after the proprietor has resorted to the crown for a charter, the lands are held of the crown feudally as other lands in Scotland. *Scotch Lan Dict.*

UFFINGI. The kings of the East Angles were so termed from King Uffa, who lived in the year 578. *Matt. West.*

ULCUS. A hulk of a ship of burden. *Leg. Ethelred.*

ULLAGE. Is when there is want of measure in a cask, &c.

ULNAGE. The same with *Almage*; which see.

ULNA FERREA. Was the standard ell of iron, kept in the exchequer for the rule of measure. *Mon. Angl. ii. 383.*

ULTIMUS HERES. The last heir: this is the king; who succeeds, failing all relations. *Scotch Dict.*

UMPIRE AND UMPIRAGE. See *Anard*,

UNANIMITY OF JURIES. See *Jury*.

UNCEASESATH. An obsolete word mentioned in *Leg. Inæ. cap. 37*; viz. he who kills a thief may make oath that he killed him in flying for the fact, *et parentibus ipsius occisi juret unceasesath*; that is, that his kindred will not revenge his death. From the Saxon, *ceas*, *litus*, and *un*, which is a negative particle, and signifies without; and *ath*, which is oath; i. e. to swear that there shall be no contention about it. *Blount.*

UNCERTAINTY OF THE LAW. On this subject, see *9 Comm. 325*; where the popular doctrine of the hardship and inconveniency of this supposed evil is very ably explained and refuted.

UNCIA TERRÆ; UNCIA AGRI. These phrases often occur in the charters of the British kings, and signify some measure or quantity of land. It was the quantity of 12 *modii*, and each *modius* possibly 100 feet square. *Mon. Angl. iii. 198.*

UNCORE PRIST. The plea of a defendant, in nature of a plea in bar; where, being sued for a debt due on bond at a day past, to save the forfeiture of the bond, he says that he tendered the money at the day and place, and that there was none there to receive it; and that he is also still ready to pay the same. See *Tender*.

UNCUTH, Sax.] Unknown. See *Thurd-Night-Ann-Hinda*.

UNDE NIHIL HABET. See *Dote unde nihil habet, Dover*.

UNDER-CHAMBERLAIN OF THE EXCHEQUER.

An officer there that cleaved the tallies written by the clerk of the tallies, and read the same, that the clerk of the pell and comptrollers thereof might see their entries were true. He also made searches for all records in the treasury, and had the custody of Domesday-book. There were two officers of this name. *Conell*. This office is now abolished. See *Exchequer*
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UNI

UNDER-ESCHEATOR, *sub-eschaetor*.] Mentioned in *5 Edw. 3. c. 4*. See *Escheator*.

UNDER-SHERIFF, *sub-vicecomes*.] See *Sheriff*, V.

UNDERTAKERS. Such as the king's purveyors employed as their deputies. *12 Car. 2. c. 24*. The name is given in several statutes to persons who undertake any great work, as draining of fens, &c. See *2 & 3 P. & M. c. 6*; *43 Eliz. c. 11*, and formerly in Ireland to grantees of forfeited lands.

UNDER-TREASURER OF ENGLAND, *vice-thesaurarius Angliæ*.] An officer in the time of King Henry VII.; but some think he was of a more ancient original. His business was to chest up the king's treasure at the end of every term, to note the content of money in each chest, and see it carried into the king's treasury, for the ease of the lord treasurer, as being a thing beneath him, but fit to be performed by a man of great trust and secrecy. And, in the vacancy of the lord treasurer's office, he did all things in the receipt, &c. This officer is mentioned in *39 Eliz. c. 7. § 2*, as under-treasurer of the Exchequer.

When there is a lord high treasurer, the chancellor of the exchequer is under-treasurer. *Madox, Hist. Exch. 198. n. b. 580, 619, 737, note n*. There was also formerly a vice-treasurer for Ireland. See *Treasurer*.

UNDERWOOD. See *Malicious Injuries, Trees*.

UNDERWRITER. The person who undertakes to insure or indemnify another against losses by sea or fire. He is called underwriter from his signing his name under or at the foot of the policy or instrument by which the insurance is effected. See *Insurance*.

UN DIEU ET UN ROY. One God, and one king. The learned judge Littleton's motto.

UNDRESS. A word used for minors, or persons under age, not capable to bear arms, &c. *Fleta, l. 1. c. 9*.

UNFRID. One that hath no quiet or peace. Sax.

UNGELD. A person out of the protection of the law; so that, if he were murdered, no gold or fine should be paid, or composition made, by him that killed him. *Leg. Ethelred.*

UNGILDA AKER. This is mentioned in *Brompton, Leg. Ethelred, p. 898*; and it signifies almost the same as ungeld, viz. where a man was killed attempting any felony, he was to lie in the field unburied, and no pecuniary compensation was to be paid for his death: from the Sax. *un*, without, *gilda solutio*, and *acera, ager*. *Conell*.

UNIFORMITY, *uniformitas*.] One form of public prayers, and administration of sacraments, and other rites and ceremonies of the church of England, is prescribed by *1 Eliz. c. 2*; *13 & 14 Car. 2. c. 4*. See *Dissenters, Nonconformists*.

UNION, clause of, in an infestment. By such a clause, or by a charter from the crown for that purpose, lands or tenements lying discontiguous are incorporated, so that one seignie may suffice for them all. *Scotch Dict.*

UNION, *unio*.] A combining and consolidating of two churches into one. Also, it is when one church is made

subject to another, and one man is rector of both; and where a conventual church is made a cathedral. *Lyndemede*. In the first signification, if two churches were so mean that the tithes would not afford a competent provision for each incumbent, the ordinary, patron, and incumbents, might unite them at common law, before any statute was made for that purpose; and in such case it was agreed which patron should present first, &c.; for though, by the union, the incumbency of one church was lost, yet the patronage remained, and each patron might have a *quare impedit* upon a disturbance to present it in his turn. 3 *Nels. Abr.* 480. The licence of the king is not necessary to an union, as it is to the appropriation of advowsons; because an appropriation is a mortmain, and the patronage of the advowson is lost, and, by consequence, all tithes and first-fruits. *Dyer*, 259; *Moor*, 409, 661. See *Appropriation*.

By assent of the ordinary, patron, and incumbent, two churches, lying not above a mile distant one from the other, and whereof the value of the one is not above 6*l.* a year in the king's books of first-fruits, may be united into one. 37 *Hen. 8. c. 21*. And by another statute, in cities and corporation-towns, it shall be lawful for the bishop, patrons, and mayors, or chief magistrates of the place, &c. to unite churches therein; but where the income of the churches united exceeds 100*l.* a year, the major part of the parishioners are to consent to the same; and after the union made, the patrons of the churches united shall present, by turns, to that church only which shall be representative, in such order as agreed; and, notwithstanding the union, each of the parishes united shall continue distinct as to rates, charges, &c. though the tithes are to be paid to the incumbent of the united church. 17 *Car. 2. c. 3*. A union made of churches of greater yearly value than mentioned in the 37 *Hen. 8.* was held good at common law; and, by the canon law, the ordinary, with consent of the patron, might make an union of churches, of what value soever; so, by statute, with the assent of the king. *Dyer*, 259; 2 *Roll. Abr.* 778.

When two parochial churches were thus united, the reparations continued several as before; and therefore the inhabitants of the parish where any such church was demolished were not obliged to contribute to the repairs of the remaining church to which it was united. *Hob.* 67. This occasioned the 4 & 5 *Wm. & M. c. 12.* by which it is ordained, that where any churches have been united, by virtue of the 17 *Car. 2. c. 3.* and one of them is demolished; when the other church shall be out of repair, the parishioners of the parish whose church is down shall pay in proportion towards the charge of such repairs, &c.

Union of England and Scotland, and of Great Britain, and Ireland. See *Ireland, Scotland*.

UNITY OF POSSESSION, *unitas possessionis*.] Is where a man hath a right to two estates, and holds them together jointly in his own hands; as if a man take a lease of lands from another at a certain rent, and after he buys the fee-simple, this is an unity of possession, by which the lease is extinguished, because that he who had before the occupation only for his rent, is now become lord and owner of the land. *Terms de la Ley*.

A lessee for years of an advowson, on the church becoming void, was presented by the lessor, and instituted and inducted; and it was held that this was a surrender of his lease; for they cannot stand together in one person, and by the unity of possession one of them is extinguished. *Hut.* 105.

No unity will extinguish or suspend tithes, but, notwithstanding any unity, they remain, &c. 11 *Rep.* 14; 2 *Lill.* 638.

Unity of possession extinguisheth all privileges not expressly necessary; but not a way to a close, or water to a mill, &c. because they are thus necessary. A way of ease is destroyed by unity of possession; and a rent, or easement, do not exist during the unity, wherefore they are gone. *Latch.* 153, 154;

1 *Vent.* 95. See further, *Extinguishment, Suspension, Way, &c.*

Both joint tenants and tenants in common hold by unity of possession, but the estates of the former must necessarily have commenced at one and the same time, whereas those of the latter may have been created at different periods; and there may exist between them an entire disunion of interest and title as well as of time. See *Joint-tenants, Tenants in Common*.

UNIVERSITY,

UNIVERSITAS; the civil law term for a corporation. 1 *Comm.* 469.] A place where all kinds of literature are universally taught.

The Universities, with us, are taken for those two bodies which are the nurseries of learning and liberal science in this kingdom, viz. Oxford and Cambridge, endowed with great privileges.

By 13 *Eliz. c. 29.* it was enacted, That each of the universities shall be incorporated by a certain name, though they were ancient corporations before; and that all letters patent and charters granted to the universities shall be good and effectual in law: that the chancellor, masters, and scholars of either of the said universities, shall enjoy all manors, lands, liberties, franchises, and privileges, and all other things which the said corporate bodies have enjoyed, or of right ought to enjoy, according to the intent of the said letters patent; and all letters patent, and liberties, franchises, &c. shall be established and confirmed; any law, usage, &c. to the contrary notwithstanding.

The universities have the keeping of the assise of bread and beer, and are to punish offences concerning it: also they have the assise of wine and ale, &c. and the chancellor, his commissary, and deputy, are justices of peace for the vill of Oxon, county of Oxon, and Berks, by virtue of their offices; see 51 *Hen. 3*; 31 *Edw. 1.* (both repealed); 7 *Edw. 6*; 2 & 3 *P. & M.*; and the chart. 29 *Edw. 3*; 14 *Hen. 3*; 1 & 2 *Geo. 4. c. 50. § 24.* &c.

And the Vice-chancellor of Cambridge may act as justice of the county, without the landed qualification. 7 *Geo. 2. c. 10.* See *Justices of Peace*.

Persons acting theatrical performances within the precincts of either university, or five miles thereof, shall be deemed vagrants; and the chancellor, &c. may commit them to the house of correction, or common gaol for one month. 10 *Geo. 2. c. 19.* But it is doubtful whether this provision is not repealed by the 3 *Geo. 4. c. 40.* and players generally are not now within the vagrant act. See *Vagrant*.

Their courts are called the chancellors' courts. The chancellors are usually peers of the realm, and are appointed over the whole university. But the courts are kept by their vice-chancellors, their assistants, or deputies; their causes are managed by advocates or proctors. See chart. 14 *Hen. 8.*

As to the power of these courts in civil cases, see *Courts of the Universities*. The following particulars are also deserving notice.

These courts have jurisdiction in all causes, ecclesiastical and civil, (except those relating to freehold,) where a scholar, servant, or minister of the university, is one of the parties in suit. *Cro. Car.* 73.

Their proceedings are in a summary way, according to the practice of the civil law; and in their sentences they follow the justice and equity of the civil law, or the laws, statutes, privileges, liberties, and customs of the universities, or the laws of the land, at the discretion of the chancellor. *Cro. Car.* 73; *Hatley*, 25; *Hard* 508.

If there is an erroneous sentence in the chancellor's court of the university of Oxford, an appeal lies to the congregation, thence to the convocation, and thence to the king in chancery, who nominates judges delegates to hear the appeal; the appeal is of the same nature in Cambridge. *Wood's Inst.* 549; 2 *Ld. Raym.* 19, 46.

As cognizance is granted to the university of all suits arising any where in law or equity, against a scholar, servant or minister of the university, depending before the justices of the King's Bench, Common Pleas, and others there mentioned, and before any other judge, though the matter concern the king; therefore, if an *indebitatus assumpsit* is brought by *quo minus* in the exchequer against a scholar or other privileged person, the university shall have consuance, for the court of exchequer is included in the general words. *Cro. Car. 73; Hard. 505.*

But if a debtor and accountant to the king sues a scholar by bill in equity in the exchequer, or if an attorney sues a scholar by writ of privilege, it is said that the universities shall not have consuance, for a general grant shall not take away the special privilege of any court. *Hard. 189; Lit. Rep. 304; 3 Leon. 149.*

But in the cases where privilege is allowable, a scholar, &c. cannot waive his privilege and have a prohibition in the courts of Westminster; for the university by right has the consuance of the plea, where one is a privileged person; and a stranger is forced to sue a privileged person in the courts, by reason of that right vested in them. *Cro. Car. 73; Heth. 28.*

But a scholar ought to be resident in the university at the time of the suit commenced; and no other ought to be joined in the action with him, for in such case he shall not have privilege. *Heth. 28.* Though it is said that servants of the university are privileged, yet it has been held that a bailiff of a college was not capable of privilege. *Brownl. 74.* Neither is a townsman entitled to privilege, to exempt him from an office in the town, if he keeps a shop and follows a trade, though he is matriculated as servant to a scholar. *2 Vent. 106.*

It is to be observed, that though cases as to freehold appear, as above, to be the only causes excepted in their charter, yet it has been held that in actions for the recovery of the possession of a term, without claiming title to the freehold, the universities shall have no privilege, because the freehold may come in question. *Cro. Car. 87, 88; Litt. R. 252.*

It hath been disputed how far the words of the grant entitled them to privilege in matters of equity. And the general principle of construction seems to be, that where chattels only are concerned, or where damages only are to be given, there their privilege is allowable; but where the suit is for the thing itself, there their privilege cannot be allowed. *Vide 2 Vent. 362.*

Thus if a scholar of Oxford or Cambridge be sued in Chancery for a special performance of a contract to lease lands in Middlesex, the university shall not have consuance, because they cannot sequester the lands. *Gibb. Hist. of C. P. 194, cites 2 Vent. 363.*

Consuance was granted to the university of Oxford (no cause being shown to the contrary) in Easter Term, 9 Geo. 2. in the case of *Woodcocke and Brooke*. *Hurdw. 241.*

A claim of consuance made by the vice-chancellor of the university of Oxford (in the vacancy of the office of chancellor by death,) on behalf the university, was allowed in a plea of trespass. *11 East, 513.*

Consuance of a plea of trespass sued against a resident member of the university of Cambridge for a cause of action, verified by affidavit to have arisen within the town and suburbs of Cambridge, over which the university court has jurisdiction, was allowed upon the claim of the vice-chancellor, on behalf of the chancellor, masters, and scholars of the university, entered a bill in due form, set out the jurisdiction under charters confirmed by acts of parliament, and averring the cause of action to have arisen within such jurisdiction. *12 East, 12.*

So claim of consuance by the university of Oxford was al-

lowed in an action of trespass against a proctor, a pro-proctor, and the marshal of the university, though the affidavit of the latter, describing him as of a parish in the suburbs of Oxford only, verified that he then was, and for the last fourteen years had been, a common servant of the university, called marshal of the university, and that he was sued for an act done by him in discharge of his duty, and in obedience to the orders of the other two defendants, without stating that he resided within the university, or that he was matriculated. *15 East, 634. See further, Cognizance.*

The jurisdiction of the criminal courts in the university of Oxford, is thus stated by *Blackstone*, and it is believed that of Cambridge is nearly similar. *See 2 Ld. Raym. 13, 46.*

The chancellor's court of Oxford hath authority to determine all causes of property, wherein a privileged person is one of the parties, except only causes of freehold; and also all criminal offences or misdemeanors under the degree of treason, felony, or mayhem. The prohibition of meddling with freehold still continues; but the trial of treason, felony, and mayhem, by a particular charter, is committed to the university jurisdiction in another court, namely, the court of the lord high steward of the university.

For by the charter of 7th June, 2 Hen. 4. (confirmed among the rest by the 13 *Edw. c. 29.*) cognizance is granted to the university of Oxford of all indictments of treasons, insurrections, felony, and mayhem, which shall be found in any of the king's court against a scholar or privileged person; and they are to be tried before the high steward of the university, or his deputy, who is to be nominated by the chancellor of the university for the time being. But when his office is called forth into action, such high steward must be approved by the lord high chancellor of England; and a special commission under the great seal is given to him and others to try the indictment then depending, according to the law of the land and the privileges of the said university. When, therefore, an indictment is found at the assizes or elsewhere, against any scholar of the university or other privileged person, the vice-chancellor may claim the cognizance of it; and (when claimed in due time and manner) it ought to be allowed him by the judges of assize; and then it comes to be tried in the high steward's court. But the indictment must first be found by a grand jury, and then the cognizance claimed; for it seems that the high steward cannot proceed originally *ad inquirendum*; but only, after inquest in the common law courts, *ad audiendum et determinandum*. Much in the same manner as when a peer is to be tried in the court of the lord high steward of Great Britain, the indictment must first be found at the assizes, or in the Court of King's Bench, and then (in consequence of a writ of *certiorari*.) transmitted to be finally heard and determined before his grace the lord high steward and the peers. *See Parliament, Peers.*

When the cognizance is so allowed, if the offence be *inter minora crimina*, or a misdemeanor only, it is tried in the chancellor's court by the ordinary judge. But if it be for treason, felony, or mayhem, it is then, and then only, to be determined before the high steward, under the king's special commission to try the same. The process of the trial is this: the high steward issues one precept to the sheriff of the county, who thereupon returns a panel of eighteen freeholders; and another precept to the headles of the university, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio universitatis gaudentes*." And by a jury formed *de medietate*, half of freeholders and half of matriculated persons, is the indictment to be tried, and that in the Guildhall of the city of Oxford. And if execution be necessary to be awarded in consequence of finding the party guilty, the sheriff of the county must execute the university process, to which he is annually bound by an oath. *4 Comm. c. 19. p. 277, 278.*

The universities and royal colleges are excepted out of the Statute of Charitable Uses, 43 *Eliz. c. 4. § 2*. See *Charitable Uses*.

They are also excepted out of the Mortmain Act. Colleges possessed of more advowsons than a moiety of the fellows, were not to purchase more, by that statute § 4. 5; but this was repealed by 45 *Geo. 3. c. 101*. See *Mortmain*.

Universities may file a bill in equity to discover trusts, 12 *Ann. st. 2. c. 14. § 4*. Pending *quare impedit*, a rule may be made for examining patron and clerk, 12 *Ann. st. 2. c. 14. § 5*.

The presentation of benefices belonging to Papists was given to the two universities by the 1 *W. & M. st. 1. c. 26*; 12 *Ann. st. 2. c. 14*; and grants made by papists of ecclesiastical livings vested in the universities, were declared void by the 11 *Geo. 2. c. 17. § 5*.

Collegians refusing to take the oaths, the king may nominate persons to succeed. *Mandamus* lies to admit the king's nominee, 1 *Geo. 1. st. 2. c. 13*. See title *Mandamus*.

In the 4 *T. R. 244*, the Court of King's Bench thought that a *mandamus* was the proper mode of trying the validity of an election made by the fellows of Trinity Hall, Cambridge, which was disputed by the master. And see further, as to the election of fellows, &c. 5 *Russ. 65, 73, 76, 85*.

Independent members of a college are mere boarders, and have no corporate rights; nor can they appeal to the visitor. And if a college do not exceed its jurisdiction, the king's courts have no cognizance, and expulsion of a member is a matter entirely within its jurisdiction. *Comp. 319*. And see 6 *T. R. 89*.

UNKNOWN PERSONS, Larceny from. An indictment will lie for stealing the goods of a person unknown. 1 *Hale's P. C. 512*. See *Larceny*.

UNLAGE. A Saxon word denoting an unjust law; in which sense it is used in *Leg. Hen. 1. c. 34*.

UNLAWFUL ASSEMBLY, illicita congregatio.] See *Riot*.

UNLAWFUL GAMES. See *Gaming*.

UNLAWFUL OATHS. See *Oaths, Unlawful*.

UNQUES PRIST. See *Tender, Uncore prist*.

UPHOLDERS, UPHOLSTERS, or UPHOLSTERERS.

By two old and obsolete statutes, none shall put to sale any beds, holsters, &c. except such as are stuffed with one sort of dry pulled feathers or clean down, and not mixed with scalded feathers, fen-down, thistle-down, sand, &c. on pain to forfeit the same or the value; and they are to stuff quilts, mattresses, and cushions, with clean wool and flocks, without using horse-hair, &c. therein, under the like forfeiture. 11 *Hen. 7. c. 19*; 5 & 6 *Edw. 6. c. 23*.

UPLAND. High ground or *terra firma*, in contradistinction to marshy and low ground. *Ingulph*.

URBAN SERVITUDES. Tenures in cities. *Stillicidium* is the rain water falling from the roof of a house, which the proprietor (in Scotland) cannot throw on his neighbour's house without the other is bound by tenure or servitude to that purpose. *Scotch Law Dict*.

URE. Use, custom, practice, habit. "Put in ure." 13 *Eliz. c. 2. § 1* (English.) 10 *Hen. 7. c. 11* (Irish.) Johnson quotes *Hooker* for a like sense.

USA. The river Isis, which river was termed Isis from the goddess of that name; for it was customary among the Pagans to dedicate hills, woods and rivers to favourite goddesses, and to call them after their names. The Britons, having the greatest reverence for Ceres and Proserpina, who was also called Isis, did for that reason name the river Isis; she being the goddess of the night, thence they computed days by nights, as seven-night, &c. *Blount*.

USAGE. Differs from custom and prescription. No man may claim a rent, common, or other inheritance by usage, though he may by prescription. 6 *Rep. 65*. See *Custom, Prescription, Ways, &c.*

USANCE. A calendar month, as from May 20th to June 20th, and double usance is two such months. See further, *Bills of Exchange, I. 1*.

USE,

Usus.] Is, in application of law, the profit or benefit of lands and tenements, or a trust and confidence reposed in a man for the holding of lands, that he to whose use the trust is made shall take the profits thereof. *West. Sym. par. 1*; 1 *Inst. 272*.

USE AND OCCUPATION. The current of ancient authorities is against the action on the case upon promises, for rent, in respect of a lease for years. It was a matter savouring of the realty, for which debt was the proper remedy; and therefore they seem to have agreed that assumpsit would not lie, except in the case of an express promise made to pay the rent after the expiration of the term, in consideration of previous enjoyment, where no certain sum was agreed upon, and the plaintiff merely went upon his *quantum meruit*, in consideration of the defendant's previous occupation. See *Comyn's Land. & Ten.* and the authorities there cited.

But assumpsit lay for rent at common law, on an express promise made at the same time as the lease, although not an implied promise. *Bul. N. P. 138*. However, all difficulties in the case of demises not under seal are removed by the 11 *Geo. 2. c. 19. § 14*. See the clause, *Rent, II*.

This act, in the case of houses, lands, &c. gives a right of action against the occupier for rent, without the necessity of setting forth the particulars of the demise. 6 *T. R. 62*; 6 *East, 348*.

The statute only gives a remedy where there is no demise by deed. 2 *Ves. jun. 307*. But where there were articles of agreement under seal, by which A. agreed to let and make a lease to the defendant, Lord Kenyon, C. J. held the defendant might be charged in assumpsit for his use and occupation of the premises, because he did not hold under a deed, but only an agreement for a lease. 4 *Esp. 59*. And so where a lease by deed has expired, and the tenant holds over, the landlord may recover for the subsequent occupation of the lessee or his under-tenant, in an action of assumpsit. 1 *Esp. 57*.

The action for use and occupation is founded on a contract, and unless there be a contract express or implied, it cannot be maintained. 1 *T. R. 378*. It follows, therefore, that it cannot be supported where an ejectment is pending for the same premises, as the two remedies are inconsistent. But after a recovery in ejectment, the landlord may maintain use and occupation for the rent to the time of the demise bid in the ejectment, but not after. *Comp. 246*. So use and occupation will not lie where the title is in dispute, ejectment being the proper action to try such title. See *Woodfall's Land. & Ten. 607, 2d ed.*

Where an express contract can be proved between the parties, the defendant is liable, whether he occupies the premises or not, for the action lies for a constructive as well as an actual occupation. 6 *Bing. 206*.

So where there is no other contract than is to be inferred from the fact of occupation, as tenant by permission of the plaintiff, the defendant is liable.

If A. agree to let lands to B., who permits a third person to occupy them, A. may recover the rent against B. in an action for use and occupation. 8 *T. R. 327*.

There must, however, be an occupation by some one; for it has been decided, that a tenant who agrees to take furnished lodgings, but does not enter, is not liable in an action for use and occupation. 1 *C. & J. 391*.

There must also be a beneficial enjoyment. Thus, where the defendant agreed "to become tenant by occupying," and it appeared that the house was not fit for comfortable occupation, it was held the plaintiff could not recover. 4 *C. & P. 65*; and see 7 *D. & R. 117*. So where the premises are un-

wholesome for want of draining, if the evil cannot be remedied by ordinary and reasonable care and expense on the part of the tenant. 1 *Moo. & R.* 112.

But where premises have been demised for a term, the landlord may recover, in an action for use and occupation, the rent accruing due after the premises are burnt, and of course are no longer inhabited by the tenant. See 4 *Taunt.* 45.

The action will not lie where premises are let, with the knowledge of the plaintiff, for an immoral purpose, as for prostitution. See 1 *Esp.* 13; 1 *B. & P.* 340; and see 2 *C. & P.* 347; *R. & M.* 251.

Whenever it appears that the defendant has come in under the plaintiff, the rule of law that a tenant shall not dispute his landlord's title prevails, and he will not be permitted to show that the plaintiff has no legal estate. Thus, where premises had been let to B. for a term determinable by a notice to quit, and pending such term C. applied to A. the landlord, for leave to become the tenant instead of B., and A. consenting, C. agreed to stand in B.'s place, and offered to pay rent: it was held, that (though B.'s term had not been determined either by a notice to quit, or a surrender in writing) A. might maintain an action for use and occupation against C., and the latter could not set up B.'s title in defence to that action. 1 *B. & A.* 50.

And although in ejectment, where the tenant is equally debarred from proving that his landlord never had any title, he may show that the landlord's title was expired. 4 *T. R.* 682. Yet it seems, that, in an action for use and occupation, the defendant will not be permitted, though he admit the landlord's original title, to show that it has ceased to exist, unless he solemnly renounce the plaintiff's title at the time, and commenced a fresh holding under another person. 2 *Camp.* 11.

Where premises are let at an entire rent, an eviction from part, if the tenant thereupon gives up possession of the residue, is a complete defence to this action. 3 *Camp.* 513. But if he continue in possession of such residue, he is liable for that portion. 3 *Camp.* 514, n.

Use and occupation lies where the tenant quits the premises without any regular determination of the demise; and in such a case the plaintiff will not be debarred from recovering by having put up a bill at the window to let the apartments. 3 *Esp.* 225.

Where, however, a tenant from year to year quitted at the expiration of a year without giving notice, and before the next half year expired, the landlord let the premises to another person, who occupied them, it was held he was not entitled to recover rent from the first tenant from the time the latter quitted to the period when the premises were relet. 5 *B. & C.* 332; and see 3 *Bing.* 462.

See further, *Distress, Ejectment, Lease, Rent, &c.*

USES AND TRUSTS. The following extract from the *Commentaries* (lib. 2. c. 20.) seems to afford the clearest and most perspicuous view of the doctrine of uses and trusts, as the most intricate part of our law, and on which our modern conveyances are in general founded. See further, as connected with the subject, titles *Conveyance, Deed, Fine of Lands, Lease and Release, Mortmain, Recovery, Trusts, &c.*

Uses and trusts are, in their original, of a nature very similar, or rather, exactly the same; answering more to the *fidei commissum* than the *usus fructus* of the civil law, which latter was the temporary right of using a thing without having the ultimate property or full dominion of the substance. But in our law a use was a confidence reposed in another, who was tenant of the land or *terre-tenant*, that he should dispose of the land according to the intention of *cestui que use*, or him to whose use it was granted, and suffer him to take the profits. As if a feoffment was made to A. and his heirs, for the use of (or in trust for) B. and his heirs: here at the common law, A., the *terre-tenant*, had the legal property and possession of

the land, but B., the *cestui que use*, was in conscience and equity to have the profits and disposal of it. *Plowd.* 352.

This notion was transplanted into England from the civil law, about the close of the reign of Edward III. by means of the foreign ecclesiastics, who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to their religious houses directly, but to the use of the religious houses, which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience; and therefore assumed the jurisdiction of compelling the execution of such trusts in the Court of Chancery. See 50 *Edw. 3. c. 6*; 1 *Rich. 2. c. 9*; 1 *Rep.* 139; and title *Mortmain*. And as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet if a testator had enfeoffed another to his own use, and so was possessed of the use only, such use was devisable by will. But this evasion was crushed by 15 *Rich. 2. c. 5.* with respect to religious houses. See *Mortmain*. Yet the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes; particularly as it removed the restraint of alienations by will, and permitted the owner of lands, in his lifetime, to make various designations of their profits, as *prudence* or *justice*, or *family convenience*, might from time to time require; till at length, during our long wars in France, and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal; through the desire that men had (when their lives were continually in hazard) of providing for their children by will, and of securing their estates from forfeitures, when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore, about the reign of Edward IV. (before whose time Lord Bacon remarks there are not six cases to be found relating to the doctrine of uses) the courts of equity began to reduce them to something of a regular system. See *Bacon on Uses*, 313.

Originally it was held that the Chancery could give no relief but against the very person himself intrusted for *cestui que use*, and not against his heir or alienee. This was altered in the reign of Henry VI. with respect to the heir; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use. *Keilw.* 42, 46; *Y. B. 22 Edw. 4. c. 6*; *Bac. Uses*, 312. But a purchaser for a valuable consideration, without notice, might hold the land discharged of any trust or confidence. And also it was held that neither the king or queen on account of their dignity royal, nor any corporation aggregate on account of its limited capacity, could be seised to any use but their own, that is, they might hold the lands, but were not compellable to execute the trust. *Bac. Uses*, 346, 347. And if the feoffee to uses died without heir, or committed a forfeiture, or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, were liable to perform the use, because they were not parties to the trust, but came in by act of law, though doubtless their title in reason was no better than that of the heir. 1 *Rep.* 122.

On the other hand, the use itself, or interest of *cestui que use*, was learnedly refined upon, with many elaborate distinctions: and 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession, as annuities, ways, commons, and authorities, *quæ ipso usu consumuntur*, or whereof the seisin could not be instantly given. 1 *Jon.* 127; *Cro. Eliz.* 401.—2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another without any consideration, equity presumes that he meant it to the use of himself, unless he expressly declares it to be to the use of another, and then no-

thing shall be presumed contrary to his own expressions. 1 *And.* 37. But if either a good or a valuable consideration appears, equity will immediately raise a use correspondent to such consideration. *Moor*, 684.—3. Uses were descendible according to the rules of common law, in the case of inheritances in possession; for in this and many other respects, *equitas sequitur legem*, and cannot establish a different rule of property from that which the law has established. 2 *Rel. Abr.* 780.—4. Uses might be assigned by secret deeds between the parties, or be devised by last will and testament: for as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary; and as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. *Bac. Uses*, 312, 318. But *cestui que use* could not, at common law, alien the legal interest of the lands, without the concurrence of his feoffee, to whom he was accounted by law to be only tenant at sufferance. See 1 *Rich. 3. c. 1.*—5. Uses were not liable to any of the feudal burdens, and particularly did not escheat for felony, or other defect of blood; for escheats, &c. are the consequence of tenure, and uses are held of nobody: but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use. *Jenk.* 190.—6. No wife could be endowed, or husband have his curtesy of a use; for no trust was declared for their benefit at the original grant of the estate. 4 *Rep.* 1; 2 *And.* 75. And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives, which was the original of modern jointures. See *Jointure*.—7. A use could not be extended by writ of *elegit* or other legal process, for the debts of *cestui que use*. For being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, which looked no farther than to the person actually seised of the land, could award no process against it. *Bro. Abr.* tit. *Executions*, 90.

It is impracticable here to pursue the doctrine of uses through all the refinements and niceties which the ingenuity of the times (abounding in subtle disquisitions) deduced from this child of the imagination, when once a departure was permitted from the plain simple rules of property established by the ancient law. These principal outlines will be fully sufficient to show the ground of Lord Bacon's complaint, that this course of proceeding "was turned to deceive many of their just and reasonable rights. A man that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of his curtesy; the lord of wardship, relief, heriot, and escheat; the creditor of his extent for debt; and the poor tenant of his lease." *Bac. Use of the Law*, 153. To remedy these inconveniences, abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestui que use*; allowed actions for the freehold to be brought against him, if in the actual pernaney or enjoyment of the profits; made him liable to actions of waste; established his conveyances and leases, made without the concurrence of his feoffees; and gave the lord the wardship of his heir, with certain other feudal perquisites. See 50 *Edm. 3. c. 6*; 2 *Rich. 2. st. 2. 3*; 19 *Hen. 7. c. 15*; 1 *Rich. 2. c. 9*; 4 *Hen. 4. c. 7*; 11 *Hen. 6. c. 3*; 1 *Hen. 7. c. 1*; 11 *Hen. 6. c. 5*; 1 *Rich. 3. c. 1*; 4 *Hen. 7. c. 17*; 19 *Hen. 7. c. 15*.

These provisions all tended to consider *cestui que use* as the real owner of the estate; and at length that idea was carried into full effect by the 27 *Hen. 8. c. 10*, usually called the *statute of uses*, or, in conveyances and pleadings, the *statute for transferring uses into possession*. The hint seems to have been derived from what was done at the accession of King

Richard III.: who, having, when Duke of Gloucester, been frequently made a feoffee to uses, would upon the assumption of the crown (as the law was then understood) have been entitled to hold the land discharged of the use. But, to obviate so notorious an injustice, an act of parliament was immediately passed, which ordained, that, where he had been so enfeoffed jointly with other persons, the land should vest in the other feoffees, as if he had never been named, and that, where he stood solely enfeoffed, the estate itself should vest in *cestui que use*, in like manner as he had the use. 1 *Rich. 3. c. 5*. And so the statute of Henry VIII., after reciting the various inconveniences before mentioned, and many others, enacts, that "when any person shall be seised of lands, &c. of the use, confidence, or trust, of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, &c. of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use in such quality, manner, form and condition, as they had before in the use." The statute thus executes the use, as the lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession; thereby making *cestui que use* complete owner of the lands and tenements as well at law as in equity. 2 *Comm. c. 20*.

It is a curious circumstance that, after having been disregarded for a period of two centuries and a half, from the passing of this statute of uses, one of the previous acts above cited (1 *Rich. 3. c. 1*) was relied upon in argument as applicable to the *cestui que use* of a term of years in the case of *Goodtitle v. Jones*, 7 *T. R. 47*; it was held not to apply to the circumstances of that case: but in *Blake v. Foster*, 8 *T. R. 494*, it was referred to by Lawrence, J. as still in force. But see *Gilbert on Uses*, p. 67, and *Sugden's* notes there, that the act 1 *Rich. 3. c. 1*. has now no operation whatever.

The statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestui que use* into a legal, instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted, with improvements, by the judges of the common law. The same persons only were held capable of being seised to a use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchaser discharged of the use, nor be liable to dower or curtesy on account of the seisin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to *cestui que use*, as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seisin of *cestui-que-use*, who is now become the *terre-tenant* also; and they likewise were no longer devisable by will. 2 *Comm. c. 20*.

The various necessities of mankind induced also the judges very soon to depart from the rigour and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses than upon others. Hence it was adjudged, that the use need not always be executed the instant the conveyance is made; but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time; and in the meanwhile the

ancient use shall remain in the original grantor: as, when lands are conveyed to the use of A. and B., after a marriage shall be had between them, or to the use of A. and his heirs, till B. shall pay a sum of money, and then to the use of B. and his heirs. 2 Roll. Abr. 791; Cro. Eliz. 439; Bro. Abr. tit. Feoffm. al. Uses, 30. Which doctrine, when devised by will were again introduced, and considered as equivalent in point of construction to declarations of uses, was also adopted in favour of *Executory Devises*. See that title.

But herein these, which are called contingent or springing uses, differ from an executory devise; in that there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute; and therefore if the estate of the feoffee to such use be destroyed by alienation, or otherwise, before the contingency arises, the use is destroyed for ever; whereas by an executory devise the freehold itself is transferred to the future devise. 1 Rep. 134, 138; Cro. Eliz. 439. And in both these cases a fee may be limited to take effect after a fee; because, though that was forbidden by the common law in favour of the lord's escheat, yet, when the legal estate was not extended beyond one fee simple, such subsequent uses (after a use in fee) were before the statute permitted to be limited in equity: and then the statute executed the legal estate in the same manner as the use before subsisted. Follexf. 78; 10 Mod. 423.

It was also held, that a use, though executed, may change from one to another by circumstances *ex post facto*; as, if A. makes a feoffment to the use of his intended wife and her eldest son for their lives, upon the marriage the wife takes the whole use in severalty; and upon the birth of a son, the use is executed jointly in them both. Bac. Us. 331. This is sometimes called a secondary, sometimes a shifting use.

Whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is styled a resulting use. As if a man makes a feoffment to the use of his intended wife for life, with the remainder to the use of her first-born son in tail: here, till he marries, the use results back to himself; after marriage, it is executed in the wife for life; and, if she dies without issue, the whole results back to him in fee. Bac. Us. 350; 1 Rep. 120.

It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow was a deed of defeasance coeval with the grant itself (and therefore esteemed a part of it) upon events specifically mentioned. And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead. Co. Litt. 237. And this was permitted, partly to indulge the convenience, and partly the caprice of mankind, who, as lord B. once observes, have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards. Bac. Us. 316. See *Power*.

By this equitable train of decisions in the courts of law the power of the court of chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use;" and that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a farther use to another person is repugnant, and therefore void. Dy. 155; 1 And. 37, 136. And therefore, on a feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity; not adverting, that the instant the first use was executed in B., he became seised to the use of C.; which second use the statute might as well be permitted to execute as it did the

first; and so the legal estate might be instantaneously transmitted down, through a hundred uses upon uses, till finally executed in the last *cestui-que-use*. [It is now the practice to introduce only the names of the trustee and *cestui-que-trust*; the estate being conveyed to A. and his heirs, to the use of A. and his heirs in trust for B. and his heirs. See *post*.]

Again, as the statute mentions only such persons as were seised to the use of others, this was held not to extend to terms of years, or other chattel interests, whereof the termor is not seised, but only possessed; and therefore, if a term of one thousand years be limited to A., to the use of (or in trust for) B. the statute does not execute this use, but leaves it at common law. Bac. Us. 335; Jenk. 244; Poph. 76; Dyer, 369.

And lastly, (by more modern resolutions,) where lands are given to one and his heirs, in trust to receive and pay over the profits to another, this use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust. 2 Comm. c. 20.

And if there be a conveyance in trust to pay over the profits, 15 Ves. 371; 4 Taunt. 772; or to convey, 1 Atk. 607; 7 Ves. 201; or to sell, 2 Atk. 578; or any act to be done, the legal estate must necessarily vest in the trustee. So it is if a trust to permit a feme covert to receive the profits for, or to pay the same to her separate use.

But although it is not necessary that an estate of freehold should vest in the trustees, the general rule is, that the legal estate shall vest in them so far only, as is proper to give effect to the intention of the settler or deviser. See 5 Taunt. 382; 9 East, 1.

See further, *Sanders on Uses*, 231—263, where the cases on the subject of uses not executed by the statute are fully considered.

Of the two more ancient distinctions above mentioned, the courts of equity quickly availed themselves. In the first case it was evident that B. was never intended by the parties to have any beneficial interest; and in the second the *cestui-que-use* of the term was expressly driven into the court of chancery to seek his remedy. And therefore the court determined, that though these were not uses, which the statute could execute, yet still they were trusts in equity, which in conscience ought to be performed. To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of trusts: and thus by this strict construction of the courts of law a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance. Vaugh. 50; Atk. 591; 2 Comm. 336.

This last observation, however, does not seem quite warranted by the fact: as it is manifest that, in consequence of the statute, many modifications of real property have been introduced for the convenience of families, of which the common law was not susceptible: and, how little soever the retention of what was formerly known by the name of uses, under the substituted appellation of trusts, may have been warranted upon the true principles of judicial construction, it certainly has been attended in many respects with considerable practical convenience.

An important question formerly arose upon the effect of a limitation (to such uses as a party shall appoint, and, in default of and until appointment, to himself and his heirs) with respect to the claim of dower against the appointee under the power: the great weight of professional and judicial opinion was in favour of the validity of the appointment, as opposed to the claim of dower: the discussion of this point by lord Eldon, (in *Maundrell v. Maundrell*, 10 Ves. 246.) precluded all reasonable litigation on the question, which was ultimately decided against the claim of dower. See 5 B. & A. 561; 5 Mad. 310.

The doubt formerly raised whether the power given to the above limitation, would, on being exercised, defeat the claim

of dower, gave rise to another limitation, (usually called dower uses), which, by the intervention of a vested estate in a trustee, prevented dower from attaching. The law of dower has been recently materially altered. See *Dower*.

The courts of equity, in the exercise of their new jurisdiction over trusts, have wisely avoided, in a great degree, those mischiefs which made uses intolerable. The statute of frauds, 29 Car. 2. c. 3. having required that every declaration, assignment, or grant of any trust, in lands and hereditaments, (except such as arise from implication or construction of law,) shall be made in writing signed by the party, or by his written will; the courts now consider a trust-estate (either when expressly declared or resulting by such implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law: and, by a long series of uniform determinations, for now near a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses without their inconvenience or frauds. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice; which, as *cestui-que-use* is generally in possession of the land, is a thing that can rarely happen. 2 *Freem.* 43. The trust will descend, may be aliened, is liable to debts, to executions on judgments, statutes, and recognizances, (by the express provision of the statute of frauds,) to forfeiture, to leases, and other incumbrances, nay, even to the curtesy of the husband, as if it was an estate at law. It was not until recently subjected to dower (see now that title), more from a cautious adherence to some hasty precedents, than from any well-grounded principle. 1 *Chanc. Rep.* 254; 2 *P. Wms.* 640. It hath also been held not liable to escheat to the lord, in consequence of attainer or want of heirs; because the trust could never be intended for his benefit. *Hardw.* 494; *Burgess and Wheat*, 1 *Black.* 129. See *Trusts*.

The statute of uses has given efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only ancient conveyance of corporeal freeholds; the security and notoriety of which public investiture (Blackstone considers) abundantly overpaid the labour of going to the land, or of sending an attorney in one's stead: but which has yielded among other assurances to a species of conveyance called a covenant to stand seised to uses; by which a man, seised of lands, covenants, in consideration of blood or marriage, that he will stand seised of the same to the use of his child, wife, or kinsman; for life, in tail, or in fee. Here the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land, without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate, when made upon such weighty and interesting considerations as those of blood or marriage. 2 *Comm. c.* 20. See *Conveyance*, *Covenant to stand seised*.

And the most usual mode of assurance is by lease and release, by which the necessity of giving possession by livery of seisin is also avoided through the instrumentality of the statute of uses. See *Conveyance*, *Lease and Release*.

SUPERSTITIOUS USES. A devise of lands or goods to superstitious uses, is where it is to find or maintain a chaplain or priest to pray for the souls of the dead; or a lamp in a chapel, a stipendiary priest, &c. These, and such like, are declared to be superstitious uses; and the lands and goods so devised are forfeited to the king by 1 *Edw.* 6. c. 14; see also 23 *Hen.* 8. c. 10, and *tits. Charitable Uses, Mortmain*.

A man devised lands to trustees and their heirs to find a priest to pray for his soul, so as the laws of the land would permit; and if the laws would not permit it, then to apply the

profits to the poor, with power to convert the profits to either of the said uses; adjudged this was not a devise to any superstitious use. 3 *Nels. Abr.* 259. Where certain profits arising out of lands are given to superstitious uses, the king shall have only so much of the yearly profits which were to be applied to the superstitious uses; though when the land itself is given to the testator, declaring that the profits, without saying how much, shall be employed for such uses, in this case the king shall have the land itself. *Moor*, 129. If a sum certain is given to a priest, and other goods which depend upon the superstitious use, all is forfeited to the king; yet if land, &c. is given to find an obit, or anniversary, and for another good use, and there is no certainty how much shall be employed to the superstitious use, the gift to the good use shall preserve the whole from forfeiture. 4 *Rep.* 104; 2 *Roll.* 205. Where a superstitious use is void, so that the king could not have it, it is not so far void as to result to the heir at law, and therefore the king may apply it to charity. 1 *Salk.* 163.

It seems now that, independent of the statutes, devises of this kind could not have effect: for either they would be void by the Mortmain statutes, or when not within the reach of any of them, would be deemed superstitious by the courts of equity; which would therefore direct the money to be applied to some use really charitable, at the court's discretion; or should the determined uses not be thought strong enough to warrant the exercise of a discretion so large, would consider the devisee as a trustee, for such as would be entitled if there were no devise. 1 *Inst.* 112, b. n. 2. See *Charitable Uses, Mortmain*.

USER DE ACTION. Is the pursuing or bringing an action in the proper county, &c. *Broke*, 64.

USHER, Fr. huisier, a door-keeper. An officer in the king's house, as of a privy chamber, &c.

There are also ushers of the Courts of Chancery and Exchequer.

USUCAPTION, usucapio. The enjoying, by continuance of time, a long possession, or prescription. *Termes de la Ley.* Property acquired by use or possession.

USUFRUCT. Is a tenure introduced by the Scotch law from the civil law: it is the right of life-rent possession, without destroying or wasting the subject over which the tenure extends. The proprietor of the subject is termed the *fiar*; the property the *fee*; and the person possessed, the *life-renter*.

USUFRUCTUARY, usufructuarius. One that hath the use, and reaps the profit of a thing.

USURPATION, usurpatio. The using that which is another's; an interruption or disturbing a man in his right and possession, &c.

Usurpations in the civil and canon law are called intrusions; and such intruders, having not any right, shall submit, or be excommunicated and deprived, &c. by *Boniface's Const. Gibs. Codex*, 817.

For usurpations of advowsons, see *Advowson*, III.

As to usurpations of franchises, see *Corporation*, *Quo Warranto*.

USURY.

USURA. Money given for the use of money; it is particularly defined to be the gain of any thing by contract above the principal, or that which was lent, exacted in consideration of loan thereof, whether it be of money, or any other thing. 3 *Inst.* 151. Some make usury to be the profit exacted for a loan made to a person in want and distress; but properly it consists in extorting an unreasonable rate for money, beyond what is allowed by positive law.

The letting money out at interest, or upon usury, was against the common law; and in former times, if any one, after his death, had been found to be an usurer, all his goods and chattels were forfeited to the king, &c. And, according to several

ancient statutes, all usury is unlawful; but at this time neither the common or statute law absolutely prohibit usury. 3 Inst. 151, 152. By this is meant interest for money lent, not exceeding the settled rate: interest being the lawful gain; usury the extortion of unlawful gain. See *Interest*.

The church, at common law, held jurisdiction over usurers "for the good of their souls." *Pro reformatione morum et pro salute animarum*. 15 Edw. 1. c. 6; *Roll. Abr. tit. Usurers*, and was wont to punish them by excommunication and censure, until they made restitution; and to grant them pardon only on condition, "on *dum tamen*," that they forsook their evil courses. *Canon*, 109; *Ex. of Neshech*, 31. Most of the early acts of parliament contain a saving clause in favour of such jurisdiction. It seems, however, that it either had not exclusive authority over usurers, or if so, that it was invaded at an early period by the temporal courts; for it appears that in the fifteenth year of the reign of Edward III. A. D. 1341, the clergy, through the archbishop of Canterbury, and other bishops, complained that "the justices had punished usurers," to which an answer was returned, making a distinction between the living and the dead usurers, "that the king and his heirs shall have the cognizance of usurers dead. That his majesty might take possession of their wealth; and the ordinances of the holy church, the cognizance of them in life, as to them appertaineth, to make compulsion by the censures of the holy church for the sin, to make restitution of the usuries taken against the laws of the holy church." 15 Ed. 3. c. 6; *Roll. Abr. tit. Usurers*. And it was a charge to justices in eyre to enquire who had died usurers, which being then a crime second only to murder, was punishable by forfeiture of the usurer's goods and chattels to the king, and the disherison of his heir. *Brac. lib. 2. c. 26*; *Glamm. lib. 7. c. 16*; *Ibid. lib. 10. c. 8. § 3*; *vide Mirror des Justices, lib. 17. c. 1. § 17*; but this was confined to those who were found by inquest, within a year and a day of their deaths, to have died "habitual usurers," and not when before death they had discontinued the practice, and done penance for it. 3 Hen. 7. c. 5. *Kelly on Usury*, 16.

Spiritual censures have failed to check usury; various statutes (3 Hen. 7. c. 5; 3 Hen. 7. c. 6; 11 Hen. 7. c. 8.) were passed for its suppression previous to the 37 Hen. 8. c. 9; which was the first act recognising the legality of taking interest upon loans; yet the old statutes, even when legalizing interest at certain rates, bear witness to the violent prejudices still existing against the practice.

By the 37 Hen. 8. c. 9. 10*l. per cent.* was allowed as the legal rate of interest; but by 5 & 6 Edm. 6. c. 20. it was observed that the above statute, allowing this rate of interest, had been construed to give a license and sanction to all usury, not exceeding 10*l. per cent.*; and this construction was declared to be utterly against Scripture; and therefore all persons were forbid to lend or forbear by any device, for any usury, increase, lucre, or gain whatsoever, on pain of forfeiting the thing, and the usury or interest, and of being imprisoned and fined.

And so the law stood till the 13 Eliz. c. 8. which reciting "that all usury being forbidden by the laws of God, is sin, and detestable," revived the 37 Hen. 8. c. 9. and ordained that all brokers should be guilty of a *præmunire* who transacted any contracts for more, and the securities themselves should be void.

By the 21 Jac. 1. c. 17. which reduced the rate of interest to 8*l. per cent.*, it was provided, that "nothing in the law shall be construed to allow the practice of usury at point of religion or conscience." Rolle says, that this clause was introduced to satisfy the bishops, who would not pass the bill without it. *Oliver v. Oliver, Roll. R.*

The rate of interest having been lowered in 1650, during the Usurpation, to 6*l. per cent.* the same reduction was re-enacted after the Restoration, by 12 Car. 2. c. 13. And

lastly, this rate of interest was reduced to 5*l. per cent.* by 12 Ann. st. 2. c. 16.

The prejudices of early times (*Blackstone* remarks) against the taking of interest appear to have worn off in some degree in the reign of Henry VIII.; a rational commerce having taught the nation, that an estate in money, as well as an estate in land, houses, and the like, might be let out to hire, without the breach of one moral or religious duty. And indeed, when the source of this prejudice is examined, it will be found to have originated in a political, and not a moral precept; for though the Jews were prohibited from taking usury, that is interest, from their brethren, they were in express words permitted to take it from a stranger. 2 Comm. 455, 456.

And that the prohibition to the Jews was political, not moral, and consequently does not extend to other nations, was the opinion of Grotius and Puffendorf; who have treated the subject at length. For a full statement of the reasonings on the question, whether receiving money is against conscience and natural law, and for a refutation of old and vulgar errors which held it to be so, see *Grotius de Jure, B. et P. lib. xi. c. xii. § 20*; *Puffendorf, Droit de la R. lib. v. c. vii. § 8, 9, 10*; *Rutherford's Instit. N. L. B. i. c. xiii.* The passage in St. Luke, c. 19, v. 22, "Wherefore then gavest thou not thy money into the bank, that at my coming I might have required mine own with usury?" (see St. Matthew, c. xxv. v. 27), seems to show that the usage existed at Jerusalem of placing money at interest in the hands of bankers, and was not deemed unlawful.

Calvin and St. Thomas Aquinas both agree that the receipt of usury is not contrary to Scripture. *Calv. Epist. de Usura*, St. Thomas Aqu. *Op. de Usur. c. 4.*

Now by the 12 Ann. st. 2. c. 16. no person shall take, directly or indirectly, for loan of any money, or any thing, above the value of 5*l.* for the forbearance of 100*l.* for a year, and so proportionably for a greater or less sum; and all bonds, contracts, and assurances made for payment of any principal sum to be lent on usury, above the rate of 5*l. per cent.* shall be utterly void; and whoever shall take, accept, or receive by way of corrupt bargain, loan, &c. a greater interest, shall forfeit treble the money borrowed, one half of the penalty to the prosecutor, the other to the king; and if any scrivener or broker takes more than 5*s. per cent.* procurator money, or more than 12*d.* for making a bond, he shall forfeit 20*l.* with costs, and suffer half a year's imprisonment.

By 58 Geo. 3. c. 93. reciting that by the laws in force all contracts and assurances whatsoever for payment of money, made for a usurious consideration, are utterly void; and also reciting that in the course of mercantile transactions negotiable securities often pass into the hands of persons who have discounted the same, without any knowledge of the original considerations for which the same were given; and that the avoidance of such securities in the hands of such *bond fide* indorsees without notice is attended with great hardship and injustice: it is enacted "that no bill of exchange, or promissory note, (drawn or made after the passing the act) shall, though it may have been given for a usurious consideration, or upon a usurious contract, be void in the hands of an indorsee for a valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill or note had been originally given for a usurious consideration, or upon a usurious contract." It may be doubted whether this act received all the consideration due to the subject; and whether an exception ought not to have been made as to the first and immediate indorsees of the parties to the usury, which latter seem the principal persons benefited by the act.

Before the passing of the above statute, 58 Geo. 3. c. 93. it was held that a bill of exchange, or note, given in consequence of an usurious contract, was absolutely void, even in the hands of an innocent person, who might have taken it in the fair and regular course of business, without any notice of

the usury: and that evidence of usury was a good defence, in an action brought upon such bill or note against the drawer, acceptor, or indorser. *Lowe v. Waller*, Doug. 708. But where A. for an usurious consideration gave his promissory note to B., who transferred it to C. for a valuable consideration, without notice of the usury, and afterwards A. gave a bond to C. for the amount, the Court of K. B. determined that the bond was valid: though they held that if the bond had been given in consideration of the note, it would have been void. 8 T. R. 390.

By the act, renewing the Bank charter, (3 & 4 Wm. 4. c. 98. § 7), bills of exchange and promissory notes, not exceeding three months' date, or not having more than that time to run, may be discounted at any rate of interest that may be agreed on without incurring the penalties of usury.

A warrant of attorney given to secure the amount of a bill at three months, discounted at more than 5l. per cent. interest, and which was dishonoured when due, was held to be also protected by the above statute. 4 N. & M. 302.

With respect to the propriety of repealing all restraints on the amount of interest, or consideration, to be taken for the loan of money, much discussion has lately taken place; and great differences between those who ought to be well informed on the subject. For a statement of the general arguments, see *Evans's Collection of Statutes*, Part III., Class v. note on the 37 Hen. 8. c. 9.

And see the question as to the policy of laws regulating the rate of interest, discussed with ingenuity and clearness, by Mr. Bentham, "Defence of Usury, showing the impolicy of the present legal restraints," 1818.

Having given this historical summary of the law of usury, we will now proceed to enquire more particularly,

I. What is Usury.

II. Of Relief from Usury at Law and in Equity.

III. Of the Penalties for Usury.

I. It is not necessary that money should be actually advanced to constitute the offence of usury; but any contrivance or pretence whatever to gain more than legal interest, where it is the intent of the parties to contract for a loan, will be usury; as where a person applies to a tradesman to lend him money, who, instead of cash, furnishes him with goods, to be paid for at a future day, but at such an exorbitant price as to secure to himself more than legal interest upon the amount of their intrinsic value, this is an usurious contract. The question of usury, or whether a contract is a colour and pretence for an usurious loan, or is a fair and honest transaction, must, under all its circumstances, be determined by a jury, subject to the correction of the court by a new trial. *Comp.* 112, 770; *Doug.* 708; 3 T. R. 531.

It is remarkable that one particular species of indirect usury is guarded against by the 37 Hen. 8. c. 9. and this part of the statute seems still in force. By this it is enacted that no person shall sell his merchandizes to any other, and within three months after buy the same, or any part thereof, upon a *lesser price*, knowing them to be the same, on pain to forfeit treble the value; half to the informer and half to the king; and also to be punished by fine and imprisonment.

By Holt, chief justice: if A. owes B. 100l., who demands his money, and A. acquaints him that he hath not the money ready, but is desirous to pay it, if B. can procure it to be lent by any other person; and thereupon B., having present occasion for his money, contracts with C. that if he will lend A. 100l. he will give him 10l., on which C. lends the money, and the debt is paid to B.; this is a good and lawful contract, and not usurious between B. and C. *Carth.* 252. It is not usury if there be not a corrupt agreement for more than the statute interest; and the defendant shall not be punished unless he receive some part of the money in affirmation of the usurious agreement. 3 Salk. 390.

A lent B. 500l., and at the time of the loan it was agreed

that B. should give something more than legal interest as a compensation, but no particular sum was specified. After the execution of the deed B. gave A. 50l.—B. continued to pay interest on the whole 500l. for five years, at the end of which time an action was brought against A. for usury. The Court of C. P. held, that the action was not barred by lapse of time, for that the loan was substantially for no more than 450l. and consequently the interest at the rate of 5l. per cent. on the 500l. received within the last year was usurious. 2 Bos. & Pul. 381.

There can be no usury without a loan; and the court hath distinguished between a bargain and a loan. 1 Lutw. 273; *Sid.* 27. If a man lend another 100l. for two years, to pay for the loan 30l., and if he pays the principal at the year's end, he shall pay nothing for interest; this is not usury, because the party may pay it at the year's end and so discharge himself. *Cro. Jac.* 509; 5 Rep. 69. And it is the same where a person by special agreement is to pay double the sum borrowed, &c. by way of penalty for nonpayment of the principal debt; the penalty being in lieu of damages, and the borrower might repay the principal at the time agreed, and avoid the penalty. 2 Inst. 89; 2 Roll. Abr. 801. But if these clauses be inserted merely to evade the statute, the contract is void, and the lender is liable to the penalties of usury. 1 Hawk. P. C. c. 82. § 19.

To make usury there must be either a direct loan and a taking of more than legal interest for the forbearance of payment; or there must be some device for the purpose of concealing or evading the appearance of a loan and forbearance where in truth it was such. 4 East, 55.

In all questions, in whatever respect repugnant to the statute, the nature and substance of the transaction, and the view of the parties, must be ascertained to satisfy the court that there is a loan and borrowing; and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statutes. *Comp.* 115, 796; *Doug.* 712.

A man surrenders a copyhold estate to another upon condition that if he pays 80l. at a certain day, then the surrender to be void; and after, it is agreed between them that the money shall not be paid, but that the surrenderor shall forfeit, &c.: in consideration whereof the surrenderor promises to pay to the surrenderor on a certain day 60l. or 6l. per annum from the said day *pro usu et interesse* of the said 80l. till that sum is paid; this 6l. shall be taken to be *interesse damnorum*, and not *lucris*, and but limited as a penalty for nonpayment of the 80l. as a *nomine poenae*, &c. 2 Roll. Rep. 469; 1 Dane. Abr. 41. On a loan of 100l. or other sum of money for a year, the lender may agree to take his interest half-yearly or quarterly, or to receive the profits of a manor or lands, &c. and it will be no usury though such profits are rendered every day. *Cro. Jac.* 26.

Where a bond was conditioned for the payment of 100l. by quarterly payments of 5l. each, and interest at 5l. per cent. with a memorandum indorsed, that at the end of each year the year's interest due was to be added to the principal, and then the 20l. received in the course of the year was to be deducted, and the balance to remain as principal; this was held not to be usurious, 4 T. R. 613; and this judgment was affirmed in the Exchequer chamber. 2 H. Bl. 144.

If a grant of rent, or lease for 20l. a year of land which is worth 100l. per annum, be made for one hundred pounds, it is not usurious, if there be not an agreement that this grant or lease shall be void upon payment of the principal and arrears, &c. *Jenk. Cent.* 219. But if two men speak together, and one desires the other to lend him an hundred pounds, and for the loan of it he will give more than legal interest; and, to evade the statute, he grants to him 30l. per annum out of his land for ten years, or makes a lease for one hundred years to him, and the lessee regrants it upon condition that he shall pay 30l. yearly for the ten years; in this case it is usury, though the lender never have his own hundred pounds again. 1 Cro. 27. See 1 Leon. 119.

A man granted a large rent for years for a small sum of money; the statute of usury was pleaded; and it was adjudged, that if it had been laid to be upon a loan of money, it had been usurious, though it is otherwise if it be a contract for an annuity. 4 *Shep. Abr.* 170. If one hath a rent-charge of 50*l.* a year, and another asketh what he shall give for it, and they agree for 100*l.*, this is a plain contract for the rent-charge, and no usury. 3 *Nels.* 510.

So an agreement for the payment of the purchase money of an estate by instalments, with interest beyond the legal rate, held not to be usurious, where the sum stipulated for as interest was in fact part of the purchase money. 1 *M. & R.* 143; 7 *B. & C.* 453.

H. having taken a building lease of land at 108*l.* per annum, assigned over the lease to R. for 2300*l.* (the value of the premises being proved to be about 800*l.*) and on the same day agreed to take the premises as tenant to R. and subject to the same covenants as in the building lease, but at an increased rent of 395*l.*; and there was a stipulation that H. should be at liberty, upon giving six months' notice, to repurchase the lease for the sum of 2300*l.* On H.'s becoming bankrupt his assignees brought an ejectment against the tenant, claiming under R., and the learned judge left it to the jury to say whether the transaction was substantially a purchase or a lease by R. to H.: if they thought the latter, the deed was void for usury: and the jury having found it the latter, the court refused to disturb the verdict. In such cases it is a question of fact for the jury, whether the transaction is *bona fide* or a colour for an usurious loan. 3 *B. & A.* 664; and see 5 *Price*, 560; 4 *Camp.* 1. As to cases where a lease granted in consideration of a loan of money is considered usurious, see 1 *Ball & Beal*, 116, 125, 129; 1 *Scho. & Lef.* 182; 2 *Id.* 218.

Loans on contingencies are not usurious, on account of the risk incurred. Thus the grant of an annuity for lives, not only exceeding the rate allowed for interest, but also the proportion for contracts of this kind, in consideration of a certain sum of money, is not within the statutes against usury; and so of a grant of an annuity on condition, &c. *Cro. Jac.* 252; 2 *Lev.* 7. See 1 *Sid.* 182; and *ante*, tit. *Annuities for Lives*.

Where an annuity of 500*l.* was granted in consideration of 3500*l.* redeemable upon payment of the original consideration with all arrears, costs, and expenses, upon six months' notice or payment of half a year's annuity; and an agreement was entered into for the cessation of the annuity in consideration of a bill of exchange for 5000*l.* payable in three years, which 5000*l.* was made up by the original purchase money and arrears of the annuity, an allowance for redeeming without notice the interest of 5000*l.* for three years, and the balance paid in cash, this deduction of the three years' interest, in the first place, and at the time of the advance, being held to exceed the legal rate of interest, the transaction was deemed usurious. 3 *Bos. & Pull.* 154.

Where an annuity was granted for a term of years, to be paid half-yearly, and the grantor gave to the purchaser promissory notes, each for half a year's payment, payable at the times when the instalments became respectively due; and it appeared that the payments would discharge the principal sum together with interest at the rate of nearly 12*l.* per cent.; the transaction was held to be usurious. 1 *Russ. & M.* 45.

The grantor of an annuity, having agreed with the grantee to redeem, drew a bill of exchange for 5000*l.* at three years, which the grantee discounted in the following manner: he took 4083*l.* 6*s.* 8*d.* as the amount of the purchase money and arrears; advanced 168*l.* 13*s.* 4*d.* to the grantor in cash, and retained 750*l.* as interest for three years on 5000*l.* Held that the transaction was usurious. 3 *B. & P.* 154.

The risk of the insolvency of the grantor of an annuity otherwise usurious is not such a risk of the principal as will make the grant good. 3 *N. & M.* 665.

Where interest exceeds 5*l.* per cent. per annum on a bond,

if possibly the principal and interest are in hazard, upon a contingency or casualty, or if there is a hazard that one may have less than his principal, as when a bond is to pay money upon the return of a ship from sea, &c. these are not usury. 2 *Cro.* 208, 508; 1 *Cro.* 27; *Show.* 8. Though where B. lends to D. three hundred pounds on bond, upon an adventure during the life of E. for such a time; if therefore D. pays to B. twenty pounds in three months, and at the end of six months the principal sum, with a farther premium at the rate of 6*d.* per pound a month; or if before the time mentioned E. dies, then the bond to be void; this, differing from the hazard in a bottomry bond, was adjudged an usurious contract. *Carthem*, 67, 68; *Comberb.* 125. One hundred pounds is lent to have one hundred and twenty pounds at the year's end upon a casualty; if the casualty goes to the interest only, and not the principal, it is usury. The difference is, that where the principal and interest are both in danger of being lost, there the contract for extraordinary interest is not usurious; but when the principal is well secured, it is otherwise. 3 *Salk.* 391. See *Insurance*, IV, as to *Bottomry Bonds*.

The loan of money produced by the sale of stock (or valued with reference to the price of stock at the time of the loan) on an agreement that the borrower shall, at a certain day, replace (or purchase) stock to the amount of the stock sold (or purchasable at the time of the loan) with such interest in the mean time as the stock itself might have produced, is not usurious; not even if there is a condition in the alternative to repay the money on a subsequent day; unless the transaction be colourable, and a mere device to obtain more than the legal interest. 3 *T. R.* 531; 8 *T. R.* 162; 8 *East*, 304.

Where stock was lent upon a bond to replace it on a given day, with interest at 5*l.* per cent. in the mean time upon the sum which the stock produced, the stock not having been replaced at the time, it was held that the lender was entitled to the amount produced by the sale of the stock with interest, and not compellable to accept the amount of the stock (which had fallen) with the dividends which had accrued due in the mean time. 4 *Ves.* 492. But where a certain amount of stock was to be transferred, or the value thereof (at a particular day then past, when a loan ought to have been repaid) paid at the option of the lender, with interest in the mean time, the master of the rolls ruled the contract to be usurious, as it reserved the capital with legal interest, and likewise a contingent advantage, without putting either capital or interest in any kind of risk, and it was usurious to stipulate for the chance of that advantage. 17 *Ves.* 44.

So where A. lent 400*l.* stock to B. taking as security an agreement from B. to replace the stock on request, and a bond for the payment of the produce of the stock, and reserving to himself the dividends of the stock for interest, and the option either to have the stock replaced or the produce of it paid in money with interest at 5*l.* per cent.; this was held an usurious bargain. *White v. Wright*, 5 *D. & R.* 110; 3 *B. & C.* 273; and see 11 *East*, 612; 1 *Moo. & Mulk. Ca.* 411; 3 *B. & C.* 267.

Where bankers agreed to give credit on account in a certain sum, for which the person credited was to purchase stock of a certain amount, and which, at the then current price, was more than the money credited would purchase, and was to account for the dividends from the last dividend day, and the sum was credited accordingly, and drafts honoured by the bankers; the Court of K. B. held, that the contract was usurious, though the price of the stocks was less than when several of the sums were advanced; but that the party was entitled to credit in account for the amount agreed upon. 11 *East*, 612.

Where money was advanced on the security of *omnium*, which was to be taken back by the borrower at a fixed advance of price at a day certain, and the difference in price

exceeded the rate of 5*l.* per cent. for the period, the transaction was held to be usurious. 2 *Campb.* 607.

But where a person, having a vested interest in stock which he could not transfer till a certain day, sold his interest in the principal and dividends at a sum below the current price, this was helden not to be usurious. *Esp.* 164.

If the original contract be not usurious, nothing done afterwards can make it so. A counter-bond to save one harmless against a bond made upon a corrupt agreement, will not be void by the statutes. But if the original agreement be corrupt between all the parties, and so within the statute, no colour will exempt him from the danger of the statutes against usury. 1 *Brownl.* 73; 2 *And.* 428; 4 *Shep. Abr.* 170. A bond *fide* debt is not destroyed by being mingled with an usurious contract relating to it. 1 *H. Bl.* 462; 1 *East*, 92.

A fine levied, or judgment suffered as a security for money, in pursuance of an usurious contract, may be avoided by an averment of the corrupt agreement, as well as any common specialty or parol contract. It is not material whether the payment of the principal and the usurious interest be secured by the same or by different conveyances, for all writings whatsoever for the strengthening such a contract are void; also a contract reserving to the lender a greater advantage than allowed, is usurious, if the whole is reserved by way of interest, or in part only under that name, and in part by way of rent for a house let at a rate plainly exceeding the known value; so where part is taken before the end of the time, that the borrower hath not the profit of the whole principal money, &c. 1 *Hank. P. C. c.* 82. § 22.

It is now clearly settled that bankers and others, discounting bills, may not only take 5*l.* per cent. for interest, but also a reasonable sum besides, for their trouble and risk in remitting cash, and for other incidental expenses. 2 *T. R.* 52. But still, whether such a charge is reasonable or usurious must be decided by a jury, assisted by the direction of the judge. See 1 *Bos. & Pull.* 376.

A. having a bill for 2000*l.* at two months' date, which he could not readily negotiate in London, requested B. to give him in exchange an acceptance of B.'s London banker, at the same date and for the same sum; B. did so, deducting 16*l.* 10*s.* for commission: held no usury. 4 *Bingh.* 81.

Where a broker carried bills to be discounted, and allowed to the person discounting interest at the rate of 5*l.* per cent. per annum, and in addition 1*l.* per cent. on the account of the bills, towards the payment of the debt due from a third person to the discounter, but which the broker thought himself bound in honour, though not in law, to pay, and the broker accounted to his principal for the whole amount of the bills, minus lawful discount and commission; it was held, that the transaction was not usurious. If the discounter of a bill engage with the holder that he shall pay the agent procuring the discount a premium in addition to the legal interest, this is usurious, although the discounter himself only take the legal discount. 7 *B. & C.* 431; *Moo. & Malk. Ca.* 121.

A. being indebted to B. for different usurious loans, applies to B. for a further advance, which B. agrees to make at the legal rate of interest, if A.'s father will give his security for that and also for part of the previous debt: A.'s father consents, and accepts three bills, the two first of which exactly cover the amount of the legal debt: the parties paid when due. In an action on the second, held, that the acceptances having been given partly as a security for an illegal debt, were all tainted with the illegality, and therefore void. 1 *Marsh.* 349; 5 *Taunt.* 780.

The restrictions of the statutes against usury, however, do not apply to contracts made in foreign countries; for on such contracts our courts will direct the payment of interest according to the law of the country in which such contract was made. 1 *P. Wms.* 396; 2 *Bro. P. C.* 72. Thus Irish, American, Turkish, and Indian interest have been allowed in our courts to the amount of even 12*l.* per cent.; for the mode-

ration or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade. By 14 *Geo. 3. c.* 79. and 1 & 2 *Geo. 4. c.* 51. all mortgages and other securities upon estates and other property in Ireland, or the plantations, bearing interest not exceeding 6*l.* per cent. were declared legal, though executed in the kingdom of Great Britain; and though bonds are given as collateral securities for payment of such interest in Great Britain, unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case also, to prevent usurious contracts at home, under the colour of such foreign securities, the borrower shall forfeit treble the sum so borrowed. 2 *Comm.* 463, 464. And now, by the 3 *Geo. 4. c.* 47. securities made in Great Britain on estates, &c. in Ireland, or in the West Indian colonies, with interest not exceeding the rate of interest payable by the law of the country, &c. where the estate is situate, are declared valid. See further, *Mortgage*.

II. As usury (with the exceptions already noticed) avoids every security into which it enters, it necessarily follows that none such can be enforced at law; and advantage may be taken of such securities, by pleading the statute in bar to actions brought on them to recover the sum secured. 12 *Mod.* 493.

Formerly, to an action of assumpsit brought on an usurious contract, the general issue might have been pleaded and the usury given in evidence; *Str.* 498; but a defendant could not do both; 9 *Mod.* 359. Now, however, by the rule of *H. T. 4 Wm. 4.* usury must be pleaded specially.

Money paid by A. to B. in order to compromise a *qui tam* action of usury brought by B. against A. on the ground of an usurious transaction between the latter and one E., may be recovered back in an action by A. for money had and received. For the prohibition and penalties of the 18 *Eliz. c. 5.* attach only on the "informer or plaintiff, or other person suing out process in the penal action," making composition, &c. contrary to the statute; and not upon the party paying the composition; and therefore the latter does not stand, in this respect, in *pari delicto*, nor is *particeps criminis*, with such compounding informer or plaintiff. And such recovery may be had, although E.'s assignees had before recovered from B. the money so received by him, as money received to their use (the money paid by way of composition being at the time stated to be E.'s money), there being no evidence to show that A. the present plaintiff was privy to that suit. 8 *East*, 378.

In one case the Court of Common Pleas refused to set aside a judgment and execution, founded on an usurious consideration, until the defendant had paid the legal principal and interest. 1 *Bos. & Pul.* 270.

But in a latter case the Court of King's Bench expressed their disapprobation of this decision, and set aside a judgment founded on an usurious consideration, without compelling the defendant to pay the principal and interest. 4 *B. & A.* 92.

Where, however, usurious securities have been acted on, and the money partly paid by the borrower, the court will not set aside a judgment and execution, except on the terms of the defendant paying the principal and legal interest. *Hindle v. O'Brien*, 1 *Taunt.* 413.

But though the securities are void, the debt is not destroyed, if it were originally good and lawful.

Thus if an usurious security be given for a legal subsisting debt, although the security is void, the debt is not extinguished. 3 *Campb.* 119. So if a bond, void on the ground of usury, be cancelled, and another taken for the original principal, after deduction of a payment made under the former one, the latter bond is valid. 1 *Campb.* 165, n. So after usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal

and legal interest is valid. 2 Taunt. 184; 1 Campb. 157, 190.

Relief from usury in courts of equity differs from that afforded by courts of law; for in the former it is a maxim, that he that would have equity must do equity, the statutes of usury precluding the remedy merely; and this court will only grant relief upon the terms of the party seeking it consenting to pay what is really due.

Although a court of equity will not, in general, relieve against an usurious contract, except on the terms of paying the principal with legal interest, yet a suit by the assignees of a bankrupt for delivering up an assignment of stock, founded on a usurious contract, was sustained on the ground that as the assignment was usurious, it followed in consequence that it was wholly void. 17 Ves. 44. In all cases of bankruptcy, if usury is made out, the security is cut down altogether, not leaving the party a creditor for the money actually advanced. 9 Ves. 84.

Where securities had been given for legal interest, and more was afterwards received by taking advantage of the necessitous circumstances of the borrower; upon a suit for redemption, the account was directed to be taken upon the principle of applying the payments beyond legal interest in satisfaction of the principal, and in case the lender was overpaid, that he should refund. Rep. temp. Talb. 37.

As to the general principles of relief in equity on payment of principal and legal interest, see *Henckle v. Royal Assurance Comp.* 1 Ves. 319; *Scott v. Nesbitt*, 2 Bro. C. C. 641; *Bamfield v. Solomons*, 9 Ves. jun. 84. But a bill in equity requiring a discovery of usury is demurrable to, as tending to subject the defendants to penalties. See *Chauncey v. Fohorn-den*, 2 Atk. 322; 2 Eq. Ab. 70, pl. 7; *Harrison v. Southcote*, 1 Atk. 534.

In several cases in the Irish Court of Chancery relief has been given against leases granted by borrowers to the lenders of money, and which in that country appears to have been a frequent practice; and the subject is familiarly described by the expression of lease and loan. See *Scholes and Lefroy's Reports in Chancery*, i. 115, *Browne v. O'Dea*; 182, *Drew v. Power*; 310, *Molloy v. Irwin*; ii. 218, *Gubbins v. Creed*. See also the following cases, in which the inclination of the court is against extending the doctrine. *Merredith v. Saunders*, Don's Purl. Ca. 514; *Ball's Rep. C. i. 27*, *Prior v. Dunphy*; 126, *Willen v. Browne*; ii. 93, *Corbet v. Seagrove*.

III. To constitute usury and consummate the offence there must be an actual taking of money or money's worth; and therefore the re-payment of the sum lent, with usurious interest, either by bill of exchange, promissory note, or banker's cheque, is not completed until it has been paid; the lender having, in fact, as yet received nothing for payment, may be refused. 7 T. R. 184; 1 Camp. 445; 2 Camp. 53.

The forfeitures under the statute of Anne are recoverable by action of debt, plaint, or information.

An action *qui tam* for penalties may be brought by a stranger; and the borrower may be produced as a witness to prove the usury in an action for the penalty, if he swears that he has repaid the sum borrowed. 4 Burr. 2251. See Raym. 191.

It was formerly held, that the borrower could not be admitted to prove the re-payment of the money; for, till that was proved, he was no witness at all. 1 Stra. 633.

But now the borrower may be a witness, though the money is not paid, if the usury neither affects the debt, nor avoids the contract: and where the matter is doubtful, the objection shall only go to his credit, and not to his competency as a witness. 1 T. R. 153.

Informations and *qui tam* actions upon the statute must be brought within twelve calendar months from the commission of the usurious act; but the crown may sue within two years after the end of the first year. 31 El. c. 5. See *Limitation of Actions*.

An action to recover penalties for usury may be compounded by leave of the court; which, by the rule of *H. T. 2 Wm. 4.* shall not be granted in cases where part of the penalty goes to the crown, unless notice has been given to the proper officer.

If judgment cannot be given on the statute against usury, it hath been said that if it be found that a person took money for forbearance by corrupt agreement, judgment may be given against him at common law of fine and imprisonment. 3 Salk. 391.

See *Plowden and Comyn* on usury, the former of whom contends that usury is still an offence at common law, while the latter seems to adopt the contrary opinion. It has been thought by some that no indictment will lie for usury since the statute of Anne. But upon the principles laid down in a former part of this work (*Indictment*, II.) there does not seem any reason why an indictment may not be sustained for this offence. There is indeed one *dictum* (for it can hardly be called a case) reported in a book of not very great authority, from which it would appear that such an indictment will not lie, and that the party prosecuting must sue for the penalty, as being the method prescribed by the statute. 11 Mod. 174. But that case was decided in the absence of Lord C. J. Holt, and is certainly at variance with the doctrine deducible from many other decisions.

The statute, however, having given such heavy penalties to the informer, there is no instance of an indictment having been brought in modern times for usury. And it is quite clear that where there is not actual taking of the illegal interest, an indictment in that case is not sustainable, however corrupt the contract may be, or however void under the provisions of the statute. 2 Str. 316.

An indictment will not lie at the sessions for usury; for the statute gives the justices there no jurisdiction of the offence. 2 Salk. 680; 2 Ld. R. 1144.

UTAS, octava.] The eighth day following any term or feast; as the utas of St. Michael, &c. And any day between the feast and the octave is said to be within the utas.

The use of this was in the return of writs; as appears by the 51 Hen. 3. st. 2. See further, *Days in Bank, Terms*.

UTENSIL. Any thing necessary for use and occupation; as household stuff, &c. *Cowell*.

UTERINUS FRATER, uterine brother.] A brother by the mother's side. *Fortesc. de Laud. LL. Ang. 5.* See *Descent*.

UTLAGATO, *capiendo, quando utlagatar in uno comitatu, et postea fugit in alium*; when he is outlawed in one county, and afterwards flees to another: a writ for taking an outlaw, the nature whereof is sufficiently expressed by the name. See *Reg. Orig. fol. 133*; and *Outlawry*.

UTLEGH, *utlagus utlagatus*.] An outlaw. *Fleta, lib. 1. c. 47.* See *Outlawry*.

UTLAWRY, *utlagaria vel utlagatio*.] See *Outlawry*.

UTLEPE, Sax.] An escape of a felon out of prison. *Flet. lib. 1. 17.*

UTTER BARRISTERS, *juris consulti*.] Barristers at law, who plead without the bar, &c. See *Barrister, Serjeant*.

UTTERING FALSE MONEY. See *Coin, Treason*.

UTTERING FORGED INSTRUMENTS. See *Forgery, II.*

V.

VAC

VACARIA. A void place, or waste ground. *Mem. in Scacc. Mich. 9 Edw. 1.*

VACANT POSSESSION. A vacant possession is where a tenant has entirely abandoned the premises which he held, for if he still retains the virtual possession of them, though he has ceased to occupy, the possession can not be treated as vacant, but the landlord must proceed by ejectment in the ordinary way. See *Ejectment*.

Many nice distinctions have been drawn as to what is a vacant possession.

Where the tenant of a house locked it up, and quitted it, the court held that the landlord should treat it as a vacant possession. *4 B. & C. 259.*

But where there is any thing left by the tenant on the premises, however trifling, (for almost any matter will suffice to prevent a vacant possession, see *2 Chitty's R. 177*), as if the tenant leave beer in a cellar; or hay in a barn, *2 Str. 1064; Bul. N. P. 97, S. C.*; and in case of ground on which there is no house or building, if it be known where the tenant lives, the lessor of the plaintiff cannot proceed as in a vacant possession. *Ibid.*

The mode of proceeding in ejectment on a vacant possession is according to the ancient practice in ejectments, and is as follows.—A lease for years being previously prepared, and when necessary, a power of attorney executed, the party claiming title, or his attorney, enters upon the premises before the first day of the term, and there seals and delivers the lease to the lessee, who is usually some friend of the lessor, and at the same time delivers him the possession, but an attorney cannot be lessee. *R. M. 1654; 2 Doug. 486.* The lessee remains on the premises until some third person enters thereon by previous agreement, and turns him out of possession, upon which a declaration in ejectment, which has been previously prepared, is delivered on the premises to the ejector, founded upon the demise contained in the lease.

The declaration is similar to that in ordinary cases, except that the parties to it are real, and not fictitious parties, the lessee being made plaintiff on the demise of the lessor, and the ejector defendant. In lieu of the ordinary notice for the tenant to appear and be made defendant instead of the casual ejector, a notice is subscribed to the declaration, signed by the plaintiff's attorney, and addressed to the real defendant, informing him that unless he appear in court on the first day, or within the first four days, in London or Middlesex, or in any other county within the first eight days of the next term, at the writ of the plaintiff, and plead to the declaration, judgment will be entered against him by default. *Tidd's Pr. 532, 8th edit.; Adams' Eject. 174, 2d edit.* In cases of vacant possession, no person claiming title will be let in to defend, but he that can first seal a lease upon the premises must obtain possession. *Barnes, 177.*

In moving for judgment against the defendant, in case of a vacant possession, in the King's Bench, an affidavit must be made of the sealing of the lease, entry of the lessee, and ouster, and the delivery of the copy of the declaration; so also of

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the power of attorney, if the entry was made by a third person; but in the Common Pleas such an affidavit is unnecessary, it being only requisite to give a rule to plead, as in common cases. *Tidd's Pr. 536, 8th edit.; Adams' Eject. 176, 2d edit.* And see *Roscoe on Real Actions, 548; 1 Archb. by Chitty, 642.*

For the provisions of the 11 Geo. 2. c. 19. § 18; and 57 Geo. 3. c. 52. enabling two justices to give the landlord possession when premises are deserted, and no sufficient distress is to be found upon them, see *Rent, II.*

VACATION, vacatio.] Is all the time between the end of one term and the beginning of another; and it begins the last day of every term, as soon as the court rises. See *Term*.

The time from the death of a bishop, or other spiritual person, till the bishopric or dignity is supplied with another, is also called vacation. *Stats. Westm. 1. c. 21; 14 Edw. 3. st. 4. c. 4. See Plenarty.*

VACATURA. An avoidance of an ecclesiastical benefice; as *prima vacatura*, the first avoidance, &c.

VACCARY, vaccaria.] A house or place to keep cows in; a dairy-house, or cow-pasture. *Fleta, lib. 2.*

VACCARIUS. The cow-herd, who looks after the common herd of cows. *Fleta.*

VADIUM PONERE. To take security, bail, or pledges, for the appearance of a defendant in a court of justice. *Reg. Orig. See Pone.*

VADIUM MORTUUM. See *Mortgage*.

VADIUM VIVUM. A living pledge: as when a man borrows a sum of another, and grants him an estate, as of 20*l.* per annum, to hold until the rents and profits shall repay the sum borrowed. See *Mortgage*.

VAGABOND, vagabundus.] One that wanders about, and has no certain dwelling; an idle fellow. See *Vagrants*.

VAGRANTS,

VAGRANTES.] Some of the ancient statutes contained very severe regulations respecting vagrancy. By 22 Hen. 8. c. 12. a vagrant, after being whipped, was to take an oath to return to the place where he was born, or where he had last dwelt before the punishment, for the space of three years, and there labour as a true man ought to do. By 27 Hen. 8. c. 25. persons found a second time in a state of vagrancy were not only to be whipped, but to have the upper part of the gristle of the right ear clean cut off: for a third offence, the punishment was death. By 1 Edw. 6. c. 3. a vagabond was to be marked with a hot iron on the breast with V., and adjudged to be a slave for two years to the person who took him. He was to be kept on bread and water, or small drink; and made to work by beating, chaining, or otherwise, at any work however vile. If he absented himself for fourteen days, he was to be marked on the forehead or cheek with S., and adjudged a slave to his master for ever: and, if he ran away a second time, was declared guilty of felony. Children of the age of five years and under fourteen were

adjudged to the apprehenders until twenty-one, if females; or twenty-four, if male; to be treated as slaves: and if they beat or wounded their masters, or conspired with others to do so, they were to suffer as felons, unless the party injured agreed to take them as slaves for ever. This act was repealed by 3 & 4 Edm. 6, c. 16. which restored the provisions of 22 Hen. 8, c. 12. with some additions. By 14 Eliz. c. 5; 18 Eliz. c. 3. provisions were made for the punishment of vagabonds by whipping, gaoling, boring the ears, and death, for a second offence. These were repealed by 35 Eliz. c. 7. § 6. By 13 & 14 Car. 2, c. 12. § 23. the justices at quarter sessions were empowered to order incorrigible rogues to be transported to the English plantations. General directions concerning vagrants, conformable to the principles of the present system, were given by the 12 Anne, st. 2, c. 23; 13 Geo. 2, c. 24.

In Scotland the laws against vagrants were formerly equally severe, for all between the age of fourteen and seventy, who begged without a badge, were, by the act 1424, c. 42, burned in the cheek and banished: and by act 1535, c. 22, none were permitted to beg in any other parish than where they were born. Vagabonds offending a second time against the act 1424, were to suffer death; act 1570, c. 74. These and other acts were confirmed by act 1698, c. 21.

Under the 17 Geo. 2, c. 5. vagrants in England were divided into three classes; viz. Idle and Disorderly Persons—Rogues and Vagabonds—and Incorrigible Rogues: which classification is adhered to in the 5 Geo. 4, c. 83.

By that act all provisions theretofore made relative to idle and disorderly persons, rogues, and vagabonds, incorrigible rogues, or other vagrants, in England, are repealed, as well as the provisions of the 32 Geo. 3, c. 45. relating to passes given on their discharge from prison, or to persons acquitted or discharged at the assizes or sessions.

By § 3. every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish, township, or place;

every person returning to and becoming chargeable in any parish, township, or place, from whence he or she shall have been legally removed by order of two justices of the peace, unless he or she shall produce a certificate of the churchwardens and overseers of the poor of some other parish, &c. thereby acknowledging him or her to be settled in such other parish, &c.;

every petty chapman or pedlar wandering abroad and trading, without being duly licensed, or otherwise authorized by law;

every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner;

every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, or causing or procuring or encouraging any child or children so to do;

shall be deemed an *idle and disorderly person*; any justice of the peace may commit such offender (being thereof convicted before him by his own view, or by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the House of Correction, there to be kept to hard labour for any time not exceeding one calendar month,

By § 4. every person committing any of the offences therein-before mentioned, after having been convicted as an *idle and disorderly person*;

every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of his majesty's subjects;

every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself;

every person wilfully exposing to view, in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition;

every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female;

every person wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms;

every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence;

every person running away and leaving his wife, or his or her child or children, chargeable, or whereby she or they or any of them shall become chargeable to any parish, township, or place;

every person playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance;

every person having in his or her custody or possession any picklock key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling house, warehouse, coach-house, stable, or outbuilding, or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument, with intent to commit any felonious act;

every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose;

every suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse, near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place, adjacent, with intent to commit felony;

and every person apprehended as an *idle and disorderly person*, and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended;

shall be deemed a *rogue and vagabond*, and any justice of the peace may commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any term not exceeding three calendar months.

By § 5. every person breaking or escaping out of any place of legal confinement before the expiration of the term for which he or she shall have been committed or ordered to be confined by virtue of the act;

every person committing any offence against this act which shall subject him or her to be dealt with as a *rogue and vagabond*, such person having been at some former time adjudged so to be and duly convicted thereof;

and every person apprehended as a *rogue and vagabond*, and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended,

shall be deemed an *incorrigible rogue*, and any justice of the peace may commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the House of Correction to hard labour, there to remain until the next general or quarter sessions of the peace.

By § 10. when any incorrigible rogue shall have been committed to the House of Correction, there to remain until the next general or quarter sessions, the justices of the peace there assembled may examine into the circumstances of the case, and order, if they think fit, that such offender be further imprisoned in the House of Correction, and kept to hard labour for not exceeding one year, and may order further, such offender (not being a female) to be punished by whipping, at such time during his imprisonment, and at such place within their jurisdiction, as they shall deem expedient.

§ 6. Any person may apprehend any person offending against the act, and forthwith take him or her before some justice, or deliver him or her to any constable or other peace officer of the place where he or she shall have been apprehended, and so taken as aforesaid; and in case any constable, &c. shall refuse or wilfully neglect to take such offender into custody, and to convey him or her before some justice, it shall be deemed a neglect of duty, and he shall on conviction be punished as therein-after directed.

By § 7. any justice may issue a warrant to apprehend offenders. And by § 13. any justice, upon information on oath before him made, that any person therein-before described to be an idle and disorderly person, or a rogue and vagabond, or an incorrigible rogue, is or is reasonably suspected to be harboured in any house kept for the entertainment of travellers, by warrant may authorize any constable or other person to enter at any time such house, and to bring before him or any other justice every such idle and disorderly person, &c. found therein, to be dealt with in the manner therein-before directed.

By § 8. any constable, peace officer, or other person apprehending any person charged with being an idle and disorderly person, or a rogue and vagabond, or an incorrigible rogue, may take any horse, mule, ass, cart, car, caravan, or other vehicle, or goods in the possession or use of such person, and convey the same as well as such person before some justice; and every justice by whom any person shall be adjudged to be an idle and disorderly person, &c. may order that such offender shall be searched, and his or her trunks, &c. shall be inspected in the presence of the said justice, and of him or her, and also any cart, or other vehicle, found in his or her possession, shall be searched in his or her presence; and the said justice may order any money found upon such offender to be applied towards the expense of apprehending, conveying to the House of Correction, and maintaining such offender during the time for which he or she shall have been committed; and if upon such search money sufficient for the purposes aforesaid be not found, such justice may order a part, or the whole of such other effects then found, to be sold, and the produce of such sale applied as aforesaid, the overplus of such money or effects, after deducting the charges of such sale, to be returned to the said offender.

By § 9. justices may bind persons by recognizance to prosecute vagrants at sessions, who shall give notice of their intention to appeal against their conviction, and empowers the sessions to order payment of expenses to prosecutors and witnesses.

§ 11. Penalty on officers neglecting their duties, &c. of 5*l*. And § 12. on conviction, &c. justices may make an order upon them for payment of the expenses of prosecution.

§ 14. Any person aggrieved by any act or determination of any justice out of sessions, concerning the execution of the act, may appeal to the next quarter sessions, giving to the justice notice in writing of such appeal, and of the ground thereof, within seven days after such act or determination, and before the next quarter sessions, and entering within such seven days into a recognizance, with sufficient surety, before a justice for the county or place in which such person shall have been convicted, personally to appear and prosecute such appeal; and upon such notice and recogni-

zance, such justice may discharge such person out of custody; and the court at such quarter sessions shall hear and determine the matter of such appeal, and make such order therein as shall seem meet, and in case of the dismissal of the appeal, or the affirmation of the conviction, shall issue the necessary process.

By § 15. the visiting justices of gaols, &c. are empowered to grant certificates for enabling persons discharged from prison to receive alms in their route.

§ 16. Justices are not to grant certificates enabling persons to ask relief on route, except to soldiers and sailors. 43 *Geo. 3. c. 61.* See *Soldiers*.

§ 18. Where actions are brought against justices, &c. they shall have treble costs if judgment be in their favour.

§ 20. Persons convicted under the act are to be chargeable to the parish in which they shall reside.

§ 21. Provided, wherever by any acts of parliament now in force it is directed that any person shall be punished as an idle and disorderly person, or as a rogue and vagabond, or as an incorrigible rogue, for any offence specified in such acts, and not therein-before provided for, whether such person shall or shall not have committed any offence against that act, every such person shall be punished under the provisions thereof.

By the 11 *Geo. 4.* and 1 *Wm. 4. c. 5.* (repealing the former statutes on the subject) the justices may, on the complaint of the churchwardens and overseers of any parish, make an order for the removal, at the expense of such complaining parish, to the place of their birth, of chargeable poor born in Jersey and Guernsey, who have not gained a settlement in England.

And by the 3 & 4 *Wm. 4. c. 40.* which repeals the former statutes relating to the removal of poor persons born in Scotland and Ireland, two justices may make an order for the removal to the place of their birth of poor persons born in Scotland or Ireland, or in the Isle of Man, or Scilly, with their families, who have become chargeable to parishes in England. The expense is in the first instance to be borne by the complaining parish, but is to be repaid by the county, or division, in which such parish is situate.

See further, *Police*.

VALET, VALECT, or VADELET, valettus, vel valectus. Was anciently a name specially denoting young gentlemen, though of great descent or quality; but afterwards attributed to those of lower rank, and now a servitor, or gentleman of the chamber. *Cambd.; Selden's Tit. Hon.; Bract. lib. 3.*

In the accounts of the Inner Temple, it is used for a benchers clerk or servant; and the butlers of the house corruptly call them varlets.

VALENTIA. The value or price of any thing. See *Value*.

VALESHERIA. Signifies the proving by the kindred of the slain, one on the father's side, and another on the side of the mother, that a man was a Welshman. It is mentioned in stat. *Wallæ, 12 Edm. 1. c. 4.* See *Englecery*.

VALOR BENEFICIORUM. See *Taxatio Ecclesiastica*.

VALOR MARITAGII, value of marriage. Under the ancient tenures, while an infant was in ward, the guardian had the power of tendering him or her a suitable match, without disparagement or mequality, which, if the infants refused, they forfeited the value of the marriage to their guardian; that is, so much as a jury would assess, or any one would *bond fide* give to the guardian for such an alliance; and if the infants married themselves without the guardian's consent, they forfeited double the value. This was one of the greatest hardships of our ancient tenures. But the tenures being taken away by 12 *Car. 2. c. 24.* the law is abolished. See *Tenures, II. 4.*

VALUABLE CONSIDERATION. See *Consideration*.

VALVASORS. See *Vassors*.

VALUE, valentia, valor. Is a known word; and the

value of those things as to which offences are committed, is usually comprised in indictments; which was formerly necessary in theft to make a difference from petit larceny, and in trespass to aggravate the fault, &c.

But now that the distinction between grand and petit larceny has been abolished, the exact value in cases of simple larceny is immaterial.

In other cases a distinction has been made between value and price. If a plaintiff declares in an action of trespass for the taking away of live cattle, or one particular thing, he ought to say that the defendant took them away, *pretii* so much; if the declaration be for taking of things without life, it must be alleged *ad valentiam*, &c. so that live cattle are to be prized at such a price as the owner of them did esteem them to be worth; and dead things to be reckoned at the value of the market, which may be certainly known. Of coin, not current, it shall be *pretii*; but of common coin, current, it shall be neither said *pretii* nor *ad valentiam*, for the value and price thereof is certain. The difference between *pretii* and *ad valentiam* may proceed from the rule in the register of writs, which shows it to be according to the ancient forms used in the law. *West. Symb. par. 2; 2 Lill. Abr. 629.*

A jewel, it is said, is not valuable in law, but only according to the valuation of the owner of it, and is very uncertain. But there seems to be a certain value for diamonds among the merchant jewellers, according to their weight and lustre, &c. *Hil. 21 Car. B. R.; 2 Lill. 628.* A man cannot say that another owes him so much, when the value of the thing owing is uncertain; for which reason, actions in these cases are always brought in the *definet*, and the declaration *ad valentiam*, &c. *1 Lutw. 484. See Money, Pleadings, &c.*

VANG, *Sax.*] He vanged for me at the vant, *i. e.* stood for me at the fount. *Blount.*

VANNUS. A vane, *venti index*; a fan to winnow corn with. *Lit. Dict.*

VANTARIUS, *præcursor.*] As *vantarius regis*, the king's fore footman. *Rot. de finibus. Term Mich. 2 Ed. 2.*

VARIANCE, *variantia*, from the Fr. *varier*, *i. e.* *alterare.*] An alteration of a thing formerly laid in a plea; or where the declaration in a cause differs from the writ, or from the deed upon which it is grounded, &c. *2 Lill. Abr. 629.* If there is a variance between the declaration and the writ, it is error, and the writ should formerly abate.

But the defendant can no longer take advantage of such a defect, as the court will not now grantoyer of the writ. See *Oyer.*

Where there is a variance, omission, or a mistake in the name of a defendant in a writ, or in the number of parties in the cause of action, in the *testa*, in the indorsements, or the like, the court will discharge the defendant out of custody, or order the bail-bond (if any) to be delivered up to be cancelled, and a common appearance entered, and in some cases will set aside the proceedings.

The courts and judges have, since the introduction of the new writs under the uniformity of process act, resolved not to allow any amendments in the writ itself, or in any form of the memorandum or indorsement, if prescribed by the statute, unless great injustice would be occasioned by the refusal, and that only in cases where the statute of limitations would be a bar. But in the forms of indorsement as prescribed by the rules of court, and not by statute, the court or a judge will allow an amendment. *3 Dow, P. C. 101; 1 Archb. Pr. by Chitty, 129.*

If there appear to be a material variance between the matter pleaded and the manner of the pleading of it, this is not a good plea; for the manner and matter of pleading ought to agree in substance, or there will be no certainty in it. *Cro. Jac. 479; 2 Lill. 629.*

But when the pleading is good in substance, a small variance shall not hurt. *3 Mod. 227.* If the record of *Nisi*

Prius agrees with the declaration delivered, a variation from the issue is not material. *2 Strange, 1131.*

The 9 Geo. 4. c. 15. allowing of amendments by the judge on the trial of civil actions, or indictments or informations for misdemeanors, has already been noticed under the title *Amendment.* That statute, however, was confined to variances which appeared between any matter in writing or in print, and the recital upon the record on which the trial was pending. But by the 3 & 4 Wm. 4. c. 42. § 23. the powers of amendment given to the courts and judges have been greatly extended.

By § 1. any court of record holding plea in civil actions, and any judge sitting at nisi prius, if such court or judge shall see fit, may cause the record, writ, or document, on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a mandamus, when any variance shall appear between the proof and the recital, or setting forth of the record, writ, or document, on which the trial is proceeding, of any contract, custom, prescription, name, or other matter in any particular or particulars in the judgment of such court or judge, not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings in which it may become necessary to amend, on such terms, as to payment of costs to the other party, or postponing the trial, to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars, in the judgment of such court or judge, not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record, or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and in case such trial shall be had at nisi prius, or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the *postea* or the writ, as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any other court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had, provided that any party dissatisfied with the decision of such judge at nisi prius, sheriff, or other officer, respecting his allowance of any such amendment, may apply to the court from which such record or writ issued, for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet.

By § 24. the court or judge may, in all such cases of variance, instead of causing the record or document to be amended, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document; and notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite

party in the conduct of the action or defence, give judgment according to the very right and justice of the case.

See further, *Abatement, Amendment, Averment, Error, Pleading, Verdict, &c.*

VASSAL, vassalus.] In our ancient customs signified a tenant or feudatary; or person who vowed fidelity and homage to a lord on account of some land, &c. held of him in fee; also a slave or servant, and especially a domestic of a prince. *Du-Cange.* *Vassalus* (in Scotland) is said to be *quasi inferior socius*, as the vassal is inferior to his master, and must serve him; and yet he is in a manner his companion, because each of them is obliged to the other. *Skene.* The vassal is the person who receives a feudal right; the giver is the superior. See 2 *Comm.* 58; and tit. *Tenures.*

VASSALAGE. The state of a vassal, or servitude and dependency on a superior lord. *Liege Vassalage* belonged only to the king.

VASSELERIA. The tenure or holding of vassal. *Cowell.*

VASTO. A writ against tenants for term of life or years, committing waste. *F. N. B.* 55; *Reg. Orig.* 72. See *Waste.*

VASTUM. A waste or common lying open to the cattle of all tenants who have a right of commoning. *Paroch. Antiq.* 171.

VASTUM FORESTÆ VEL BOSCI. That part of a forest or wood wherein the trees and underwood were so destroyed that it lay in a manner waste and barren. *Paroch. Antiq.* p. 351.

VAVASORS. The first name of dignity, next beneath a peer, was anciently that of *vidames, vice-domini, valvasors*, or *vavasors*, who are mentioned by our ancient lawyers, as *virī magnæ dignitatis*; and Sir Edward Coke speaks highly of them. Yet they are now quite out of use; and our legal antiquarians are not agreed upon even their original or ancient office. 1 *Comm.* c. 12. p. 403.

The *vavassores*, in dignity, were next to the barons and higher thanes. *Selden* says they either held of a mesne lord, and not immediately of the king, or at least of the king as of an honour or manor, and not in chief. *Kelham*, 354. *Vavassores*, however, are mentioned but twice in the first volume of the *Domesday Survey*, at least under that denomination. At the close of the account of Suffolk, however, we find a distinct title of "*Verra Vavassorum*," *Domesday*, tom. 2. fol. 448; the perusal of the contents of which satisfactorily proves that throughout the greater part of the survey the title was sunk in the general name of *liberi homines*.

"The grantees," says Sir Henry Spelman, "that received their estates from the barons or *capitanei*, and not from the king, were called *valvasores*, (a degree above knights,) and were unto their lords (the *capitanei* or *barones regis*) as they the *capitanei* were unto the king; and did in like manner subdivide their lands among their socmen and military followers, who in old time were called *valvasini*, whom I take to be the same at this day that are the lords of every manor, if not those themselves that we call knights, as owners of a knight's fee. For in this, the feudal law itself is doubtful and various, as of a thing lost by antiquity, or made uncertain by the differing manners of several nations. Inasmuch, that *valvasores* and *valvasini* grew to be confounded, and both of them at last to be out of use, and no other military tenures to be known amongst us than *tenere per baronium*, and *tenere per feudum militare*. But in a charter of Henry I. *De tenend. Comitatus*, it is said, "*Si exurgat placitum de divisione territorum, si interest barones meos dominicos, tractetur in curia mea; et si inter valvasores duorum dominorum, tractetur in comitatu, &c.*" where the *valvasores* were also, and the barons themselves suitors and attendants. *LL. Hen.* 1. c. 8. *Bracton* mentioneth them in Henry III.'s time to be *virī magnæ dignitatis*. *Bract. lib.* i. c. 8. nu. 4. Nor was their memory clean gone in Richard II.'s days; as appeareth by *Chaucer*. Yet do I not find in any of our ancient laws or monuments that they stood

in any classic kind of tenure, other than that we may account the baron, *vavator*, and knights, to be (as our lawyers at this day term them) the chief lord, mesne and tenant." *Spelm. English Works, of Parliaments*, 58. Compare also *Seld. Tit. Hon.* 625; and *Spelm. Glossar. ed.* 1617, p. 550.

Fleta, whose book was written after the 13 *Edw.* 1. places the *vavassores* next to the *milites*. *Kelham*, 398. *Kelham*, from *Madox's Baronia Anglica*, says, "We read of *vavassours* in the time of Henry the First, belonging to the barony of the Archbishop of York; to the barony of Robert Fossard, and others; but they were not numerous." *Kelham*, 354.

The relief of the *vavator* or the Conqueror's laws follows that of the baron. *Leges Guil. Cong.* 22; *Wilk.* 223; 1 *Ellis's Domesday*, 54.

VAVASORY, vavatoria.] The lands that a *vavator* held. *Bract. lib.* 2.

VEAL MONEY. The tenants within the manor of Bradford, in the county of Wilts, pay a yearly rent by this name to their lord, in lieu of veal paid formerly in kind. *Blount's Ten.*

VECTIGAL JUDICIARIUM. Is applied to money or fines paid to the king, to defray the charge he is at in maintaining the courts of justice, and protection of the people. 3 *Salk.* 33.

VEJOURS, visores, from the Fr. *veier*, i. e. *cernere*.] Such persons as are sent by the court to take a view of any place in question, for the better decision of the right thereto. It is also used for those that are appointed to view an offence. *Old Nat. Br.* 112; *Bract. lib.* 5. See *View*.

VELTRAIA, ministerium de veltraia.] The office of dog-leader, or a courser. *Rot. Pip.* 5 *Steph.*

VELTRARIUS. One who leads greyhounds; which dogs, in Germany, are called *welters*; in Italy, *voltres*, &c. *Blount's Tenures*, p. 9.

VELUM QUADRAGESIMALE. A veil or piece of hangings drawn before the altar in Lent, as a token of mourning and sorrow. *Synod. Exon. anno* 1217.

VENARIA. Beasts which are caught in the woods by hunting. *Leg. Canut.* c. 108.

VENATIO. In the statute of *Charta de Foresta*, signifies *venison*, in Fr. *venaison*. It is called *venaison*, of the means whereby the beasts are taken, *quoniam ex venatione capiuntur*, and being hunted are most wholesome. And they are termed beasts of venary because they are gotten by hunting. 4 *Inst.* 316.

VENDITIONI EXPONAS. A judicial writ, directed to the sheriff, commanding him to expose to sale goods which he hath already taken into his hands for the satisfying a judgment given in the king's court. *Reg. Judic.* 33; 14 *Car.* 2. c. 21. If the sheriff upon a *fieri facias* takes goods in execution, and returns that he hath so done, and cannot find buyers; or if he delay to deliver them to the party, &c. then the writ *venditioni exponas* shall issue to the sheriff, reciting the former writ and return, and commanding the sheriff to make sale of the goods, and bring in the money. 13 *Hen.* 7. 1; *Dyer*, 363. If a *supersedeas* be not delivered to the sheriff till he hath in part executed a writ of execution, he may afterwards be authorized to go through with it by a *venditioni exponas*; as he may also in the like case after a writ of error. *Dyer*, 98; *Cro. Eliz.* 597; 1 *Roll. Abr.* 894.

After the delivery of the *venditioni exponas* to the sheriff, he is bound to sell the goods, and have the money in court on the return day of the writ. *Comp.* 403; 3 *Camp.* 405, 524. And he cannot a second time return that the goods remain in his hands for want of buyers; although if he do make such a return, the court will not on that account grant an attachment against him. 1 *B. & N.* 359. But one way of proceeding against the sheriff, if he do not sell and pay over the money on or before the return of the *venditioni*, is to sue out a *distingas* against him, directed to the coroner, and if he do not sell the goods, and pay over the money before the return of

the writ, he shall forfeit issues to the amount of the debt. 2 *Saund.* 47, n.; 6 *Mod.* 295. If there has been laches on the part of the plaintiff, or collusion between him and the officer, the court will not grant a *distringas*. 3 *B. & Ald.* 204. It is also to be observed that an action on the case may be supported against the sheriff for his neglect in not selling the goods within a reasonable time. 2 *C. & M.* 413.

In making sale of goods under a *venditioni exponas*, the sheriff is not bound by the value set upon the goods in his return to the *fi. fa.* *Cro. Eliz.* 598; *Cro. Jac.* 515; *Godb.* 276; but see 2 *Show.* 89. But otherwise, if they be rescued from him, or the like, so that he cannot make sale of them. 2 *Ld. Raym.* 1075; 1 *Archb. Pr. by Chitty*, 469.

If goods are not taken to the value of the whole, the plaintiff may have a *venditioni exponas* for part, and a *feri facias* for the residue, in the same writ. *Thes. Brev.* 305. And it seems that a *venditioni exponas* may be directed to the new sheriff, where the old one returns that he has taken goods, which remain in his hands for want of buyers. 2 *Saund.* 343. But the more usual way of proceeding in such case is by writ of *distringas nuper vicecomitem* to the new sheriff, commanding him to distrain the old one, till he sell the goods, &c. Of this writ there are two sorts; the first, which is the more ancient, commands the sheriff, to whom it is directed, to distrain the late sheriff, so that he exposes the goods to sale, and cause the monies arising therefrom to be delivered to the present sheriff, in order that such sheriff may have those monies in court at the return. *Gillb. Ex.* 21; 34 *Hen.* 6, 36. The other writ, which is the most usual, is to distrain the late sheriff to sell the goods, and have the money in court himself. 6 *Mod.* 299; *Rast.* 164; *Thes. Brev.* 90; *Off. Bar.* 15; 2 *Ld. Raym.* 1074, 1075; 1 *Salk.* 323.

VENDITOR REGIS. The king's salesman; being the person who exposed to sale goods and chattels seized or distrained to answer any debt due to the king.

This office was granted by King Edward I. to Philip de Lardiner, in the county of York; but the office was seized into the king's hands for the abuse thereof, *anno* 2 *Ed.* 2.

VENDOR AND VENDEE. Vendor is the person who sells any thing, and vendee the person to whom it is sold.

Where a man sells a thing to another, it is implied that the vendor shall make assurance by bill of sale to the vendee, but not unless it be demanded. *Per Finch*, chancellor. 2 *Chan. Cases.* 5. See 21 *Fin. Abr.* title *Vendor and Vendee*.

See further *Agreement, Contract, Purchase, Sale, Stoppage in Transitu, Warranty, &c.*

VENELLA. A narrow or strait way. *Monast.* i. 408.

VENIA. A kneeling or low prostration on the ground by penitents. *Walsing.* 196.

VENIRE FACIAS. A writ judicial awarded to the sheriff to cause a jury in the neighbourhood to come, or appear, when a cause is brought to issue, to try the same. *Old Nat. Br.* 157.

Formerly many questions arose concerning the place or places from whence a jury should come, but these are now set at rest. See *Jury*, I.; *Venue*, I.

One *venire facias* is sufficient to try several issues between the same parties, and in the same county. 2 *Cro.* 550.

If the matter to be tried be within divers places, and one and the same county, the *venire facias* shall be general; and if in several counties, it shall be special. 2 *Lill. Abr.* 637.

By the jury act, 6 *Geo.* 4. c. 50. § 23. in either civil or criminal cases, where jurors are to view, the court may order special writs of *venire facias* to issue. See *View*.

In all cases, where there is to be a special jury, the *venire* must be special.

Where an action was brought against two, they both joined issue, and one died; and after, the *venire facias* was awarded to try the issue between both, which was done, and held to be no error, because one of the defendants was living. *Cro. Car.* 308. See *Amendment*.

If a *venire facias* is returned by the coroner for defect of the sheriff, &c. when it ought to be returned by the sheriff, the trial is wrong, and not remedied by any statute of jeofails. 5 *Rep.* 36.

At a trial at *nisi prius*, the plaintiff changed the *venire facias* and panels, and had a jury the defendant knew not of; and ruled, that the defendant cannot be aided, if the first *venire* was not filed. And a difference was taken when the first *venire* was not filed, that he cannot be aided, because he may resort to the sheriff, and have a view of the panel, to be prepared for his challenges; but if the first *venire* was filed, then the defendant shall have a new trial. *Raym.* 79.

A *venire facias*, after filed, cannot be altered without consent of parties. Though where a verdict in a cause is imperfect, so that judgment cannot be given upon it, there shall be a new *venire facias* to try the cause, and find a new verdict. 2 *Lill.* 634, 635.

The want of a *venire* is aided after verdict. *Cro. Eliz.* 259; *Bul. N. P.* 320.

A *venire facias ad respondendum* is the common process upon any presentment, being in nature of a summons for the party to appear; and is a proper process to be first awarded on an indictment for any crime, under the degree of treason, felony, or maihem, except in such cases wherein other process is directed by statute. See *Process*, II.

The *venire facias ad respondendum* may be without a day certain, because by an appearance the fault in this process is cured; but a *venire facias ad triand. exdum* must be returnable on a day certain, &c. 3 *Salk.* 371.

Before the 3 & 4 *Wm.* 4. c. 67. § 2, the latter writ of *venire facias* must have been tested and returned in term time only; and it used to be tested on the first day of the term in or after which the cause was to be tried, and was made returnable on some day certain in term before the trial; or if it were a country cause, then on the last day of the term. But now by that statute, except in trials at bar, it may be tested on the day it is issued, and be made returnable forthwith.

VENIRE FACIAS tot Matronas. See *Ventre Inspiciendo*.

VENIRE FACIAS, de Novo; the ancient proceeding of the common law, to send a cause or a prosecution for a misdemeanor to a new trial. And this proceeding is still preserved in certain cases.

New trials are generally granted where a general verdict is found: a *venire facias de novo*, upon a special verdict. But the most material difference between them is this, that a *venire facias de novo* must be granted upon matter appearing upon the record; while a new trial may be granted upon things out of it, if the record be never so right.

But a *venire de novo* is not awarded for every defect appearing upon the face of the record, but for a defective finding in the verdict only. 7 *T. R.* 52; 2 *Wils.* 144; 4 *B. & C.* 69.

A *venire de novo* is granted, 1st. If it appears upon the face of the record that the verdict is so imperfect that no judgment can be given upon it. 2d. Where it appears that the jury ought to have found facts differently from what they do. See 1 *Wils.* 55; and tit. *Trial*.

The following seem to be cases in which a *venire de novo* is grantable. 1st. Where the jury are improperly chosen, or there is any irregularity in returning them. So where a person not summoned on the jury was sworn at *nisi prius* in the name of a person for whom a summons to serve on that jury was delivered, and to whose house he had succeeded; the irregularity being noticed before verdict, the Court of C. P. awarded a *venire de novo*. 6 *Taunt.* 460. 2dly. Where they have improperly conducted themselves. 3dly. Where they give general damages, upon a declaration consisting of several counts; and it afterwards appears that one or more of them is defective. 4thly. Where the verdict, whether general or special, is imperfect, by reason of some ambiguity or uncertainty; or by finding less than the whole matter put in issue;

or by not assessing damages. *Tidd's Pr.*; and the authorities there cited.

Where a verdict can be amended, a *venire de novo* is never awarded. See further *Trial*, III.; *Verdict*.

A *venire de novo* may be granted by a court of error, but see 1 *Arch. Pr. by Chitty*, 336, *contra*; or after a demurrer to evidence, 5 *T. R.* 367; or bill of exceptions, 2 *T. R.* 125; *Tidd's Pr.*

By the 6 *Geo. 4. c. 50. § 16.* if a plaintiff after suing out a *venire* should not go to trial, he may afterwards sue out a *venire de novo*, and try at any subsequent assizes; and where the plaintiff does not proceed on the *venire* first sued out, the defendant may also sue out a *venire de novo* if he wishes to proceed to trial by proviso.

VENITARE. The Book of *Ecclesiasticus*; so called because of the *venite exultemus Domino, jubilate Deo, &c.* written in the hymn-book or psalter as it is appointed to be sung, &c. It often occurs in the history of our English synods; and is called *venitarium*. *Mon. Ang.* iii. 432.

VENTER, Lat.] Literally the belly; it is used in law to distinguish the issue, where a man hath children by several wives; (said to be by a first or second venter.) How they shall take in descents of lands, see *Descent*.

VENTRE INSPICIENDO. A writ to search a woman who saith she is with child, and thereby withholdeth lands from the next heir. The trial whereof is by a jury of women. *Reg. Orig.* 227.

Where a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate, the heir presumptive may have this writ to examine whether she be with child or not; and if she be, to keep her under proper restraint till delivered. But if the widow be, upon examination, found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again on the birth of a child within forty weeks from the death of a husband. 1 *Comm. c. 16.* See *Bustard*.

See further on the writ *de ventre inspiciendo*, *Aiscough's Case*, *Mosel.* 391; and 2 *P. Wms.* 591, *S. C.*; in which King, C., on petition, granted the writ, though the persons applying were only tenants in tail. And this writ is now granted, not only to an heir at law, but to a devisee, whether for life, or in tail, or in fee; and whether his interest is immediate or contingent. *Ex parte Bateman*, at the Rolls, 16th Dec. 1784; *ex parte Bellett*, at the Rolls, 20th Dec. 1786; *ex parte Browne*, in Chancery, *Trin. T.* 1792. See 4 *Bro. C. R.* 90. In *Moseley's* report of *Aiscough's* case, a case of personal estate is cited, in which the then master of the rolls, in conformity to the reason of the common law, directed that the master should appoint two matrons to inspect a woman. See 1 *Inst.* 8, b. note 3; where the necessity of an act of parliament to regulate the proceedings on the writ is suggested.

Thomas de Aldham of Surrey, brother of Adam de Aldham, anno 4 *Hen. 3.* claimed his brother's estate. But Joan, widow of the said Adam, pleaded she was with child; whereupon the said Thomas obtained the writ *ventre inspiciendo*, directed to the sheriff. *Quod assumptis tecum discretis et legalibus militibus et discretis et legalibus mulieribus de comitatu tuo, in propria persona accedat ad ipsam Joannam, et ipsam a prædictis mulieribus coram præfatis militibus videri facias et diligenter tractari per ubera et ventrem, et inquisitionem factam certificari, facias sub sigillo tuo et sigillo duorum militum, justiciarum nostris apud Westm. &c.* In Easter term, 39 *Eliz.* this writ was sued out of the Chancery into C. B. at the prosecution of Percival Willoughby, who had married the eldest of the five daughters of Sir Francis Willoughby, who died without any son, but left a wife named Dorothy, that at the time of his death pretended herself to be with child by Sir Francis; which, if it were a son, all the five sisters would thereby lose the inheritance descended unto them; which writ was directed to the sheriffs of London, and they were commanded to cause the said Dorothy to be viewed by twelve knights, and search-

ed by twelve women, in the presence of the twelve knights, *et ad tractandum per ubera et ad ventrem inspiciendum*, whether she were with child, and to certify the same to the Court of Common Pleas; and if she were with child, to certify for how long in their judgments, *et quando sit paritura*; upon which the sheriffs accordingly caused her to be searched, and returned that she was twenty weeks gone with child, and that within twenty weeks more *fuit paritura*. Thereupon another writ issued out of C. B. requiring the sheriffs safely to keep her in such a house, and that the doors should be well guarded; and that every day they should cause her to be viewed by some of the women named in the writ; and when she should be delivered, that some of them should be with her to view her birth, whether it be male or female, to the intent that there should be no falsity. And upon this writ the sheriffs returned, that they had caused her accordingly to be kept and viewed, and that such a day she was delivered of a daughter. *Cro. Eliz.* 566.

The sheriffs of London, with a jury of women, whereof two were midwives, came to the lady's house, and into her chamber, and sent to her the women, sworn by the sheriffs before, to search, try, and speak the truth whether she was with child or not. The men all went out, and the women searched the lady, and gave their verdict that she was with child; whereupon the sheriffs returned the writ accordingly. *Moore*, 523, pl. 692.

In the 22d year of King James I., the widow of one Duncomb married within a week after the death of her first husband; and his cousin and heir brought the writ *ventre inspiciendo* directed to the sheriff of L. who returned that he had caused her to be searched by such matrons, who found her with child, *et quod paritura fuit* within such a time; and thereon it was prayed, that the sheriff might take her into his custody, and keep her till she was delivered; but because she ought to live with her husband, they would not take her from him; but he was ordered to enter into a recognizance not to remove her from his dwelling house, and a writ was awarded to the sheriff to cause her to be inspected every day by two of the women which he had returned had searched her, and that three of them should be present at her delivery, &c. *Cro. Jac.* 685.

See also *Execution and Reprieve*.

VENUE,

VICINETUM, or VISNETUM.] A neighbouring place, *locus quem vicini habitant*: the place from whence a jury are to come for trial of causes. *F. N. B.* 115.

The want of a venue is only curable by such a plea as admits the fact, for the trial whereof it was required to lay a venue. 3 *Salk.* 381.

- I. *Of the Origin of Venues in Actions.*
- II. *Of Local and Transitory Actions.*
- III. *Of changing the Venue; in what Actions allowed; into what Counties; and how obtained.*
- IV. *In what Cases the Venue may be brought back by the Plaintiff.*
- V. *Of altering the place of Trial of Actions.*

I. THE nature of the trial by jury, while conducted in the form which first belonged to the institution, was such as to render particularity of place absolutely essential in all cases which a jury was to decide. Consisting as the jurors formerly did of witnesses, or persons in some measure cognizant of their own knowledge of the matter in dispute, (see *Stephen on Plead.* 134, 3d edit.) they were of course, in general, to be summoned from the particular place or neighbourhood where the fact happened; see *Co. Lit. by Harg.* 125 a, n (1); *Gibb. Hist. C. P.* 84; and in order to know into what county the *venire facias* for summoning them should issue, and to enable

the sheriff to execute that writ, it was necessary that the issue, and therefore the pleadings out of which it arose, should show particularly what that place or neighbourhood was. 2 H. Bl. 161; Comp. 176; Co. Lit. 125 a, b. Such place or neighbourhood was called the *venue* or *visne* (from *vicinetum*), *Bac. Abr. Visne or Venue* (A.), and the statement of it in the pleadings obtained the same name; to allege the place being, in the language of pleading, to lay the venue.

Until the change of system introduced by the late rule of court, Hl. T. 4 Wm. 4. it was accordingly the rule that every allegation in the pleadings, upon which issue could be taken, that is, every material and traversable allegation (supposing it to be in the affirmative form), should be laid with a venue; that is, should state the place at which the alleged fact happened. This venue was to consist (according to the more rigorous and ancient practice at least) not only of the county, but also of the parish, town, or hamlet in the county. Co. Lit. 125 a; Com. Dig. Abatement, (H. 13); Ibid. Pleading, (C. 20); Cro. Eliz. 260; 3 M. & S. 143; 5 B. & A. 712.

A venue was also laid in the margin of the declaration at its commencement, by inserting there the name of the county in which the several facts mentioned in the body of the declaration, or some principal part of them, occurred. See 4 B. & A. 175, 176; 7 Rep. 1; 2 T. R. 238. The venue so laid in the margin was called the venue in the action, and the action was said to be laid, or brought, within that county; because it was always the same county as that into which the original writ had issued at the commencement of the suit, and because the action was always tried by a jury of that county, unless a new and different venue happened to be laid in the subsequent pleadings.

Though the original object of thus laying a venue, was to determine the place from which the *venire facias* should direct the jurors to be summoned, in case the parties should put themselves upon the country, that practice had nevertheless, so far as regarded the laying of a venue in the body of the pleadings, become an unmeaning form, the venue in the margin having been long found sufficient for all practical purposes. It may be convenient to explain here by what process this change took place.

The most ancient practice, as established at the period when juries were composed of persons cognizant of their own knowledge of the fact in dispute, was of course to summon the jury from that venue which had been laid to the particular fact in issue; and from the venue of parish, town, or hamlet, as well as county. Co. Lit. 125 a; Bac. Ab. Visne or Venue. Thus in an action of debt on bond, if the declaration alleged the contract to have been made at Westminster, in the county of Middlesex, and the defendant in his plea denied the bond, issue being joined on this plea, it would be tried by a jury from Westminster. Again, if he pleaded an affirmative matter, as for example, a release, he would lay this new traversable allegation with a venue, and if this venue happened to differ from that in the declaration, being laid, for example, at Oxford, in the county of Oxford, and issue were taken on the plea, such issue would be tried by a jury from Oxford, and not from Westminster. 1 Saund. 246 b; Com. Dig. Action, (N. 12); 3 Reeves, 110. And it may here be incidentally observed, that as the place or neighbourhood, in which the fact arose, and also the allegation of that place in the pleadings, was called the venue; so the same term was often applied to the jury summoned from thence. Thus it would be said in the case last supposed, that the venue was to come from Oxford.

With respect to the form of the venue at this period, it was as follows: *venire facias duodecim liberos et legales homines de vicineto de W.* (or O.) (i. e. the parish, town, or hamlet,) *per quos rei veritas melius sciri poterit, &c. De vicineto tali* (is the expression of Bracton) *per quos rei veritas melius sciri poterit, &c. Bract. 309 b, 310 a, 376 b, 397 a.* In the 27 Eliz. c. 6. § 1. the form is: 12 *liberos et*

legales homines de vicineto de B. per quos rei veritas, &c. And see Litt. § 234.

While such appears to have been the most ancient state of practice, it soon sustained very considerable changes. When the jury began to be summoned no longer as witnesses, but as judges, and instead of being cognizant of the fact of their own knowledge, received the fact from the testimony of others judicially examined before them, the reason for summoning them from the immediate neighbourhood ceased to apply; and it was considered as sufficient if, by way of partial conformity with the original principle, a certain number of the jury came from the same hundred in which the place laid for venue was situate, though their companions should be of the county only, and neither of the venue nor even of the hundred. This change in the manner of executing the venire did not however, occasion any alteration in its form, which still directed the sheriff, as in former times, to summon the whole jury from the particular venue. 27 Eliz. c. 6. § 1; Litt. § 234. The number of hundredors which it was necessary to summon, was different at different periods; in later times, no more than two hundredors were required in a personal action. 27 Eliz. c. 6. § 5.

In this state of the law, was passed the 16 & 17 Car. 2. c. 8. By this act, (which is one of the statutes of jeofails,) it is provided "that after verdict, judgment shall not be stayed or reversed, for that there is no right venue; so as the cause were tried by a jury of the proper county or place where the action is laid." This provision was laid to apply to the case (among others) where issue had been taken on a fact laid with a different venue from that in the action; but where the venue had improperly directed a jury to be summoned from the venue in the action, instead of the venue laid to the fact in issue. 1 Saund. 247. This formerly had been a matter of error, and, therefore, ground for arresting or reversing the judgment; 1 Saund. 247, n. 1; 1 Saund. 248, n. 3; Cro. Eliz. 468; 6 Rep. 15 b; Co. Litt. by Harg. 125 a, n. (1); but by this act (passed with a view of removing what had become a merely formal objection), the error was cured, and the staying or reversal of the judgment disallowed. While such was its direct operation, it had a further effect, not contemplated perhaps by those who devised the enactment. For, what the statute only purported to cure as an error, it virtually established as regular and uniform practice; and issues taken on facts laid with a different venue from that in the action, were afterwards constantly tried, not by a jury of the venue laid to the fact in issue, but by a jury of the venue on the action. 2 Saund. 5, n. (3).

Another change was introduced by the 4 Ann. c. 16. § 6. This act provides, that "every *venire facias* for the trial of any issue shall be awarded of the body of the proper county where such issue is triable," instead of being (as in the ancient form) awarded from the particular venue of parish, town, or hamlet. From this time, therefore, the form of the venue has been changed; and directs the sheriff to summon twelve good and lawful men, &c. "from the body of the county;" and they are accordingly, in fact, all summoned from the body of the county only, and no part of them necessarily from the hundred in which the particular place laid for the venue is situate. And even in criminal proceedings it is now expressly enacted, that no jurors shall be required to be returned from any hundred or hundreds, or from any particular venue within the county; and that the want of hundredors shall be no cause of challenge. 5 Geo. 4. c. 50. § 13.

It thus appears, that by the joint effect of the two statutes, 16 & 17 Car. 2. c. 2. and 4 Ann. c. 16. the venue, instead of directing the jury to be summoned from that venue which had been laid to the fact of an issue, and from the venue of parish, town, or hamlet, as well as county, directed them in all cases to be summoned from the body of the county in which the action is laid, whether that be the county laid to the fact

in issue or not, and without regard to the parish, town, or hamlet.

In this altered state of things it is evident that there was no longer any real utility in the practice of laying a venue to each traversable fact in the body of the pleadings. This practice however continued to be observed until the making of the *Regula Generalis* of the H. T. & Wm. 4. above mentioned. By that rule it is provided, that "in future the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration or in any subsequent pleading." This rule was recommended by the common law commissioners. See their *Second Report*, p. 38.

On the whole then the rule of pleading as to the necessity of laying venue is now reduced to this, that the venue in the action, that is, the county in which the action is intended to be tried, and from the body of which the jurors are accordingly to be summoned, must be stated in the margin of the declaration; and that in the few cases in which the proceeding is still by original writ, this must be the same county into which the original writ issued.

There is however another very important point still remaining to be considered, viz. how far it is necessary to lay the venue truly.

Before the change in the constitution of juries above mentioned, the venue was of course always to be laid in the true place where the fact arose, for so the reason of the law of venue evidently required. But when, in consequence of that change, this reason ceased to operate, the law began to distinguish between cases in which the truth of the venue was material, or of the substance of the issue, and cases in which it was not so. A difference began now to be recognized between *local* and *transitory* matters. The former consisted of such facts as carried with them the idea of some certain place, comprising all matters relating to the realty, and hardly any others; the latter consisted of such facts as might be supposed to have happened any where, and therefore comprised debts, contracts, and generally all matters relating to the person or personal property. With respect to the former it was held, that if any local fact were laid in pleading at a certain place, and issue was taken on that fact, the place formed part of the substance of the issue, and must therefore be proved as laid, or the party would fail as for want of proof. But as to transitory facts the rule was, that they might be laid as having happened at one place, and might be proved on the trial to have occurred at another. *Vin. Ab. Trial* (M. f.); *Co. Lit.* 282 a.

The late rule of H. T. & Wm. 4. having abolished the allegation of venue, except as it regards the county in the margin of the declaration (or venue in the action), the present state of the law with respect to the necessity of laying the true venue, is accordingly as follows:—

Actions are either local or transitory. An action is local, if all the principal facts on which it is founded be local; and transitory, if any principal fact be of the transitory kind. In a local action the plaintiff must lay the venue in the action truly. In a transitory one, he may lay it in any county that he pleases.

From this state of the law it follows, first, that if an action be local, and the facts arose out of the realm, such action cannot be maintained in the English courts, 4 *T. R.* 503; for as the venue in the action is to be laid truly, there is no county which, consistently with that rule, can be laid in the margin of the declaration. But, on the other hand, if the action be transitory, then, though all the facts arose abroad, the action may be maintained in this country, because the venue in the action may be laid in any English county, at the option of the plaintiff.

The same state of law also leads to the following inference, that in a transitory action the plaintiff may have the action

tried in any county that he pleases; for (as we have seen) he may lay the venue in the action in any county, and upon issue joined, the venue issues into the county where the venue in the action is laid. And such accordingly is the rule, subject only to a check interposed by another regulation, viz. that which relates to the *changing of the venue*.

The court established about the reign (as it is said) of James I., 2 *Salk.* 670; a practice by which defendants were enabled to protect themselves from any inconvenience they might apprehend from the venue being laid contrary to the fact, and enforce, if they pleased, a compliance with the stricter and more ancient system. By this practice, when the plaintiff by a transitory action lays a false venue, the defendant is entitled to move the court to have the venue changed, i. e. altered to the right place; and the court, upon affidavit that the cause of action arose wholly in the county to which it is proposed to change the venue, will in most cases grant the application and oblige the plaintiff to amend his declaration in this particular; unless he, on the other hand, will undertake to give at the trial some material evidence arising in the county where the venue was laid. (See *post*, II.) *Stephen on Plead.* 280—290, 3d edit.

II. Where the action could only have arisen in a particular county it is local, and the venue must be laid in that county; (or where several facts material to an action, in its nature local, arise in different counties, the venue must be laid in one or other of those counties;) for if it be laid elsewhere, the defendant may demur to the declaration; or the plaintiff, on the general issue, will be nonsuited at the trial. Where the action might have arisen in any county, it is transitory, and the plaintiff may in general lay the venue where he pleases; subject to its being changed by the court, if not laid in the very county where the action arose. Thus, in an action upon a lease for rent, &c. founded on the privity of estate, as in debt by the assignee or devisee of the lessor against the lessee; or by the lessor, or his personal representatives, against the assignee of the lessee; or against the executor of the lessee, in the *debet* and *detinet*; or in covenant, by the grantee of the reversion against the assignee of the lessee; the action is local, and the venue must be laid in the county where the estate lies. But in an action upon a lease for rent, &c. founded on the privity of contract; as in debt by the lessor against the lessee, or his executor, in the *detinet* only; or in covenant, by the lessor or grantee of the reversion against the lessee, the action is transitory, and the venue may be laid in any county, at the option of the plaintiff. *Tidd's P. See Trial*.

There are, however, some actions of a transitory nature, wherein the venue must be laid in the county where the facts which are the ground of the action were committed, and not elsewhere. Such are all actions upon penal statutes, 31 *Eliz.* c. 5. § 2; 21 *Jac.* 1. c. 4. § 2. For the general effect of these acts, as connected with each other, see 2 *M. & S.* 429; and that the 31 *Eliz.* extends to penal actions, given by subsequent statutes, 9 *East*, 296.

Actions upon the case, or trespass against justices of peace, mayors, or bailiffs of cities, or towns corporate, headboroughs, portreeves, constables, tithingmen, churchwardens, &c. or other persons acting in their aid and assistance, or by their command, for any thing done in their official capacity. 31 *Jac.* 1. c. 12. § 5. Actions against any person or persons, for any thing done by an officer or officers of the excise or customs, or others acting in his or their aid, in execution, or by reason of his or their office. See 20 *Geo.* 3. c. 70. § 34; 7 & 8 *Geo.* 4. c. 53. § 115; 3 & 4 *Wm.* 4. c. 53. § 107. In these actions, the venue must be laid in the county where the facts were committed, and not elsewhere.

So with respect to actions against persons in public employment, civil or military, in or out of the kingdom, having authority to commit to safe custody, if the fact be committed

out of the kingdom the venue may be laid in Westminster or in the county where the defendant resides, 42 Geo. 3. c. 85. § 6.

Where by consent of both parties the venue was laid in London, it was held no objection could afterwards be taken, although it ought under an act of parliament to have been laid in Surrey. 1 Bing. N. C. 68.

On the other hand, the venue in a transitory action is, in some cases, altogether optional in the plaintiff; as where the action formerly arose in Wales, or where it arises beyond the sea, or is brought upon a bond or other specialty, promissory note, or bill of exchange; for *scandalum magnatum*, or a libel dispersed throughout the kingdom; against a carrier or lighterman; for an escape or false return; and, in short, wherever the cause of action is not wholly and necessarily confined to a single county. In these cases, the venue cannot be changed by the court, but upon a special ground. *Tidd's Pr.* and the authorities there cited. See post, III.

III. 1. The law having settled the distinction between local and transitory actions, it seems that, towards the reign of Richard II. this distinction was but little attended to; for a litigious plaintiff would frequently lay his action in a foreign county, at a great distance from where the cause of it arose, and by that means oblige the defendant to come with his witnesses into that county. To remedy which, it was ordained by 6 Rich. 2. c. 2. "To the intent that writs of debt and account, and all other such actions, be from henceforth taken in their counties, and directed to the sheriffs of the counties where the contracts of the same actions did arise; that if from henceforth, in pleas upon the same writs, it shall be declared, that the contract thereof was made in another county than is contained in the original writ, that then incontinently the same writ shall be utterly abated." The design of this statute was to compel the suing out of all writs arising upon contract, in the very county where the contract was made; agreeably to a law of Hen. 1. c. 81; *Gillb. C. P.* 89 n. But the statute only prescribes, that the count shall agree with the writ in the place where the contract was made, it did not effectually prevent the mischief: and therefore the 4 Hen. 4. c. 18. directed all attorneys to be sworn, that they will make no suit in a foreign county; and there is an old rule of court, which makes it highly penal for attorneys to transgress this statute. *R. Mich.* 1654.

Soon after the statute of Henry IV. a practice began of pleading, in abatement of the writ, the impropriety of its venue even before the plaintiff had declared. At first, in the reign of Henry V. they examined the plaintiff, upon oath, as to the truth of his venue. But soon after they began to allow the defendant to traverse the venue, and to try the traverse by the country. This practice being subject to much delay, the judges introduced the present method of changing the venue upon motion, on the equity of the above statutes; which, Lord Holt says, began in the time of James I. 2 Salk. 670. The forms of the rule and affidavit are also stated by *Styles*, as established in 23 Car. 1. *Sty. P. R.* 670. (ed. 1707.)

It is now settled that, in transitory actions, the venue may be changed upon motion, either by the plaintiff or defendant. The plaintiff shall not directly alter his venue after the first day of the next term after appearance; though he would pay costs or give time. Yet he may in effect do it, by moving to amend; and that after the defendant has changed the venue, or pleaded, and even after two terms have elapsed from the delivery of the declaration. *Tidd's Pr.*

2. The defendant is, in general, allowed to change the venue in all transitory actions arising in a county different from that where the plaintiff has laid it; and he may even change it from London to Middlesex, or *vice versa*. But in transitory actions, where material evidence arises in two

counties, the venue may be laid in either. *R. M.* 10 Geo. 2. reg. 2. (c.) And if it be laid in a third county, the court will not change it; for the defendant in such case cannot make the necessary affidavit, that the cause of action arose in a particular county, and not elsewhere. 1 Wils. 178.

In order to change the venue, therefore, it is indispensably necessary that the cause of action should be wholly confined to a single county; and, therefore, where that is not the case, the court will not change it. Thus, in an action of debt on bond or other specialty, the court will not change the venue, unless some special ground be laid; for *debitum et contractus sunt nullius loci*; and bonds and other specialties are *bona notabilia*, wherever they happen to be. In analogy to which it is now holden, agreeably to the practice of the Court of Common Pleas, that the venue cannot be changed in an action upon a promissory note or bill of exchange, 1 T. R. 571; 1 B. & B. 20; 5 Taunt. 576; 1 Dowl. 426, except on special ground, see post; but the venue may still be changed in an action upon a policy of insurance, not being by deed; or in any other action, the right of which is founded upon simple contract. *Tidd's Pr.* See 7 Taunt. 306. that the Court of Common Pleas will not change the venue in an action upon any written instrument, the exception not being confined to promissory notes and bills of exchange.

In an action on a promissory note, and for goods sold and delivered, the defendant can not change the venue without disclosing his grounds of defence, nor until after issue joined. 3 Dowl. P. C. 66. And where part of the cause of action arises in a bill of exchange, the venue can not be changed on the common affidavit; in such a case it can only be changed on special grounds. 3 Dowl. P. C. 160.

In covenant upon a lease, a view being proper to be had, the venue was changed to the county where the premises lay, though most of the plaintiff's witnesses resided in the county where the venue was laid, 8 East, 268; but in another case the application was refused. 2 Chitty, 419.

In a recent case, however, the venue having been changed from London to Hereford, in an action of covenant on a lease for nonpayment of rent of premises in the latter place, the court refused to bring it back. 4 Tyrw. 56.

In an action of covenant on a farming lease the court refused to allow the venue to be changed on special grounds (the impossibility of a fair trial in the original county, &c.) until after issue joined, when the nature of the defence would appear. 4 Tyr. 275; 2 Dowl. P. C. 609. See also 3 B. & C. 552; 3 Tyr. 705. And the same was done in an indictment for misdemeanor. 2 Dowl. P. C. 440.

In an action for *scandalum magnatum*, the court will not change the venue; because a scandal raised of a peer of the realm is not confined to any particular county, but reflects on him through the whole of the land; and he is a person of so great notoriety, that there is no necessity for obliging him to try his cause in the neighbourhood; though this was denied in the case of *Lord Sandrich v. Miller*. So in an action for a libel, published in a newspaper in one county, and circulated in other counties, or contained in a letter written by the defendant in one county, and directed into another, the court will not change the venue; because the defendant cannot make the common affidavit, that the cause of action arose in a single county, and not elsewhere: and, for a similar reason, the venue cannot be changed in an action against a carrier or lighterman, or for an escape, or false return. *Tidd*. But in an action for a libel, the court will change the venue into a county in which it is both written and published. And the distinction seems to be, between a libel which is dispersed through several counties, and a letter which is written in one county, and opened in another; on the former the venue cannot be changed, on the latter it may. See 3 T. R. 306, 652.

In all the above cases however, the court will change the venue when special grounds are shown for the application.

Thus in an action for a libel published in a local newspaper, the venue was allowed to be changed on a special affidavit. *2 Dougl. P. C. 645.*

Though the court in general will not change the venue, where it is laid in the proper county; yet they will change it even then upon a special ground. Thus, in debt on bond, where the venue was laid in London, and the plaintiff's and defendant's witnesses lived in Lincolnshire, the court changed it into the latter county. *1 T. R. 781*; but see *Id. 782*; *1 Wils. 162.*

Where a transitory action is brought in the county in which the cause of action arose, the court will never change the venue, unless a fair and impartial trial cannot be had in the county where it is already laid, *2 Str. 811*; *Comp. 510*; *3 Burr. 1333*; or unless the witnesses on both sides live at a great distance from the place where the venue is laid; or unless the expense of trying the cause in the county where the venue is laid greatly preponderates, *8 Bing. 733*; *2 Dougl. P. C. 260*; *2 C. & J. 473*; or under other very special circumstances, *1 T. R. 782*; *8 East, 268*; *10 Bing. 1*; or with the consent of parties, *1 Wils. 298*; *2 Archb. Pr. by Chitty, 824.*

On the other hand, though the court will in general change the venue, where it is not laid in the proper county, yet if an impartial or satisfactory trial cannot be had there, they will not change it; as in an action for words spoken of a justice of the peace, by a candidate, upon the hustings, at a county election. *Comp. 510.*

So, where the venue is not laid in the proper county, the privilege of the plaintiff will, in some cases, prevent the court from changing it. Thus, in an action brought by a barrister, attorney, or other officer of the court, if the venue be laid in Middlesex, the plaintiff, suing as a privileged person has a right to retain it there, on account of the supposed necessity of his attendance on the court. But if the venue be laid in any other county, as in London; or the plaintiff sue as a common person, by original or otherwise, or *en autre droit*, as executor, or administrator, or jointly with his wife or other persons, he has no such privilege. And where a barrister, attorney, or other officer of the court, is defendant, it seems that he has not any privilege respecting the venue. *Tidd's Pr.*; and see *Privilege, I.*

3. When the venue is changed upon the common affidavit it is always changed to the county in which the cause of action arose; when changed, because a fair and impartial trial cannot be had in the county where it is laid, it is usually changed to the next adjoining county; when changed for any other special cause, it is changed into such county as the circumstances of the case suggest. *2 Archb. by Chitty, 825.*

When the cause of action arises in an English county, where the assizes are regularly holden twice a year, it is a matter of course to change the venue into that county. *R. M. 1654. § 5.* But where the cause of action arises out of the realm, the court will not change the venue, because the action may as well be tried in the county where the venue is laid, as in any other where the cause of action did not arise. And, in order to avoid delay, the court will not change the venue, except by consent, into a northern county, where there are no lent assizes, in Michaelmas or Hilary term; nor into Hull, Canterbury, &c. where the justices of nisi prius seldom come; nor into the city of Worcester or Gloucester, out of the county at large, because the assizes for the city and county at large are holden at the same place. *Tidd's Pr.*

4. In order to change the venue, the defendant must make a positive affidavit, that the plaintiff's cause of action (if any) arose in the county of *A.* and not in the county of *B.* (where the venue is laid,) or elsewhere out of the county of *A.* *R. M. 10. Geo. 2. reg. (2).* An affidavit was necessary, because, if the motion succeeded, it was equivalent to a plea in abatement, and the form of the affidavit is always most strictly adhered to. *Tidd's Pr.*

Where the cause of action arose partly in Derbyshire and partly in Ireland, the Court of King's Bench refused to change the venue from London to Derbyshire, on affidavit that the cause of action arose in Derbyshire and Ireland, and not in London, nor elsewhere than in Derbyshire and Ireland. *4 East, 495.* and see *1 New Rep. 110.* And the Court of Common Pleas refused to discharge a rule for changing the venue upon an affidavit that the cause of action arose principally in Ireland. *2 New Rep. 397.*

The motion for the defendant to change the venue is a motion of course, and by the rule of *H. T. 2 Wm. 4. § 103.* is absolute in the first instance; and it must formerly have been made within eight days after the declaration delivered, which was the time allowed by the rules of the court for pleading. And accordingly it was said, that if a declaration were delivered so early in term, that the defendant had eight days in that term, he could not move to change the venue the next term. But it is now settled that the defendant may move to change the venue, at any time before plea pleaded. *R. M. 1654. § 5.* And he is even allowed to change it, after an order for time to plead, though upon the terms of pleading issuably; but not after an order for time to plead, where the terms are to plead issuably, and take short notice of trial, at the first or other sittings within term, in London or Middlesex, because a trial would by that means be lost. And the venue cannot be changed after plea pleaded, unless under special circumstances: even though the defendant afterwards have leave to withdraw his plea, and plead it *de novo* with a notice of set off. *Tidd's Pr.* But if the defendant plead, pending a rule nisi for changing the venue, the court will allow him to change it notwithstanding his plea. *3 Bos. & Pul. 12.*

IV. As it would be hard to conclude the plaintiff by the single affidavit of the defendant, he is at liberty to aver that the cause of action arose in the county where the venue is laid, and to go to trial thereon at the same time that the merits are tried, by undertaking to give material evidence arising in that county. And, upon such undertaking, the court will discharge the rule for changing the venue (and this undertaking the Court of King's Bench required even where the venue had been changed by the defendant on a false affidavit. *6 East, 433.*) This practice is equivalent to joining issue, before alluded to, that the cause of action arose in the first county: and if the plaintiff fail in proving it, he must be nonsuited at the trial; which has, in this case, the same effect as quashing the writ by a judgment on a plea in abatement, viz. *quod act sine die*, and the plaintiff must begin again. *2 Salk. 669.* Originally it was required that the plaintiff should give no evidence at the trial but what arose in the county wherein the venue was retained; and if he gave no such evidence, he must have been nonsuited of course. But when it was laid down (more liberally) that the plaintiff might lay his venue in any county wherein part of the cause of action arose, he was then bound only to give some evidence, and not the whole, (*dare aliquam evidentiā*;) in the county where the venue was laid.

In uniformity with the former practice, it is declared by a rule of court, *H. T. 2 Wm. 4. r. 103.* that "the venue shall not be brought back, except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was originally laid."

The evidence, however must be material; and therefore it is not sufficient merely to prove that the witnesses to the contract reside in the county where the venue is laid. *Tidd's Pr.* But where a rule to change the venue from Middlesex to London was discharged, on the plaintiff's undertaking to give material evidence in Middlesex, the court held, that the undertaking was complied with, by proving a rule of court, obtained by the defendant in Middlesex for paying money into court; although that rule was obtained, after the rule for changing the venue was discharged. *2 T. R. 275.*

And further, as to what has been held to be sufficient, see 2 Archb. Pr. by Chitty, 825.

If the plaintiff fail in doing that which he has undertaken, namely, to give material evidence at the trial of some matter in issue, arising in the county where the venue is laid, he shall be nonsuited. 2 W. Bl. 1031. and see 2 T. R.

The court will, under very special circumstances, discharge the rule to change the venue without requiring the above undertaking from the plaintiff. See several instances enumerated, 2 Archb. Pr. by Chitty, 826.

It was formerly holden, that the plaintiff must move to discharge the rule for changing the venue, before replication; and therefore that he came too late after issue was joined, and delivered to the defendant's agent. But now, as the plaintiff may alter his venue, by moving to amend; so, for avoiding circuitry, he may move to discharge the rule for changing the venue, on undertaking to give material evidence in the county where it is laid, at any time before the cause is tried; and it was accordingly discharged in one case, after the cause had been twice taken down for trial. Comp. 409; Tidd's Pr.

V. By the 38 Geo. 3. c. 52, reciting, "that there exists in counties of cities and of towns corporate an exclusive right that all causes and offences arising within their particular limits should be tried by a jury of persons residing within the limits of such cities and towns, which privilege has been found not to be conducive to the ends of justice;" it is enacted that in actions in any court of record at Westminster, and in indictments removed into the King's Bench by *certiorari*, and on informations filed by the attorney general, or by leave of the Court of King's Bench, and on pleas or traverses to writs of *mandamus*, if the venue be laid in the county of any city or town corporate in England, the court may direct the issue to be tried by a jury of the county next adjoining. § 1. Indictments for offences committed within any such county of a city, &c. may be preferred to juries of next adjoining county. § 2. Indictments, inquisitions, &c. found by a grand jury of any county of a city, &c. may be ordered by the Court of Oyer, &c. (if requisite) to be filed in the next adjoining county, and offenders may be removed to the gaol thereof. § 3, 4, &c. But recognizance is to be given to pay extra costs. § 12. Yorkshire is to be considered as the next county to the town of Hull, and Northumberland next to Newcastle. § 9. London, Bristol, and Chester, are wholly excepted out of the act: Exeter is also excepted in criminal cases, except where the indictment is removed by *certiorari* into King's Bench, § 10. See *Trial*.

And in order to avoid unnecessary delay and expense, it is enacted, by the 3 & 4 Wm. 4. c. 42. § 22. that in any local action depending in the superior courts, the court, or any judge may, on the application of either party, order the issue to be tried, or writ of inquiry to be executed in any other county or place than that in which the venue is laid, and for that purpose may order a suggestion to be entered on the record, that the trial may be more conveniently had, or writ of inquiry executed in the county, &c. where the same is ordered to take place.

So, in local actions, where a fair and impartial trial cannot be had where the venue is laid, instead of moving to change the venue it is more usual to apply to the court, by motion supported by affidavit, to enter a suggestion upon the issue, which the court, on a proper case being made out, will grant, with a *nient dedere* and an award of the venue to the sheriff of the next adjoining county. 3 Burr, 1333; 1 T. R. 365; 3 B. & A. 444. And it seems immaterial whether the next adjoining county be a county palatine or not. 7 T. R. 735.

VERDEROR, *viridarius*, from the Fr. *verdeur*, i. e. *custos nemoris*.] An officer in the king's forest, whose office is properly to look to the vert, and see it well maintained; and

he is sworn to keep the assizes of the forest, and view, receive, and inrol, the attachments, and presentments of trespasses of vert and venison, &c. *Mann*, par. 1. p. 332. See *Forest*.

VERDICT,

VEREDICTUM; QUASI DICTUM VERITATIS. The answer of a jury given to the court, concerning the matter of fact in any cause committed to their trial; wherein every one of the twelve jurors must agree, or it cannot be a verdict: and the jurors are to try the fact, and the judges to adjudge according to the law that ariseth upon it. 1 Inst. 226. See *Jury*, II. III.

A jurymen withdrawing from his fellows, or keeping them from giving their verdict, without giving good reason for it, shall be fined; but if he differ from them in judgment, he shall not. *Dyer*, 58. If one of the jury that found a verdict were outlawed at the time of the verdict, it is not good: and where a verdict is given by thirteen jurors, it is said to be a void verdict; because no attain would lie. 2 Lill. 644, 650. If there be eleven jurors agreed, and but one dissenting, the verdict shall not be taken, nor the refuser fined, &c. Though it is said, anciently, it was not necessary that all the twelve should agree in civil causes. 2 Hale's Hist. P. C. 297.

In capital cases, a verdict must be actually given; and if the jury do not all agree upon it, they may be carried in carts after the judges round the circuit, till they agree: and in such case they may give their verdict in another county. 1 Inst. 227, 281; 1 Vent. 97. If the jury acquit a person of an indictment of felony against evidence, the court, before the verdict is recorded, may order them to go out again and reconsider the matter; but this hath been thought hard, and of late years is not so frequently practised as formerly. 2 Hank. P. C. c. 47. § 11.

In case a jury acquits a man upon trial against full evidence, and being sent back to consider better of it, are peremptory in, and stand to their verdict, the court must take it, but may respite judgment upon the acquittal: and here the king might formerly have had an attain: and if the jury will, by verdict, convict a person against or without evidence, and against the opinion of the court; they may reprieve him before judgment, and certify for his pardon. 2 Hale's Hist. P. C. 310.

OF SPECIAL VERDICTS. On a general verdict, the jury were formerly liable to be attainted if they gave a false verdict. To relieve them from this difficulty, it was enacted by *Westm.* 2. (13 Edw. 1.) c. 30. § 2. "that the justices of assize should not compel the jurors to say precisely whether it were disseisin or not, so as they stated the truth of the fact, and prayed the aid of the justices; but if they would say of their own accord, that it was disseisin, their verdict should be admitted at their own own peril." Upon this statute, it has become the practice for the jury, when they have any doubt as to the matter of law, to find a special verdict, stating the facts, and referring the law arising thereon to the decision of the court. See further, *Jury*, III.

If a special verdict, in a criminal case, do not sufficiently ascertain the fact, a *venire de novo* ought to issue. *Skin.* 667; *Ld. Raym.* 1521; for a special verdict ought not to be amended in criminal cases, *Ld. Raym.* 141; unless there are unobjectionable minutes to amend it by, see *Stra.* 514, 1197; and in forgery, a special verdict has been amended where the fault was committed by the defendant. *Stra.* 844. If a special verdict find only part of the matter in issue, or do not take in the whole issue, or if the imperfection is such that judgment cannot be given, it is bad. *Ld. Raym.* 1522; *Cra. Jac.* 31. But if there be several issues, and the jury find only some of them, the court may give judgment. *Stra.* 845. For in a general verdict on several counts, if any one of them is good, it is sufficient in criminal cases. *Salk.* 384; *Doug.* 730.

It may be doubted, however, whether the language of the *Westm.* 2. does by any means import that special verdicts were previously unknown to the law. See 2 Inst. 425.

In all cases, and all actions, the jury may give a general or special verdict; and the court is bound to receive it, if pertinent to the point in issue; and if the jury doubt, they may refer themselves to the court, but are not bound so to do. 3 Salk. 378.

In finding special verdicts, where the points are single and not complicated, and no special conclusion, the counsel, if required, are to subscribe the points in question, and agree to amend omissions or mistakes in the mesne conveyance, according to the truth, to bring the point in question to judgment. And unnecessary finding of deeds in *hæc verba*, where the question rests not upon them, but are only derivation of title, ought to be spared; or they ought to be found shortly, according to the substance they bear in reference to the deed, as feoffment, lease, grant, &c. It is also a general rule, that, in a special verdict, the jury must find facts, and not merely the evidence of facts: and if in this, or any other particular, the verdict be defective, so that the court are not able to give judgment thereon, they will amend it, if possible, by the notes of counsel, or even by an affidavit of what was proved upon the trial; or, otherwise, they will supply the defect by awarding a *venire de novo*. *Tidd's Pr.* and the references there.

If, at the prayer of a plaintiff or defendant, a special verdict is ordered to be found, the party praying it is to prosecute the special verdict, that the matter in law may be determined; and if either party delay to join in drawing it up, and pay his part of the charges, or if the counsel for the defendant refuses to subscribe the special verdict, the party desiring it shall draw it up and enter it *ex parte*. Where the parties disagree, or the special verdict is drawn contrary to the notes agreed upon, the court on motion will rectify it; and the court may amend a special verdict, to bring the special matter into question. 2 Lil. Abr. 645, 646, 653.

The special verdict ought to be dictated by the court at the trial, and signed by counsel on both sides, before the jury is discharged. If in settling it any difference of opinion arise about a fact, the opinion of the jury is taken, and the fact is stated accordingly. 1 Burr. in Pref. IV.; 8 Taunt. 183.

But this in practice is seldom done, as the plaintiff's attorney generally gets it drawn afterwards from the minutes taken at the trial, and settled by his counsel, who signs the draft. It is then delivered over to the opposite attorney, who gets his counsel to peruse and sign it. If the counsel differ in the mode of settling it, the judge who tried the cause, being attended by the parties and their counsel upon summons, will settle it according to his notes. When the verdict is thus settled and signed, it is left with the clerk of nisi prius in a town cause, or with the associate in the country, who makes copies for each party. The whole proceedings are then entered, docketed, and filed of record; the cause entered with the clerk of the papers, (a rule for a *concilium* is no longer necessary. R. H. T. 4. Wm. 4. c. 6), copies of the record made and delivered to the judges, and counsel instructed and heard, in like manner as upon arguing a demurrer; only that a special verdict must be set down in the paper for argument within four days, and cannot be set down afterwards without leave of the court. After judgment given, the prevailing party is immediately entitled to tax his costs, and take out execution, without giving a four day rule for judgment; but the other party may have a rule to be present at taxing costs. *Tidd's Pr.*; and see *Arch. Pr. by Chitty*.

The cause will be called on for argument in the order in which it stands in the paper. The plaintiff's counsel then states the pleadings shortly, and the special verdict at length; and then argues the case. The defendant's counsel is next heard in answer; and lastly the plaintiff's counsel in reply. Only one counsel on each side is allowed to be heard. The court then deliver their judgment. If the judges coincide in

opinion, they deliver their opinions in the order of their precedence: but if they differ, then in the inverse order, namely the junior puisne judge first, and the chief justice last.

OF SPECIAL CASES. A special case (see *Jury*, II.) has this advantage over a special verdict, that it is attended with much less expense, and obtains a much speedier decision; the *postea* being staid in the hands of the officer at nisi prius till the question is determined, and the verdict is then entered for the plaintiff or defendant, as the case may happen. But as nothing appears upon the record, except the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge, in point of law; which makes it a thing to be wished, that a method could be devised of either lessening the expence of special verdicts, or else of entering the case at length upon the *postea*. 3 Comm. c. 23.

In a special case, as in a special verdict, the facts proved at the trial ought to be stated, and not merely the evidence of facts. It also ought to be dictated by the court, and signed by the counsel, before the jury are discharged; but in practice it is usually drawn afterwards, and settled in the same manner as a special verdict. For the argument of a special case, the same steps must be taken as for that of a special verdict, except that it is not entered of record. *Tidd's Pr.* When a special case is reserved, the verdict ought always to be for the plaintiff; and the rule of Nisi Prius ought to be of opinion for the defendant, then judgment of nonsuit should be entered; otherwise the defendant could have no remedy in case of the plaintiff's death. *Barnes*, 460. *Selton's Pr.*

In comparing special verdicts with special cases, it is a well known distinction that the latter form no part of the record, and therefore cannot be made the subject of review. Upon a special verdict, if the judges are equally divided, nothing can be done, but the matter remains in suspense: but if the verdict be taken for the plaintiff, subject to a case, and the court be equally divided, it seems that the judgment must be given according to the verdict; and this may sometimes operate materially to the disadvantage of defendants, as the statement of the case by no means necessarily imports an opinion of the court, on the trial, in favour of the plaintiff. Another distinction suggested to exist between special cases and special verdicts is, that in the latter every thing must be formally found, and nothing can be presumed (as the actual conversion in trover,) but that the same particularity is not absolutely requisite with respect to special cases, these being considered as rather in the nature of a reference to the court as to the direction which should properly have been given to the jury at the trial.

A practice has lately been introduced of reserving a special case, with liberty to turn it into a special verdict, which is a very convenient mode of proceeding, as it is attended with a saving of expense in the first instance, and allows the benefit of a further revision of the disputed question.

Or it may be done by consent of the parties, and frequently is done, upon the suggestion of the court, before or after the argument of the special case. Unless the judge expressly reserves the power of turning a special case into a special verdict, it cannot be done. 2 Dowl. P. C. 78; 1 C. & M. 714; *Archb. by Chitty*, 364.

It is lamented, by a late writer, that the facility of granting special cases, and the mode of stating them in Lord Mansfield's time under the dictation of the judge in court after the trial, (not only for the satisfaction of the parties, but to prevent other disputes by making the rules of law, and the grounds on which they are established, certain and notorious,) have been abandoned: and that in modern practice the reservation of a special case generally induces a cavil upon some verbal nicety, some bye point, or some collateral and incidental

question, upon which a decision may be obtained of the particular case, independently of the general question which was the object of the case being reserved: and that this course has too frequently met with the encouragement of the courts, who have preferred resting upon the special grounds of some incidental finding to entering into the discussion of such general question. See *Evans's Collection of Statutes, Pt. IV. Class xiii. nu. 2. in n.*

Where the parties in an action are agreed upon the facts, it is no longer necessary to incur the expense of a trial, but a special case may be framed and argued under the provisions of the 3 & 4 Wm. 4. c. 42. § 25. which enacts that the parties in any action or information after issue joined, by consent and order of any of the judges of the superior courts, may state the facts of the case in the form of a special case, for the opinion of the court, and may agree that a judgment shall be entered for the plaintiff or defendant by confession, and of *nolle prosequi* immediately after the decision, or otherwise as the court may think fit.

Where a point of law arises in the course of a suit in equity, the chancellor or other judge of the court of equity, may, if he wish to have the opinion of a court of law upon it, direct a special case to be made out and sent to a particular court of law, there to be argued, and returned with the opinion of such court certified upon it. This has always been the practice of the court of chancery; but until the case of *Daintry v. Daintry*, 6 T. R. 313, the courts of common law would not certify their opinion to the master of the rolls. See 1 Doug. 344, n.

After the case has been argued, the judges will sometimes state the grounds of the opinion they intend to certify, openly in court, and they afterwards certify their opinion to the court of equity, usually without stating the grounds of it.

If the judge in the court of equity be dissatisfied with their opinion, or if the point be of such importance that he may wish to have the opinion of another court upon it; he may direct it to be sent to the judges of another court of law. There is only one instance in which a case has been sent back to the same court. 10 Ves. 500; 3 T. R. 539; 4 Id. 570; *Newl. Ch. Pr.* 181.

A case cannot be sent by the committee of appeals of the privy council for the opinion of a court of law. See 1 Doug. 344, n; but by the 3 & 4 Wm. 4. c. 41 § 10. the judicial committee of the privy council appointed under that act, may direct feigned issues to be tried in the courts of law. See *Privy Council*.

GENERALLY OF VERDICTS. If the fact upon which the court was to judge be not found by the verdict, a new *venire facias* may be granted. 1 *Rob. Abr.* 693. A verdict being given where no issue is joined, there can be no judgment upon it; but a repleader is to be had. *Mod. Ca.* 4. And if a verdict be ambiguous, insufficient, repugnant, imperfect, or uncertain, judgment shall not pass upon it. 1 *Saund.* 154, 155. See *Venire facias de Novo*.

Verdicts must in all things directly answer the issue, or they will not be good; and if a verdict finds only part of the issue, it may be ill for the whole. 3 *Salk.* 374. But there is a difference between actions founded on a wrong, and on a contract; for where it is founded on a wrong, as on a trespass, or escape, &c. it is maintainable, if any part of it is found so in debt for rent, a less sum than demanded may be found by the verdict, because it may be apportioned: but where an action is founded on a contract, there it is entire, and otherwise. 2 *Cro.* 380. If several persons are indicted, or jointly charged in an information, a verdict may find some of the defendants guilty, and not others. And if the substance of an issue be found, or so much as will serve the plaintiff's turn, although not directly according to the issue, the verdict is good. 1 *Lev.* 142; *Hob.* 73; 1 *Mod.* 4. Where only two are found guilty of a riot, (which cannot be committed by less than three,) or only one found guilty of a conspiracy, (to which two at least are required,) they having in both cases

been indicted with others, judgment shall be given against them, even though the others who were indicted do not come to trial. *Stra.* 193, 1227. So where six were indicted for a riot, and two died before trial, two were acquitted, and two only found guilty, judgment was given. For they must have been found guilty with one or both of those who had not been tried, or it could not have been a riot. *Burr.* 1262.

If the jury find the issue and more, it is good for the issue, and void for the residue: and where a jury find a point in issue, and a superfluous matter over and above, that shall not vitiate the verdict. 2 *Lev.* 253. Yet where a man brought an action of debt, and declared for 20*l.* and the jury, upon *nil debet* pleaded, found that the defendant owed 40*l.* this verdict was held ill; for the plaintiff cannot recover more than he demands; and in the above case he could not recover what he demanded, because the court could not sever their judgment from the verdict. 3 *Salk.* 376. See *Debt*.

A verdict found against a record, which is of a higher nature than any verdict, is not good: but where a verdict may be any ways construed to make it good, it shall be so taken, and not to make it void. 2 *Lill.* 644, 651. Upon a general issue, a verdict which is contrary to another record may be allowed; but not where the verdict found is against the same record upon which it is given. *Dyer*, 300. A verdict against the confession of the party is void: but it has been held that the verdict may be good in the disjunctive, though it be not formal; but if it find a thing merely out of the issue, it is not good. *Jenk. Cent.* 257; *Hob.* 53, 54. Where the jury begin with a direct verdict, and end with special matter, &c. that shall make the verdict: also if they begin with any special matter and after make a general conclusion upon it, contrary to law, the judges will judge of the verdict according to the special matter. *Hob.* 53.

No verdict will make that good, which is not so by law, of which the court is to judge; judgments to be given on verdicts that stand with law; and what both parties have agreed in the pleading, must be admitted so to be, though the jury find it otherwise, it being a rule in law. *Hob.* 112; 2 *Cro.* 678; 2 *Mod.* 4. See *Jury*.

At common law, where any thing is omitted in the declaration, though it be matter of substance, if it be such as, without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment. This rule, however, is to be understood with some limitation; for, on looking into the cases, it appears to be, that where the plaintiff has stated his title, or ground of action, defectively, or inaccurately, (because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial,) it is a fair presumption after a verdict, that they were proved: but that, where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption. And hence it is a general rule, that a verdict will aid a title defectively set out, but not a defective title. Thus, where the grant of a reversion is stated, which cannot take effect without attornment, that being a necessary ceremony, may be presumed to have been proved. But where, in an action against the indorser of a bill of exchange, the plaintiff did not allege a demand on, and refusal by the acceptor, when the bill became due, or that the defendant had notice of the acceptor's refusal, this omission was held to be error, and not cured by the verdict: for, in this case, it was not requisite for the plaintiff to prove, either the demand on the acceptor, or the notice to the defendant, because they were neither laid in the declaration, nor were they circumstances necessary to any of the facts charged. *Doug.* 679. See *Tidd's Pr.*

Another rule at common law is, that surplusage will not vitiate after verdict; *utile per inutile non vitiatur*; and therefore, in *trover*, if the plaintiff declare that on the 3d of March

he was possessed of goods, which came to the defendant's hands; and that afterwards, to wit, on the first of March, he converted them to his own use: this is cured after verdict; for that he afterwards converted them is sufficient, and the surplusage is void. *Cro. Jac.* 428. *Tidd's Pr.*

The statute of jeofails helps, in certain cases, after verdict; as it supposes the matter left out was given in evidence, and that the judge directed accordingly. 1 *Mod.* 292. See *Amendment*.

Where a verdict is found for the plaintiff, and he will not enter it, the defendant may compel him to do it, on motion; or the defendant may enter it himself. 2 *Lill.* After a verdict is returned into court, it cannot be altered; but if there be any misprision, it is to be suggested before: and a mistake of the clerk of the assizes appearing to the court, was ordered to be amended. *Cro. Eliz.* 112, 150. See *Amendment*.

The court of C. P. refused to set aside a verdict upon the affidavit of a jurymen that it was decided by lot. 1 *New Rep.* 326.

In a case where a general verdict was taken for the plaintiff, the court refused to entertain an application for entering the verdict on particular counts, according to the evidence on the judge's notes; after a lapse of eight years, and after the judgment had been reversed in error for a default in one count. 1 *B. & A.* 161.

As to the power of the court to direct the jury to find the facts according to the evidence in cases of variance, see *Variance*.

VERGE, or **VIRGE**, *virgata*.] The compass of the king's court which bounds the jurisdiction of the lord steward of the household; and that seems to have been twelve miles about. 13 *R. 2. cap.* 3; *Britton*, 68; *F. N. B.* 24. See *Marshalsea, Palace*.

There is also a verge of land; which is an uncertain quantity, directed by the custom of the country, from fifteen to thirty acres. See *Yard-Land*. 28 *Edw.* 1.

The word verge has also another signification, of a stick or rod, whereby one is admitted tenant to a copyhold estate. *Old Nat. Br.* 17. See *Copyhold*.

VERGERS, *virgatores*.] Are such as carry white wands before the judges. *Fleta*, lib. 2. *cap.* 38. Otherwise called *Portatores Virgæ*.

VERONICA. It is a piece of ancient superstition, that as our Saviour was led towards the cross, the likeness of his face was formed on his handkerchief in a miraculous manner: this handkerchief is pretended to be still preserved in St. Peter's church at Rome, and called *veronica*. *Matt. Paris*, anno 1216, p. 514; *Brompt.* 121.

VERT, *Fr. Verd, i. e. Viridis*, otherwise called *Greenhue*.] In the forest laws signifies every thing that beareth a green leaf within a forest, that may cover a deer; but especially great and thick coverts. Of vert there are divers kinds; some that bear fruit, which may serve for food, as chestnut trees, service trees, nut trees, crab trees, &c. And for the shelter of the game, some are called *haut-boys*, (high-wood,) serving both for food and browse; also for the defence of them, as oaks, beeches, &c.; and for shelter and defence, such as ashes, poplars, maples, alder, &c.; of *sub-boys*, (underwood,) some are for browse and for food of the game; of bushes and other vegetables, some are for food and shelter, as the hawthorn, black-thorn, &c. And some for hiding and shelter, such as brakes, gorse, heath, &c. But herbs and weeds, although they be green, our legal vert extendeth not to them. 4 *Inst.* 327.

Manwood divides vert into overt-vert and nether-vert: the overt-vert is that which the law-books term *haut-boys*; and nether-vert what they call *sub-boys*; and into special-vert, which is all trees growing within the forest that bear fruit to feed deer: called special, because the destroying of it is more grievously punished than of any other vert. *Manw. par.* 2, p. 33.

Vert is sometimes taken for that power which a man hath by the king's grant to cut green wood in the forest. See *Forest*.

VERVISE. A kind of cloth, mentioned in the (repealed) 1 *Rich.* 3. c. 8.

VERY LORD AND VERY TENANT, *verus dominus, et verus tenens*.] They that are immediate lord and tenant one to another. *Broke*. See *Old Nat. Br.*; and tit. *Tenures*.

VEST, *vestire*.] To invest with, to make possessor of, to place in possession. *Plenum possessionem terræ vel prædii tradere, seisinam dare, infeodare*. *Spelman*.

VESTA. The vest, the vesture, or crop on the ground. *Hist. Croyl. contin.* p. 454.

VESTED ESTATES. See *Estate, Remainder*.

VESTED LEGACIES. See *Legacy*.

VESTRY. See *Churches*, III. 1. A place or room adjoining to a church, where the vestments of the minister are kept.

It is also a meeting at such place: heretofore the bishop and priests sat together in vestries, to consult of the affairs of the church; in resemblance of which ancient custom the ministers, churchwardens, and chief men of most parishes, do at this day make a parish vestry: and in general a person is chosen in every parish to act as vestry clerk, whose duty is to attend at all parish meetings, to draw up and copy all orders and other acts of vestry, and to give out copies thereof when necessary; for which purpose he has the custody of all books and papers relating thereto. See 58 *Geo.* 3. c. 69. § 6.

His office is not a fixed and permanent one for which a mandamus will lie. 5 *T. R.* 714.

The Sunday before a vestry is to meet, public notice ought to be given either in the church after divine service is ended, or else at the church-door as the parishioners come out, both of the calling of the said meeting, and also of the time and place of the assembling of it; and it ought also to be declared for what business the said meeting is to be held, that no one may be surprised, but that all may have full time before to consider of the subject-matter of the meeting. It is also usual to toll one of the church-bells for half an hour preceding the time when the vestry is to assemble, in order to remind the parishioners of the appointed time. See 5 *Mod.* 68; *La.* 21; *Heil.* 61; *Litt.* 263; *Poph.* 137; 1 *Mod.* 194; 2 *Vent.* 167; *Burn, Eccl. L.* And see now the notice required by statute, *post*.

Vestries for church matters regularly are to be called by "the churchwardens with the consent of the minister." The 58 *Geo.* 3. c. 69. has not altered the general authority under which or the persons by whom vestries are to be called.

Every parishioner who is assessed to, and pays the church-rates, or scot and lot, is, of common right, entitled to be admitted into a general vestry, and to give his vote therein. Thus where *Phillibrown*, an inhabitant and parishioner, paying scot and lot in the parish of St. Botolph, Bishopsgate, in London, was excluded from the vestry-room of that parish by *Ryland*, the churchwarden, he brought his action for this injury, and, on a demurrer to the declaration, it was insisted that vestries are voluntary meetings only, and therefore the exclusion was neither an injury or damage to *Phillibrown*; but that, admitting the shutting of the door against him, and keeping him out was a damage, yet it was no more than a public damage, for which no action would lie. But, on the other side, it was contended that every inhabitant has a right to be present at such meetings, and give his vote, and the court made no difficulty but that such an action was maintainable; but they gave judgment for the defendant, because it was not stated in the declaration that the parishioners had a right to hold their vestry in this room; for that, in an action of this nature, the plaintiff must first show a right in the thing claimed, and then a disturbance in the enjoyment of it. 2 *Lord Raym.* 1388; 1 *Stra.* 624; 8 *Mod.* 52, 53.

So also, all out-dwellers, occupying land in the parish, have a right to vote in the vestry as well as the inhabitants. *Burn, Eccl. L.* And see 59 Geo. 3, c. 85.

The rector, vicar, or curate, also has a right to be admitted into the vestry, and to vote upon the question therein propounded, although not assessed to the church-rates.

And the minister has a right to preside over the meeting, whether he be rector or vicar, *Shaw's Par. L. c. 17*; and in sound legal principle he is the head and *præses* of the meeting. 3 *Phill. Eccl. Ca.* 87; 3 *B. & Ald.* 246, *notis.* And see the provision of the 58 Geo. 3, c. 69. § 2. *post*, for nominating a chairman in the absence of the rector, vicar, or perpetual curate, which seems to admit by implication the right of these parties, if present, to preside. See also 1 & 2 *Wm. 4. c. 60. post.*

When the parishioners, thus qualified, are assembled at the time and place appointed, those who are present include all those who are absent, and the votes of the major part of those present bind all the rest. *Vent.* 367; 2 *Phill. Eccl. Ca.* 350.

The vestry has the right to investigate and restrain the expenditure of the parish funds, to determine the expediency of enlarging or altering their churches or chapels, or of adding to or disposing of the "goods and ornaments" connected with those edifices. The election of some of the parish officers is either wholly or in part to be made by the vestry, and it has either directly or indirectly a superintending authority in all the weightier matters of the parish. *Steele's Parish Law*, 257.

The acts of one vestry are not absolutely binding on a succeeding vestry, and they may be confirmed or rescinded by such succeeding vestry, but the confirmation of the succeeding vestry is not necessary to make the acts of the preceding one valid. 2 *Esp.* 687.

The persons assembled at a vestry being all upon an equal footing, the power of adjourning it does not reside singly in the minister, or in any other person as chairman, nor in the churchwardens, but in the whole assembly; for *inter pares non est potestas*; and therefore the adjournment, as well as every other act of the vestry, must be decided by the majority of votes. 2 *Stra.* 1045.

To prevent disputes, it may be convenient that every vestry act be entered in the parish books of accounts, and that every man's hand consenting be set thereto. *Burn, Eccl. L.*

By the 58 Geo. 3, c. 69. (amended by 59 Geo. 3, c. 85.) for the regulation of parish vestries, three days' notice shall be given of the holding all vestries by publication in the church on a Sunday, and affixing a notice on the church-door. If the rector, vicar, or perpetual curate, is not present at the vestry, a chairman shall be elected by the persons present: in cases of equality of votes, the chairman shall have the casting vote, in addition to his vote as a vestryman: votes shall be proportioned to the amount of the poor's rate upon the parties voting, not exceeding six votes; the parties not having neglected or refused to pay the rates when called on. The minutes of the proceedings shall be entered in the parish-books, and signed by the chairman, and such vestry-men as choose so to do: and that such books shall be carefully kept, &c. Provision is made for vestries regulated by special acts, &c. By the 59 Geo. 3, c. 85. persons rated to the poor, though not inhabitants, and the clerks, &c. of corporations, are allowed to attend and vote.

By the 1 & 2 *Wm. 4. c. 60.* an act was passed "for the better Regulation of Vestries, and for the Appointment of Auditors of Accounts, in certain Parishes of England and Wales."

By § 2. any number of rate-payers amounting at least to one-fifth of the rate-payers of any parish, or any number of rate-payers amounting at least to fifty parishioners, may, between the first day of December and the first day of March, deliver a requisition to the churchwardens, requiring of them

to ascertain, according to the manner therein-after mentioned, whether or not a majority of the rate-payers of the said parish wish that the act should be adopted therein.

§ 3. Upon receipt of requisition, the churchwardens are to give notice of time and place for receiving votes, which the ratepayers are to signify by printed or written declarations.

§ 5. Churchwardens are to declare whether the votes are in favour of adopting the act.

§ 6. Rate-payers may inspect votes.

§ 7. No person to vote unless he has been rated one year.

§ 8. Notice of adoption of the act is to be given in the London Gazette, &c.

§ 9. If the rate-payers determine against the adoption of the act no similar requisition is to be made within three years.

§ 11. Churchwardens and others refusing to call meetings, &c. according to the act, are guilty of a misdemeanor.

§ 12. And on some Sunday, at least twenty-one days previous to the annual election of vestrymen, notice of election, pursuant to the act, signed by the churchwardens, shall be affixed to the principal doors of every church and chapel of the said parish, and at other usual places, in the form therein given.

§ 13. Rate-collectors, &c. may be summoned to assist at the election.

§ 14. On the day of annual election for vestrymen and auditors in any parish adopting the act, each parishioner then rated, and having been rated to the relief of the poor one year, desirous of voting, shall meet at the place appointed for such election, to nominate eight rate-payers of the said parish as fit persons to be inspectors of votes, four of such eight to be nominated by the churchwardens, and the other four to be nominated by the meeting; and after such nomination the said parishioners shall elect such parishioners duly qualified as may be proposed for vestrymen and auditors; and the chairman shall declare the names of the parishioners elected by a majority of votes.

§ 15. Five rate-payers may demand a poll, to be taken by ballot, each rate-payer to have one vote for the vestry, and one vote for the auditors.

§ 19. Persons forging or falsifying any voting list, or obstructing the election, shall forfeit 50*l.*, &c.

§ 20. Public notice to be given of vestrymen and auditors chosen by parishioners.

§ 22. Election of vestrymen and auditors of accounts to be held annually in the month of May.

§ 23. In all parishes adopting the act the vestry as therein-before mentioned shall consist of twelve vestrymen for every parish in which the number of rated householders shall not exceed one thousand; twenty-four vestrymen, where they exceed one thousand; thirty-six vestrymen, where they exceed two thousand; and so on at the proportion of twelve additional vestrymen for every thousand rated householders: provided, that in no case the number shall exceed one hundred and twenty: provided always, that in any parish wherein a greater number of vestrymen are given by special act of parliament, the number shall remain the same as given by such act: and provided, that the rector, district rectors, vicar, perpetual curate, and churchwardens, of the said parish, shall constitute a part of the said vestry, and shall vote therein, in addition to the vestrymen elected under the act: provided always, that no more than one such rector or other such minister, from any one parish, shall *ex officio* be a part of or vote at any vestry meeting.

§ 24. One third of existing vestry to go out of office at each of three first elections under the act, and afterwards (§ 25.) vestrymen are to quit office after three years, and one third of the whole number to be elected annually.

§ 26. The vestry elected under this act in any parish not within the Metropolitan Police District, or the city of London, shall consist of resident householders rated to the poor upon a rental of not less than ten pounds; if the parish adopting the act should be within the Metropolitan Police District, or the

city of London, or if the resident householders therein amount to more than three thousand, the vestry elected under the act shall consist of resident householders rated to the poor upon a rental of not less than forty pounds *per annum*.

§ 27. Vestries appointed after the adoption of the act to exercise the authority of former vestries. But the act is not to affect local acts regarding vestries, divine worship, &c. except as therein expressed.

§ 28. The acts of a quorum of the vestry at any meeting to be considered as the acts of the vestry.

§ 29. In any case in which the vestry room of any parish in any city or town shall not be sufficiently large for any vestry meeting, such meeting shall be held elsewhere within the said parish, but not in the church.

§ 30. At every meeting of any vestry, in the absence of the persons authorized by law or custom to take the chair, the members present shall elect a chairman before proceeding to other business.

§ 31. Proceedings of the vestry are to be entered in books to be open to inspection.

And § 32. account-books are to be kept, and be open to inspection.

§ 33. In every parish adopting the act the parishioners qualified to vote for vestrymen shall elect five rate-payers, who shall have signified in writing their assent to serve, to be auditors of accounts, which auditors shall be elected on the first day on which the vestrymen shall be chosen after such parish shall have adopted the act, and according to the same forms of voting as therein-before prescribed for the election of the vestry: provided, that no person shall be eligible to the office of auditor not qualified according to the act to fill the office of vestryman; and provided, that no person shall be eligible to fill the said office of auditor who shall be one of the vestry; provided also, that no person shall be eligible to fill the said office of auditor who shall be interested in any contract, office, business, or employ, or in providing or supplying any materials or articles for the parish for which he is to serve.

§ 34. specifies the mode of audit.

And by § 35. auditors may call for persons and books.

§ 36. Accounts to be signed by auditors.

And § 37. accounts after audit to be open for inspection.

And § 38. abstracts of accounts are to be published fourteen days after being audited, and copies delivered to rate-payers on the payment of a shilling.

§ 39. Vestry to make out and publish yearly a list of estates, charities, and bequests, &c. with the application thereof, which list shall also be open to inspection.

§ 43. The act is not to extend to parishes where there are not more than eight hundred rate-payers, except in cities or towns.

For a recent decision upon the qualification and manner of election of vestrymen under the above act, see 3 *N. & M.* 311.

SELECT VESTRIES. In large and populous parishes, especially in and about the metropolis, a custom has obtained of yearly choosing a select number of the chief and most respectable parishioners to represent and manage the concerns of the parish for that year; and this has been held to be a good and reasonable custom. 2 *P. Wms.* 8; *Lutw.* 1027; *Burn, Eccl. L.*

It seems also to have been held a good and reasonable custom to choose a certain number of parishioners as a select vestry: and that as often as any one of the members die, the rest shall choose one other fit and able parishioner of the same parish to fill up the vacancy of him so deceased; but this can only be supported upon the basis of prescription, and constant immemorial usage.

The custom, however, differing in different parishes as to the election, government, and proceedings of select vestries, it is enacted by the 10 *Ann. c. 11. § 20.* for building fifty

new churches in or near London and Westminster, that the commissioners shall appoint a convenient number of sufficient inhabitants to be vestry-men; and from time to time, upon the death, removal, or other avoidance of any such vestry-man, the rest, or majority of them, may choose another.

In several local and personal acts, the legislature has described the persons of whom a select vestry shall respectively consist. Thus, in *Spitalfields*, by 2 *Geo. 2. c. 10.* the rector, churchwardens, overseers, and all other persons who have served or fined for those offices, shall, so long as they continue householders within the parish, and pay the poor-rate, be vestrymen of the said parish for the time being, and have the management of the affairs of the parish. So also, in the parish of *Wapping, Stepney*, by 2 *Geo. 2. c. 30.* the rector, churchwardens, overseers, and all other persons who shall pay two shillings a month, or more, towards the relief of the poor, and no other, shall be vestrymen of the said parish. So also in several more modern local acts for the relief and management of the poor.

By the 59 *Geo. 3. c. 12. § 1.* an act was made for the better regulation of the laws for the relief of the poor, under which the inhabitants of any parish in vestry assembled may appoint not more than twenty, or less than five, householders to be a select vestry; and the rector, vicar, or other minister of the parish, and in his absence the curate (such curate being resident and rated,) and the churchwardens and overseers, with the inhabitants elected as aforesaid (such inhabitants being first appointed by writing under the hand and seal of a justice of peace,) shall constitute a select vestry for the management of the poor, and any three (two of whom shall neither be churchwardens or overseers) shall be a quorum.

Magistrates are bound to appoint persons elected by the parishioners under the above act, and have no discretion to reject any elected. A magistrate acting within the parish may, if an inhabitant, be a select vestryman, and an overseer may be a member by election, though he be also a member by virtue of his office. 4 *N. & M.* 299.

Wherever a select vestry is appointed under this act, the right of the common law vestry has always in practice been considered as superseded. It is optional with the parishioners, whether they will or will not proceed upon the old law, or upon the statutes, by appointing a select vestry, but if they pursue the latter course, they delegate their authority to that body. See *Steer's Par. Law*, 267.

As to the persons by whom relief is now to be administered under the late act for the amendment of the poor laws, see *Poor*, VII. 6.

VESTURA, vestura. A crop of grass or corn: an allowance of some set portion of the products of the earth, as corn, grass, wood, &c. for part of the salary or wages to some officer, servant, or labourer, for their livery or vest. So foresters had a certain allowance of timber and underwood yearly out of the forest for their own use. *Paroch. Antiq.* p. 620. See *Vesture*.

VESTURE. A garment; metaphorically applied in law to a possession or seisin. *Stat. Westm. 2. c. 5.*

Vesture of an acre of land is the profit of it; "It shall be inquired how much the vesture of an acre of ground is worth, and how much the land," &c. 4 *Edw. 1. § 14* *Edw. 3.* By grant of *vestura terræ*, the soil will pass; and the vesture being the profit of land, it is generally all one to have that, as the land itself. 1 *Vent.* 393; 2 *Roll. Abr.* 2. See *Vestura*.

VETITUM NAMUM. See *Replevin, Withernam*.

VIA SERVITUS, servitude of way. A right of road over another's ground, or rather the tenure (in Scotland) by which such right accrues against the possessor of land. This may be for a foot road, a horse road, or a carriage road, and must be established either by prescription or by grant followed by possession. *Bell's Scotch Dict.*

VIA REGIA. The highway or common road, called the king's way, because authorized by him, and under his pro-

tection: it is also denominated *via militaris*. *Leg. Hen. 1. c. 80; Bract. lib. 4.* See *tit. Ways*.

VICAR, *vicarius, quasi vice fungens rectoris.*] The priest of every parish is called rector, unless the predial tithes are appropriated, and then he is styled vicar, as acting *vice*, instead of, the rector; and when rectories are appropriated, vicars are to supply the rectors' places. See *Parson, I.*

Where the vicar is endowed, and comes in by institution and induction, he hath *curam animarum actualiter*; and is not to be removed at the pleasure of the rector, who in this case hath only *curam animarum habitualiter*; but where the vicar is not endowed, nor comes in by institution and induction, the rector hath *curam animarum actualiter*, and may remove the vicar. *1 Vent. 15; 3 Salk. 378.*

Upon endowment, the vicar hath an equal, though not so great an interest in the church as a rector; the freehold of the church, church-yard, and glebe is in him; and as he hath the freehold of the glebe, he may prescribe to have all the tithes in the parish, except those of corn, &c. Many vicars have a good part of the great tithes; and some benefices, that were formerly severed by impropriation, have, by being united, had all the glebe and tithes given to the vicars: but tithes can no other way belong to the vicar than by gift, composition, or prescription; for all tithes *de jure* appertain to the parson; and yet generally vicars are endowed with glebe and tithes, especially small tithes, &c. If a vicar be endowed of small tithes by prescription, and afterwards land, which had been arable time out of mind, is altered, and there are growing small tithes thereon, the vicar shall have them; for his endowment goes to such tithes, in any place within the parish. *Cro. Eliz. 467; Hob. 39.* But where the vicar is endowed out of the parsonage, he shall not have tithes of the parson's glebe, or of land that was part thereof at the time of the endowment, but now severed from it: yet it seems to be otherwise, if the glebe lands are in the hands of the parson's lessee. *Cro. Eliz. 479; Mallor. Q. Imped. 4.* See further, *tit. Tithes*.

VICARAGE, *vicaria.*] Of places did originally belong to the parsonage or rectory, being derived out of it.

The rector of common right is patron of the vicarage; but it may be settled otherwise; for if he makes a lease of his parsonage, the patronage of the vicarage passes as incident to it. *2 Roll. Abr. 59.* And if a vicarage become void, during the vacancy of the parsonage, the patron of the parsonage shall present to such vicarage. *19 Edw. 2, 41.*

The parson, patron, and ordinary, may create a vicarage, and endow it; and in time of vacancy of the church, the patron and ordinary may do it: but the ordinary alone cannot create a vicarage, without the patron's assent. *17 Edw. 3, 51; Cro. Jac. 516.*

Where there is a vicarage and parsonage, and both are vacant, and in one person's patronage; if he presents his clerk as parson, who is thereupon inducted, this shall unite the parsonage and vicarage again. *11 Hen. 6, 3.*

Upon the appropriation of a church, and endowment of a vicar out of the same, the parsonage and vicarage are two distinct ecclesiastical benefices: and it hath been held, that where there is a parsonage and vicarage endowed, that the bishop in the vacation may dissolve the vicarage; but if the parsonage be impropriated, he cannot do it; for on a dissolution the cure must revert, which it cannot, into lay-hands. *2 Cro. 518; Palm. 219.*

For the most part, vicarages were endowed upon appropriations; but sometimes vicarages have been endowed without any appropriation of the parsonage.

If the profits of the parsonage or vicarage fall into decay, that either of them by itself is not sufficient to maintain a parson and vicar, they ought again to be re-united: also, if the vicarage be not sufficient to maintain a vicar, the bishop may compel the rector to augment the vicarage. *2 Roll. Abr. 337; Pars. Counsell. 195, 196.*

The provisions of the *29 Car. 2. c. 8.* "for confirming and perpetuating Augmentations made by Ecclesiastical Persons to small Vicarages and Curacies," which have already been slightly noticed under *Parson, I.*, have been greatly extended by the *1 & 2 Wm. 4. c. 45.*

By § 1. the provision in the above act, by which the amount of any augmentation was limited to one moiety of the clear yearly value of the rectory impropriate out of which the same should be granted, is repealed.

By § 3. the above act is to extend to augmentations by colleges and hospital; and also (§ 4.) to extend to augmentations made by spiritual persons, colleges, and hospitals, out of any hereditaments, to any church or chapel being in their patronage.

By § 5. all such augmentations are to be in the form of annual rents.

By § 11. archbishops, bishops, deans, deans and chapters, &c. ecclesiastical corporations, colleges, &c. holding impropriate rectories or tithes, may annex the same to any church or chapel within the parish in which the rectory lies or the tithes arise.

And § 12. empowers the above persons by deed to annex lands, &c. held by them to any church or chapel under their patronage.

§ 16. Benefices exceeding in yearly value 300*l.* are not to be augmented, and no others to be raised above 350*l.*, or 300*l.*, not taking account of surplice fees.

§ 19. Provided that the incumbent of any benefice or living shall not exercise any of the powers aforesaid with respect to hereditaments to which he may be entitled in right of his benefice.

But (§ 20.) the incumbent may annex tithes, &c. to which he is entitled, arising out of the limits of his benefice, to the church or chapel of the parish where they arise.

§ 21. Empowers rectors or vicars to charge their rectories and vicarages with annual sums for the benefit of chapels of ease, &c.; but by § 22. the last provision is not to extend to new churches built under the *58 Geo. 3. c. 45.*

By § 29. the act is to apply to all heads of colleges under whatever denomination.

Vicarage, or not, is to be tried in the spiritual court, because it could not begin to be created but by the ordinary. *3 Salk. 378.* See further, *tits. Appropriation, Parson; and 1 Comm. c. 11. n. 21.*

VICARAGE TEINDS, are small teinds of lambs, wool, eggs, due to the vicar, who serves the cure. *Scotch. Dict.* See *Tithes*.

VICARIAL TITHES. Privy or small tithes. See *Tithes*.

VICARIO *deliberando occasione ejusdam recognitionis, &c.* An ancient writ for a spiritual person imprisoned, upon forfeiture of a recognizance, &c. mentioned in *Reg. Orig. 147.*

VICE-ADMIRAL. An under-admiral at sea; or admiral on the coasts, &c. See *Admiral*.

VICE-ADMIRALTY COURTS. By the *2 & 3 Wm. 4. c. 51.* his majesty was empowered to regulate the practice and the fees in the vice-admiralty courts abroad, and to obviate doubts as to their jurisdiction. See further, *Admiralty*.

VICE-CHAMBERLAIN. A great officer next under the lord chamberlain, who, in his absence, hath the rule and controul of all officers appertaining to that part of his majesty's household, which is called the chamber above stairs. *13 Rich. 2.*

VICE-CONSTABLE OF ENGLAND. An officer whose office is set forth in *Pat. 22 Edw. 4.* See *Constable*.

VICE-CONSUL. The same as *vicecomes*, or sheriff. *Leg. Ed. Conf. c. 12.*

VICE-DOMINUS. The same with *vicecomes*. *Leg. Hen. 1. c. 7; Selden's Tit. Hon. par. 2; Ingulphus.*

VICE-DOMINUS EPISCOPI. The vicar-general, or commissary of a bishop. *Blount.*

VIC-GERENT. A deputy or lieutenant. *31 Hen. 8. c. 10.*

VICE-MARSHAL. Is mentioned with vice-constable in *Pryn's Animad.* on 4 *Inst.* 71.

VICE-ROX, pro rex.] The king's lord-lieutenant over a kingdom, as Ireland.

VICE-TREASURER. See *Under-Treasurer*.

VICINAGE, Fr. voisinage, vicinetum.] Neighbourhood, or near dwelling. *Magna Charta*, c. 14. See *Venue*.

As to common by reason of vicinage, see *Common*.

VICIOUS INTROMISSION, is when any one meddles with the moveables of the deceased without confirmation (or probate) of his will, or other probable title. *Scotch Dict.*

VICIS ET VENELLIS MUNDANDIS. An ancient writ against a mayor or bailiff of a town, &c. for the clean keeping of their streets and lanes. *Reg. Orig.* 267.

VICOUNT, or VISCOUNT, vicecomes.] Signifies as much as sheriff. Between which two words, there seems to be no other difference, but that the one comes from the Normans, the other from our ancestors the Saxons; of which, see *Sheriff*.

Viscount also signifies a degree of nobility next to an earl, which Camden (*Brittan.* page 170,) says, is an old name of office, but a new one of dignity, never heard of amongst us, till Henry VI. who, in the eighteenth year in parliament, created John Lord Beaumont, Viscount Beaumont; but far more ancient in other countries. See *Selden's Tit. Hon.* 761; and *Peers of the Realm*, I.

VICONTIEL, or VICONTIEL, an adjective, from viscount, and signifieth any thing that belongeth to the sheriff; as, writs viscontiel are such writs as are triable in the county or sheriff's court; of which kind there are divers writs of nuisance, &c. mentioned by Fitzherbert. *Old Nat. Brev.* 109; *F. N. B.* 184.

Vicontiels are certain farms, for which the sheriff formerly paid a rent to the king, and he made what profit he could of them. Vicontiel-rents usually came under the title of *firma comitatus*; of these the sheriff had a particular roll given in to him, which he delivered back with his accounts. See 34 & 35 *Hen. 8.* c. 16; 2 & 3 *Edw. 6.* c. 4; 22 *Car. 2.* c. 6.

Now by the 3 & 4 *Wm. 4.* c. 99. § 12. these rents (among others) are to be considered parcel of the land-revenue of the crown, and are placed under the management of the Commissioners of the Woods and Forests.

By § 13. "after reciting that many of the said acts are very ancient and have become obsolete, and it is not known out of or from what hereditaments and premises the same are issuing or payable, so that payment thereof cannot be enforced," the treasury are empowered by warrant to release the same rents, and the arrears thereof. See further, *Sheriff*, V.

VICONTIEL JURISDICTION. That jurisdiction which belongs to the officers of a county; as to sheriffs, coroners, escheators, &c.

VICTUALS, victus.] Sustenance, things necessary to live by, as meat and provisions. Victuallers are those that sell victuals; and we call now all common alehouse-keepers by the name of victuallers.

Victuallers shall sell their victuals at reasonable prices, or forfeit double value: victuallers, fishmongers, poulterers, &c. coming with their victuals to London, shall be under the governance of the lord mayor and aldermen; and sell their victuals at prices appointed by justices, &c. See 23 *Edw. 3.* c. 6; 7 *Rich. 2.* c. 11. No person during the time that he is a mayor, or in office in any town, shall sell victuals, on pain of forfeiture, &c. But if a victualler be chosen mayor, whereby he is to keep the assize by statute, two discreet persons of the same place, who are not victuallers, are to be sworn to assize bread, wine, and victuals, during the time that he is in office; and then, after the price assessed by such persons, it shall be lawful for the mayor to sell victuals, &c. 3 *Hen. 8.* c. 8. If any one offend against these statutes, the party grieved may sue a writ directed to the justices of assize commanding them to send for the parties, and to do right; or an attachment may be had against the

mayor, officer, &c. to appear in B. R. In some manors they choose yearly two surveyors of victuals, to see that no unwholesome victuals be sold, and destroy such as are corrupt. 1 *Mod.* 202.

These ancient acts seem now totally disregarded, though the provisions in some of them are not unworthy attention. See further, *Food, Forestalling, Monopoly, Regrating, &c.*

VIDAME. See *Vasators, Vice-Dominus*.

VIDELICET. See *Scilicet*.

VIDUITATIS PROFESSIO. The making a solemn profession to live a sole and chaste widow; which was heretofore a custom in England. *Dugd. Warwicksh.* 313, 654.

VI ET ARMIS, with force and arms. Words used in indictments, &c. to express the charge of a forcible and violent committing any crime or trespass.

Where the omission of *Vi et armis, &c.* is helped in indictments, see 4 & 5 *Ann.* c. 16; 7 *Geo. 4.* c. 64. § 20. and tit. *Indictment*, VI.

VIEW, Fr. Veue, i. e. Visus.] Originally, where a real action was brought, and the tenant did not know certainly what was in demand, he might pray that the jury might view it. *Britton*, c. 45; *F. N. B.* 178.

The view was for the jury to see the land or thing claimed, and in controversy: formerly, a view was not granted in personal actions; and by the 13 *Edw. 1.* c. 48. it was restrained in certain real actions.

In personal actions before the 4 & 5 *Ann.* c. 16. (which did not extend to criminal cases,) there could be no view, till after the cause had been brought on to trial; when if the court saw the question involved in any obscurity which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on again. 1 *Burr.* 253.

That statute as well as a subsequent one was repealed by the jury act, 6 *Geo. 4.* c. 50.

Now where in any case, either civil or criminal, it may appear to the court, or to a judge in vacation, to be proper and necessary that the jury should have a view of the premises in question previously to the trial, they have authority by the above statute (§ 23.) to order in the *istringas* or *habeas corpora*, that the sheriff shall have six or more of the jurors returned to try the cause, (who shall be consented to by the parties, or nominated by the sheriff in case the parties cannot agree,) at the place in question some convenient time before the trial; and that the place in question shall be then and there shewn to them by two persons to be named in the writ, and appointed by the court or judge. And the sheriff shall afterwards, by a special return upon the *istringas* or *habeas corpora*, certify that the view has been had according to the command of the said writ, and shall specify the names of the viewers. (*Id.*) The court or judge may also, if they think fit, require by the rule that the party applying for it shall deposit in the hands of the under-sheriff a certain sum of money for payment of the expenses of the view. (*Id.*) And by a rule of court made since this statute, (*R. T.* 7 *Geo. 4.* 5 *B. & C.* 795.) "upon every application for a view there shall be an affidavit stating the place at which the view is to be made, and the distance thereof from the office of the under-sheriff, that the sum to be deposited shall be 10*l.* in case of a common jury, and 16*l.* in case of a special jury, if such distance do not exceed five miles; and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it be above five miles; and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall be forthwith returned to the attorney of the party who obtained the view; and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such attorney to the under-sheriff, and it is further ordered that the under-sheriff shall pay, and shall account for the money so deposited according to the scale set down in the rule."

The court will disallow the costs of a view, unless the names of the viewers are inserted in the writ of view, as directed by the 23rd section of the above act. 7 *Bing.* 403.

In actions of waste, of trespass *quare clausum fregit*, and nuisance, the motion for a view was always of course, and required only counsel's signature; but in other cases a special application must formerly have been made to the court in term time, or to a judge in vacation, for a rule nisi, or order upon an affidavit of the circumstances. *Tidd*, 797; *Imp. B. R.* 399. Now, however, by the rule of H. T. 2 *Wm.* 4. r. 63. "the rule for a view may in all cases be drawn up by the officer of the court, on the application of the party, without affidavit or motion for that purpose." And in all cases it is made part of the rule or order, that if no view be had, or if had by less than the number of jurors mentioned in the rule, &c. the trial shall nevertheless proceed without any objection being made on that account, or on account of any defect in the return of the *distingus* or *habeas corpora*, that no evidence shall be given on either side, at the time of taking the view, and, in ordinary cases, that the expenses of taking it shall be equally borne by both parties. *Archb. Pr. by Chitty*, 313.

If a rent or common is demanded, the land out of which it issues must be put in view. 1 *Leon.* 56. And if a view be denied where it ought to be granted, or granted where it ought not to be, &c. it is error. 2 *Lev.* 217.

Where, in action of waste, several places were assigned, and the jury had not the view of some of them, they might have found no waste done in that part which they did not view: in waste for wasting of wood, if the jury viewed the wood without entering into it, it was good: also waste being assigned in every room of an house, the view of an house, generally, was sufficient. 1 *Leon.* 259, 267.

For the ancient practice with regard to granting views in real actions, and in which actions it was demandable, see *Roscoe on Real Actions*, 247, and see 1 *Burr.* 252.

VIEW OF FRANK-PLEDGE. See *Frank-Pledge*.

VIGIL, *vigilia*.] The eve, or next day before any solemn feast; because then Christians were wont to watch, fast, and pray in their churches. 2 & 3 *Edw.* c. 19.

VI LAICA REMOVENDA. A writ that lies where two persons contend for a church, and one of them enters into it with a great number of laymen, and holds out the other *vi et armis*; then he that is holden out shall have this writ directed to the sheriff, that he remove the lay force: but the sheriff ought not to remove the incumbent out of the church, whether he is there by right or wrong, but only the force. *F. N. B.* 54; 3 *Inst.* 161; and see 15 *Rich.* 2. c. 2.

The writ *Vi laicâ removendâ* ought not to be granted until the bishop of the diocese where such church is hath certified into the chancery such resisting and force, &c. though it is said in the *New Natura Brevium*, it lieth upon a surmise made by the incumbent, or by him that is grieved, without any such certificate of the bishop. *New Nat. Brev.* 121.

The writ is made returnable in the king's bench, in which court the offenders shall be fined and punished for the force; and restitution also shall be awarded by the same court as it seemeth. *Wats.* c. 30.

A restitution was awarded to one who was put out of possession by the sheriff upon a *vi laicâ removendâ*. *Cro. El.* 466; 5 *Mod.* 443.

VILL, or VILLAGE, *villa*.] Is sometimes taken for a manor, and sometimes for a parish, or part of it: but a vill is most commonly the out-part of a parish, consisting of a few houses, as it were separate from it. *Villa est ex pluribus mansionibus vicinata, et collata ex pluribus vicinis*. 1 *Inst.* 115. *Fleta* mentions the difference between a mansion, a village, and a manor, viz. a mansion may be of one or more houses, but it must be but one dwelling-place, and none near it; for, if other houses are contiguous, it is a village; and a manor may consist of several villages, or one alone. *Fleta*, lib. 6. c. 51. According to *Fortescue*, the boundaries of villages are not by houses or streets; but by a circuit of ground, within which there may be hamlets, woods, and waste ground, &c. *Fortesc. de LL. Ang.* c. 24.

The word *town*, or *vill*, is now, by the alteration of times and language, become a general term, comprehending under it the several species of cities, boroughs, and common towns. 1 *Comm. Introd.* § 4.

When a place is named generally, in legal proceedings, it is intended to be a vill, because, as to civil purposes, the kingdom was first divided into vills; and it is never intended a parish, that being an ecclesiastical division of the kingdom to spiritual purposes, though in many cases the law takes notice of parishes as to civil purposes. 1 *Mod.* 250.

A vill and a parish by intendment shall be all one; and in process of appeal, a parish may be intended a vill. *Cro. Jac.* 623; 2 *Salk.* 380. If a venue be laid in Gray's Inn, which is no parish or vill, the defendant must plead there is no such vill as Gray's Inn, or it shall be intended a vill after verdict, &c. 3 *Salk.* 381.

If no vill, &c. is alleged, where a messuage and lands lie, no trial can be had concerning it: but some counties in the north of England, and in Wales, have no vills but parishes. *Jenk. Cent.* 33, 328.

Two houses in an extraparochial place are not enough to denominate a vill. 2 *Str.* 1304, 1071. See further *Poor*, I. 1.; *City, Town*.

VILLA REGIA. A title given to those country villages where the kings of England had a royal seat, and held the manor in their own demesne, having there commonly a free chapel, not subject to ecclesiastical jurisdiction. *Paroch. Antiq.* 53.

VILLAIN, VILLEIN, *villanus*, Fr. *vilain*, i. e. *vilis*.] A man of base or servile condition; a bondman or servant.

Of these bondmen or villains there were two sorts in England; one termed a villain in gross, who was immediately bound to the person of the lord, and his heirs; the other, a villain regardant to a manor, being bound to his lord as a member belonging and annexed to a manor, whereof the lord was owner. And he was properly a pure villain, of whom the lord took redemption to marry his daughter, and to make him free; and whom the lord might put out of his lands and tenements, goods and chattels, at his will, and chastise, but not maim him: for if he maimed his villain, he might have appeal of maihem against the lord; as he could bring appeal of the death of an ancestor against his lord, or appeal of rape done to his wife. *Bract. lib.* 1. c. 6; *Old Nat. Br.* 8; *Termes de Ley*.

Some were villains by title or prescription, that is to say, that all their blood had been villains regardant to the manor of the lord time out of mind: and some were made villains by their confession in a court of record, &c. Though the lord might make a manumission to his villain, and thereby enfranchise him: and if the villain brought any action against his lord, other than an appeal of maihem, &c. and the lord, without protestation, made answer to it; by this the villain was made free. *Termes de Ley*, 576.

Villain estate was contradistinguished to free estate, by the 8 *Hen.* 6. c. 11. The villains were such as dwelt in villages, and of that servile condition, that they were usually sold with the farm to which they respectively belonged; so that they were a kind of slaves, and used as such; villenage, or bondage, it is said, had beginning among the Hebrews. *Termes de Ley*, 455.

For the best account of the tenure of villani, see 2 *Comm.* 92—96. and see 1 *Ellis's Domesday*, 80.

VILLENAGE cometh of villain, and was a base tenure of lands or tenements, whereby the tenant was bound to do all such services as the lord commanded, or were fit for a villan to perform. See further, *Tenures*, III. 1; 13; *Villanage*.

VILLANIS REGIS SUBTRACTIS REDUCENDIS. A writ that lay for the bringing back of the king's bondmen, that had been carried away by others out of his manors, whereto they belonged. *Reg. Orig.* 87.

VILLANOUS JUDGMENT, *villanum judicium*.] Is that

which casts the reproach of villany and shame upon him against whom it was given.

Formerly, where the conspiracy was to accuse another of a capital offence, the defendant was liable to receive what was called the villanous judgment, which was like the ancient judgment in attain, viz. that the offender should not be of any credit afterwards; nor should it be lawful for him to approach the king's court; and his land and goods should be seized into the king's hands, his trees rooted up, and body imprisoned, &c. *Staudf. P. C.* 157; *Lamb. Erren.* 63.

But this judgment was not inflicted for conspiracies of a less aggravated character, and it has long been obsolete, not having been pronounced since the reign of *Edm. 3.* though the punishment at this day appointed for perjury may partake of the name of villanous judgment, as it hath somewhat more in it than corporal or pecuniary pain, i. e. the discrediting the testimony of the offender for ever. *1 Hawk. c. 72. § 6. 4 Comm. c. 10. p. 186.* See *Infamous Crims.*

VILLEIN FLEECES. Bad fleeces of wool, shorn from scabbed sheep. *31 Edw. 3. c. 8.* (repealed.)

VILLENAGE, villenagium, from villan.] A servile kind of tenure belonging to land or tenements, whereby the tenant was bound to do all such services as the lord commanded, or were fit for a villain to do. *Ubi sciri non poterit vespere quale servitium fieri debet mans.* For every one that held in villenage was not a villain or bondman: *villenagium vel servitium nihil detrahit libertatis, habita tamen distinctione utrum tales sunt villani et teneant in villano socagio de dominico domini Regis.* *Bract. l. 1. c. 6. num. 1.*

The division of villenage was into villenage by blood, and villenage by tenure. Tenure in villenage could make no freeman villain, unless it were continued time out of mind, nor even free land make a villain free.

Bracton (l. 2. c. 8. num. 3.) divides it into *purum villenagium* & *quo præstator servitium incertum & indeterminatum, ubi sciri non poterit vespere, quale servitium fieri debet mans, viz. ubi quis facere tenetur quicquid ei præceptum fuerit.* The other he calls *villanum socagium*, and was tied to the performance of certain services agreed upon between the lord and tenant; and was to carry the lord's dung into his field, to plough his ground at certain days, to reap his corn, plash his hedges, &c.; as the inhabitants of Bickton were bound to do for those of Clunccastle in Shropshire, which was afterwards turned into a rent, now called Bickton Silver, and the service excused.

There were likewise *villani sockmanni*, which were those who held their land in socage; and there were *villani adventitii*, who were those who held land by performing certain services expressed in their deeds. *Bract. l. 2. c. 8.* See *Tenures*, III. 1; *2 Comm. c. 5.*

The tenure of villenage was abolished by the *12 Car. 2. c. 24.* at which time there was hardly a pure villain left in the nation.

VINAGIUM, tributum à vino.] A payment of a certain quantity of wine instead of rent, to the chief lord, for a vineyard. *Mon. Ang. ii.* 980.

VINCULO MATRIMONII, Divorce à. See *Divorce.*

VINERIAN PROFESSOR. See *1 Comm. 27.*

VINEYARDS. The owners of vineyards may make wine of British grapes only growing there, free from any duty. *10 Geo. 2. c. 17.*

VINET, or vignet, Fr.] A flower or border which printers use to ornament printed leaves of books; mentioned in *14 Car. 2. c. 33.*

VIOLATION OF WOMEN AND GIRLS. See *Rape.*

VIOLENCE, violentia.] All violence is unlawful. If a man assault another with an intention of beating him only, and he dieth, it is felony. And where a person knocks another on the head who is breaking his hedges, &c. this will be murder, because it is a violent act, beyond the provocation. *Kel. Rep. 64, 131.* See *Homicide, Riots.*

VIOLENT PRESUMPTION. See *Evidence.*

VIOLENT PROFITS. Are the double value of a tenement within a burgh, and the highest rent for lands in the country; recoverable against a tenant for refusing to remove. *Scotch Dict.*

VIRGA. A rod, or white staff, such as sheriffs, bailiffs, &c. carry as a badge or ensign of their office. *Covell.*

VIRGATA TERRÆ. A yard land, *ex 24 acris constat, quatuor virgatæ ludam faciunt, & quinque ludæ feodum militis.* *Kenet's Gloss.*

VIRGE. *Tenant by.* A species of copyholders, i. e. such as are said to hold by the virge or rod. In fact, copyholders and customary tenants differ not so much in nature as in name; for, though called by different names, yet they all agree in substance and kind of tenure. Their lands are holden in one general kind, that is, by custom and continuance of time. See *Calthorp on Copyholds*, 51, 54; *2 Comm. c. 9. p. 148;* and tit. *Copyhold, Verge.*

VIRIDARIO ELIGENDO. A writ for the choice of a verderer in the forest. *Reg. Orig.* 177.

VIRIDIS ROBA. A coat of many colours; for, in the old books, *viridis* is used for *varius*. *Bract. l. 3.*

VIRILIA. The privy members of a man; to cut off which was felony by the common law, though the party consented to it. *Bract. l. 3. p. 144.* See *Maimem.*

VIS, Lat.] Any kind of force, violence or disturbance, relating to a man's person, or his goods, right in lands, &c. See *Assault, Force, &c.*

VISCOUNT. See *Vicount.*

VISITATION, visitatio.] That office which is performed by the bishop of every diocese once every three years, or by the archdeacon once a year, by visiting the churches and their rectors throughout the whole diocese. *Reform. Leg. Eccl.* 124.

The chapels and donatives (unless such donative has received the augmentation of Queen Anne's bounty) are exempt from the visitation of the ordinary, the first being visitable only by commission from the king, and the second by commission from the donor; and there are also other churches and chapels exempted, which did belong to the monasteries; having heretofore obtained exemptions from ordinary visitations, and being visitable only by the pope; which by the statute of *25 Hen. 8. c. 31.* were made visitable by the king, or by commission under the great seal. *4 Burn's Eccles. Law*, 13.

When a visitation is made by the archbishop, all acts of the bishop are suspended by inhibition, &c. A commissary at his court of visitation cannot cite lay parishioners, unless it be churchwardens and sidesmen; and to those he may give his articles, and enquire by them. *Noy*, 123; *3 Salk.* 370. Proxies and procurations are paid by the parsons whose churches are visited, &c. See those titles.

VISITATION BOOKS OF HERALDS. When admissible in evidence, see tit. *Court of Chivalry.*

VISITOR. An inspector of the government of a corporation, &c. The ordinary is visitor of spiritual corporations; but corporations instituted for private charity, if they are lay, are visitable by the founder, or whom he shall appoint; and from the sentence of such visitor there lies no appeal. By implication of law, the founder and his heirs are visitors of lay foundations, if no particular person is appointed by him to see that the charity is not perverted. *3 Salk.* 381. See further *Charities, Corporation*, IV.; *Mandamus.*

VISITOR OF MANNERS. In ancient time, was wont to be the name of the regarder's office in the forest. *Manwood*, par. 1. p. 195.

VISNE, visnetum.] A neighbouring place, or place near at hand. See *Venue.*

VISUS. View, or inspection; as wood is to be taken *per visum forestarii*, &c. *Hoved.* 784.

VIVARY, vivarium.] A place by land or water, where living creatures are kept. In law, it is most commonly used for a park, warren, piscary, &c. *2 Inst.* 100.

VIVA VOCE. Is where a witness is examined *by voice*, not by writing, personally in open court. See *Evidence*.

VOCIFERATIO. An outcry, or bue and cry. *Leg. Hon.* 1. c. 12. See *Hue and Cry*.

VOIDANCE, vacatio. The want of an incumbent upon an ecclesiastical benefice. See *Avoidance*.

VOID AND VOIDABLE. In the law, some things are absolutely void, and some are voidable.

Where a lease is absolutely void, acceptance of rent will not affirm it; it is otherwise when a lease is only voidable, there it will make it good. A lease for life, which is voidable only, must be made void by re-entry, &c. 3 *Rep.* 64. It is generally held that covenants made in a void lease or deed, are also void. *Yelv.* 18. *Owen*, 136. See *Lease*, III.

A deed of exchange, entered into by an infant, or one *non sanæ memoriæ*, is not void; but may be avoided by the infant when arrived at age, or by the heir of him who is *non sanæ memoriæ*. *Perk.* 281. But it hath been adjudged, that a bond of an infant, or of one *non compos*, is void, because the law hath not appointed any thing to be done to avoid such bonds; for the party cannot plead *non est factum*, as the cause of nullity does not appear upon the face of the deed. 2 *Salk.* 675. See *Idiots, Infants*.

Where the condition of a bond is void in part by statute, it may be void totally; though it is otherwise if void in part by the common law, for there it shall be good for the residue. *Moor*, 856; 1 *Brownl.* 64. A deed being voidable, is to be avoided by special pleading; and where an act of parliament says, that a deed, &c. shall be void, it is intended that it shall be by pleading, so as it is voidable, but not actually vacated. 5 *Rep.* 119.

A judgment given by persons who had no good commission to do it, is void, without writ of error, 2 *Hawk. P. C. c.* 50. § 3. But an erroneous attainder is not void, but voidable by writ of error, &c. 2 *Hawk. P. C. c.* 29. § 40. See *Attainder, Judgment*.

VOIRE DIRE, Fr. veritatem dicere. Is when it is prayed upon a trial at law, that a witness may (previously to his giving evidence in a cause) be sworn to speak the truth, whether he shall get or lose by the matter in controversy; and if it appears that he is disinterested, his testimony is allowed, otherwise not. *Blount*.

On a *voire dire*, a witness may be examined by the court, if he be not a party interested in the cause, as well as the person for whom he is a witness; and this has been often done, where a busy evidence, not otherwise to be excepted against, is suspected of partiality. *Terms de Ley*, 581.

And a witness may be examined on the *voire dire* in criminal as well as civil causes. 10 *Mod.* 192.

The rule formerly was, that the objection of interest ought to be made on the *voire dire*, and was not to be allowed after the examination in chief. But for the convenience of the court, and because the incompetency may not be at first suspected, a greater latitude has been allowed: and now, if it is discovered during any part of the trial that a witness is interested, his evidence will be struck out. 7 *T. R.* 720; 2 *Camp.* 14.

Yet it seems that a party who is cognizant of the interest of the witness at the time he is called, is bound to make his objection in the first instance, according to the general principle, for otherwise he might obtain an unfair advantage, by having it in his power to establish or to destroy the evidence just as was more beneficial to himself. This appears to be a matter entirely within the discretion of the court. 1 *Starkie on Ev.* 124.

A witness may be examined on the *voire dire* as to the contents of a will or deed, or other written evidence under which he is supposed to acquire an interest in the subject matter of the trial, although the instrument be not produced. 1 *Phil. on Ev.* 132. Any objection arising from a witness's answer on the *voire dire*, may be likewise removed by his examination thereon. 15 *East*, 57.

If the witness discharge himself on the *voire dire*, the party who objects may still support his objection by evidence, 10 *Mod.* 192, although the old rule is said to have been different. See 1 *Phil. on Ev.* 132.

So in case of trial of infancy by inspection, the court may examine the infant himself upon the oath of *voire dire*, to make true answer to such questions as the court shall demand of him. See 3 *Comm. c.* 22, and tit. *Infant*.

VOLUMUS. The first word of a clause in the king's writs of protection and letters patent. See *Protection*.

VOLUNTARY. As applied to a deed, is where any conveyance is made without a consideration, either of money, or marriage, &c. Thus remainders limited in settlements, to a man's right heirs, &c. are deemed voluntary in equity, and the persons claiming under them are called volunteers. *Abr. Cas. Eq.* 385; 3 *Salk.* 174.

The term fraudulent, used in several statutes respecting conveyances to the injury of creditors, &c. and in the cases decided on the construction of those acts, is in general intended to denote merely an invalidity in certain conveyances or dispositions of estates, arising from the insufficiency of consideration for such conveyances, &c. or from other incidental circumstances, in consequence of which they are not allowed to operate in prejudice of other interests, which the statutes were particularly intended to protect: and not to express the immorality of intention which is understood in the more general and popular signification of the expression fraudulent. The kind of fraud which is the object of the statutes may therefore, in respect to the original disposition, be better expressed by the word voluntary, which, although not used in the statutes, is of general occurrence in the cases decided respecting their operation.

Of these acts the 13 *Eliz. c.* 5. is chiefly for the protection of creditors whose claims do not immediately regard the particular property, which is the subject of the disposition impeached as invalid, but who have a general right to obtain a satisfaction by means of such property, in respect of the personal obligations of the party making the disposition.

The 27 *Eliz. c.* 4. is for the protection of purchasers, whose rights have a direct and immediate relation to the specific subject, disposed of or affected by the previous disposition, impeached as deficient in legal validity: and the relief afforded by this statute is in some cases more extensive than that of the act in favour of creditors. See further, *Fraud II*.

An escape may be voluntary. See *Escape*. And as to voluntary oaths and voluntary waste, see those titles.

VOLUNTARY JURISDICTION. That jurisdiction which may be exercised in matters admitting of no opposition, and which may be exercised by any judge at any time and in any place. *Bell's Scotch Law Dict.*

VOLUNTARY REDEMPTION. Is when the Wadsetter (Mortgagee) receives his money, and renounces voluntary. *Scotch Dict.*

VOLUNTEERS. In the last war great numbers of persons were desirous, under the king's commission, voluntarily to unite themselves in armed companies and regiments for the defence of the kingdom; and various acts of parliament accordingly, from time to time, passed for enabling the king to accept their services, and giving to such volunteers certain exemptions from being called upon to serve in the regular militia of the kingdom. See 42 *Geo. 3. c.* 66; 44 *Geo. 3. c.* 54. In Ireland volunteers were generally called yeomanry. See 42 *Geo. 2. c.* 68.

Members of such volunteer corps are entitled to resign on due notifications of their intention so to do: unless they are expressly restrained from such liberty of resignation by the rules of the corps to which they belong, or by its condition of service. 4 *East*, 512.

VOTUM. A vow or promise, used by Fleta for *nuptiæ*; so *des tatorum* is the wedding-day. *Fleta*, l. 4.

VOUCHE, Fr. in Latin Voco. To call one to warrant lands, &c. See *Recovery*.

VOUCHEE. The person vouched in a writ of right. See *Recovery*.

VOUCHER. A word of art, when the tenant in a writ of right called another into the court, who was bound to him to warranty; and was either to defend the right against the demandant, or yield him other lands to the value, &c. And it extended to lands or tenements of freehold or inheritance, and not to any chattel real, personal, or mixed: he that vouched was called the voucher, and he that was vouched is the vouchee; and the process whereby the vouchee was called was a *summones ad warrantandum*; on which writ if the sheriff returned that the party had nothing whereby he might be summoned, then went out another writ called *sequatur sub suo periculo*, &c. *Co. Lit.* 101. See *Recovery*.

There was also a foreign voucher, when the tenant being impleaded within a particular jurisdiction, as in London, vouched one to warranty in some other county out of the jurisdiction of that court, and prayed that he might be summoned, &c. *2 Rep.* 50. On a suit in England, a voucher did not lie in Ireland: but it did in Wales, and the tenant was summoned in the next county to it.

A vouchee, by entering into warranty, became tenant in law of the lands; and when the demandant counted against him, he might plead a release, &c. *Jenk. Cent.* 41, 100.

In a writ of entry in the degrees, none should vouch out of the line: and in writs of right and possession, it was a good counterplea, that neither the vouchee nor his ancestors had ever seisin of the land. *3 Edw.* 1. c. 40. The demandant might aver a vouchee to be dead, and that there was no such person where the tenant vouched a person deceased, to warranty. *14 Edw.* 3. st. 1. c. 18. See further, *Recovery, Warranty*.

VOUCHER. Is also used for a ledger book, or book of accounts, wherein are entered the acquittances or warrants for the accountant's discharge. *19 Car.* 2. c. 1. Voucher signifies also any acquittance or receipt, discharging a person, or being evidence of payment.

VOX, vocem non habere.] A phrase made use of by Bracton, signifying an infamous person, one who is not to be admitted to be a witness. *Bract. lib.* 3.

VULGARIS PURGATIO, vulgar purgation.] The most ancient species of trial by ordeal, which was peculiarly distinguished by the appellation of *judicium Dei*, and sometimes *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party. See further, *Ordeal*.

VULTUS DE LUCA. The image or portrait of our crucified Saviour kept at Lucca, in the church of the Holy Cross.

William I. called the Conqueror, often swore *per sanctum vultum de Lucā*. *Eadmer. lib.* 1; *Malmsb. lib.* 4.

W.

WAGER OF LAW.

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WADSET. Is a right whereby lands are impignorated or pledged for security of a certain sum. *Scotch Dict.* Similar to the English mortgage; see that title.

WADSET PROPER, is when the wadsetter (mortgagee) takes his hazard of the rents of the land for satisfaction of his annual rent, and pays himself all public burdens. *Scotch Dict.*

WADSET IMPROPER, is when the grantor of the wadset (the mortgagor) pays the public burdens, the wadsetter having his annual rents secured. *Scotch Dict.*

WADSETTER, is he to whom a wadset is granted (the mortgagee). *Scotch Dict.*

WAFORS, *waftores.*] Conductors of vessels at sea.

King Edward IV. constituted certain officers with naval power, whom he styled *custodes, conductores, waftores*, to guard our fishing vessels on the coasts of Norfolk and Suffolk. *Pat. 22 Edm. 4.*

WAGE, *vadiare*, from Fr. *gaga.*] The giving of security for performance of any thing; as to wage or gage deliverance, to wage law, &c. *Co. Litt. 294.* See *Wager of Law.*

WAGER OF BATTLE. See *Battel.*

By the 59 Geo. 3. c. 46, this mode of trial was abolished in writs of right: the same act abolished all appeals of murder, treason, felony, or other offences, and, consequently, the trial by *battel* in those cases; which was therefore thus completely put an end to, after much ingenious research and controversy on the subject. See *Wager of Law.*

WAGER OF LAW, *vadiatio legis.*] So called because the defendant put in sureties, *vadios*, that at such a day he would make his law, that is, take the benefit which the law allowed him. 3 *Comm. c. 22*; 1 *Inst. 295.*

This formerly took place where an action of debt was brought against a man upon a simple contract between the parties, without deed or record; and the defendant swore in court, in the presence of eleven compurgators, that he owed the plaintiff nothing, in manner and form as he had declared. The reason of this waging of law was, because the defendant might have paid the plaintiff his debt in private, or before witnesses who might be all dead, and therefore the law allowed him to wage his law in his discharge; and his oath should rather be accepted to discharge himself, than the law would suffer him to be charged upon the bare allegation of the plaintiff. 2 *Inst. 45.*

Wager of law was used in actions of debt without specialty; and also in action of detinue, for goods or chattels lent or left with the defendant, who might swear on a book, that he detained not the goods in manner as the plaintiff had declared; and his compurgators (who must in all cases, as it seems now, be eleven in number) swear that they believe his oath to be true. 3 *Comm. c. 22.*

The defendant could not wage his law in any action but personal actions, where the cause was secret; and wager of law has been denied on hearing the case, and the defendant been advised to plead to issue, &c. 2 *Lil. 675, 676.*

Executors and administrators, when charged for the debt of the deceased, were not admitted to wage their law; for no

man could with a safe conscience wage law of another's man's contract; that is, swear that he never entered into it, or at least he privately discharged it. *Finch, L. 424.* The king also had his prerogative; for as all wager of law imported a reflection on the plaintiff for dishonesty, therefore there was no such wager on actions brought by him. *Finch, L. 425.* And this prerogative extended and was communicated to debtor and accomptant, for on a writ of *quo minus* in the exchequer for a debt on simple contract the defendant was not allowed to wage his law. 1 *Inst. 295.*

In an action of debt on a by-law, the defendant waged his law; a day being given on the roll for him to come and make his law, he was set at the right corner of the bar, and the secondary asked him if he was ready to wage his law, who answering that he was, he laid his hand on the book, and then the plaintiff was called; then the judges admonished him and his compurgators not to swear rashly; and thereupon he made oath that he did not owe the money *modo et forma* as the plaintiff had declared; and then his compurgators, who were standing behind him, were called, and each of them laying his right hand upon the book, made oath that they believed what the defendant had sworn was true. 2 *Fent. 171*; 2 *Salk. 682.*

The manner of waging law was thus:—he that was to do it brought his compurgators with him into court, and stood at the end of the bar towards the right hand of the chief justice; and the secondary asked him Whether he would wage his law? If he answered that he would, the judge admonished him to be well advised, and told him the danger of taking a false oath; and if he still persisted, the secondary said, and he that waged his law repeated after him: "Hear this, ye justices, that I, A. B., do not owe to C. D. the sum of, &c. nor any penny thereof, in manner and form as the said C. D. hath declared against me: so help me God." Though before he took the oath the plaintiff was called by the crier thrice; and if he did not appear he became nonsuited, and then the defendant went quit without taking his oath; and if he appeared, and the defendant swore that he owed the plaintiff nothing, and the compurgators gave it upon oath that they believed he swore true, the plaintiff was barred for ever; for when a person waged his law, it was as much as if a verdict passed against the plaintiff if the plaintiff did not appear to hear the defendant perform his law, so that he was nonsuit, he was not barred, but might have brought a new action. 1 *Inst. 155*; 2 *Lil. Abr. 674.*

The following ingenious deduction of the origin and explanation of the nature of wager of law is extracted from *Kendal's Argument on Trial by Battle*, and for *Abolishing Appeals*, a work in which so much research and acuteness are manifested, that it is to be lamented that the author did not bestow a little more pains upon it to avoid errors and omissions which seem the result of almost wilful carelessness.

To understand the matter thoroughly (says that writer) we must carry back our imagination to the time when European society consisted but of two great classes, that is, of *freemen*

and slaves; when a third class was created by the subdivision of freemen into knights and simple freemen; when national and personal defence was the noblest, because it was the most important civil employment; when trade was limited and insignificant, and when the arts (including the art of husbandry, and excepting only the art of war,) were abandoned to the pursuit of slaves. All freemen under these circumstances were warriors; and freemen at this time, and indeed at all others, had a law of their own, their *liberam legem*. In matters of controversy they were to be believed on their oath; and this high privilege was supported by the magnanimous and concomitant provision, that they might always be called upon to prove or defend their honour by their lives by trial by battle.

It was under the same circumstances of society that the other ancient mode of trial called *ordeals* sprung up; modes of trial in which the accused was neither permitted to defend himself by his body, nor to discharge himself by his oath. In the rudest times there was a numerous portion of society, including women, priests, the young, the aged, the blind, the lame, and the whole population of slaves, who could not defend themselves by battle; who, therefore, had no claim to be believed on their oaths, and the greater part of whom were not allowed to offer them. Priests were excepted, because that was accorded to their sanctity which was yielded to freemen as due to their honour; and hence what the law calls *canonical purgation*, in contradistinction to the vulgar purgation, or trial of the common people by ordeal. See *Purgation*.

Serfs or slaves on either hand could have no trial by arms, nor by oath, because they had neither military, civil, nor religious character to justify such an indulgence.

Thus then there were three classes of trials: *battle* for freemen, *oaths* for priests, and *ordeals* for women, infirm persons, and slaves.

But by degrees, as the arts of peace increased in estimation, their professors rose in the scale of society, and were privileged for their encouragement; and on this occasion a new class of freemen was created; freemen, not by birth or landed tenure, but by charter,—freemen, not warlike, but composed of artisans and traders. Now these freemen had their free law; they were raised above the mode of trial belonging to slaves, because they were freemen; but they did not aspire to the honours of trial by battle, because they were not warriors. The privileges therefore granted to them were assimilated to those of the clergy, though they were still kept at a further distance even from these; they were men of peace, but not of sanctity; and therefore, while the priest was permitted to discharge himself by his single oath, the lay citizen was obliged to produce his neighbours, who were to swear that he was worthy of being believed on his oath.

This was wager of law; this is its foundation as a privilege of freemen of cities; and this privilege stood opposed to trial by battle on appeal at the suit of a subject, and trial by jury on indictment at the suit of the crown.

Blackstone seems to suppose that wager of law stood in opposition to wager of battle in all cases, as if battle were not law. But it is shown by the author from whom the foregoing quotation is made that the laws or modes of trial were many; that battle *legem manifestam* was one of them, and, as such, protected by Magna Charta as the *legem terræ*, distinguished from the trial *per pares*. Wager of law, says the same writer, was merely a popular name. Oath-law, *legem sacramentum*, was the true one, and this stood opposed to assise law or trial by jury, as much as to trial by battle.

The wager of law (says Blackstone) was never permitted but where the defendant bore a fair and irreproachable character; and it also was confined to such cases where a debt might be supposed to be discharged, or satisfaction made in private, without any witness to attest it; and many other

prudential restrictions accompanied this indulgence. But at length it was considered that (even under all its restrictions) it threw too great a temptation in the way of indigent or profligate men, and therefore by degrees new remedies were devised, and new forms of actions were introduced, wherein no defendant is at liberty to wage his law. So that now (he adds) no plaintiff need at all apprehend any danger from the hardness of his debtor's conscience, unless he voluntarily chose to rely on his adversary's veracity by bringing an obsolete instead of a modern action. Therefore one shall hardly hear at present of an action of debt brought upon a simple contract, that being supplied by an action of trespass on the case for the breach of a promise or *assumpsit*, wherein, though the specific debt cannot be recovered, yet damages may, equivalent to the specific debt; and this being an action of trespass, no law can be waged therein. So, instead of an action of detinue to recover the very thing detained, an action of trespass on the case in trover and conversion is usually brought, wherein, though the horse or other specific chattel cannot be had, yet the defendant shall pay damages for the conversion equal to the value of the chattel; and for this trespass also no wager of law is allowed. In the room of actions of account a bill in equity is usually filed, wherein, though the defendant answers upon his oath, yet such oath is not conclusive to the plaintiff; but he may prove every article by other evidence, in contradiction to what the defendant has sworn. So that wager of law is quite out of use, being avoided by the mode of bringing the action; but still it is not out of force. And therefore, when a new statute inflicts a penalty, and gives an action of debt for recovering it, it is usual to add, "in which no wager of law shall be allowed;" otherwise an hardy delinquent might escape any penalty of the law, by swearing he had never incurred, or else had discharged it. See 3 *Comm. c. 22*, where many particulars as to this species of trial are detailed.

Wager of law, though obsolete in the time of Blackstone, was resorted to in a modern case. The court, on being applied to, refused to give any assistance to the defendant by assigning the number of compurgators with whom he should come to perfect his law. The defendant proposed to bring eleven, but the plaintiff abandoned his action. 2 *B. & C. 538*.

It was at length altogether abolished by the 3 & 4 *Wm. 4. c. 42. § 13*.

WAGERING POLICIES. See *Insurance*.

WAGERS. Although the law does not prohibit wagers in general, and if made on indifferent subjects they are valid, however trivial they may be, yet the courts have of late years discountenanced them, and expressed regret that they were ever sanctioned; and some judges have refused to try actions on wagers which, though not illegal, raised questions in which the parties have no interest, and are of a trifling or ridiculous nature. A judge may, undoubtedly, by virtue of his general superintending power, defer the trial of an action on a wager, which, being legal, is yet of an unimportant or contemptible character; but it would seem he cannot absolutely reject such a cause. See 7 *Price, 540*.

I. *What Wagers are illegal.*

II. *In what cases money paid or deposited on account of Wagers may be recovered.*

I. WAGERS are void if they are of such a nature that they might have an illegal tendency, although they are not accompanied by an illegal intention in the particular instance; as a wager between two voters respecting the event of an election. 1 *T. R. 56*.

By the 7 *Ann. c. 16*, all wagers laid upon a contingency relating to the then war with France, and all securities, &c. thereon, were declared to be void, and persons concerned were to forfeit double the sums laid.

A wager on the length of life of Buonaparte (then First Consul of France), arising out of the conversation as to the probability of his coming to a violent end, was held void on the grounds of immorality and impolicy. 16 *East*, 150.

Where two boxers fought for a wager of five guineas; on assumption for that sum brought by the winner, it was held that the action would not lie, the act being a breach of the peace. *Webb v. Bishop*, *Glouces. Ass.* 1731, *Bul. Ni. Pri.* 16. And an action will not lie on a wager whether an unmarried woman would have a child by a certain day, 4 *Camp.* 152; nor on a wager as to the sex of a third person, *Comp.* 729; nor on a wager on an abstract question of law, or judicial practice, not arising out of circumstances really existing, and in which the parties have an interest, 12 *East*, 247; 2 *Camp.* 408; nor on a wager as to the amount of any branch of the public revenue, 2 *T. R.* 610; 2 *Bos. & Pull.* 130; nor on a wager that plaintiff would not marry within six years, since this is in restraint of marriage, and void, 10 *East*, 22; nor on a wager on a cock-fight, 3 *Camp.* 140; or a dog-fight, 1 *Ry. & Moo.* 213.

No action will lie on a wager respecting the mode of playing an illegal game; and if such a cause be set down for trial, the judge at *Nisi Prius* is justified in ordering it to be struck out of the paper. 2 *H. Bl.* 43.

Neither will an action lie on a wager on a horse-race, if the sum betted by either party be above 10*l.*, 2 *Str.* 1159; 2 *Wils.* 309; 2 *Black.* 706; or if the horse-race is run for less than 50*l.*, though the sums betted be under 10*l.*, *Johnson v. Bann*, 4 *T. R.* 1; nor although the sum run for is above 50*l.* unless the race is a *bond fide* horse-race on the turf, *Ximenes v. Jacques*, 6 *T. R.* 499; *Whaley v. Pajot*, 2 *Bos. & Pull.* 51. But if neither of the sums betted on a horse-race amounts to 10*l.* and the race is run for 50*l.* or upwards, an action lies on the wager, 2 *Camp.* 438.

So an action will not lie for a wager, though for more than 50*l.* that the plaintiff could perform a certain journey with a post-chaise and pair of horses in a given time, 6 *T. R.* 499; nor a wager that a single horse should go from A. to B. on the high road, sooner than one of two other horses; these being transactions prohibited by the 16 *Car.* 1. c. 7. § 2. and 9 *Ann.* c. 14; and not legalized by the 13 *Geo.* 2. c. 19. or the 18 *Geo.* 2. c. 34, which statutes relate to *bond fide* horse-racing only. 2 *B. & P.* 51. See *Horse-races*.

It seems also that a wager between two proprietors of carriages for conveying passengers, that a given person shall go by one particular carriage, and no other, is illegal, as exposing the individual to inconvenience and importunity. 1 *B. & Ald.* 683.

In general a wager may be considered as legal if it be not an incitement to a breach of the peace, or to immorality; or if it do not affect the feelings or interest of a third person, or expose him to ridicule; or if it be not against sound policy. *Comp.* 729; 2 *T. R.* 610, 616; 3 *T. R.* 697; where the principal cases on this point are very fully considered. See also 5 *T. R.* 405; 7 *T. R.* 535; 8 *T. R.* 575; 2 *Bos. & Pull.* 130, 467.

An action will lie on a wager whether the defendant be older than the plaintiff, *Hussey v. Crickett*, 3 *Camp.* 168; and a wager as to the identity of a third person is not illegal, *Bland v. Collett*, 4 *Camp.* 157.

It is not material that the plaintiff knows at the time that he is right with respect to the matter in which the wager is laid. 4 *Camp.* 157.

II. In 7 *T. R.* 535, the Court of K. B. (on the ground that whenever money has been paid upon an illegal consideration, it may be recovered back by the party who has improperly paid it,) held that where the plaintiff had given the defendant 100*l.* to receive 300*l.* in case of a peace within a certain time, he might recover back his 100*l.* though after the event of the wager was decided, by which, if the wager

had been legal, he would have won his 300*l.* And see 1 *B. & A.* 683.

With respect to stakeholders, if two persons deposit money with a third, subject to the event of a legal wager, no part of the amount deposited can be recovered from him except by the winner. 4 *Camp.* 37; *Id.* 157. Neither is it competent to either to rescind the agreement or wager.

But where the wager is on an illegal battle or race, after the parties have fought or run they may still recover back their deposits from a stakeholder, if they give notice to him before he has paid them over. 5 *T. R.* 405; 4 *Taunt.* 474; 7 *Price*, 549; 8 *B. & C.* 221. In strictness, the parties perhaps should not be allowed to rescind the contract and recover the deposits, unless they do so before the risk is altered by the lapse of time. See observation of Mansfield, C. J., 3 *Taunt.* 282; and note (a), 4 *Taunt.* 292.

But where money deposited on an illegal wager had been paid over to the winner by the consent of the loser, the court held that the latter could not afterwards maintain an action against the former to recover back his deposit. 8 *T. R.* 575. And although the wager be illegal, the stakeholder ceases to be liable if he pay the stakes to the winner without notice or dispute. But a stakeholder receiving country bank-notes as money, and paying them over wrongfully to the original depositor, after he had lost the wager, was held answerable to the winner as for money had and received. 13 *East*, 120.

A. and B. laid a wager on the event of a boxing-match, and deposited their stakes. The battle was fought, and a dispute arising, the matter was referred to an umpire, who decided against A. He however refused to abide by the decision, claimed the whole money deposited, and threatened the stakeholder (the defendant) with an action in case of refusal. The stakeholder paid the money to B. in accordance with the umpire's decision. The claim of A. was held valid as to the moiety deposited by himself, on the ground that he had a right to rescind the contract at any time before its actual completion by payment over, even after the event was decided; and that the stakeholder, having paid the money after notice, was liable to A. for his deposit. 2 *B. & C.* 221.

By the Scotch Act 1621. c. 14. (determined in 1774 not to be in desuetude) when a person wins more than 100 marks within twenty-four hours on cards, dice, or horse-racing, the surplus shall be given to the poor. A very excellent regulation, and fit to be applied throughout the kingdom.

See further, *Gaming*.

WAGES. The reward agreed upon by a master to be paid to a servant, or any other person which he hires to do business for him. 2 *Litt. Abr.* 677. See *Labourer, Servants*.

WAIFS, from the Sax. *wafian*, Fr. *chose gaaivée*. Lat. *bona waviata*.] Goods which were stolen and waived (i. e. abandoned) by the felon, on his being pursued, for fear of being apprehended, which were formerly forfeited to the king, or lord of the manor, if he had the franchise of waif. *Kitch.* 81.

If a felon in pursuit waived the goods; or, having them in his custody, and thinking that pursuit was made, for his own ease and more speedy flight fled away and left the goods behind him; then the king's officer, or the bailiff of the lord of the manor within whose jurisdiction they were left, who had the franchise of waif, might have seized the goods to the king's or lord's use, and keep them, except the owner made fresh pursuit after the felon, and sued an appeal of robbery within a year and a day, or gave evidence against him whereby he was concluded, &c. In which cases the owner should have had restitution of his goods so stolen and waived. 21 *Hen.* 8. c. 11 (repealed); 5 *Rep.* 109; *Finch.* L. 212.

The law made a forfeiture of goods waived as a punishment to the owner of the goods for not bringing the felon to justice; but if the thief had not the goods in his possession when he fled, there was no forfeiture. If a felon stole goods

and hid them, and afterwards fled, those goods were not forfeited; so where he left stolen goods any where with an intent to fetch them at another time, they were not waived; and in these cases the owner might have taken his goods where he found them, without fresh suit, &c. *Cro. Eliz.* 694; *5 Rep.* 109; *Moor.* 785.

The goods of a foreign merchant, though stolen and thrown away in flight, were never waifs. *Fitz. Abr. tit. Estray*, l. 3; *Bulst.* 19. The reason assigned for this was not only for the encouragement of trade, but also because there was no wilful default in the foreign merchant's not pursuing the thief, he being generally a stranger to our laws, our usages, and our language. *1 Comm. c. 8. p. 297.*

Waived goods also did not belong to the king till seized by somebody for his use; for if the party robbed could seize them first, though at the distance of twenty years, the king should never have had them. *Finch. L.* 212; *1 Comm. c. 8.*

Though waif is generally spoken of goods stolen, yet if a man were pursued with hue and cry as a felon, and he fled and left his own goods, these would be forfeited as goods stolen; but they were properly fugitive's goods, and not forfeited till it were found before the coroner, or otherwise of record, that he fled for the felony. *2 Hawk. P. C. c. 49. § 17.*

Now by the 7 & 8 *Geo. 4. c. 28. § 3.* the jury are not to be charged concerning the goods of the person indicted, or whether he fled for treason or felony. See further, *Forfeiture*, II. 1.

Waifs and strays are said to be *nullius in bonis*, and therefore they belong to the lord of the franchise where found. *Britton, c. 17.* We read of *placita coronæ et waif* in the manor of Upton, &c. in *com. Salop.* See *22 Vin. Abr.* 408—410; and ante, tit. *Estray*.

WAIN, *plastrum*.] A cart, waggon, or plough, to till land.

WAINABLE, i. e. that may be ploughed or manured; land tillable. *Chart. Antiq.*

TO WAIVE, *waivare*.] In the general signification is to forsake; but is specially applied to a woman, who, for any crime for which a man may be outlawed, is termed waived. *Reg. Orig.* 132. See *Outlawry*.

WAIVER. The passing by of a thing, or a declining or refusal to accept it. Sometimes it is applied to an estate, or something conveyed to a man, and sometimes to a plea; and it is frequently applied to the declining to take advantage of an irregularity in legal proceedings.

A waiver or disagreement as to goods and chattels, in case of a gift, will be effectual. *Lit. § 710.* If a jointure of lands be made to a woman after marriage, she may waive this after her husband's death. *3 Rep.* 27. An infant, or if he die, his heirs, may by waiver avoid an estate made to him during his minority. *1 Inst.* 23, 348. But where a particular estate is given with a remainder over, there regularly he that hath it may not waive it to the damage of him in remainder: though it is otherwise where one hath a reversion, for that shall not be hurt by such waiver. *4 Shep. Abr.* 192. After special issue joined in any action the parties cannot waive it without motion in court. *1 Keb.* 225. Assignment of error by attorney on an outlawry ordered to be waived, and the party to assign in person after demurrer for this cause. *2 Keb.* 16.

The receipt of rent with a knowledge of a forfeiture committed by the lessee is a waiver of such forfeiture.

In case of the seduction of an apprentice the master may waive the tort, and maintain an action against the seducer for the work and labour and service of the apprentice. *3 M. & S.* 191.

And so in many other cases a party may waive the tort and bring an action of *assumpsit*.

So costs are sometimes waived to obtain speedy execution. See *Archb. by Chitty*, 380, 4th ed.

See further on this subject, *Assumpsit*, *Disclaimer*, *Forfeiture*, *Lease*, &c.

WAKE. The eve-feast of the dedication of churches, which in many country places is observed with feasting and rural diversions, &c. *Puroch. Antiq.* 609.

WAKEMAN, *quasi* watchman.] The chief magistrate of the town of Ripon in Yorkshire is so called. *Camd.*

WAKENING. Is a summons narrating that the complainant has raised a summons which he had let sleep for year and day, concluding that all persons cited in the first should compare, hear, and see the aforesaid action called and wakened and debated till sentence be given. *Scotch Dict.*

WALES, *Wallia*.] Part of Great Britain on the west side of England; formerly divided into three provinces, North Wales, South Wales, and West Wales, and inhabited by the offsprings of the ancient Britons, chased thither by the Saxons called in to assist them against the Picts and Scots. *Lamb. ; Stat. Wallie*, 12 *Edw.* 1.

England and Wales were originally but one nation; and so they continued till the time of the Roman conquest; but when the Romans came, those Britons who would not submit to their yoke betook themselves to the mountains of Wales; from whence they came again soon after the Romans were driven away by their dissensions here. After this came the Saxons, and gave them another disturbance; and then the kingdom was divided into an heptarchy; and then also began the Welsh to be distinguished from the English. Yet it is observable, that though Wales had princes of their own, the king of England had superiority over them, for to him they paid homage. *Camden*; *2 Mod.* 11. See further, *1 Comm. Introd.* § 4.

The fact of the Welsh being the same race with the ancient Britons has, however, been doubted. See *Moore's History of Ireland*, vol. i. 90.

The 28 *Edw. 3. st. 1. c. 2.* annexed the marches of Wales perpetually to the crown of England, so as not to be of the principality of Wales. And by 27 *Hen. 8. c. 26.* Wales was incorporated into and united with England. All persons born in Wales are to enjoy the like liberties as those born in England, and lands to descend there according to the English laws. The laws of England were to be executed in Wales; and the king to have a chancery and exchequer at Brecknock and Denbigh. Officers of law and ministers should keep courts in the English tongue; and the Welsh laws and customs were to be inquired into by commission, and such of them as should be thought fit continued; but the laws and customs of North Wales were saved.

By 34 & 35 *Hen. 8. c. 26.* Wales was divided into twelve counties, and a president and council appointed to remain in Wales and the marches thereof, with officers, &c. Two justices were to be assigned to hold a session twice every year, and determine pleas of the crown and assizes, and all other actions; and justices appointed as in England, &c. By 18 *Eliz. c. 8.* the crown was empowered to appoint two persons, learned in the laws, to be judges in each of the Welsh circuits, which had but one justice before; or grant commissions of association, &c.

An office for enrolments was erected, and the fees and proceedings regulated in passing fines and recoveries in Wales, by 27 *Eliz. c. 9.*

By 1 *W. & M. st. 1. c. 27.* the court anciently holden before the president and council of the marches of Wales was abolished; and by 9 & 10 *Wm. 3. c. 16.* the courts at Westminster were empowered to award execution on existing judgments of the courts so abolished.

And by 8 *Geo. 1. c. 25. § 6.* the regulations of 29 *Car. 2. c. 3. § 14.* as to signing judgments, were extended to Wales. See *Judgment*.

By 4 *Ann. c. 16. § 24.* all the statutes of *jeofails* were extended to Wales. See *Amendment*.

Persons living in Wales may give and dispose of their goods and chattels by will, in like manner as may be done within any part of the province of Canterbury, or elsewhere. 7 & 8 Wm. 3. c. 38. See *Wills*.

By the 11 & 12 Wm. 3. c. 9. § 2. jurors returned on issues in Wales were to have 6l. a year of freehold or copyhold, above reprises. But now see *Jury*, 1.

By 20 Geo. 2. c. 42. § 3. in all cases where the kingdom of England, or that part of Great Britain called England, hath been or shall be mentioned in any act of parliament, the same has been and shall be taken to comprehend the dominion of Wales, and town of Berwick.

By the 11 & 12 Wm. 3. c. 9. § 2. none were to be held to bail in Wales, unless affidavit be made that the cause of action is 20l. or upwards, raised by the 7 & 8 Geo. 4. c. 71. to 50l.; and in personal actions, where the damages are under 40s. the plaintiff should have no more costs than damages.

But these acts are virtually repealed by the 11 Geo. 4. and 1 Wm. 4. c. 70. (see *post*). And now defendants in Wales may be arrested upon process issued out of the superior courts at Westminster, where the cause of action is 20l., in like manner as defendants in other counties.

By the 11 Geo. 4. and 1 Wm. 4. c. 70. "for the more effectual administration of justice in England and Wales," it is enacted, that (after 12th October, 1830,) the king's writ shall be directed and obeyed, and the jurisdiction of the Courts of King's Bench, Common Pleas, and Exchequer, and the judges of these courts, shall extend and be exercised over and within the several counties in Wales, in like manner, to the same extent, and for all intents and purposes, as such jurisdiction is exercised in England; and that all original writs to be issued into the several counties of Wales shall be issued by the cursitors for London and Middlesex; and the process and proceedings thereon shall be issued by and transacted with such officers of the several Courts of King's Bench and Common Pleas, as shall be named by the chief justice of each court.—§ 13. (This act extends, in like manner, to the county, and county of the city of Chester.)

All powers of the judges and courts of great sessions, both in law and equity, shall cease and determine; and all suits then depending in any of the said courts shall be transferred, if in equity, to the Courts of Chancery or Exchequer, and if in law, to the latter court.—§ 14.

Attornies, &c. of the court of great sessions are allowed to practise in the courts at Westminster in suits depending, without payment of any additional duty; and afterwards, on payment of such duty as, with the duty before paid by them, shall be equal to the duty paid in the superior courts.—§ 16, 7, 18.

Assizes shall be held for the trial and disposition of all matters, criminal and civil, within the several counties and towns in Wales, under commissions of assize and gaol delivery, and other writs and commissions to be issued in like manner as for the counties in England; and all laws relating to such commissions shall be extended to Wales. One judge of the two appointed to hold assizes for Wales and Chester, shall hold such assizes for South Wales, and the other for North Wales.—§ 19, 20.

§ 21, 22, contain regulations as to rendering defendants in custody (or not) in discharge of their bail.

Compensations are given by the act to those judges and officers whose offices determined; and the records of the courts abolished are to be kept as theretofore until otherwise provided by law.

The lord chancellor is empowered to appoint trustees for certain matters formerly appointed by the Welsh judges. — 31.

Provision is made for the oath of officers, § 32; and for passing the accounts of sheriffs for Welsh counties, § 3.

The attorney-general for Wales is to continue to exercise

his office (in person and not by deputy) during the king's pleasure.—§ 34.

By § 56. the courts of quarter sessions are to be holden at the same periods as the sessions in England. See *Sessions of the Peace*.

See further, *Indictment, Trial, Venue*.

WALISCUS, i. e. *servus*.] A servant, or any ministerial officer. *Leg. Inc.* c. 34.

WALKERS. Foresters, within a certain space of ground assigned to their care, in forests, &c. *Crompt. Jurisd.* 145.

WALSINGHAM. The demesne lands in Walsingham may be let by copy, and shall be copyholds. 35 Hen. 8. c. 13.

WALTHAM BLACKS. See *Black Acts*.

WANG, *Sax.*] The cheek, or jaw wherein the teeth are set. See *Seal*.

WANGA. An iron instrument with teeth. *Consuetud. Dom. de Farend.* MS. 18.

WANLASS, or driving the wanlass, is to drive deer to a stand, that the lord may have a shoot. An ancient customary tenure of lands. *Blount's Ten.* 140.

WANT. As to justification of theft on account of extreme want, see *Larceny*, I. 1.

WAPENTAKE, from the *Sax.* *weapon*, i. e. *armatura*, and *tac, tactus*.] Is all one with what we call a hundred; specially used in the north countries beyond the river Trent. *Bract. l.* 3; *Lamb*.

The words seem to be of Danish original, and to be so called for this reason; when first this kingdom, or part thereof, was divided into wapentakes, he who was the chief of the wapentake or hundred, and whom we now call a high constable, as soon as he entered upon his office, appeared in the field on a certain day, on horseback, with a pike in his hand; and all the chief men of the hundred met him there with their lances, and touched his pike; which was a sign that they were firmly united to each other by the touching their weapons. *Hoveden; Fleta, lib.* 2. But Sir Thomas Smith says, that anciently musters were made of the armour and weapons of the several inhabitants of every wapentake; and from those that could not find sufficient pledges for their good abearing, their weapons were taken away, and given to others; from whence he derives this word. *Rep. Angl. l.* 1. c. 16; *Camd. Brit.* 159; 2 *Inst.* 99.

Dr. Wilkins, in his *Glossary upon the Anglo-Saxon Laws*, derives wapentake from *weapon*, *arma*, and *teacan, doceere*; as the district where a given number of persons in each county were accustomed to meet and train themselves in the use of arms. *Wilks. LL. Anglo-Sax.* 117.

That the wapentake was one of the earliest terms used by the Saxons in this country for a district of territory, seems more than probable. It may be traced among the more ancient tribes of the north. Professor Ihre tells us, that among the Goths *wapntak* implied the manner in which decrees were made by the people at large, by the clashing of their arms. *Tacitus*, he adds, has described the usage in his time. He further informs us, that *wapntak* also denoted the confirmation of a judicial edict by the touch of arms. The votes being collected, the judge reached forth a spear, by touching which all his assessors confirmed the sentence. See 1 *Laws Domesday*, 18.

See further, *stat. antiq.* 3 Hen. 5. c. 2; 9 Hen. 6. c. 10; 15 Hen. 6. c. 7; and *tit. Hundred*.

WAR, *bellum*.] A fighting between two kings, princes, or parties, in vindication of their just rights; also the state of war, or all the time it lasts.

By our law, when the courts of justice are open, so that the king's judges distribute justice to all, and protect men from wrong and violence, it is said to be a time of peace. But when, by invasion, rebellion, &c. the peaceable course of justice is stopped, then it is adjudged to be a time of war; and

this shall be tried by the records and judges, whether justice at such a time had her equal course of proceeding or not. For time of war gives privilege to them that are in war, and all others within the kingdom. 1 *Inst.* 249.

In the civil wars of King Charles I. it was computed that there were not fewer than 200,000 foot and 50,000 horse in arms on both sides; which was an extraordinary host, considering it composed of Britons, sufficient to have shaken Europe, though it was otherwise fatally employed. In ancient times, when the kings of England were to be served with soldiers in their wars, a knight or squire that had revenues, farmers, and tenants, would covenant with the king, by indenture, inrolled in the exchequer, to furnish him with such a number of military men; and those men were to serve under him, whom they knew and honoured, and with whom they must live at their return. 1 *Inst.* 71. See *King, Militia, Soldiers, Tenures, &c.*

WARA. A certain quantity or measure of ground. *Mon. Ang.* i. 172.

WARD, custodia.] Is variously used in our old books.

A ward in London is a district or division of the city, committed to the special charge of one of the aldermen; of these there are 26, according to the number of the mayor and aldermen, of which every one has his ward for his proper guard and jurisdiction. *Stow's Survey.* See *London.*

A forest is divided into wards. *Manwood, par. 1. p. 97.* A prison is also called a ward.

Lastly, the heir of the king's tenant, that held in *capite*, was termed a ward during his nonage; and it is now usual to call all infants, under the power of guardians, wards. See *Tenure, II. 3; Guardian.*

WARDA, The custody of a town or castle, which the inhabitants were bound to keep at their own charge. *Mon. Ang.* i. 372.

WARDAGE, wardagium.] Seems to be the same with wardpenny.

WARDEN, guardianus; Fr. gardien.] Guardian or keeper. He that hath the keeping or charge of any persons or things by office; as the wardens of the fellowships or companies in London; wardens of the marches of Wales, &c.; warden of the Cinque Ports; warden of a forest; warden of the Stannaries; wardens (now justices) of the peace, 2 *Edw. 3. c. 3*; wardens of the tables of the king's exchange; warden of the armour in the Tower; warden (or keeper) of the rolls of the chancery; of the king's writs and records of his court of common bench; warden of the lands for repairing Rochester bridge; warden and minor canons of St. Paul's church; warden of the Fleet prison, &c.

See 59 *Geo. 3. c. 64.* for facilitating process against the latter in vacation. See further, *Guardian, Gaoler.*

WARD-HOLDING. The ancient military tenure of Scotland; abolished by the British act 20 *Geo. 2. c. 50.* See *Tenures, III. 4.*

WARDMOTE, wardmotus.] A court kept in every ward in London, ordinarily called the wardmote court.

The wardmote inquest hath power every year to inquire into and present all defaults concerning the watch and constables doing their duty; that engines, &c. are provided against fire; that persons selling ale and beer be honest, and suffer no disorders, nor permit gaming, &c.; that they sell in lawful measures; searches are to be made for vagrants, beggars, and idle persons, &c. who shall be punished. *Chart. K. Hen. II.; Lex Lond. 185.* See *London, Police.*

WARDPENY. Money paid and contributed to watch and ward. *Domesday.*

WARDWIT. The being quit of giving money for keeping of wards. *Terms de la Ley.*

WARDS, Court of. A court first erected in the reign of King Henry VIII. and afterwards augmented by him with the office of liveryes; wherefore it was styled the Court of Wards and Liveryes. It was abolished by the 12 *Car. 2. c. 24.* See *Tenures.*

WARD-STAFF. The constable or watchman's staff.

The manor of Langbourn, in Essex, is held by the service of the ward-staff, and watching the same in an extraordinary manner, when it is brought to the town of Eybridge. *Camd.*

WARECTARE. To plough up land designed for wheat in the spring, in order to let it lie fallow for better improvement, which in Kent is called Summer-land. Hence *Warectabilis campus*, a fallow field; *campus ad warectam*, terra warectata, &c.

WAREHOUSING SYSTEM. By this system is meant the allowing of goods imported to be deposited in public warehouses, at a reasonable rent, without payment of the duties on importation if they are re-exported; or if they are ultimately withdrawn for home consumption, without payment of such duties until they are so removed.

The first foundations of this system were laid by the 43 *Geo. 3. c. 132.* and it was greatly improved and extended by subsequent statutes, the provisions of which are embodied and consolidated by the 3 & 4 *H. M. 4. c. 57.*

The following is an outline of its principal clauses:

§ 2. The commissioners of the treasury, by their warrant, may appoint the ports in the United Kingdom which shall be warehousing ports for the purposes of the act; and the commissioners of the customs, subject to the directions of the commissioners of the treasury, by their order may appoint in what warehouses or places of special security, or of ordinary security, in such ports, and in what different parts or divisions of such warehouses or places, and in what manner any goods, and what sorts of goods, may and may only be warehoused and kept and secured without payment of any duty upon the first entry thereof, or for exportation only, in cases wherein the same may be prohibited to be imported for home use; and also in such order may direct in what cases (if any) security by bond, in manner thereafter provided, shall be required in respect of any warehouse so appointed.

By § 3. warehouses connected with wharfs, and within walls, &c., are to be warehouses of special security without appointment.

§ 5. Commissioners of the customs are to provide warehouses for tobacco, and treasury to fix rent.

By § 8. the warehouse-keeper may give general bond, if he be willing, for the payment of the duties on all goods warehoused with him, or otherwise the different importers shall give particular bonds for their separate goods.

§ 9. Sale of goods in warehouses by proprietor, if in writing, &c. shall be valid, although they remain in such warehouse; but the transfer of such goods shall be entered in a book by the officer of the customs having charge of the warehouse.

§ 11. Goods fraudulently concealed or removed, are forfeited. Penalty on opening warehouse, except in the presence of the custom-house officer, 500*l.*

By § 13. goods are to be carried to warehouse under authority of officers of customs, and as he shall direct, or otherwise are to be forfeited.

§ 14. Goods are to be cleared in three years; ship stores in one year (unless further time be given by the treasury); if not cleared, they may be sold or destroyed by the commissioners of the customs, and the produce applied to the payment of warehouse rent and other charges, and the overplus, if any, paid to the proprietor; and such goods, when sold, shall be held subject to all the conditions to which they were subject previous to such sale, except that a further time of three months from the sale shall be allowed to the purchaser for the clearing of such goods from the warehouse; and if not duly cleared within such three months, the same shall be forfeited.

§ 15. In case of accident in landing or shipping goods, the duty shall be remitted.

By § 16. goods permitted to be shipped from the warehouse, duty-free, as ship's stores,

§ 18. The duties are to be paid on original quantities, except in certain cases.

§ 19. The duties on tobacco, sugar, and spirits to be charged on quantities delivered, except in certain cases; and no allowance to be made for leakage, except as provided by the act.

§ 21. Goods may be removed to other ports to be re-warehoused; and on notice given, the officers are to prepare for their removal, under the seals of office.

§ 23. Bond is to be given to re-warehouse, which may be given at either port.

§ 25. Goods re-warehoused shall be held on the terms of the first warehousing.

§ 27. Goods in one warehouse may be removed to another warehouse in the same port.

§ 28. Such goods and the parties shall be subject to the original conditions on which the goods were held.

§ 29. If goods are sold, the new owner may give a bond, and release the original bond.

§ 31. Goods may be sorted, separated, and repacked in the same or in equal packages; and wine or rum may be bottled off for exportation, and rum drawn off for stores; brandy may be mixed with wine for exportation, in certain proportions; and casks of wine may be filled up or racked off; also samples may be taken, without entry or payment of duty.

§ 32. No alteration is to be made in goods or package but according to such regulations as the commissioners shall direct.

§ 34. No foreign casks, &c. to be used for repacking, unless duties have been paid, &c.

§ 35. Silks, linens, &c. may be delivered out of the warehouse to be cleaned, &c. or bleached; also rice of the East Indies to be cleaned.

§ 36. Copper ore may be taken out of warehouse to be smelted.

§ 37. No goods warehoused, which were imported in bulk, shall be delivered, except in the whole quantity of each parcel, or in a quantity not less than one ton weight, unless by special leave.

§ 38. Packages to be marked before delivery.

§ 39. The treasury may make regulations for ascertaining the amount of decrease or increase of the quantity of any particular sorts of goods, and direct in what proportion any abatement of duty payable under the act, for deficiencies, shall upon exportation be made on account of any such decrease: provided that if such goods be lodged in warehouses of special security, no duty shall be charged for deficiency on exportation, except where suspicion shall arise that part of such goods has been clandestinely conveyed away, nor shall any such goods (unless they be wine or spirits) be measured, counted, weighed, or gauged for exportation, except in cases of suspicion.

§ 40. specifies the allowances for natural waste of wine, spirits, &c. in warehouses not of special security.

§ 41. In cases of embezzlement and waste through misconduct of officers, the damages are to be made good to the proprietor.

§ 44. No goods shall be exported from the warehouse to the Isle of Man, except such goods as may be imported into the island with licence of the commissioners of customs, and in virtue of any such licence.

§ 45. Goods removed from warehouse for shipment are to be under the care of the officers of customs.

§ 46. Ships are to be not less than seventy tons for exporting warehoused goods.

§ 47. Goods landed in docks shall be liable to claims for freight as before landing.

For a list of the ports where goods may be warehoused, and of the goods that may be warehoused in each, see the tables in *McCulloch's Com. Diet.*

WARGUS. A banished rogue. *Leg. Hen. 1. c. 83.*

WARNING. By the 2 *Wm. 4. c. 39. § 4.* a warning is to be subscribed to the writ of *capias* given by that act (see *Process*), stating that if the defendant, being in custody, shall be detained on the writ, or being arrested shall go to prison for want of bail, the plaintiff may declare against him before the end of the term next after such detainer or arrest, and proceed to judgment and execution.

WARNISTURA. Garniture, furniture, provision, &c. *Pat. 9 Hen. 3.*

WARNOTH. There is an ancient custom, that if any tenant holding of the castle of Dover, failed in paying his rent at the day, that he should forfeit double, and for the second failure treble: and the lands so held are called *terræ cultæ & terræ de warnoth.* *Mon. Angl. ii. 589.*

WARRANTICE. The Scotch term for warranty. See that title.

WARRANT. A precept under hand and seal to some officer to take up any offender, to be dealt with according to due course of law. See *Commitment, Constable, Justices of Peace.*

WARRANT OF ATTORNEY. An authority and power given by a client to his attorney to appear and plead for him, or to suffer judgment to pass against him by confessing the action, by *nil dicit, non sum informatus, &c.*

At common law, the warrant authorizing the attorney to act in a suit, might be filed even after judgment, for its not being filed in time was not assignable as error. 1 *Wils. 39.* Many statutes and rules of court, however, required the warrant to be filed at certain specified times; and previous to the recent rule of court, the warrant of the attorney for the plaintiff must have been filed the same term he declared (4 & 5 *Ann. c. 16. § 5.*) and the warrant of the defendant's attorney must have been given to and filed by him at the same time with his own (*R. M. 5 Ann. r. 2.*) These statutes and rules are now virtually repealed by a rule of *H. T. 4 Wm. 4. r. 4.* which declares that no entry shall be made on record of any warrant of attorney to sue or defend.

Before the 5 *Geo. 4. c. 41.* the warrant must have been stamped, and a memorandum of it filed with the proper officer; but now, as the stamp duty is repealed by the above statute, the filing of the memorandum, which was required to protect the revenue, is unnecessary, and at all events is discontinued. See *Arch. Pr. by Chitty, 4th ed. 39.*

As to warrants of attorney to confess judgment, see *Judgments acknowledged for Debts.*

WARRANTIA CHARTÆ. A writ where a man was enfeoffed of lands with warranty, and then he was sued or impleaded in assize or other actions, in which he could not vouch or call to warranty. By this writ he might have compelled the feoffor or his heirs to warrant the land unto him; and if the land were recovered from him, he should recover as much lands in value against the warrantor, &c. But the writ ought to have been brought by the feoffee depending the first writ against him, or he lost his advantage. *F. N. B. 134; Terms de la Ley, 372, 588.* See *Pleadings, l. 1.*

If a person enfeoffed another of lands by deed with warranty, and the feoffee made a feoffment over, and took back an estate in fee, the warranty was determined, and he should not have the writ *warrantia chartæ*, because he was in of another estate. Also where one made a feoffment in fee with warranty against him and his heirs, the feoffee should not have a *warrantia chartæ* upon this warranty against the feoffor or his heirs, if he were impleaded by them; but the nature of it was to rebut against the feoffor and his heirs *Dalt. 48; 2 Lit. Abr. 684.*

This writ might have been sued forth before a man was impleaded in any action, but the writ supposed that he was impleaded; and if the defendant appeared and said that he was not impleaded, by that plea he confessed the warranty, and the plaintiff should have judgment, &c.; and the party

should recover in value of the lands against the vouchee, which he had at the time of the purchase of his *warrantia chartæ*; and therefore it might have been good policy to bring it against him before he was sued, to bind the lands he had at that time; for if he had aliened his lands before the voucher, he should render nothing in value. *New Nat. Br.* 298, 299.

If a man recovered his warranty in *warrantia chartæ*, and after he was impleaded, he ought to have given notice to him against whom he recovered, of the action, and prayed him to show what plea he would plead to defend the land, &c. where one upon a warranty vouched and recovered in value, if he was then impleaded of the land recovered, he might not vouch again, for the warranty was once executed. *23 Edw. 3. 12.*

In a warranty to the feoffee in land made by the feoffor, upon voucher, if special matter were shown by the vouchee, when he entered into the warranty, viz. that the land at the time of the feoffment was worth only 100*l.* and at the time of the voucher it was worth 200*l.* by the industry of the feoffee, the plaintiff in a *warrantia chartæ*, &c. should recover only the value as it was at the time of the sale. *Jenk. Cent. 35.*

If the vouchee could show cause why he should not warrant, that must have been tried, &c. See *Recovery*.

This writ has long been obsolete, and was abolished by the *3 & 4 Wm. 4. c. 27. § 36.*

WARRANTIA DIEL. An ancient writ, where one having a day assigned personally to appear in court to any action, is in the mean time employed in the king's service, so that he cannot come at the day appointed: it was directed to the justices, to this end, that they neither take nor record him in default for that time. *Reg. Orig. 18; F. N. B. 17.* See *Essoign, Protection*.

WARRANTY,

WARRANTIA.] A promise or covenant by deed by the bargainor, for himself and his heirs, to warrant or secure the bargainee and his heirs against all men for the enjoying of the thing granted. *Bract. lib. 2, § 5; West. Symb. par. 1.*

As applied to lands, it is defined to be a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same; and, either upon voucher or by judgment in a writ of *warrantia chartæ*, to yield other lands and tenements to the value of those that shall be evicted by a former title, or else may be used by way of rebutter. *1 Inst. 365 a.* See *Litt. § 697*; and Mr. Butler's note there on the subject of warranty. See *Deed, Recovery, Tenures, I. 7. &c.*

The following account of the doctrine of warranty, which has long been obsolete, and by the recent changes in the law relating to real property has been deprived of all practical use and application, is from the *2 Comm. c. 20.*

By the clause of warranty in a deed, the grantor doth for him himself and his heirs warrant and secure to the grantee the estate so granted. By the feudal constitution, if the vassal's title to enjoy the feud was disputed, he might vouch or call the lord or donor to warrant or insure his gift, which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense. And so by our ancient law, if before the statute of *quia emptores* a man enfeoffed another in fee, by the feudal verb *dedi*, to hold of himself and his heirs by certain services, the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered. *Co. Lit. 384.* Or if a man and his ancestors had immemorably holden land of another and his ancestors by the service of homage (which was called *homage ancestral*), this also bound the lord to warranty, the homage being an evidence of such a feudal grant. *Litt. § 143.*

And upon a similar principle, in case after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty, because they enjoy the equivalent. *Co. Lit. 174.* And so even at this day, upon a gift in tail, or lease for life, rendering rent, the donor or lessor, and his heirs (to whom the rent is payable,) are bound to warrant the title. *1 Inst. 384.* But in a feoffment in fee by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs, because it is a mere personal contract on the part of the feoffor, the tenure, (and of course the ancient services,) resulting back to the superior lord of the fee. *1 Inst. 384.* And in other forms of alienation gradually introduced since that statute, no warranty whatsoever is implied, they bearing no sort of analogy to the original feudal donation. *1 Inst. 102.* And therefore in such cases it became necessary to add an express clause of warranty to bind the grantor and his heirs, which is a kind of covenant real, and can only be created by the verb *warrantizo* or *warrant*. *Litt. § 773.*

These express warranties were introduced even prior to the statute of *quia emptores*, in order to evade the strictness of the feudal doctrine of non-alienation without the consent of the heir. For though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet if a clause of warranty was added to the ancestor's grant, this covenant descending upon the heir, insured the grantee, not so much by confirming his title as by obliging such heir to yield him a recompense in lands of equal value; the law in favour of alienations, supposing that no ancestor would wantonly disinherit his next of blood; and therefore presuming that he had received a valuable consideration, either in land or in money, which had purchased land, and that this equivalent descended to the heir, together with the ancestor's warranty. *Co. Lit. 373.* So that when either an ancestor, being the rightful tenant of the freehold, conveyed the land to a stranger and his heirs, or released the right in fee simple to one who was already in possession, and superadded a warranty to his deed, it was held that such warranty not only bound the warrantor himself to protect and assure the title of the warrantee, but it also bound his heir; and this, whether that warranty was *lineal* or *collateral* to the title of the land. *Lineal* warranty was, where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty; as where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty, this was *lineal* to the younger son. *Litt. § 703, 706, 707.* *Collateral* warranty was where the heir's title to the land neither was nor could have been derived from the warranting ancestor; as where a younger brother released to his father's disseisor, with warranty, this was *collateral* to the elder brother. *Litt. § 705, 707.* But where the very conveyance to which the warranty was annexed, immediately followed a disseisin, or operated itself as such (as where a father, tenant for years, with remainder to his son in fee, aliened in fee-simple with warranty,) this being, in its original, manifestly founded on the tort or wrong of the warrantor himself, was called a *warranty commencing by disseisin*, and being too palpably injurious to be supported, was not binding upon any heir of such tortious warrantor. *Litt. § 698, 702.*

In both lineal and collateral warranty, the obligation of the heir (in case the warrantee was evicted, to yield him other lands in their stead) was only on condition that he had other sufficient lands by descent from the warranting ancestor. *Co. Lit. 102.* But though, without assets, he was not bound to insure the title of another, yet in case of lineal warranty, whether assets descended or not, the heir was perpetually barred from claiming the land himself; for if he could succeed in such claim, he would then gain assets by descent (if

he had them not before,) and must fulfil the warranty of his ancestor. And the same rule was, with less justice, adopted also in respect of collateral warranties, which likewise (though no assets descended) barred the heir of the warrantor from claiming the land by any collateral title, upon the presumption of law that he might hereafter have assets by descent either from or through the same ancestor. *Lit.* § 711, 712.

The inconvenience of this latter branch of the rule was felt very early, when tenants by the curtesy took upon them to alien their lands with warranty, which collateral warranty of the father descending upon his son (who was the heir of both his parents,) barred him from claiming his maternal inheritance; to remedy which, the statute of *Gloucester*, 6 *Edm.* 1. c. 3. declared that such warranty should be no bar to the son, unless assets descended from the father. It was afterwards attempted in 50 *Edm.* 3. to make the same provision universal, by enacting that no collateral warranty should be a bar, unless whose assets descended from the same ancestor; but it then proceeded not to effect. *Co. Lit.* 373. However, by the 11 *Hen.* 7. c. 20. notwithstanding any alienation with warranty by tenant in dower, the heir of the husband was not barred, though he were also heir to the wife. And by 4 & 5 *Ann.* c. 16. all warranties by any tenant for life were void against those in remainder or reversion; and all collateral warranties by any ancestor who had no estate of inheritance in possession, were void against the heir. By the wording of which last statute, it should seem that the legislature meant to allow that the collateral warranty of tenant in tail in possession descending (though without assets) upon a remainder-man or reversioner, should still bar the remainder or reversion: for though the judges, in expounding the statute *d. dous*, held that, by analogy to the statute of *Gloucester*, a lineal warranty by tenant in tail without assets should not bar the issue in tail, yet they held such warranty with assets to be a sufficient bar. *Litt.* 712; 2 *Inst.* 293. This was therefore formerly one of the ways whereby an estate-tail might be destroyed, it being indeed nothing more in effect than exchanging the lands entailed for others of equal value. See *Fee-tail, Tail*.

They also held that collateral warranty was not within the statute *d. dous*, as that act was principally intended to prevent the tenant in tail from disinherit his own issue; and therefore collateral warranty (though without assets) was allowed to be, as at common law, a sufficient bar of the estate-tail and all remainders and reversions expectant thereon. *Co. Lit.* 374; 2 *Inst.* 335. And so it continued to be notwithstanding the statute of Queen *Anne*, if made by tenant in tail in possession, who therefore might, until recently, without the forms of a fine or recovery, in some cases have made a good conveyance in fee-simple, by superadding a warranty to his grant, which, if accompanied with assets, barred his own issue; and without them, barred such of his heirs as might be in remainder or reversion. 2 *Comm.* c. 20. p. 303.

A., B., and C., being tenants in common in tail, B. released to A. and C. and their heirs all his undivided part, and all his estate and interest therein, to hold "to them, their heirs, and assigns, as tenants in common, and not as joint-tenants, to the use of them and their assigns." And B. covenanted with A. and C., their heirs and assigns, that he, his heirs, &c. would warrant and for ever defend the premises to A. and C., (not using the word heirs,) against all persons; that A. and C., their heirs and assigns, should quietly enjoy, &c. The Court of King's Bench held, that the release passed the interest of B. to A. and C. as tenants in common, and not as joint-tenants: and that the warranty annexed to the release created a discontinuance of B.'s estate-tail, and barred B., and those claiming under him, (as against those claiming under the release,) of a subsequently-acquired right in fee. 4 *M. & S.* 178. And see 1 *N. & M.* 130.

Now by the 3 & 4 *Wm.* 4. c. 27. § 39. no warranty shall toll or defeat any right of entry or action for the recovery of land.

And by the 3 & 4 *Wm.* 4. c. 74. § 14. estates-tail, and estates-expectant thereon, are no longer barrable by warranty.

See further, *Discontinuance, Entry, Fine of Lands, Recovery, Tail, &c.*

WARRANTY OF THINGS PERSONAL. By the civil law, an implied warranty was annexed to every sale, in respect to the title of the vendor: and so too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose. 2 *Comm.* 451.

In support of this position *Blackstone* quotes *Cro. Jac.* 474; 1 *Roll. Abr.* 90; but in these cases there were affirmations by the vendor, that he was owner: and it is doubtful whether the Commentator intended to advance the doctrine, that there was a liability, although no express warranty could be proved. For it would seem that there is no implied warranty, as such, annexed to a sale of goods that the vendor has a title. The authorities in the books are not, however, very satisfactory on the subject, but they lead to the conclusion, that the seller of goods is not responsible to the purchaser, if the latter be afterwards disturbed in the possession by a third person, the true owner, except, 1st, there be an express warranty, or 2dly, a fraudulent misrepresentation or concealment by the vendor. See 4 *Taunt.* 347; 5 *Taunt.* 657; but see *Peake*, 94. See further, *Chitty on Contracts*, 353; *Law Mag.* vol. iii. 180.

With regard to the goodness of the wares purchased, the vendor is not bound to answer; unless he expressly warrants them to be sound and good; or unless he knew them to be otherwise, and hath used any art to disguise them; or unless they turn out to be different from what he represented to the buyer. *F. N. B.* 94; 2 *Roll. Rep.* 5; 2 *Comm.* c. 30. See further, *Deut.*

The general rule is that, although a liberal price be given for goods, the law does not imply a warranty as to their goodness or quality. The maxim is *caveat emptor*, and no liability in general exists in regard to bad quality or defects, unless there be a special warranty or fraud. *Doug.* 20; 2 *East*, 314; and see 5 *Bing.* 533.

But it seems that in contracts for provisions, there is always an implied warranty that they are wholesome. 3 *Comm.* 166.

No particular form of words is necessary to constitute a warranty: the word warrant need not be used. 3 *M. & P.* 173; 5 *Bing.* 533, *S. C.* And a bare representation or assertion as to the quality of the goods may amount to a warranty, if there be nothing to negative that it was understood as such. See *M. & R.* 2; 4 *C. & P.* 15; *Id.* 145.

So the description of goods, in an advertisement or particular of sale, may amount to a warranty that the goods answer such description. 5 *B. & A.* 240. And the description of an intended publication, in a book of subscriptions, or prospectus, amounts to an undertaking that the work shall be conformable to the account so given of it. 3 *C. & P.* 333; 4 *C. & P.* 198.

The custom of any particular trade may establish an implied warranty between parties transacting business therein; it being presumed, that the dealings of the parties were regulated by the custom, in the absence of evidence to the contrary. See *per Heath, J.* 4 *Taunt.* 853; 4 *B. & C.* 110, 114. But where there is an express warranty it cannot be restrained or varied by the custom of the trade. 1 *Holt*, 95; 6 *Taunt.* 446, *S. C.*

A sale of goods by sample is in effect a sale thereof by warranty. 2 *East*, 314; 4 *B. & A.* 387.

Where there is an express written (or it seems verbal) warranty, the vendee is not at liberty to avail himself in addition thereto of any representations not embodied in the contract, and made by the vendor without fraud. 4 *Taunt.* 779, 786; 2 *B. & C.* 634.

A general warranty will not extend to guard against de-

facts that are plain and obvious to the sense, and require no skill to detect them; as, if a horse be warranted perfect, and want an ear, or a tail, &c. 2 *Comm.* 165, 166; 1 *Salk.* 211.

In general a warranty must be made during the treaty, or before, or at the time of the sale, or, at least, before the performance of the substantial terms thereof. A warranty after the sale was complete, or the contract was performed, would seem not to be binding for want of consideration.

It is not necessary to offer to return the goods previously to an action for the breach of an express warranty, or at any other time. 1 *H. Bl.* 17; 2 *T. R.* 745; 9 *B. & C.* 259. The purchaser may resell and declare specially for the loss or difference, 1 *M. & P.* 761; 4 *Bing.* 722, *S. C.*; nor is there any occasion even to give notice of the breach of warranty to the seller; but the not giving such notice will be a strong presumption against the buyer that the goods, at the time of the sale, had not the defect complained of, and will make the proof on his part much more difficult. 1 *H. Bl.* 19; 9 *B. & C.* 559. If there has been no offer to return the goods, the measure of damages is merely the difference between the sum given and the real value, although there has been no re-sale by the vendee. 1 *Taunt.* 766; 3 *Stark.* 32. And if the warranty be coupled with an express undertaking to take back the goods, and return the money, if on trial, the goods should be found defective, the buyer must, in such case, return the article as soon as he discovers its faults, or within a reasonable time afterwards, in order to maintain an action on the warranty; unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. 2 *H. Bl.* 573.

Where an offer to return is made within a reasonable time by the vendee, and the seller is legally bound to take the goods back, but refuses to do so, they remain at his risk. 1 *Stark.* 107.

See further, on this subject, *Chitty on Contracts*, 358—370. The following distinctions are peculiarly referable to the sale of horses:—

The doctrine that sound price implies a warranty of soundness is now quite exploded, and it is necessary to have an express warranty. 2 *East*, 322.

In an action on warranty of a horse, the plaintiff must positively prove that the horse was unsound. 3 *Taunt.* 334.

A temporary lameness, which renders a horse less fit for service, is a breach of warranty of soundness. 4 *Campb.* 281; *sed vide* 2 *Exp.* 573.

Roaring is unsoundness, if it is shown to proceed from some disease or organic defect. 2 *Campb.* 532; 2 *Stark.* 81.

So a cough, unless proved to be of a temporary nature, is unsoundness. 2 *Chitt. R.* 425; and *see id.* 416.

A nerved horse is unsound. 1 *Ry. & Moo.* 290.

Crib-biting is not a breach of a general warranty of soundness. *Holt. Ca.* 680.

Mere badness of shape, though it render the horse incapable of work, is not unsoundness. 1 *M. & Rob.* 209.

If a horse is sold with a warranty that he is a good drawer and pulls quiet in harness, both parts of the warranty must be shown by the seller to be true. 2 *Dowl. & Ry.* 10.

A warranty as follows: "to be sold a black gelding, five years old, has been continually driven in the plough, warranted," applies to nothing more than soundness, and not to having been driven continually in the plough. 1 *Bingh.* 344.

Where two persons severally employed a dealer to sell their horses, and he sold them for an entire price, and warranted them sound; it was held that the purchaser could not sever the contract, and bring an action on the warranty against one of the sellers, in respect of the unsoundness of his horse. 1 *Campb.* 361.

Where the seller warranted a horse sound, and in a conversation subsequently said, that if the horse were unsound (which he denied,) he would take it again and return the money; it was held that this was no abandonment of the

original contract, and the vendee's remedy was upon the warranty. 7 *East*, 274.

A warranty given by a person entrusted to sell, *prima facie* binds the principal; but the warranty of a person commissioned merely to deliver the thing sold, does not, unless an express authority to warrant be shown. Where, therefore, a horse having been sold by A. to B. A's servant, on delivering the horse to B., made certain statements, and signed a receipt for the price, containing a warranty: it was held, that A. was not bound by such statements and receipt, no express authority to the servant to give a warranty being shown. 2 *C. & M.* 391.

Where a horse is sold with a warranty of soundness, but there is a misrepresentation at the sale as to the place from whence the horse came, if the warranty be complied with, the misrepresentation will not vitiate the sale. 5 *Dow. & R.* 164.

In an action on a warranty, it is not necessary that the seller knew of the horse's imperfections at the time of the sale. 2 *Comm.* c. 30, in n.

On a sale with a warranty for twenty-four hours, the seller's knowledge of the unsoundness of the horse does not vitiate the contract. It is a sale with all faults that shall not be discovered within the time limited. 3 *Campb.* 154; 3 *N. & M.* 745.

Where rules were posted up at a repository for horses, regulating sales by private contract there, and were known to the plaintiff and the defendant, it was held that they impliedly adopted the terms of such rules into their bargain, without making any express reference to them. 3 *N. & M.* 748.

If an horse is sold with an express warranty by the seller that it is sound and free from vice, the buyer may maintain an action upon this warranty or special contract, without returning the horse to the seller, or without even giving him notice of the unsoundness or viciousness of the horse: yet it will raise a prejudice against the buyer's evidence, if he does not give notice within a reasonable time, that he has cause to be dissatisfied with his bargain. 1 *H. Black.* 17.

Upon the breach of a warranty of a horse the measure of damages, if the horse is returned, is the price paid for him; if the horse is not returned, the measure of damages is the difference between the real value and the price paid. If the horse is not tendered to the defendant, the plaintiff can recover nothing for the expense of his keep. 1 *Taunt.* 566; 2 *Campb.* 82.

Where a horse warranted sound, proves unsound, and is, after notice to the seller, resold by the buyer, the latter may recover not only the difference in price between the two rates, but also the keep of the horse for a reasonable time. Whether he was kept an unreasonable time is a question for the jury. 4 *N. & M.* 195.

The vendee is entitled to recover for the keeping the horse only for such time as would suffice to re-sell it to the best advantage. 1 *R. & M.* 436.

If the buyer of a horse with warranty, relying thereon, re-sells him with warranty, and being sued thereon by his vendee, offers the defence to his vendor, who gives no direction as to the action, the plaintiff defending that action is entitled to recover the costs thereof by his vendor, as part of the damage occasioned by his breach of warranty. 7 *Taunt.* 153.

The warranty cannot be tried in a general action of *assumpsit* to recover back the price of the horse. *Comp.* 819.

As to warranties on policies of insurance, *see Insurance*.

WARREN, *warrenna*, from Germ. *wahren*, i. e. *custodire*; or the Fr. *garrener*.] A franchise, or place privileged by prescription or grant from the king, for the keeping of beasts and fowls of the warren; which seem to be only hares and conies, partridges, and pheasants; though some add quails, wood-cocks, and water-fowl, &c. *Terms de Ley*, 589; 1 *Inst.* 233; 2 *Comm.* c. 3, in n.

Grouse are not birds of warren. 7 B. & C. 36.

A person may have a warren in another's land, for one may alien the land, and reserve the franchise: but none can make a warren, and appropriate those creatures that are *feræ naturæ*, without licence from the king, or where a warren is claimed by prescription. 8 Rep. 108; 11 Rep. 87.

Free-warren cannot be parcel of a manor, therefore it will not pass by a grant of the manor (without the appurtenances,) though it be held with the manor. Nor can a warren appertain to a manor but by prescription.

Free-warren in gross, whereof a grantor is seised, will not pass by a grant of a manor and the appurtenances; nor by a grant of a manor, and all right of fishing, fowling, hawking, hunting, and shooting, royalties, franchises, hereditaments, and appurtenances, belonging or in any wise appertaining to the manor, or such as were in and by the deed of grant or letters-patent granted and assured by the crown as appurtenant to the manor, or any part thereof. 3 N. & M. 671.

A warren may lie open; and there is no necessity of inclosing it, as there is of a park. 4 Inst. 318.

If any person offend in a free warren, he is punishable by the common law.

When conies are on the soil of the party, he hath a property in them by reason of the possession, and action lies for killing them; but if they run out of the warren, and eat up a neighbour's corn, the owner of the land may kill them, and no action will lie. 5 Rep. 104; 1 Cro. 548.

In waste, &c. against a lessee of a warren, the waste assigned was for stopping coney burrows; and it was held that this action did not lie, because a man cannot have the inheritance of conies; and action may be brought against him who makes holes in the land, but not against him who stops them, by reason the land is made better by it. Owen, 66.

Blackstone says a man that has a franchise of warren is in reality no more than a royal game-keeper: and asserts, that no man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on his own, unless he had the liberty of free warren. 2 Comm. c. 3. This latter position is very earnestly combated by Mr. Christian.

This franchise is almost fallen into disregard, since the new statutes for preserving the game; the name being now chiefly preserved in grounds set apart for breeding hares and rabbits.

See further, *Game*.

WARSCOT. A contribution usually made towards armour, in the time of the Saxons. Leg. Cant.

WARTH. A customary payment for castle-guard. Blount. Ten. c. 5.

WASH. A shallow part of a river, or arm of the sea; as the washes in Lincolnshire, &c. Knight, 1346.

WASSAIL. Sax. A festival song, but of late sung from door to door about the time of the Epiphany. See *Wassail-Bowl*.

WASTE,

VASTUM.] Hath divers significations: first, it is a spoil made either in houses, woods, lands, &c. by the tenant for life or years, to the prejudice of the heir, or of him in the reversion or remainder. Kitchen, fol. 168. Whereupon the writ of waste might formerly be brought, for the recovery of the thing wasted, and treble damages. As to which, see at large *post*.

Waste of the forest is most properly where a man cuts down his own woods within the forest, without licence of the king, or lord chief justice in eyre. See *Mannwood*, part 2. cap. 8. numb. 4 & 5. See tit. *Forest*.

Waste is also taken for those lands which are not in any man's occupation, but lie common; which seem to be so called because the lord cannot make such profit of them as of his other lands, by reason of that use which others have

of it in passing to and fro; upon this none may build, cut down trees, dig, &c. without the lord's licence.

Prima facie the presumption is, that a strip of land lying between the highway and the adjoining inclosure is, as well as the soil of the highway, *ad filum viae*, the property of the owner of the inclosure, whether he be a freeholder, copyholder, or leaseholder. 7 B. & C. 304. But if such strip of land communicate with open commons, or other large portions of land, the presumption is either done away, or considerably narrowed: for the evidence of ownership, which applies to the large portions, applies also to the narrow strip which communicates with them. 7 Taunt. 39. See *Common*, *Copyhold*, *Manor*.

Year, day, and waste, *annus, dies, et vastum*, was a punishment or forfeiture formerly belonging to petit treason or felony; whereof see *Staundf. Pl. Cor. lib. 3. c. 30*; and tits. *Day*, *Year*, *Waste*.

But forfeiture is now restricted to attainders for high treason and murder, and does not extend to the disheriting of any heir, or to the prejudice of the title of any other person than that of the offender for his life. See *Forfeiture*, II. 2.

WASTE, in its most usual acceptation, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments; to the destruction and alienance of him that has the remainder or reversion in fee-simple or fee-tail. 1 Inst. 53.

I. *What shall be considered as Waste; generally, and in many particular specified Instances.*

II. 1. *Who may have a Remedy for Waste done.*

2. *Against whom such Remedy may be had, and who are punishable for Waste.*

III. *Of the Punishment of Waste; and the Proceedings at Law against Persons guilty thereof.*

IV. *Of Injunctions, and other Proceedings in Equity, to prevent, or relieve, against Waste.*

I. WASTE is either voluntary, or actual, which is a crime of commission, as by pulling down a house; or it is permissive or negligent, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Generally speaking, whatever does a lasting damage to the freehold or inheritance is waste. *Hill. 35*. Therefore removing wainscots, floors, or other things once fixed to the freehold of a house, comes under the general notion of waste. 4 Rep. 64. If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste: but otherwise, if the house be burnt by the carelessness or negligence of the lessee; though now by the 6 Ann. c. 31. no action will lie against a tenant for an accident of this kind. See *post*.

Waste may also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance. *Co. Litt. 53*.

Timber also is part of the inheritance. 4 Rep. 62. Such are oak, ash, and elm, in all places; and in some particular countries, by local custom, where other trees are generally used for building, they are for that reason considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste. *Co. Litt. 53*. But underwood the tenant may cut down at any seasonable time that he pleases, and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions. 2 Roll. Abr. 817; *Co. Litt. 41*.

The conversion of land from one species to another, is waste. To convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture, into woodland; or to turn arable or woodland into meadow or pasture; are all of them waste. *Hob. 296*. For, as Coke observes, it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described

as pasture, is found to be arable, and *à converso*. 1 *Inst.* 53. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in its value. 1 *Lev.* 309. To open the land to search for mines of metal, coal, &c. is waste; for that is a detriment to the inheritance: but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use; for it is now become the mere annual profit of the land. 5 *Rep.* 12; *Hob.* 295.

These three are the general heads of waste, viz. in houses, in timber, and in land. Though, whatever else tends to the destruction, or depreciating the value of the inheritance, is considered by the law as waste. 2 *Comm. c.* 18. Which we therefore proceed to state more at large.

It has been laid down as a general principle, that the law will not allow that to be waste, which is not in any way prejudicial to the inheritance. *Hell.* 35. Thus in a recent case where in ejectment against a copyholder for a forfeiture by waste, the jury found there had been no damage, it was held there was no waste, and no forfeiture. 2 *N. & M.* 534.

Nevertheless it has been held, that a lessee or tenant cannot change the nature of the thing demised; though, in some cases, the alteration may be for the greater profit of the lessor. Thus if a lessee converts a corn-mill into a fulling-mill, it is waste; although the conversion be for the lessor's advantage. *Cro. Jac.* 182. So the converting a brewhouse of 120*l.* per annum into other houses let for 200*l.* a year, is waste; because of the alteration of the nature of the thing, and of the evidence. 1 *Lev.* 309.

WASTE IN LANDS. It hath been already stated, that if a tenant converts arable into wood, or *à converso*, it is waste; for it not only changes the course of husbandry, but also the proof of evidence. *Hob.* 296. *pl.* 234. But if a lessee suffers arable land to lie fresh, and not manured, so that the land grows full of thorns, &c. this is not waste, but ill husbandry. 2 *Roll. Abr.* 814. Likewise the conversion of meadow into arable is waste. 1 *Inst.* 53, *b.* But if meadow be sometimes arable, and sometimes meadow, and sometimes pasture, there the ploughing of it is not waste. 2 *Roll. Abr.* 815. Neither is the division of a great meadow into many parcels, by making of ditches, waste; for the meadows may be better for it, and it is for the profit and ease of the occupiers of it. 2 *Lev.* 174. *pl.* 210.

Likewise converting a meadow into a hop-garden, is not waste; for it is employed to a greater profit, and it may be meadow again; per *Windham* and *Rhodes*, *J.* But *Periam* said, though it be a greater profit, yet it is also with greater labour and charges. 2 *Lev.* 174. *pl.* 210. But converting a meadow into an orchard is waste, though it be to the greater profit of the occupier. Per *Periam*, *Id.* *ibid.* If a lessee ploughs the land stored with conies, this is no waste; unless it be a warren by charter or prescription. 2 *Roll. Abr.* 815. So if a lessee of land destroys the coney burrows in the land, it not being a free warren by charter or prescription, it seems is not waste; for a man can have no property in them, but only a possession. *Id.* *Ibid.*; *Om.* 66.

It is waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea the meadow or marsh is surrounded, whereby the same becomes unprofitable. But if it be surrounded suddenly by the rage and violence of the sea, occasioned by wind, tempest, or the like, without any default in the tenant, this is not waste. Yet if the tenant repair not the banks or walls against rivers or other waters, whereby the meadows or marshes be surrounded and become rashly and unprofitable, this is waste. 1 *Inst.* 53, *b.* So, *a fortiori*, if arable land be surrounded by such default; for the surrounding washes away the marle and other manurance from the land. 2 *Roll. Abr.* 816.

WASTE IN TREES AND WOODS. Trees are parcel of the inheritance; and therefore, if a lessee assigneth his term, and excepts the timber-trees, it is void; for he cannot except that

which doth not belong to him by law. 5 *Rep.* 12. The lessor, after he has made a lease for life or years, may by deed grant the trees, or reasonable estovers out of them, to another and his heirs; and the same shall take effect after the death of the lessee. But such a gift to a stranger is void during the estate for life, because of the particular prejudice which might be done to the lessee. 11 *Rep.* 48. The lessee hath but a particular interest in the trees, but the general interest of the trees doth remain in the lessor; for the lessee shall have the waste and fruit of the trees, and the shadow for his cattle, &c. But the interest of the body of trees is in the lessor, as parcel of his inheritance. Therefore, if trees are overthrown, by the lessee or any other, or by wind or tempest, or by any other means disjoined from the inheritance, the lessor shall have them in respect of his general ownership. 11 *Rep.* 81.

The lessor cannot give trees during the tenant's lease. But if he grants them to a stranger, and commands the tenant to cut and deliver them, who does it, this shall excuse him in an action of waste. And yet the tenant was not bound by law to obey and execute this command. *Bro. Done*, &c. 13.

In 8 *East*, 190, the Court of K. B. held, that if trees be excepted out of a demise, waste cannot be committed by cutting them down; and therefore that ejectment cannot be brought, as for waste committed in or upon the demised premises.

Where a man leases a wood which consists only of great trees, the lessee cannot cut them. *Hobart's Rep. Cas.* 296.

With respect to timber-trees, such as oak, ash, elm, (which are timber-trees in all places,) waste may be committed in them, either by cutting them down, or lopping of them, or doing any act whereby the timber may decay. Also in countries where timber is scarce, and beeches or the like are converted to building for the habitation of man, they also are accounted timber. 1 *Inst.* 53, *a*; 54, *b.* Thus waste may be committed in cutting of beeches in Buckinghamshire, because there, by the custom of the country, it is the best timber. 2 *Roll. Abr.* 814.

So waste may be committed in cutting of birches in Berkshire, because they are the principal trees there for the most part. 2 *Roll. Abr.* 814.

If the tenant cut down timber-trees, or such as are accounted timber, as mentioned above, this is waste; and if he suffers the young germens to be destroyed, this is destruction. So it is if the tenant cuts down underwood (as he may by law), yet if he suffer the young germens to be destroyed, or if he stub up the same, this is destruction. 1 *Inst.* 53, *a.* If lessee, or his servants, suffer a wood to be open, by which beasts enter and eat the germens, though they grow again, yet it is waste; for after such eating they never will be great trees but shrubs. 2 *Roll. Abr.* 815. If a termor cuts down underwood of hazel, willows, maple, or oak, which is seasonable, it is not waste. If ashes are seasonable wood to cut from ten years, it is not waste to cut them down for house-bote. But if the ashes are gross of the age of nine years, and able for great timber, it is waste to cut them down. 2 *Roll. Abr.* 817.

If oaks are seasonable, and have been used to be cut always at the age of twenty years, it is not waste to cut them at such age, or under; for in some countries, where there is a great plenty, oaks of such age are but seasonable wood. But, after the age of twenty-one years, oaks cannot be said to be wood seasonable, and therefore it shall be waste to cut them down. 2 *Roll. Abr.* 817. Cutting down of willows, beech, birch, asp, maple, or the like, standing in the defence and safeguard of the house, is destruction. If there be a quickset fence of white thorn, if the tenant stub it up, or suffer it to be destroyed, this is also destruction; and for all these and the like destructions an action of waste lieth. 1 *Inst.* 53, *a.* The cutting of horn-beams, hazels, willows, sallows, though of forty years' growth, is no waste, because these trees would never be timber. *Godb.* 4, *pl.* 6.

The cutting down of trees is justifiable for house-bote, hay-bote, plough-bote, and fire-bote. 1 *Inst.* 53, b; *Hob. Rep.* c. 296; *Bro. Waste*, 130. By the common law, lessee shall have them, though the deed does not express it; but if he takes more than is necessary, he shall be punished in waste. *Bro. Waste*, pl. 30. The tenant may take sufficient wood to repair the walls, pales, fences, hedges, and ditches, as he found them; but he cannot make new.

Cutting of dead wood is no waste. But converting trees into fuel, when there is sufficient dead wood, is waste. 1 *Inst.* 53, b. So cutting wood to burn, where the tenant has sufficient hedgewood, is waste. *F. N. B.* 59, (M).

Where lessee for years has power to take hedge-bote by assignment, yet he may take it without assignment; for the affirmative does not take away the power which the law gives him. *Dyer*, 19, pl. 115.

If lessor excepts his trees in his lease, the lessee shall not have fire-bote, hay-bote, &c. which he should have otherwise; and the property of the trees is in the lessor himself. 4 *Lev.* 162, pl. 209. *Sir Richard Lewknor's case*. Yet it has been said, that lessee for years, the trees being excepted, has liberty to take the shrouds and loppings for fire-bote; but if he cuts any tree, it shall be waste, as well for the loppings as for the body of the tree. *Noy*, 29.

If a tenant that has fire-bote to his house in another man's land, cuts wood for that intent to make his bote-wood, and the owner of the land takes it away, an action of trover and conversion lies against him by the tenant of the land who hath such fire-bote. *Clayt.* 40, pl. 69. See *Dyer*, 36, pl. 38; *Clayt.* 47, pl. 81; 1 *Lev.* 171.

It is also a rule which appears to have been rigidly adhered to, that the trees shall be applied to the specific purpose for which they are allowed to be cut. Thus, if the lessee cuts trees for reparation, and sells them, and after buys them again, and employs them in reparation, yet it is waste by the sale. So, if lessee cuts trees, and sells them for money, though with the money he repairs the house, yet it is waste. 1 *Inst.* 53 b.

As to the cutting of timber-trees for repairs by lessee, there is no difference whether the lessor or lessee covenants to repair the houses; for in either case it is not waste if lessee cuts them. *Mo.* 23, pl. 80. *Anon.*

But the lessee shall not cut trees to make a new house where there was not any at the time of the lease. *Hob.* 296. So if a lessee suffers a house to fall for default of covering, which is waste, he cannot cut trees to repair the house. *Bro. Waste*, pl. 39. And in general, if the tenant suffer the house to be wasted, he cannot justify the felling of timber to repair it. 1 *Inst.* 53, b. If a house be ruinous at the time of the lease, though the lessee is not bound to repair it, yet he may cut trees to repair it. 1 *Inst.* 54, b. The tenant may likewise dig for gravel or clay for the reparation of the house, though the soil was not open when the tenant came in; and it is justifiable as well as cutting of trees. 1 *Inst.* 53, b. So, with regard to a stable, if it fall without default of the lessee, in time of the lessor, the lessee may take trees of the heir to make a new stable, if it be of necessity. *Bro. Waste*, pl. 67. But if the stable falls in default of the lessee in time of the lessor, he cannot, in time of the heir, cut trees to make a new stable. *Bro. Waste*, pl. 67.

It has been agreed, that tenant for years may cut wood; but it has been doubted if tenant at will may; but it seems that as long as tenant at will is not countermanded he may cut seasonable wood, &c. *Bro. Waste*, pl. 114.

If the lessee covenant that he will leave the wood at the end of the term as he found it; if the lessee cut down the trees, the lessor shall presently have an action of covenant; for it is not possible for him to leave the trees at the end of the term. So that the impossibility of performing the covenant shall give a present action on a future covenant. But it is otherwise in the case of a house; for there, though the lessee commit

waste, yet he may repair the waste done before the term expires. 5 *Rep.* 21.

If, during the estate of a mere tenant for life, timber is severed either by accident or wrong, it belongs to the first person who has a vested estate of inheritance; but where there are intermediate contingent estates of inheritance, and the timber is cut down by a combination between the tenant for life and the person who has the next vested estate of inheritance; or if the tenant for life has himself such estate, and sells timber, in these cases the chancellor will order it to be preserved for him who has the first contingent estate of inheritance under the settlement. 3 *Cox's P. Wms.* 267; 3 *Woodd.* 400. See further, post, II. IV.

WASTE IN DIGGING for gravel, mines, &c.—If the tenant digs for gravel, lime, clay, brick, earth, or stone, hid in the ground; or for mines of metal or coal, or the like, not being open at the time of the lease, it is waste. 1 *Inst.* 53, b. If a man hath land in which there is a mine of coals, or the like, and maketh a lease of the land (without mentioning any mines) for life or for years, the lessee, as to such mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any new mine that was not open at the time of the lease made, for that would be adjudged waste. Likewise, if there be open mines in the land, and the owner leases it to another, with the mines in it, he may dig in the open mines, but not in the close mines; but otherwise it would be if there was not any open mine there; for then the lessee might dig for mines, otherwise the grant would take no effect. 1 *Inst.* 54, b. If lessee dig slate-stone out of the land, it is waste; so digging for stones, unless in a quarry, is waste, though the lessee fill it up again. 2 *Roll. Abr.* 816; *On.* 66. Likewise, if he have a lease of land, in which there was a coal mine, but not open at the time of the lease; if the lessee open it, and assigns his interest, it is still waste in the assignee; but where the lease is of lands, and all mines in it, there he may dig in it. 5 *Rep.* 12, a, b.

But if lessee of land, with mines of coals, iron, and stone, digs the coals, iron, and stones, so much as is necessary for him to use without selling, it is not waste. If a lessee digs earth, and carries it out of the land, action of waste lies. 2 *Roll. Abr.* 806. If a lessee digs for gravel or clay for reparation of the house, not being open at the time of the lease, it is not waste, any more than the cutting of trees for reparation. 1 *Inst.* 53, b.

If a man leases lands with general words of "all mines of coals," where there is not any mine of coals open at the time of the demise, and after the lessee opens a mine, he cannot justify the cutting of timber-trees for making punchcoons, corses, rollescops, and other utensils in and about the mine, though without them he could not dig and get the coals out of the mine; and this is like a new house built after the demise, for the reparation of which he cannot take timber upon the land; and it had been waste to open it, if it had not been granted by express words. And it was said by *Hobart*, that the law had been the same if the mine was open at the time of the demise. *Hobart*, 296; *Hut.* 19. See further, *Mines*.

WASTE IN GARDENS, orchards, fish-ponds, dove-houses, parks, &c.—If the tenant cut down or destroy any fruit-trees growing in the garden or orchard, it is waste; but if such trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waste. 1 *Inst.* 53, a. Breking a hedge also is no waste. 1 *Inst.* 53 a. Destruction of saffron-heads in a garden is not waste. *Bro. Waste*, pl. 143. cites 10 *Hen.* 7. c. 2. But ploughing up strawberry beds by an outgoing tenant has been held to be waste. 1 *Camp.* 227.

If the tenant of a dove-house, warren, park, vivary, estanges, or such like, takes so many that so much stone is not left as he found at the time of the demise, it is waste. 1 *Inst.* 53, a; *Hob. Rep.* c. 296. Likewise, if the lessee of a pigeon-house stops the holes, that the pigeons can-

not build, it is waste. So suffering the pales of a park to decay, whereby the deer are dispersed, is waste. 1 *Inst.* 53, a. Also, if the lessee of a hop ground plough it up and sow grain there, it is waste. *Om.* 66. *Moyle v. Moyle*. The breaking a weare, or the banks of a fishpond, is waste. *Om.* 66.

WASTE with respect to Houses. Waste may be done in houses, by pulling them down or prostrating them, or by suffering the same to be uncovered, whereby the spars or rafters, planchers or other timber of the house, are rotten. 1 *Inst.* 53, a. Default of coverture of an house is waste, though the timber be standing. 2 *Roll. Abr.* 815. But, if the house be uncovered when the tenant cometh in, it is no waste in the tenant to suffer the same to fall down. Though there be no timber growing upon the ground, yet the tenant, at his peril, must keep the houses from wasting. 1 *Inst.* 53, a.

If a lessee raises the house, and builds a new house, if it be not so long and wide as the other, it is waste. 2 *Roll. Abr.* 815. So if he rebuild it larger it is waste, for it will be more charge for the lessor to repair. 1 *Inst.* 53, a.

But, if a lessee of land makes a new house upon the land where there was not any before, this is not waste; for it is for the benefit of the lessor. 2 *Roll. Abr.* 815. Though, according to *Coke*, if the tenant build a new house, it is waste; and if he suffer it to be wasted, it is a new waste. Yet, if the house be prostrated by enemies or the like, without default of the tenant, or was ruinous at his coming in, and fall down, the tenant may build the same again with such materials as remain, and with the other timber, which he may take growing on the ground, for his habitation; but he must not make the house larger than it was. 2 *Roll. Abr.* 815; 1 *Inst.* 53, a.

If the house be uncovered by tempest, the tenant must in convenient time repair it. 1 *Inst.* 53, a. If a lessee flings down a wall between a parlour and a chamber, by which he makes a parlour more large, it is waste; it cannot be intended for the benefit of the lessor, nor is it in the power of the lessee to transpose the house. 2 *Roll. Abr.* 815. So, if he pulls down a partition between chamber and chamber, it is waste. *Bro. Waste*, 143. Or if a lessee pulls down a hall or parlour, and makes a stable of it, it is waste. If a lessee pulls down a garret over head, and makes it all one and the same thing, it is waste. If a lessee permits a chamber *fore in decasu pro defectu plaustrationis, per quod grossum maheremium devenit putridum, et camera illa turpissima et foetissima devenit*, action of waste lies for it. So, if a lessee permits the wall to be in decay for default of daubing, *per quod maheremium devenit putridum*, action of waste lies. 2 *Roll. Abr.* 815. Breaking of a pale or of a wall uncovered, is not waste. But breaking of a wall covered with thatch, and of a pale of timber covered, is waste. *Bro. Waste*, pl. 94.

If the tenant do, or suffer, waste to be done in his houses, yet if he repair them before any action brought, there lieth no action of waste against him; but he cannot plead *quod non facit vastum*, but the special matter. 1 *Inst.* 53, a.

It may be of use here to add something on the progress of the law as to the accidental burning of houses, so far as regards landlord and tenant. At the common law, lessees were not answerable to landlords for accidental or negligent burning; for as to fires by accident, it is so expressed in *Fleta*, lib. 1. c. 12; and *Lady Shrewsbury's case*, 5 *Rep.* 13 b., is a direct authority to prove that tenants are equally excusable for fires by negligence. Then came the statute of *Gloucester*, (6 E. 1.) which by making tenants for life and years liable to waste without any exception, consequently rendered them answerable for destruction by fire. Thus stood the law in Lord *Coke's* time. But now, by 6 Ann. c. 31. [the provisions of which are contained in the last building act, see tit. *Fire*,] the ancient law is restored, and the distinction introduced by the statute of *Gloucester*, between tenants at will and other lessees, is taken away; for the statute exempts all persons from actions for accidental fire in any house, except in the case of special agreements between landlord and tenant. So much relates to

tenants coming in by act or agreement of parties.—As to tenants of particular estates coming in by act of law, as tenant by the curtesy, tenant in dower, and (before the statute taking away military tenures) guardian in chivalry; these, or at least the two latter, being, at common law, punishable for waste, were therefore responsible for losses by fire; unless, indeed, they were answerable for waste voluntarily only, and not for waste permissive; a distinction not found in the books. If these tenants in curtesy or dower were, at common law, responsible for accidental fire, it may, some time or other, become necessary to determine whether they are within the statute of *Anne*. The statute in expression is very general, and seems calculated to take away all actions in cases of accidental fire, as well from other persons as from landlords.

It was doubted on the statute of *Anne*, whether a covenant to repair generally extended to the case of fire, and so became an agreement within the statute. 1 *Inst.* 57, in n.

But where, since the statute, a lessee covenanted for himself and his assignees to repair the premises demised, the assignee of the lease was held bound to repair notwithstanding the premises had been destroyed by fire. 2 *Chitty's Rep.* 602.

And if a lessee covenants to pay rent, and to repair, with an express exception of casualties by fire, he may be obliged to pay rent during the whole term, though the premises are burned down by accident, and never rebuilt by the lessor. 1 *T. R.* 310. See ante, tit. *Covenant, Lease, Rent*.

WASTE in things annexed to the FREEHOLD.—The removing a post in a house is waste. 42 *Edw.* 3. 6. So the removing of a door. 1 *Inst.* 53. Or of a window. 42 *Edw.* 3. 6. The digging up a furnace annexed to the frank-tenement, and selling it, is waste. *Bro. Waste*, pl. 143. The removing of a bench is waste, though annexed by the tenant himself. *Bro. Waste*, pl. 143; 1 *Inst.* 53 a. But these are such trifles that a landlord would now scarcely obtain a verdict in an action of waste, it being so very penal, unless very great injury was done by the act. As to the furnace he might maintain trover for the value. If wainscot, annexed to the house, be taken away, it is waste. 1 *Inst.* 53 a. Of tables dormant and fixed in the land, and not to the walls by the tennor, and taken off within his term, waste does not lie; for the house is not impaired by it. *Bro. Waste*, pl. 104.

Beating down a wooden wall, or suffering a brick wall to fall, is no waste, unless it be expressly alleged that the walls were coped or covered. If waste be assigned in pulling up a plank floor, and mangers of a stable, the plaintiff must show that the same were fixed. *Dyer*, 108 b. pl. 31. If lessee erects a partition, he cannot break it down without being liable to an action of waste, for he has joined it to the frank-tenement. *Mo.* 178. Shelves are parcel of the house, and not to be taken away; and though it is not shown that the shelves were fixed, it ought to be intended that they were fixed. 2 *Bulst.* 113. Pavement is a structure, for they use lime to finish. *Id.* ib. If the tenant suffers the groomsels to waste, in his default of defence or removing the water from off them, or through dirt or dung, or other nuisance, which lies or hangs upon it, the tenant shall be charged, for he is bound to keep it in as good case as he took it. *Owen*, 43.

The law, upon this part of the subject, has been relaxed, for during the term the tenant may take away chimney-pieces or wainscot which he has put up; but not after the term, for he would then be a trespasser. 1 *Atk.* 477. A fire-engine erected by tenant for life shall go to his executor. 3 *Atk.* 13. But the rule is different between the heir and executor, with regard to fixtures upon the inheritance, that descend to the heir. 1 *H. Blk.* 258. See further, *Fixtures, Heir*, III. 3.

It may be observable in general, that waste which ensues from the act of God is excusable, or rather it is no waste. Thus if a house falls by tempest, the tenant shall be excused in action of waste; but if it be uncovered by tempest, and stands there, if the tenant has sufficient timber to repair it, and does not, the lessor, if the lease be made on condition of

re-entry for waste, may re-enter, but not immediately upon the tempest, for it is no waste until the tenant suffers it to be so long unrepaired that the timber be rotted, and then it is waste. *Bro. Cond. pl. 40.*

Likewise if a house be abated by lightning, or thrown down by a great wind, it is not waste. *1 Inst. 53 a.* So if apple-trees are torn up by a great wind, if lessee afterwards cuts them, it is not waste. *Bro. Waste, pl. 39.* If the banks are well repaired by the lessee, and the water notwithstanding subverts them, and surrounds his meadow, by which it is become rushy, it is not waste. *2 Rol. Abr. 280; contra, 20 Hen. 6. c. 1 b.*

II. 1. The persons who are injured by waste are such as have some interest in the estate wasted; for if a man be the absolute tenant in fee-simple, without any incumbrance or charge on the premises, he may commit whatever waste his own indiscretion may prompt him to, without being impeachable and accountable for it to any one. And though his heir is sure to be the sufferer, yet *nemo est hæres viventis*; no man is certain of succeeding him, as well on account of the uncertainty which shall die first, as also because he has it in his own power to constitute what heir he pleases, according to the civil law notion of an *hæres natus* and an *hæres factus*; or in the more accurate phraseology of our English law, he may alien or devise his estate to whomever he thinks proper, and by such alienation or devise may disinherit his heir at law. Into whose hands soever therefore the estate wasted comes, after a tenant in fee-simple, though the waste is undoubtedly *damnum*, it is *damnum absque injuriâ*. *3 Comm. c. 14.*

One species of interest, which is injured by waste, is that of a person who has a right of common in the place wasted, especially if it be common of estovers, or a right of cutting and carrying away wood for house-bote, plough-bote, &c.: here, if the owner of the wood demolishes the whole wood, and thereby destroys all possibility of taking estovers, this is an injury to the commoner, amounting to no less than a disseisin of his common of estovers, if he chooses so to consider it, for which he formerly had his remedy to recover possession and damages by assize if entitled to a free-hold in such common; but if he has only a chattel-interest, then he can only recover damages by an action on the case for this waste and destruction of the woods out of which his estovers were to issue. *F. N. B. 59; 9 Rep. 112.*

But the most usual and important interest that is hurt by this commission of waste, is that of him who hath the remainder or reversion of the inheritance after a particular estate for life or years in being. Here, if the particular tenant (be it the tenant in dower or by curtesy, who was answerable for waste at the common law, *2 Inst. 299*; or the lessee for life or years, who was first made liable by the statutes of *Marlebridge, 52 Hen. 3. c. 23*, and of *Gloucester, 6 Edw. 1. c. 5.*) if such particular tenant commits or suffers any waste, it is a manifest injury to him that has the inheritance, as it tends to mangle and dismember it of its most desirable incidents and ornaments, among which timber and houses may justly be reckoned the principal. To him therefore in remainder or reversion, to whom the inheritance appertains in expectancy, the law hath given an adequate remedy. *Co. Litt. 63.* For he who hath the remainder for life only is not entitled to sue for waste, since his interest may never perhaps come into possession, and then he hath suffered no injury.

Yet a parson, vicar, archdeacon, prebendary, and the like, who are seised in right of their churches of any remainder or reversion, might have had an action of waste; for they, in many cases, have for the benefit of the church and of the successor, a fee-simple qualified: but as they are not seised in their own right, the writ of waste did not lay *ad exhæredationem ipsius*, as for other tenants in fee-simple; but *ad exhæredationem ecclesiæ*, in whose right the fee-simple is holden. *1 Inst. 341; 3 Comm. c. 14.*

The writ of waste is now abolished, but the persons by whom it might have been maintained may still have a remedy at law by an action on the case in the nature of a writ of waste, which has long been the ordinary course of proceeding (see *post, III.*) The instances given in former editions of this work, of cases in which the writ of waste might be supported, are in a great measure retained, as although no longer applicable to that action, they contain and illustrate the general doctrine upon the subject of waste.

By *18 Edw. 1. c. 22.* the action of waste was given to one tenant in common against another. Where there are tenants in common for life, the one should not have trespass of trees cut against the other, but should have waste *pro indiviso*, though they were only tenants for term of life, &c. *Bro. Waste, pl. 79.* If one coparcener, before partition, made feoffment to another, and one of them did waste in the trees, waste lay. *11 Rep. 49 a, Lifford's case.* See *post, III.*

By *20 Edw. 1. st. 2.* an action of waste was maintainable by the heir for waste done in the time of his ancestor, as well as for waste done in his own time.

This action must have been brought by him that had the immediate estate and inheritance in fee-simple or fee-tail, but sometimes another might join with him. *1 Inst. 53 a, 285 a.* It is said that the reversion must have continued in the same state that it was at the time of the waste done, and not been granted over; for though the reversion took the estate back again, the action was gone, because the estate did not continue. But in some special cases an action of waste lay, though the lessor had nothing in the reversion at the time of the waste done; as if a bishop made a lease for life or years, and died, and the lessee, the see being void, did waste, the successor should have an action of waste: this was allowed, though the *20 Edw. 1.* spoke only of those that were inheritors. *1 Inst. 53 b, 356 a; 2 Rol. Abr. 825.*

If a tenant did waste, and he in reversion died, the heir should not have an action of waste, for waste done in the life of the ancestor; for he could not say that the waste was done to his disinherison, &c. *1 Inst. 341 a, 53 b, 356 a.* If a lease was made to A. for life, the remainder to B. for life, remainder to C. in fee, no action of waste lay against the first lessee during the estate in the mean remainder, for then his estate would have been destroyed. Otherwise if B. had had a mean remainder for years, for that would have been no impediment, the recovery not destroying the term of years. *5 Rep. 76, 77; 1 Inst. 54 a.*

No person was entitled to an action of waste against a tenant for life but he who had the immediate estate of inheritance in remainder or reversion expectant upon the estate for life. If, therefore, between the estate of the tenant for life, who committed waste, and the subsequent estate of inheritance, there was interposed an estate of freehold to any person *in esse*, then during the continuance of such interposed estate the action of waste was suspended; and if the first tenant for life died during the continuance of such interposed estate, the action was gone for ever. But though while there was an estate for life interposed between the estate of the person committing waste, and that of the reversioner or remainder-man *in fee*, the remainder-man could not bring his action of waste; yet if the waste were done by cutting down trees, &c. such remainder-man in fee might and may still *seize them*; and if they are taken away or made use of before he seizes them, he may bring an action of trover. For in the eye of the law a remainder-man *for life* has not the property of the thing wasted; and even a tenant for life in possession has not the absolute property of it, but merely a right to the enjoyment or benefit of it, as long as it is annexed to the inheritance of which it is considered a part, and therefore belongs to the owner of the fee. *1 Inst. 218 b, in note, refers to 1 Inst. 53; 5 Rep. 77, Paget's case, All. 81; 3 P. Wms. 267; 22 Vin. Abr. 523; 2 Eq. Abr. 727; 3 Atk. 757.*

If lessee for years committed waste, and the years expired,
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yet the lessor should have an action of waste for treble damages, though he could not recover the place wasted; but if the lessor accepted of a surrender of a lease after the waste done, he should not have his action of waste. It is said, that if a tenant repaired before action brought, he in reversion could not have had an action of waste; but he could not plead that he did no waste, therefore he must have pleaded the special matter. 1 *Inst.* 283 a, 285 a, 306; 5 *Rep.* 119; 2 *Cro.* 658.

By the 11 *Hen. 6. c. 5.* where tenants for life, or for another's life, or for years, granted over their estates, and took their profits to their own use, and committed waste, they in reversion might have had an action of waste against them. 2 *Inst.* 302. He in the remainder, as well as the reversioner, might have brought this action; and every assignee of the first lessee, mediate or immediate, was within this act. 5 *Rep.* 77; 2 *Inst.* 302.

2. By the feudal law, feuds being originally granted for life only, the rule was general for all vassals and feudatories; "*si vassallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.*" *Wright.* 44. See *Tenures*. But in our ancient common law the rule was by no means so large, for not only he that was seized of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save only in three persons,—guardian in chivalry, tenant in dower, and tenant by the curtesy; and not in tenant for life or years. And it was even a doubt whether waste was punishable at the common law in tenant by the curtesy. *Regist.* 72; *Bro. Abr. tit. Waste*; 2 *Inst.* 301. The reason of this diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and if he did not, it was his own default. 2 *Inst.* 299. But in favour of the owners of the inheritance the statutes of Marlebridge, 52 *Hen. 3. c. 23.* and of Gloucester, 6 *Edw. 1. c. 5.* provided that the writ of waste should not only lie against tenants by the law of England, (or curtesy,) and those in dower, but against any farmer or other that held in any manner, for life or years. So that for above five hundred years past all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive, unless their leases be made, as sometimes they are, without impeachment of waste, *absque impeditioe vasti*; that is, with a provision or protection that no man shall *impetere* or sue him for waste committed. But tenant in tail, after possibility of issue extinct, is not impeachable for waste, because his estate was at its creation an estate of inheritance, and so not within the statutes. *Co. Litt.* 27; 2 *Roll. Abr.* 826, 828. Neither did an action of waste lie for the debtor against tenant by statute, recognition, or *elegit*; because against them the debtor may set off the damages in account. *Co. Litt.* 54. But it seems reasonable that it should have laid for the reversioner expectant on the determination of the debtor's own estate, or of those estates derived from the debtor's own estate, or of those estates derived from the debtor, *F. N. B.* 58; 2 *Comm.* c. 18.

Though it has been said that an action of waste did not lie against tenant by statute-merchant, *elegit*, or staple, because it was not an estate for life or years, and the statute mentioned those who held in any manner for life or years; yet see *contrâ*, *Fitz. Nat.* 58 H. and there said, that in the register was a writ against him. 6 *Rep.* 37. Some books give the reason of it to be, because the conusor, if he committed waste, might have had a *venire facias ad computandum*, and the waste should be recovered in the debt. *Fitzh. N. B.* 58 b. See 1 *Inst.* 57 b, in *notis*.

The statute of Marlebridge, 52 *Hen. 3. c. 23. § 2.* enacted,

that "farmers, during their terms, shall not make waste, sale, nor exile of houses, woods, and men, nor of any thing belonging to the tenements that they have to farm, without special licence had by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciamment grievously."

This act provided remedy for waste done by lessee for life or lessee for years; and it was the first statute that gave remedy in those cases. 2 *Inst.* 145. This statute is a penal law; and yet, because it is a remedial law, it has been interpreted by equity. 10 *Mod.* 281.

Farmers.] Here farmers comprehend all such as hold by lease for life or lives, or for years by deed or without deed. 2 *Inst.* 145. It was resolved, likewise, that it extended to strangers. 10 *Mod.* 281. Although the Register says, *sciand. that per statutum de Marlebridge, c. 23. data fuit quædam prohibitio vasti versus tenementum annorum*, which was true; yet the statute extended to farmers for life also; but this act extends not to tenant by the curtesy, for he is not a farmer; but if a lease be made for life or years, he is a farmer, though no rent be reserved. 2 *Inst.* 145.

Shall not make waste.] By these words they are prohibited to suffer waste; for it was resolved that this act extends to waste *omittendo*, though the word is *faciant*, which literally imports *active waste*. 10 *Mod.* 281.

Nor of any thing.] Houses, woods, and men, were before particularly named; and these words comprehend lands and meadows belonging to the farm. 2 *Inst.* 146. Also these general words have a further signification; and therefore if there had been a farmer for life or years of a manor, and a tenancy had escheated, this tenancy so escheated did belong to the tenement that he held in farm, and therefore this extended to it; and the lessor should have had a writ generally, and suppose a lease made of the lands escheated by the lessor, and maintain it by the special matter. 2 *Inst.* 146.

Special Licence by Writing.] This grant ought to be by deed, for all waste tends to the disinheritation of the lessor, and therefore no man can claim to be dispensable of waste without deed. 2 *Inst.* 146. Likewise this special grant is intended to be *absque impeditioe vasti*, without impeachment of waste. 2 *Inst.* 146.

Writ full Damage.] And this must be understood such a prohibition of waste upon this statute as lay against a tenant in dower at the common law; and single damages were given by this statute against lessee for life and lessee for years. 2 *Inst.* 146.

It has been said that there were five writs of waste; two at the common law, as for waste done by tenant in dower, or by guardian; three by statute, as against tenant for life, tenant for years, and tenant by the curtesy. Tenant by the curtesy, it is said, was punishable for waste by the common law, for that the law created his estate as well as that of the tenant in dower, and therefore the law gave the like remedy against them. 1 *Inst.* 54 a; 2 *Inst.* 145, 299, 301, 305. But on this subject the authorities in the books are very contradictory, as the reader will perceive by attending to the note subjoined to the following clause of the statute of Gloucester, 6 *Edw. 1. c. 5.* which enacted, that a man from henceforth should have a writ of waste in the Chancery against him that held by the law of England, or otherwise for term of life or for term of years, or a woman in dower.

No action of waste lay before the statute of Gloucester, but against tenant in dower and guardian; and by the statute action of waste was given against the tenant by the curtesy, tenant for term of life, and tenant for term of years. *Bro. Waste*, pl. 88. Lord Coke says a reason is required (that seeing as well the estate of the tenant by the curtesy as the tenant in dower are created by act in law) wherefore the prohibition of waste did not lie as well against tenant by the curtesy as the tenant in dower at the common law; and the

reason he assigns is this, for that by having issue the estate of the tenant by the curtesy is originally created, and yet after that he shall do homage alone in the life of the wife, which proves a larger estate; and seeing that at the creation of his estate he might do waste, the prohibition of waste lay not against him after his wife's decease; but in the case of tenant in dower she is punishable of waste at the first creation of her estate. 2 Inst. 145. But see 2 Inst. 299. and the reasons there, as quoted above.

Neither this act nor the statute of Marlebridge created new kind of wastes, but gave new remedies for old wastes; and what is waste, and what is not, must be determined by the common law. 2 Inst. 300, 301.

Against him.] If two are joint tenants for years or for life, and one of them does waste, this is the waste of them both as to the place wasted, notwithstanding the words of the act are *him* that holds. 2 Inst. 302.

Holds by the Law of England.] Here tenant by the curtesy was named for two causes: 1st, For that albeit the common opinion was, that an action of waste did lie against him, yet some doubted of the same in respect to this word (*tenet*) in the writ, for that the tenant by the curtesy did not hold of the heir, but of the lord paramount; and after this act the writ of waste grounded thereupon recited this statute. 2dly, For that greater penalties were inflicted by this act than were at the common law. 2 Inst. 301.

Or otherwise for Term of Life or Term of Years.] A lessee for his own life, or for another man's life, is within the words and meaning of this law, and in this point this act introduces that which was not at the common law. 2 Inst. 301.

He that has an estate for life by conveyance at common law, or by limitation of use, is a tenant within the statute. 2 Inst. 302. Tenant for years of a moiety, third or fourth part *pro indiviso*, is within this act; and so it is of a tenant by the curtesy, or other tenant for life of a moiety, &c. 2 Inst. 302.

Of a Woman in Dower.] If tenant in dower were of a manor, and a copyholder thereof committed waste, an action of waste lay against tenant in dower. 2 Inst. 303. Action of waste lay against an occupant life because he had the estate of the lessee for life, and held for life, as the statute mentioned. 6 Rep. 37 b. If a lessee for life were attainted of treason, by which the lease was forfeited to the king, who granted it over to I. S. and he afterwards did waste, though he came *en le post*, yet action of waste lay against him. 2 Roll. Abr. 826. So if a man disseised the tenant for life, and did waste, yet action of waste lay against the tenant for term of life; for he might have had his remedy over against the disseisor. Bro. Waste, pl. 138. Likewise if an estate were made to A. and his heirs during the life of B., A. died, the heir of A. should be punished in an action of waste. 1 Inst. 54 a.

If a man make a lease for years, and put out the lessee, and make a lease for life, and the lessee for years enters upon the lessee for life, and does waste, the lessee for life shall not be punished for it. 2 Inst. 303. If lessee for years make a lease of one moiety to A. and of the other moiety to B., and A. does waste, the action shall be against both, for the waste of the one is the waste of the other. Brownl. 38.

An action of waste lay against a devisee, and the writ might suppose it *ex legatione*, for it was within the equity of the statute. Bro. Waste, pl. 132. If an estate of land were made to baron and feme, to hold to them during the coverture, &c., if they wasted, the feoffor should have had a writ of waste against them. Lut. § 381. If feme lessee for life married, and the husband did waste, action lay against both. And if, in the above case, the husband died, action of waste lay against the feme for the waste he committed. But if tenant in dower married, and the husband did waste, and died, the feme should not be punished for this. Likewise if baron

and feme were lessees for life, and baron did waste, and died, the feme should be punished in waste, if she agreed to the estate. 2 Roll. Abr. 827; 1 Inst. 54; Kel. 113. But if she waived the estate, she should not be charged. So upon lease for years made to the baron and feme, waste lay against both. And if baron and feme were joint lessees for years, and baron did waste, and died, action of waste lay for this against the feme. Upon lease for life to baron and feme, waste lay against both. Likewise if feme committed waste, and then married, the action should be brought against both. 2 Roll. Abr. 827. And the writ might be *quod fecerunt vastum*, or *quod uxor, dum sola fuit, fecit vastum*. Bro. Waste, pl. 55.

If baron seised for life in right of his wife did waste, and after the feme died, no action of waste lay against the baron in the *tenuit*, because he was seised only in right of his wife, and the frank-tenement was in the feme. 1 Inst. 54; 5 Rep. 75 b. But if the baron, possessed for years in right of the feme, did waste, and after the feme died, action of waste lay against the baron, because the law gave the term to him. 1 Inst. 54. See Godb. 4, 5, pl. 6; Om. 49.

Few cases, if any, can now happen of waste or injury done to premises, but the landlord, or person who has the inheritance, or even he who has a longer term in the premises, or who is himself liable to answer over, may maintain an action on the case, in nature of an action of waste, against the person committing the injury, for damages. See *post*, III. IV.

All tenants merely for life, or for any less estate, are punishable or liable to be impeached for waste both voluntary and permissive, unless their leases be made without impeachment of waste, that is, with a provision or protection that no man shall sue them for waste committed; but the words "without impeachment of waste," will not permit a tenant for life to unlead a house and pull down the tiles. 1 T. R. 55, n.

But a tenant for life, without impeachment of waste, has as full power of cutting down timber, and of opening new mines for his own use, as if he had an estate of inheritance; and is in the same manner entitled to the timber, if severed by others. 1 T. R. 56; 1 Inst. 220, n. And a tenant in tail after possibility, &c. has equally with such tenant for life an interest and property in the timber. 15 Ves. 419. But although such tenant for life may commit waste for his own benefit, yet he (and also a tenant in tail after possibility, &c.) may be restrained by an injunction out of the Court of Chancery, from making spoil and destruction on the estate. This distinction was first introduced in the case of Lord Barnard as to Raby Castle. See *post*, IV.

III. THE Punishment for waste committed was, by common law and the statute of Marlebridge, only single damages, except in the case of a guardian, who also forfeited his wardship by the provisions of the great charter. 2 Inst. 146, 300; Mag. Charta, c. 4. But the statute of Gloucester, 6 Edm. 1. c. 5. directed that the other four species of tenants (for life, for years, by curtesy, or in dower) should lose and forfeit the place wherein the waste is committed, and also treble damages, to him that had the inheritance. The expression of the statute was, "he shall forfeit the *thing* which he hath wasted;" and it was determined, that under these words the *place* was also included. 2 Inst. 303. And if waste were done *sparsim*, or here and there, all over a wood, the whole wood should be recovered; or if in several rooms of a house, the whole house should be forfeited; because it was impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. Co. Litt. 54. But if waste were done only in one end of a wood (or perhaps in one room of a house, if that could be conveniently separated from the rest,) that part only was the *locus vastatus*, or thing wasted, and that only should be forfeited to the reversioner. 2 Inst. 304; 2 Comm. c. 18.

The redress for this injury of waste was of two kinds;

preventive and corrective; the former of which was by writ of *estrepement*, the latter by that of waste.

Estrepement is an old French word, signifying the same as waste or extirpation: and the writ of *estrepement* lay at the common law, after judgment obtained in an action real, and before the possession was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit in lands, which were determined to be no longer his. 2 Inst. 328. But as in some cases the demandant might be justly apprehensive, that the tenant might make waste or *estrepement* pending the suit, well knowing the weakness of his title, therefore the statute of Gloucester, 6 Edw. 1. c. 13. gave another writ of *estrepement*, *pendente placito*, commanding the sheriff firmly to inhibit the tenant "*ne faciat vastum vel estrepamentum pendente placito dicto indissoluto.*" Regist. 77. And, by virtue of either of these writs, the sheriff might resist them that did, or offer to do, waste; and, if otherwise he could not prevent them, he might lawfully imprison the wasters, or make a warrant to others to imprison them. Or, if necessity required, he might take the *posse comitatús* to his assistance. So odious in the sight of the law was waste and destruction. 2 Inst. 329; 3 Comm. c. 14. See further, *Estrepement*.

A writ of waste was also an action, partly founded upon the common law, and partly upon the statute of Gloucester, c. 5; and might be brought by him who had the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by the curtesy, or tenant for years. This action was also maintainable in pursuance of stat. Westm. 2. (13 Edw. 1. c. 22.) by one tenant in common of the inheritance against another, who made waste in the estate holden in common. The equity of which statute extended to joint-tenants, but not to co-parceners; because by the old law co-parceners might make partition, whenever either of them thought proper, and thereby prevent future waste: but tenants in common and joint-tenants could not; and therefore the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any farther waste. 2 Inst. 403, 404. But these tenants in common and joint-tenants were not liable to the penalties of the statute of Gloucester, which extended only to such as had life-estates, and did waste to the prejudice of the inheritance. The waste however must have been something considerable; for if it amounted only to twelve pence, or some such petty sum, the plaintiff should not recover in an action of waste; *nam de minimis non curat lex*. Finch. L. 29; 3 Comm. c. 14.

This action of waste was a mixed action; partly real, so far as it recovered land, and partly personal, so far as it recovered damages: for it was brought for both those purposes; and, if the waste were proved, the plaintiff should recover the thing or place wasted, and also treble damages, by the statute of Gloucester. The writ of waste called upon the tenant to appear and show cause, why he had committed waste and destruction in the place named, *ad exheredationem*, to the disinherison, of the plaintiff. F. N. B. 55. And if the defendant made default, or did not appear at the day assigned him, then the sheriff was to take with him a jury of twelve men, and go in person to the place alleged to be wasted, and there inquire of the waste done, and the damages: and make a return or report of the same to the court, upon which report the judgment was founded. Poph. 24. For the law would not suffer so heavy a judgment, as the forfeiture and treble damages, to be passed upon a mere default, without full assurance that the fact was according as it was stated in the writ. But if the defendant appeared to the writ, and afterwards suffers judgment to go against him by default, or upon a *nilhil dicit* (when he made no answer, put in no plea, in defence,) this amounted to a confession of the waste; since, having once appeared, he could not now pretend ignorance of

the charge. Then therefore the sheriff should not go to the place to inquire of the fact, whether any waste had, or had not, been committed; for this was already ascertained by the silent confession of the defendant: but he should only, as in defaults upon other actions, make inquiry of the quantum of damages. Cro. Eliz. 18, 290. The defendant, on the trial, might give in evidence any thing that proves there was no waste committed, as that the destruction happened by lightning, tempest, the king's enemies, or other inevitable accident, Co. Litt. 58. But it was no defence to say, that a stranger did the waste, for against him the plaintiff had no remedy: though the defendant was entitled to sue such stranger in an action of trespass *vi et armis*, and shall recover the damages he has suffered in consequence of such unlawful act. Bull. N. P. 112.

When the waste and damages were thus ascertained, either by confession, verdict, or inquiry of the sheriff, judgment was given, in pursuance of the statute of Gloucester, c. 5. that the plaintiff should recover the place wasted; for which he had immediately a writ of seisin, provided the particular estate were still subsisting: (for, if it were expired, there could be no forfeiture of the land,) and also that the plaintiff should recover treble the damages assessed by the jury; which he must have obtained in the same manner as all other damages, in actions personal and mixed, were obtained, whether the particular estate were expired, or still in being. 3 Comm. c. 14.

The process incident to actions of waste was, first, a writ of summons made by the cursor of the county where the land lay, and on their return of this writ the defendant might esoin, and the plaintiff adjourn, &c. Then a *pone* was made out by the filazer of the county, on the return of which a *distringas* issued for the defendant to appear, and upon his appearing the plaintiff declared, and the defendant pleaded, &c. By the 8 & 9 Wm. 3. c. 11. § 2. a plaintiff should have costs in all actions of waste, where the damages found did not exceed twenty nobles, which he could not by the common law.

In an action of waste on the statute of Gloucester, against tenant for years, for converting three closes of meadow into garden ground, where the jury gave only one farthing damages for each close, the Court of Common Pleas permitted the defendant to enter up judgment for himself. 2 Bos. & Pul. 96. And see 1 Bing. 482; 1 Jac. & Walk. 851.

The action of waste had so entirely fallen into disuse, that the last two cited common law cases were probably the only modern instances in which it was brought, and it is now abolished by the 3 & 4 Wm. 4. c. 27. § 36.

An action on the case, in the nature of an action for waste, has long been substituted for the ancient remedy, and it will lie between persons between whom the proper action of waste was not maintainable: but in *Gibson v. Wells*, 1 New Rep. 290. it was ruled by the Court of Common Pleas that this action does not lie in the case of permissive waste. See 4 Taunt. 764; 7 Taunt. 392. But see 2 Saund. 252, (n. 7); and 3 Coke R. 25, note A. (ed. by Fraser.)

By this action on the case the reversioner or remainderman for life or years may recover damages, 2 Wm's. Saund. 252, n. (7); and it has been considered maintainable against tenants at will or by sufferance, to which persons the action of waste did not as we have seen apply. Cro. Car. 187, S. C.; Sir W. Jones, 224. But against tenants at will it seems trespass and not case is the proper remedy. *Ibid.*; Co. Litt. 57 a; and see Mr. Hargrave's, note (1); Amos & Ferard on Fixtures, 226.

The action on the case lies also against a tenant for years after the expiration of his term. Bl. 1111. Though the lease contain an express covenant against waste, so as to give the lessor his remedy by action of covenant, he may still, if he choose, bring an action on the case against the lessee for waste done during the term. *Ibid.*

One of two tenants in common cannot maintain an action on the case in nature of waste against his co-tenant (in possession of the whole, having a demise of the moiety) for cutting down trees of a proper age and growth for being cut; but he will be entitled to recover a moiety of the value in another form of action: *aliter*, if the trees be not fit to cut. 8 T. R. 145.

A more effectual remedy against voluntary waste is in many cases attainable by injunction in equity. See *post*, IV.

IV. THE Courts of Equity, upon bill exhibited, therein complaining of waste and destruction, will grant an injunction, in order to stay waste, until the defendant shall have put in his answer, and the court shall thereupon make further order; which is now become the most usual way of preventing waste. 3 Comm. c. 14.

If a tenant for life plant wood on the land, which is of so poisonous a quality that it destroys the principles of vegetation, without an express power in his lease, where it is usual to have such powers, it may be considered as waste, and the Court of Chancery may grant an injunction. *Bac. Abr.*; *MSS. Rep. Marquis of Powis v. Dorall, Canc.*

If there be lessee for life, remainder for life, the reversion or remainder in fee, and the lessee in possession waste the lands, though he is not punishable for waste by the common law, by reason of the mean remainder for life; yet he shall be restrained in Chancery, for this is a particular mischief. *Moor*, 554; 1 Vern. 23. But if such lessee has in his lease an express clause of without impeachment of waste, he shall not be enjoined in equity. 1 Vern. 23.

If A. is tenant for life, remainder to B. for life, remainder to first and other sons of B. in tail male, remainder to B. in tail, &c.; and B. (before the birth of any son,) brings a bill against A. to stay waste; and A. demurs to this bill, because the plaintiff had no right to the trees, and no one that had the inheritance was party: yet the demurrer will be overruled, because waste is to the damage of the public, and B. is to take care of the inheritance for his children, if he has any, and has a particular interest himself, in case he comes to the estate. 1 Eq. Abr. 400.

It seems to be a general principle, that tenant in tail after possibility shall be restrained in equity from doing waste, by injunction, &c. because the court will never see a man disinherited; *per Chan. Finch*. And he took a diversity, where a man is not punishable for waste, and where he hath a right to do waste; and cited *Uvedale's case*, (24 Car. 1.) ruled by Lord Rolfe to warrant that distinction. 2 Show. 69, pl. 53.

The right to restrain tenant in tail after possibility from committing equitable waste, is as fully settled as it is in the case of tenant for life without impeachment of waste. 2 Freem. 53; 2 Eq. Ab. 757; 3 Mad. 528.

A lease without impeachment of waste takes off all restraint from the tenant of doing it; and he may, in such case, pull up or cut down wood or timber, or dig mines, &c. at his pleasure, and not be liable to any action. *Plowd.* 135. But though the tenant may let the houses be out of repair, and cut down trees, and convert them to his own use; yet where a tenant in fee-simple made a lease for years without impeachment of waste, it was adjudged that the lessor had still such property, that if he cut and carried away the trees, the lessee could only recover damages in action for the trespass, and not for the trees: also it hath been held, that the tenant for life without impeachment of waste, if he cuts down trees, is only exempt from an action of waste, &c. 11 Rep. 82; 1 Inst. 220; 2 Inst. 146; 6 Rep. 63; *Dyer*, 184. And if the words are, "to hold without impeachment of waste, or any writ or action of waste," the lessor may seize the trees if the lessee cuts them down, or bring trover for them. *Wood's Inst.* 574. See *ante*, II.

In many cases, likewise, the Court of Chancery will restrain waste, though the lease, &c. be made without impeachment of

waste: for the clause of "without impeachment of waste" never was extended to allow the destruction of the estate itself, but only to excuse for permissive waste; and therefore such a clause would not give leave to fell or cut down trees ornamental or sheltering of a house, much less to destroy or demolish a house itself. And if such waste be committed, an injunction will be granted to stay the waste; and the Court of Chancery will enforce the repair by the offender. 2 Vern. 738, 739; 1 Salk. 161, *Vane v. Lord Barnard*. See 1 P. Wms. 527; *Bac. Ab. Waste*, N. (7th ed.)

There has been much uncertainty as to what is and what is not to be considered ornamental timber. The principle on which the court has gone is, that if the testator or author of the interest by deed, had gratified his own taste by planting for ornament, though he had adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and upon the competition between those parties the court should see that the tenant for life was right and the other wrong, in point of taste, yet the taste of the testator, like his will, binds them; and it is not competent to them to substitute another species of ornament for that which the testator designed. The question which is the most fit method of clothing an estate with timber for the purpose of ornament, cannot be safely trusted to the court. *Per Lord Eldon*, 6 Ves. 149; and see *acc.* 6 Mad. 149.

And therefore it is not enough for the affidavits to ground an injunction to show that the trees are ornamental. It must be shown that they were planted or left standing for the purpose of ornament. 1 Jacob, 70.

The principle has been extended from the ornament of the house to outhouses and grounds, then to plantations, vistas, avenues, and all the rides about the estate for ten miles round; and in the case of the *Marquis of Downshire v. Sandys* it was held to extend to clumps of firs on a common two miles distant from the house, they having been planted for ornament. 6 Ves. 107, 419, 787.

And the court granted the injunction where the trees were planted to exclude objects from view, holding this within the principle. 16 Ves. 174, 375.

But the injunction will not be extended to trees which protect the premises from the effects of the sea. And the court refused in one case to insert in the order the words, "contributing to ornament," and the injunction was accordingly taken according to a prior case in the terms "standing for ornament or shelter." 1 Jacob, 70; 8 Ves. 375; and see 1 Jacob, 71, *notd.*

The subject of interposition by prohibition in the case of waste committed by ecclesiastical persons, was discussed with a degree of learning and research, in the case of *Jefferson v. Bishop of Durham*, 1 B. & P. 105, that makes it impossible to add any thing to what is there collected. It appears from thence, that not one of the early text writers were aware of any common law remedy against churchmen committing waste, and that the Year Book, 2 Hen. 4. contained an extrajudicial opinion of Thirning, C. J., that if a bishop or archdeacon cut down all his wood, he shall not be punished at common law. In the reign of James I., however, Lord Coke unassisted by, and indeed, contrary to all practice, sagaciously inferred from two ancient records, 1 B. & P. 109, n., that a writ of prohibition lay at common law against a churchman who committed waste; and upon these authorities in the reign of Charles I. Lord Keeper Coventry, 2 Ro. Ab. 813. issued a prohibition of waste to a churchman under the great seal, on the application of the patron. Lord Coke in one case, 1 Rol. 86, 335; 3 Bulst. 91. went so far as to say that any one might have a prohibition as well as the patron, for it was the king's writ, and any one might have a prohibition for the king. It appears, however, most satisfactorily, from a review of the doctrine collected in *Jefferson v. Bishop of Durham*, that Lord Coke was not justified in the extent to which he carried this doctrine; and though that case, in point of actual de-

cision, merely establishes that the Court of Common Pleas has no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possession of his see, at the suit of an uninterested person; yet it may be gathered, as the opinion of the learned person who determined it, and appears to be fairly deduced in argument, that no court of common law has the power of issuing this writ against any ecclesiastical person, but that it can only issue out of Chancery.

The parson has a fee simple, qualified and under restrictions, in right of his church: but he cannot do every thing that a private owner of the inheritance can. He may cut down timber for the repairs of the parsonage house or chan- cel: if it is the custom of the country, he may cut down underwood for any purpose, but if he grubbs it up it is waste. He may cut timber for repairing old pews that belong to the rectory, and he is entitled to votes for repairing barns and outhouses belonging to the parsonage. 2 *Atk.* 216. But he cannot cut down timber for any other purpose, nor can he open mines, though he may work mines already open. A bishop cannot even open mines in the possession of his see. Lord Hardwicke mentioned an application made to parliament by Talbot, bishop of Durham, to be enabled to open mines, which was refused. *Amb.* 176.

However, the bishops of Durham have, for a long period of years, worked by their lessees the coal and lead lying as well under the leasehold as also the copyhold lands belonging to that see; and instances have occurred in the county of Durham, of rectors likewise demising or selling the coal under the glebe lands belonging to their livings with a view to its being wrought.

Before the disabling statutes, bishops had a very extensive right of cutting timber, and consequently of granting leases without impeachment of waste. There are two instances of injunctions granted against such tenants, not on the ground of want of right in the bishops to grant such leases, but in consequence of the unconscientious use which the tenants were making of their power to commit waste. 1 *P. W.* 527; 2 *Freem.* 55; *Eden on Injunctions*, 201—205.

The point has been much discussed, how far ecclesiastical persons are bound specifically to apply the timber cut for the purpose of repairs, towards the actual repairs for which it was wanted: Lord Hardwicke was of opinion that they were not so restricted, *Amb.* 176; and Lord Eldon has observed, that it would defeat the general intention of the law, that the possessions of the church should tend to the maintenance of the church; if ecclesiastical bodies were compellable in every instance to apply the identical timber, by removing it from the most distant parts of the country in which it might happen that their property lay. 3 *Meriv.* 428, 522. And in a very recent case, the same doctrine was distinctly laid down by Sir T. Plumer. 2 *Wils. Ch. Rep.* 1.

A court of equity frequently interposes by injunction against the rector, at the suit of the patron, to stay waste. *Barnard.* 399; 2 *Atk.* 217; 1 *B. & P.* 115, n.; *Amb.* 176. Lord Hardwicke also observed, that injunctions have been granted to stay waste at the instance of the attorney-general, on behalf of the crown, the patron of bishops. *Amb.* 176. And though it has been said, that no precedent could be found for this, 1 *B. & P.* 116; yet the doctrine has been recognized both by Lord Eldon, 3 *Meriv.* 427, and Mr. Justice Heath. 1 *B. & P.* 131. So deans and chapters, it should seem, may be restrained by injunction at the suit of the crown, but not at the application of a person having no interest; and therefore where a lessee filed a bill to restrain the dean and chapter of Winchester from cutting timber, Lord Eldon was of opinion, that except so far as he might derive any right or interest under an agreement, he was clearly an uninterested stranger, and dissolved an injunction which had been obtained by him. 3 *Meriv.* 421.

In all those cases in which a bill for an injunction will lie,

the courts of equity, upon the principle of preventing multiplicity of suits, will give an account of, and satisfaction for, waste already committed.

Lord Hardwicke, in one case, alluding to this jurisdiction, observed, that as in bills for account of assets, &c. which originally were bills for discovery, without which an account could not be had, the court, in order to make a complete decree, gave the party his debt likewise: in like manner upon bills for injunctions, a court of equity, in order to give complete relief, gave the party an account and satisfaction for the waste committed, without obliging him to bring an action at law as well as a bill in equity. 3 *Atk.* 263; *Mitf. Tr.* 96, n. This doctrine is clearly established where the account prayed is consequential to the injunction; but how far a court of equity will give an account of waste committed, and decree satisfaction, where that relief is not consequential to an injunction, is a point upon which the authorities are much at variance.

In the case of mines and collieries, which are looked upon in equity as a species of trade, a decree for an account of profits has been frequently made, although no injunction has been prayed by the bill. 1 *P. W.* 406; 2 *Atk.* 630; 3 *Atk.* 264; *Amb.* 54; 6 *Ves.* 89. This relief, however, is the same as the account given by a court of equity of rents and profits, and cannot be maintained upon a mere legal title. 1 *Ves.* 232.

A lord of a manor may bring a bill for an account of ore dug, or timber cut, by the defendant's testator. Thus, a customary tenant of lands, in which was a copper mine that never had been opened, opened the same, and dug out and sold great quantities of ore, and died; and his heir continued digging and disposing of great quantities out of the same mine. The lord of the manor brought a bill in equity against the executor and heir, praying an account of the said ore; and alleged that these customary tenants were as copyhold tenants, and that the freehold was in the plaintiff as lord of the manor and owner of the soil; and that the manner of passing the premises was by surrender into the hands of the lord, to the use of the surrenderee. It was insisted for the defendants, that it did not appear that the admittance in this case was to hold *ad voluntatem domini secundum consuetudinem*, &c. without which words, it was insisted, that there could be no copyhold, as had been adjudged in Lord Ch. J. Holt's time. And Lord Chan. Cowper said, it would be a reproach to equity to say, that where a man has taken another's property, as ore or timber, and disposed of it in his lifetime, and dies, there should be no remedy. 1 *P. Wms.* 406, pl. 112, *Bishop of Winchester v. Knight*. See *Finch Rep.* 185; 2 *Vern.* 263, pl. 247.

Where tenants of a manor, claiming a right of estovers, cut down a great quantity of growing timber of great value, their title being doubtful, the Court of Chancery entertained a bill, at the suit of the lord of the manor, to restrain this assertion of it. *Mitf. Treat.* 123, 124.

It has been said in equity, that remainder-man for life shall, in waste, recover damages in proportion to the wrong done to the inheritance, and not in proportion only to his own estate for life. 1 *Vern.* 158.

See further *Eden on Injunctions*.

WASTER-BOWL, from the Sax. *was-heal*, i. e. health be to you.] A large silver cup or bowl, wherein the Saxons, at their entertainments, drank a health to one another, in the phrase of *wass-heal*. The wastel or wass-heal bowl was set at the upper end of the table of religious houses for the use of the abbot, who began the health, or *poculum charitatis*, to strangers, or to his fraternity. Hence cakes and fine white bread, which were usually sopped in the wastel-bowl, were called wastel-bread. *Mat. Paris*, 141.

WASTORS. Thieves so called; mentioned among robbers, draw-latches, &c. in 4 *Hen.* 4. c. 27.

WATCH. To watch is to stand sentry, or attend as a

guard, &c. Watching is properly for the apprehending of rogues in the night, as warding is for the day; and for default of watch and ward the township may be punished.

Our ancient statutes direct, that in all towns, &c. between the day of Ascension and Michaelmas-day, night-watches are to be kept in every city, with six men at every gate; and six or four in towns; and every borough shall have twelve men to watch, or according to the number of the inhabitants of the place, from sun-setting to sun-rising; who are to arrest strangers suspected, and may make hue and cry after them, and justify the detaining them until the morning; and watches shall be kept on the sea-coasts, as they have been wont to be. 13 *Edw. 1. st. 2. c. 4*; 5 *Hen. 4. c. 3*.

Every justice of the peace may cause these night-watches to be duly kept; which is to be composed of men of able bodies, and sufficiently weaponed: and none but inhabitants in the same town are compellable to watch, who are bound to keep it in turn; or to find other sufficient bodies for them; or, on refusal, are indictable, &c. *Co. Lit. 70*; *Cro. Eliz. 204*.

In consequence of the outrages committed by the Luddites in Nottinghamshire and the adjoining counties, the 52 *Geo. 3. c. 17*. (a temporary act continued by 58 *Geo. 3. c. 52*, but now expired,) was passed for giving more prompt and effectual powers for enforcing the duties of watching in the night-time, and warding in the day-time, for the preservation of the peace and the protection of persons and property wherever similar outrages might be committed.

By the 3 & 4 *Wm. 4. c. 90*. for the lighting and watching of parishes in England and Wales, (but which statute is not compulsory, but may be adopted in the manner therein mentioned,) a variety of provisions is made for the watching and warding of parishes in which the act is put in force, by the appointment of watchmen, patrols, street-keepers, &c. and which watchmen and patrols are to be sworn in, and to have the same powers as constables. See further, *Polac.*

WATCHES. By the 3 & 4 *Wm. 4. c. 52. § 58*. watches impressed with any mark or stamp representing any British assay mark or stamp, or purporting to be of the manufacture of the United Kingdom, or not having the name and place of abode of some foreign maker abroad visible on the frame and also on the face, or not being in a complete state, with all the parts properly fixed in the case, may not be imported into the United Kingdom, even for the purpose of being warehoused.

WATER-BAILIFF. An officer in port towns, for the searching of ships.

In the city of London there is a water-bailiff, who has the supervising and search of fish brought thither, and the gathering of the toll arising from the Thames. He attends on the lord mayor, having the principal care of marshalling the guests at his table; and arrests men for debt, or other personal or criminal matters upon the river Thames. See 28 *Hen. 6. c. 5*; see also 1 & 2 *Wm. 4. c. lxxvi.* (local act.)

WATER COMPANIES. The metropolis is at present supplied with water by eight companies, namely, the New River, Chelsea, East London, West Middlesex, and Grand Junction, on the north side of the Thames; and Lambeth, Vauxhall or South London, and Southwark water-works, on the Surrey side.

WATER, AND WATER-COURSES. The right of conducting water through one estate for the use and convenience of an adjoining estate is an incorporeal hereditament of the class of easements, or a prædial service, which was known to the civilians under the name of service *aquæ ductus*, (*Domat's Civil Law, L. 1. T. 12.*) and is of use when Seins has a scarcity of water, and requires it for watering his cattle, or his lands, or for making his mill go, or for any other such advantage to his grounds. 2 *Frederican Code, 144*.

The right of taking the water out of another's well or pond is an incorporeal hereditament of the class of profits, or a

personal service, which was called by the civilians service *aquæ haustus*, which takes place when Seins has right to draw water for the use of his ground out of Caius's well or current. This service includes a right of way, in order to go to and return from the well or pond. 2 *Frederican Code, 146*; *Domat's Civil Law, L. 1. T. 12*.

I. Of the Right to Water and Water-Courses, and how acquired.

II. Of the Remedies for obstructing Water and Water-Courses.

I. It is well settled by the law of England, that water flowing in a stream is originally *publici juris*. By the Roman law, running water, light, and air, were considered as some of those things which had the name of *res communes*, and which were defined, "things the property of which belong to no person, but the use to all." 7 *Bing. 692, 693*.

The right to the use of water was thus defined by the late master of the rolls when vice-chancellor:—

"*Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water.

"Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor without the consent of the other proprietors, who may be affected by his operations. No proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years; which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of a grant." 1 *Sim. & Stu. 203*; and see 3 *B. & Ad. 304*.

The owner of the banks of a stream has a right to the advantages of that stream, flowing in its natural course, and is entitled to use it for any purpose not inconsistent with similar enjoyment in the owners above and below: and no proprietor of the banks of a stream has a right to diminish the quantity or injure the quality of the water to the detriment of the proprietors of the other parts of the banks: and the right to appropriate a stream of water, in exclusion of any owners of the banks of the stream cannot be acquired in less than twenty years. 2 *N. & M. 747*; 5 *B. & Ad. 1*.

Quære, whether such possessor of land can maintain an action for the mere violation of such general right by diversion of water, &c. without having sustained any special injury? *Id.*

The ordinary course of water cannot be lawfully obstructed for the benefit of one class of persons, to the injury of another: and where the occupiers of lands adjoining a canal erected artificial banks called fenders, to prevent the flood water escaping upon their lands, in consequence of which the canal banks were enlarged and the navigation obstructed, it was held that such erections could not be justified. 1 *B. & Ad. 871*.

So the proprietor of lands along which there is a flood stream, cannot obstruct its old course by a new water way, to the prejudice of the proprietor of lands on the opposite side. Thus, a proprietor of land on the bank of a river, who had commenced the building of a mound, which if completed would, in times of ordinary flood, have thrown the waters of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them, was restrained by a perpetual interdict, in Scotland, from the further erection of any bulwark, or other work, which might have the effect of di-

verting the stream of the river, in time of flood, from its accustomed course, and throwing the same on the lands of the other proprietors; Lord Chancellor Lyndhurst observing, that it was clear beyond the possibility of a doubt, that by the law of England such an operation could not be carried on. *Menzies v. Breadalbane*, 3 Bligh, N. S. 414, 418.

Independently of any particular enjoyment which another has been accustomed to have, every person is entitled to the benefit of a flow in his own land, without diminution or alteration; but an adverse right may exist, founded on the occupation of another; and although the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it hath existed for so long a time as may raise the presumption of a grant, the other party, whose lands are below, must take the stream subject to such adverse right. Twenty years' exclusive enjoyment of water in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of parliament. 6 East, 208; see 1 Camp. N. P. C. 463; 1 Vent. 237; 2 Wms. Saund. 113, b.

But where the use of water left unappropriated is possessed by another, it seems that an action for an injury to the newly-acquired right may be sustained on an enjoyment for less than twenty years. The rule is, that after the erection of works, and the appropriation by the owner of the land of a certain quantity of the water flowing over it, if a proprietor of other land afterwards take what remains of the water before unappropriated, the first-mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do so afterwards. 6 East, 219; see also 1 Sim. & Stu. 203.

When a mill has been erected upon a stream for a long period of time, it gives to the owner a right that the water continue to flow to and from the mill in the manner in which it has been accustomed to flow during that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill, unless the alterations prejudice the right of others. 1 B. & A. 258. As soon as water is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. The party who obtains a right to the exclusive enjoyment of water does so in derogation of the primitive right of the public. Such being the nature of the right to water, the party complaining of the breach of such a right ought to show that he is prevented from having water which he has acquired a right to use for some beneficial purpose. 2 B. & Cr. 913.

A water-course does not begin by prescription, nor yet by assent, but begins *ex jure naturæ*, having taken this course naturally, and cannot be diverted. 3 Bulst. 340.

The long enjoyment of a watercourse is the best evidence of right, and raises a presumption of an agreement; and proof of a special license, or that it was limited in point of time, must come from the party who opposes the right. 2 Vern. 390.

If land, with a run of water upon it, be sold, the water, *primâ facie*, passes with the land, and the vendee having used the water, though for less than twenty years, gains a title to it by appropriation, and may maintain an action for obstructing it. 2 Cr. & Jerv. 126; S. C. 2 Tyr. 155.

The privilege of watercourse is not confined to private individuals. It may be vested in a corporation, as where there was a grant to the corporation of Carlisle of water for the purpose of turning the city mills. 8 East, 187. So also, inhabitants may prescribe for such an easement, as where the inhabitants of a vill, or the parishoners of a parish alleged a custom or usage of keeping an ancient ferry-boat. 3 Mod. 294.

All the above decisions are prior to the prescription act, (2 & 3 Wm. 4. c. 71.) which (§ 2.) has adopted the term of twenty years as the leading period for the establishment of a

right to a water-course, or to the use of water. See *Prescription*, III.

It requires a deed to create a right and title to have a passage for water. 4 East, 407; 5 B. & Cr. 232. But although the right to a flow of water formerly belonging to the owner of a mill can only pass by grant, as an incorporeal hereditament, yet after a parol license to perform works upon a river had been executed, it is sufficient to relieve the party from restoring it to its former state, although the license has been countermanded. Thus, where plaintiff's father, by oral license, had permitted the defendants to lower the bank of a river, and make a weir above the plaintiff's mill, whereby less water than before flowed to the plaintiff's mill, it was held that the plaintiff could not maintain an action against the defendants for continuing the weir, as it was a license to construct a work in its nature permanent and continuing, and attended with expense to the party using the license, who might sustain a heavy loss by its being countermanded; and it was the fault of the party himself, if he meant to reserve the power of revoking such license, after it was carried into effect, that he did not expressly reserve that right when he granted the license, or to limit as to duration. 1 Bing. 682.

A license to take water at a particular place will not authorize the taking away the same quantity of water at another place. 2 N. & M. 747; 5 B. & Ad. 1; and see 3 B. & Ad. 304.

A general license to take water at any place, is revocable, except as to the places where it has been acted upon and expenses have been incurred. *Id.*

II. Where the owners of property have by long enjoyment acquired special rights to the use of water in its natural state, as it was accustomed to flow, by way of particular easement to their own properties, and not merely a use, which is common to all the king's subjects; an action on the case may be maintained for a disturbance of the enjoyment, 4 East, 107; but where the injury, if any, is to all the king's subjects, the only remedy is by indictment. 12 East, 429.

For where an action on the case would lie at the suit of an individual for the diversion of a water-course an indictment will lie where the act affects the public. 1 B. & Ad. 874.

The mere obstruction of the water which has been accustomed to flow through the plaintiff's lands, does not *per se* afford any ground of action: some benefit must be shown to have arisen from the water going to his lands; or at least it is necessary to show that some deterioration was occasioned to the premises by the subtraction of the water. 2 B. & Cr. 915; S. C. 4 Dowl. & Ry. 583.

The proprietor of lands contiguous to a stream may, as soon as he is injured by the diversion of the water from its natural course, maintain an action against the party so diverting it; and it is no answer to the action, that the defendant first appropriated the water to his own use, unless he has had twenty years' undisturbed enjoyment of it in the altered course. 3 B. & Ad. 304. And such action will lie at any time within the twenty years after the injury has arisen. 1 Sim. & Stu. 203.

The occupier of a mill may maintain an action for forcing back water and injuring his mill, although he has not enjoyed it precisely in the same state for twenty years; and therefore it was holden no defence to such action that the occupier had within a few years erected in his mill a wheel of different dimensions, but requiring less water than the old one, although the declaration stated the plaintiff to be possessed of a mill, without alleging it to be an ancient mill. 1 B. & Ad. 258.

If the nuisance be of a permanent nature, and injurious to the reversion, an action may be brought by the reversioner, as well as by the tenant in possession, each of them being entitled to recover his respective loss. 3 Lev. 207; 14 East 489; 1 Wms. Saund. 322, b, notes; 4 Burr. 2141; Com. Dig. Action on the Case for Nuisance, (B.)

Where the defendants erected in their own lands a permanent obstruction to a navigable drain, leading from a river through such land to the plaintiff's close, it was held that an action lay for the plaintiff, although for sixteen years the part of the drain passing through his close had been completely clogged up with mud. 1 *Bing. N. C.* 549.

It is no defence to an action by a reversioner for an injury to the reversion, in not repairing a gutter for the conveyance of water through the plaintiff's land to the defendant's mill, whereby the water oozed through the gutter, and carried away the soil of the close, that the defect in the gutter was occasioned by the plaintiff's tenant. 1 *Mod. & Malk*, 204.

As to the damages, see *Holt's N. P. C.* 543.

A bill in equity will lie for the establishment of the enjoyment of a water-course, and for the performance of a covenant to cleanse it. 1 *Eq. Cas. Abr.* 27, pl. 4. And it was held that a man who had been in possession of a water-course sixty years might bring a bill against a mortgagee who foreclosed the equity of redemption, to be quieted in the possession, although he had not established his right at law. *Prece. Ch.* 530; see *Id.* 531.

The diversion of water-courses, or the pulling down their banks, and causing inundation, are nuisances, against which a court of equity will protect parties by injunction, without first bringing an action of trespass, *Mos.* 144; 1 *Br. C. C.* 588; *S. C.* 2 *Cox*, 4; 3 *Mer.* 688; and if, on motion to dissolve the injunction, there be a question as to the right to the flow of water, an issue will be directed to try it. 2 *Cox*, 4. And the effect of an order specifically to repair the banks of a canal and other works has been obtained by an order to restrain a party using and enjoying a canal, from impeding the navigation, by continuing to keep the canals, banks, or works out of repair, by diverting the water, or preventing it by the use of locks from remaining in the canals, or by continuing the removal of a stop-gate. 10 *Ven.* 192; see 3 *Swanst.* 437, n.; and see also *Shelford's Real Prop. Acts*, 71.

WATER-GAGE. A sea wall or bank to restrain the current and overflowing of the water. It signifies also an instrument to gauge or measure the quantity or deepness of any waters.

WATER-GANG, Watergangium. A Saxon word for a trench or course to carry a stream of water; such as are commonly made to drain water out of marshes. *Ordin. Marisc. de Romn. Chart. H.* 3.

WATER-GAVEL. A rent paid for fishing in, or other benefit received from, some river. *Chart. H.* 3.

WATER-MEASURE. Was greater than Winchester measure, and was formerly used for selling of coals in the Pool, &c. it is mentioned in the 22 *Car. 2. c.* 11.

WATERMEN. By the 2 & 3 *P. & M. c.* 16. the mayor and the court of aldermen of the city of London were empowered to elect yearly eight watermen to be the overseers and rulers of all the wherry-men and watermen upon the said River of Thames between Gravesend and Windsor, who admitted and registered such watermen.

By the 11 & 12 *Wm. 3. c.* 21. the wherry-men, watermen, and lightermen, working between Gravesend and Windsor, were constituted one company, and the said lightermen were directed to be registered; and the court of lord mayor and aldermen of the city of London were empowered to elect yearly eight watermen, and also three lightermen out of twelve to be nominated by the lightermen, to be overseers and rulers of the wherry-men, watermen, and lightermen.

By the 34 *Geo. 3. c.* 65. the court of lord mayor and aldermen of the city of London were empowered to make rules, orders, and constitutions for the better government and regulation of watermen, wherry-men, and lightermen upon the said River Thames between Gravesend and Windsor.

By the 7 & 8 *Geo. 4. c.* 75. (printed among the local and personal acts,) the above, and a variety of other statutes,

commencing with the 6 *Hen. 8. c.* 7. were repealed, with a view to a consolidation of the laws regulating the watermen and lightermen on the River Thames.

By § 1. so much of the 29 *Car. 2. c.* 7. as prevented travelling by water on Sunday, is repealed.

By § 3. the act shall extend to all parts of the River Thames, from and including New Windsor in the county of Berks to and including Yantlet Creek in the county of Kent, and to all docks, canals, creeks, and harbours of or out of the said river, so far as the tide flows therein.

§ 4. The said company of watermen, wherry-men, and lightermen shall be one body corporate, by the name and style of "The Masters, Wardens, and Commonalty of Watermen and Lightermen of the River Thames," and by that name shall have perpetual succession and a common seal, and may sue and be sued.

§ 5. The company shall consist of the watermen, wherry-men and lightermen, whose names have been registered by the overseers and rulers of the company in pursuance of former acts, and who shall be called freemen of the company, and of such other persons admitted freemen of the company as thereafter mentioned.

§ 6. Empowers the company to purchase and hold land to the amount of 1000*l.* a year.

§ 7. For better managing the affairs of the said company there shall be a court of master, wardens, and assistants, consisting of twenty-six members therein named, who shall continue members of the said court during their lives, unless they shall resign, or be removed in manner thereafter mentioned.

§ 8. Appoints a master of the company, a senior and other junior Wardens.

By § 9. a quarterly court is to be held.

And by § 10. extraordinary courts may be held.

§ 13. A master and wardens are to be elected yearly by the court, and to be approved of by the court of mayor and aldermen.

§ 15. On vacancies by death, &c. of master or wardens, others are to be elected, subject to the like approbation.

§ 25. The court is to appoint inspectors of plying places, &c., beadies and other officers.

§ 26. A court shall be held next after the first of June in every year, for binding of apprentices and admission of freemen.

§ 28. No person shall be admitted a freeman of the company unless he shall have rowed on the river as the apprentice of some freeman of the said company, or of the widow of some freeman, for seven years (except as thereafter mentioned); and the widow of any freeman may take and employ apprentices in the same manner as her husband might have done if living.

§ 29. No freeman of the company, or the widow of any freeman, shall at the same time have more than two apprentices, or take a second apprentice until the first shall have served four years of his apprenticeship, except in the cases therein mentioned.

And (§ 30.) no apprentice is to be taken under fourteen or above eighteen years of age.

And (§ 32.) none but freemen or widows whose names and places of abode or working are registered in the books of the company are to take apprentices.

§ 36. No apprentice is to have the sole care of any boat unless he shall have served two years.

§ 37. None but freemen of the company (except as after mentioned) to row or work any boats or craft for hire.

§ 38. No boat is to be used for carrying passengers without a license, expressing the number of persons it may be allowed to carry.

The number and name of owner are to be painted thereon.

Penalty for taking more than the number allowed, 40s. for each passenger, and for a second offence to be disfranchised for twelve months.

In case any greater number of passengers than the allotted number be carried, and any one shall be drowned, the person working the boat is declared guilty of a misdemeanour, and liable to be punished accordingly, and for ever disfranchised.

§ 39. The names of persons keeping boats, &c. for carrying goods, without passengers, (except as after mentioned), and also the names of such boats are to be registered in the books of the company, and the names and numbers of such boats to be painted thereon.

§ 40. The names of owners residing out of the limits of the act are to be painted on their lighters, &c. navigated within the limits.

§ 41. Boats let for hire are to be registered and numbered.

§ 42. The court may appoint Sunday ferries, between Chelsea and Bow Creek.

And (§ 43.) may let the same to farm.

But (§ 45.) Sunday ferries are not to be appointed within 200 yards of Vauxhall Bridge.

§ 46. Watermen are not to ply or work on Sunday, below London Bridge, at the plying places next above and below any Sunday ferry.

§ 47. The justices at Gravesend may license watermen to work on Sundays.

And (§ 49.) permission may be granted to other watermen to work on Sundays for persons requesting.

§ 50. Inflicts 5*l.* penalty on other watermen working at Gravesend on Sunday.

§ 51. The court is to set up bells at Billingsgate and Gravesend to give notice of the tide, and to appoint officers to ring the same.

And (§ 52.) officers are to ring such bells at London and Gravesend at the times appointed.

§ 53. If boats do not go on the ringing of the bell they shall forfeit 5*l.*

And (§ 54.) watermen losing their tide to be subject to a penalty not exceeding 40s. and not to be entitled to their fare.

By § 55, 56. the court is empowered to regulate the affairs of the company, and to make bye laws.

By § 57. the court of aldermen is empowered to make bye laws, and to alter bye laws made by the court of the company.

But (§ 58.) all bye laws are to be allowed by one or more of the judges.

§ 61. The court of aldermen may fix fares for watermen. But the list of fares is to be allowed by the privy council.

§ 62. Imposes a penalty on demanding more than the fare, of not exceeding 40s.

§ 63, 64. A list of fares is to be advertised and made public, and to be put up at certain plying places between Chelsea Bridge and Greenwich, and also half-mile posts or piles westward of Chelsea Bridge and eastward of Greenwich.

§ 66. Every waterman is to carry a list of fares and bye laws, and to produce them to passengers under 5*l.* penalty.

§ 67. Imposes a penalty of 5*l.* on watermen avoiding or refusing to take a fare; or (§ 68.) having plied any fare, shall refuse or delay to proceed as directed.

§ 69. Watermen preventing persons reading the names or numbers, or refusing to state their names, or using abusive language, shall forfeit 5*l.*

§ 70. Saving the powers of the master, &c. of the Trinity House, in licensing mariners; and by § 71. the corporation of the Trinity House is to have the same power to make bye laws for their mariners, as is vested in the court of aldermen with respect to watermen.

§ 73. Mariners licensed by the Trinity House are to be limited to the same fares as watermen.

§ 74. Lord Mayor, aldermen, &c. may summon and apprehend watermen and others, and punish them by fine or imprisonment.

§ 76. Lord Mayor, &c. to summon persons for refusing to pay their fare and order payment, &c.

And (§ 77.) persons refusing to give their names, or giving fictitious names, shall forfeit 5*l.*

§ 79. Members of the court of the company are to hear and determine complaints between watermen and watermen.

§ 89. Justices may award satisfaction for damages done to any boat or craft, not exceeding 5*l.*

But (§ 90.) persons aggrieved may appeal to the quarter sessions.

§ 94. Saves the rights of the city of London.

§ 95. Saves the Duke of Richmond's right to hold a court at Gravesend, called *curia cursus aquae*.

§ 98. Saves existing ferries, and (§ 100.) the powers of dock companies.

§ 102. Any persons and their servants, if freemen, or apprentices, may use lighters, but (§ 103.) may not let them out for hire, or permit others to row them, not being freemen or apprentices.

§ 104. Owners of laystals, market gardeners, &c. may use boats as heretofore.

But (§ 105.) to be subject to a penalty if they carry passengers or goods for hire.

By § 106. the bye laws of the court of aldermen are extended to all boats and vessels. See further, *Police*.

WATER-ORDEAL. See *Ordeal*.

WATERSCAPE, from the Sax. *waeter*, *aqua*, & *schap*, *ductus*.] An aqueduct, or passage for water.

WATLING-STREET. Is one of those four ways which the Romans are said to have made in this kingdom, and called them *Consulares*, *Prætorios*, *Militares*, & *Publicas*. This street is otherwise called *Werlam Street*. See *R. Hov. f. 248, a. n. 10*.

This street leads from Dover to London, St. Alban's, Dunstable, Towcester, Atherston, and the Severn, near the Wrekin, in Shropshire, extending itself to Anglesea in Wales. *Anno 39 El. c. 2*.

The second is called *Ikenild Street*, so called *ab Icenis*, stretching from Southampton, over the river Isis, at Newbridge; thence by Camden and Litchfield; then it passeth the river Derwent by Derby, so to Bolsover Castle, and ends at Tinmouth.

The third was called *The Fossa*, because in some places it was never perfected, but lies as a large ditch; or, as *Cowell* says, from having a ditch on one side of it: this way led from Cornwall through Devonshire, by Tetbury, near Stow-in-the-Wolds, and besides Coventry to Leicester, Newark, and so to Lincoln.

The fourth was called *Ermine* or *Erminage Street*, beginning at St. David's in West Wales, and going to Southampton. See the laws of Edward the Confessor, whereby these four public ways had the privilege of *Pax Regis*. See *Hollingshed's Chron.* vol. 1. c. 19; and *Henry of Huntingdon*, lib. 1. in *principio*. And in *Leg. Will.* 1. c. 30. there are three ways mentioned; but *Ikenild Street* is omitted. See also an old description of these ways made by *Robert of Gloucester*, *Doug. Antiq. of Warr.* p. 6; *Cowell*.

WAVESON. Such goods as after shipwreck do appear swimming upon the waves. *Chart.* 18 *Hen. 8*. See *Flotsam, Wrack*.

WAXSCOT, *ceragium*.] Duty anciently paid, twice a year, towards the charge of wax candles in churches. *Spelman*.

WAYS. There are (says Lord Coke) three kinds of ways: 1. A foot-way, called in Latin *iter*; 2. A pack and prime way, which is both a horse and foot-way, called in Latin *actus*; 3. A cart-way, called in Latin *via* or *aditus*, which contains the other two, and also a cart-way; and is called *via regia*, if it be common to all men; and *communis*

strata, if it belong only to some town, or private person. *Co. Lit.* 56, a.

There is however another kind of way, namely a drift-way, or a way for driving cattle, which is not included in the above division; for according to a modern case, although a carriage-way comprehends a horse-way, yet it does not necessarily include a drift-way. 1 *Taunt.* 279. However, evidence of a carriage-way is strong presumptive evidence of a grant of a drift-way. *Ibid.*

Ways are also either public or private; and notwithstanding the above distinctions, it seems that any of the said ways which is common to all the king's subjects, whether it lead directly to a market town, or only from town to town, may properly be called a highway; that any such cart-way may be called the king's highway; that a river common to all men may also be called a highway; and that nuisances in any of the said ways are punishable by indictment; otherwise they would not be punished at all; for they are not actionable unless they cause a special damage to some particular person; because, if such action would lie, a multiplicity of suits would ensue. But it seems, that a way to a parish church, or to the common fields of a town, or to a village, which terminate there, may be called a private way, because it belongs, not to all the king's subjects, but only to the particular inhabitants of such parish, house, or village, each of which, as it seems, may have an action for a nuisance therein. *Palm.* 389; *Cro. Eliz.* 63, 664; 1 *Vent.* 189, 208; 3 *Keb.* 28; *Co. Lit.* 56; 6 *Mod.* 255; 1 *Hawk. P. C. c.* 76, § 1.

I. Generally of Highways.

II. Of the Repair of Highways at Common Law.

III. Of Nuisances at Common Law in Highways.

IV. Of Proceedings on Indictments for not repairing Highways, &c.

V. Statutory Regulations with respect to Highways and Turnpike Roads.

VI. Of Private Ways, and how they may be acquired or claimed:—

1. By Grant.
2. By Prescription.
3. By Custom.
4. By Reservation.
5. Through Necessity.

VII. Right of Way how lost.

VIII. Of the Remedies for the Disturbance of Private Ways.

I. It seems that anciently there were but four highways in England, which were free and common to all the king's subjects, and through which they might pass without any toll, unless there was a particular consideration for it; all others, which we have at this day, are supposed to have been made through the grounds of private persons, on writs of *ad quod damnum*, &c. which being an injury to the owner of the soil, it is said that they may prescribe for toll without any special consideration. *Bac. Abr.*; 1 *Mod.* 231; 2 *Mod.* 143.

Though every highway is said to be the king's, yet this must be understood so as that in every highway the king and his subjects may pass and repass at their pleasure. For it is laid down in the old books, that in a highway the king has nothing except the passage for himself and his people; but that the freehold, and all the profits, as trees, &c. appertain to the lord of the soil. 2 *E.* 4, 9; 8 *E.* 4, 9; 8 *H.* 7, 5; 2 *Inst.* 705; who in this case is the owner of the adjoining land. 8 *H.* 7, 5. But the lord of a rape, within which there are ten hundreds, may prescribe to have all the trees growing within an highway within this rape, though the manor or soil adjoining belongs to another; for usage to

take the trees is a good mark of ownership. 1 *Rol. Abr.* 392; 1 *Brownl.* 42; *Keilm.* 141.

For it is presumed by the law, that the proprietor of such land adjoining gave up to the public for passage, at some former period, all the land between his inclosure and the middle of the road. 7 *B. & C.* 306, *per Bailey, J.* Hence it is that trespass may be maintained by such a proprietor for digging the ground of the highway. 8 *E.* 4, 9; 1 *Burr.* 143. And he may also maintain ejectment; for the sheriff may give possession of the way, subject nevertheless to the easement. 1 *Burr.* 143. And where on trespass being brought by a plaintiff who had built a street, and permitted it to be used as a highway, it was objected that he could not sue as for a trespass on his private property, it was held that a street built upon a person's own ground is a dedication of the highway, so far only as the public has occasion for it, viz. for a right of passage, not as to the absolute possession of the soil. 2 *Stra.* 1004. See further, *Waste*.

If passengers have used time out of mind, when the roads are bad, to go by outlets on the land adjoining to a highway in an open field, such outlets are parcel of the highway; and, therefore, if they are sown with corn, and the tract fonderous, the king's subjects may go upon the corn. 1 *Rol. Abr.* 390; *Cro. Car.* 366; 1 *Hawk. P. C. c.* 76, § 2. But it is not a good justification in trespass that the defendant has a specific right of way over the plaintiff's land, and that he had gone upon the adjoining land, because the way was impassable by being overflowed by a river. *Doug.* 745, 9. See also 4 *M. & S.* 387.

The public may have a right to a road as a common street, although there may be no thoroughfare, 11 *East*, 375; (but see 5 *Taunt.* 125), or to a road terminating in a common, 1 *B. & A.* 63. So it may be a highway, although it is circuitous, 1 *Camp.* 261; 3 *T. R.* 265; and although it is only occasionally used by the public, and does not terminate in any town, or any other public road. 1 *B. & A.* 63. And on the contrary it is not necessarily a public highway, although it does lead from one market town to another, or connect any two points by a line, which might be advantageously used by the public, or is used by them under certain restrictions. 11 *East*, 376, n. (u.)

It seems that a highway may be claimed, first, from time immemorial, and next, by reason of such a sufferance, as will lead to the conclusion that the original proprietor had designed a common benefit for all the king's subjects.

If a man open his land, so that the public pass over it continually, the public, after a user of a very few years, will acquire a right of way; and a party not meaning to dedicate a way, but only to give a license, should do some act to show that a license only is intended. The common course is to shut up the way one day in every year. 5 *Car. & Payne*, 400. The presumption of a dedication may be rebutted by proof of a bar having been placed across the street soon after the houses forming the street were finished; though the bar was soon afterwards knocked down, and the way had been since used as a thoroughfare. 1 *Camp.* 262, n.; *Id.* 263, n.

A dedication to the public may be presumed from a shorter time than is necessary to establish a right of possession to land; and it has been presumed from a user by the public during a period of eight years, 11 *East*, 376; and even six years, 11 *East*, 376. So where a court on one side of a public street in London was left open to the public, and occasionally used as a communication from one part of the street to another, a dedication to the public was presumed. 1 *Camp.* 258; 3 *T. R.* 265. It seems that the setting out a road under a local act, by commissioners, for the use of particular persons, which in fact has been used by the public for many years, is not sufficient evidence of a dedication, without evidence of acquiescence on the part of the parish, 4 *B. & A.* 447. See 3 *East*, 294.

A highway may also be enjoyed under an express grant, or more usually may be created by act of parliament. 8 *Price*, 535. And where a way has been recognised as public in an act of parliament, it is not necessary that it should be adopted by the public to make it a public way. 5 *D. & R.* 497.

Where a railway was made under the authority of an act of parliament by which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of the way; the company having afterwards taken up the railway, the Court of K. B. granted a mandamus to compel the company to reinstate and again lay down the railway. 2 *B. & A.* 646.

An ancient highway cannot be changed at common law without an inquisition found on a writ of *ad quod damnum*, that such change will be no prejudice to the public; and it is said, that if one change a highway without such authority, he may stop the new whenever he pleases: neither can the king's subjects, in an action brought against them for going over such new way, justify generally as in a common highway, but ought to show specially, by way of excuse, how the old way was obstructed, and a new one set out; neither are the inhabitants bound to keep watch in such new way, or repair it, or to make amends for a robbery committed in it. *Cro. Car.* 286; *Vaugh.* 341; *Yelv.* 141; 1 *Burr.* 465; 1 *Hawk. P. C. c.* 76, § 3.

But it hath been holden, that if a water, which hath been an ancient highway, by degrees changes its course, and goes over different ground from that whereon it used to run, yet the highway continues in the new channel in the same manner as in the old. 22 *Ass.* 93; 1 *Roll. Abr.* 390.

An owner of land, over which there is an open road, may inclose it by his own authority, but he is bound to leave sufficient space and room for the road, and he is obliged to repair it till he throws up the inclosure. But if he alter or change the road by the legal course of a writ *ad quod damnum*, he is not obliged to repair the new road, unless the jury impose such a condition on him: for otherwise it stands just as it did before, even though it was at first open and should be directed by the jury to be inclosed. And a private act of parliament for inclosing lands, which vests power in commissioners to set out new roads by their award, is equally strong as to these consequences as a writ of *ad quod damnum*. See 1 *Burr.* 456.

II. Of common right, the general charge of repairing highways lies on the occupiers of lands in the parish wherein they lie; but it is said that the tenants of the lands adjoining are bound to scour their ditches. 1 *Roll. Abr.* 390; *March.* 26; 1 *Vent.* 90, 183; *Hen.* 7, 5; *Andr.* 276.

A highway lying within a parish, the whole parish is of common right bound to repair it: except it appears that it ought to be repaired by some particular person either *ratione tenuræ*, or by prescription. 1 *Vent.* 183; *Style*, 163.

If a parish is part in one county and part in another, and the highways in one county are out of repair, the whole parish shall contribute to the repair: but there may be an agreement between the inhabitants, that the one shall repair one part, and the other the other; and such agreement is good between themselves, and for breach, the one may have an action upon the case against the other; but in indictment they shall take no advantage of these agreements, for as to the king they are equally liable. 1 *Mod.* 112; 1 *Vent.* 256; 3 *Keb.* 301. But it has been more recently decided, that such an indictment is bad; and that in such case the indictment must be against the whole parish; and it appears to have been always considered that the indictment under such circumstances must be preferred in the county wherein the ruinous part of the road lies. 5 *T. R.* 498. If the indictment is against that part of the parish only which lies in the county in which such indictment is preferred, it must show on what account such part only is chargeable. *Ibid.*

If a parish lie in two distinct counties, an indictment may be brought against that part of the parish in which the ruinous road lies. 4 *Burr.* 2511. But it must appear upon the face of the indictment by what right the charge is laid upon the particular division of any parish, which is in one county only. 5 *Burr.* 2700, 2. As that they have repaired time out of mind. *Andr.* 276; *Hardw.* 259; and see 2 *T. R.* 513.

A parish may be bound by prescription to repair a way within another parish, 12 *Mod.* 409; but then some consideration for this liability must be shown. See 5 *M. & S.* 260, *post*, IV.

By 34 *Geo. 3. c.* 64. when the boundaries of parishes are in the middle of an highway, two justices may divide the highway by a transverse line into two equal parts, and order that the whole of such highway on both sides in one part shall be repaired respectively by the two parishes; and where no such division has been made, an indictment against one of the parishes for not repairing one side of the road ought to state that the plaintiff was bound to repair *ad filum vice*: and it is not sufficient in such case to aver that a certain part of the highway (setting out the length and one half of the breadth) is out of repair, and that he shall and ought to repair it. *Peake Up.* 219.

But though the parish be obliged of common right to repair the highways in it, yet it is certain, that particular persons may be bound to repair the highway, by reason of inclosure or prescription; as where the owner of lands not inclosed, next adjoining to the highway, incloses his lands on both sides of it; in which case he is bound to make a perfect good way, and shall not be excused by making it good as it was before the inclosure, if it were then any way defective, because by the inclosure he takes from the people the liberty of going over the lands adjoining to the common track. 1 *Roll. Abr.* 390; *Cro. Car.* 366; 1 *Sid.* 484.

Also it is said, that if one inclose land on one side, which hath anciently been inclosed on the other side, he ought to repair all the way; but that if there be no such ancient inclosure on the other side, he ought to repair but half the way. 1 *Sid.* 484.

Therefore if there be an old hedge time out of mind belonging to A. on the one side of the way, and B. having land lying on the other side, makes a new hedge, there B. shall be charged with the whole repair. 1 *Sid.* 484; 2 *Keb.* 665; 2 *Saund.* 157. But if A. makes a hedge on the one side of the way, and B. on the other, they shall be chargeable by moieties. 1 *Sid.* 484; 2 *Keb.* 665. But it seems clear, that wherever a person makes himself liable to repair a highway by reason of inclosure, that by throwing of it open again, he thereby frees himself from the burthen of any future reparation. 2 *Saund.* 160. See *ante*, I.

In a writ of *ad quod damnum*, and inquisition found thereupon, after the person hath once made the road, (and N. B. it is not necessary the whole new road should go through his own soil,) the parishioners ought to keep it in repair; because being discharged from repairing the old road, no new burthen is laid upon them; their labour is only transferred from one place to another. But if the new road lies in another parish, the person who sued out the writ, and his heirs, ought to keep it in repair, because the inhabitants of the other parish gaining no benefit from the old road being taken away, it would be imposing a new charge upon them, for which they enjoyed no compensation. 3 *Atk.* 772.

Particular persons may be bound to repair a highway by prescription, or in respect of inclosure of the land wherein the road lies; and it is said, that a corporation aggregate may be charged by a general prescription, that it ought and hath used to do it, without shewing any consideration in respect whereof they had used to do it, because such a corporation never dies, neither is it any plea, that they have done it out of charity; but it is said, that such a general prescription is not sufficient to charge a private person, because no man is

bound to do a thing which his ancestors have done, unless it be for some special reason; as having lands descended to him holden by such service, &c.; but it seems that an indictment charging a tenant of lands in fee with having used of right to repair such a way *ratione tenuræ terræ suæ*, without adding that his ancestors, or those whose estates he hath, have so done, is sufficient, for it is implied, 27 *Ass.* 8; 27 *Ed.* 4, 38. *Bro. Prescription*, 49, 70; *Kelw.* 52, a; *Latch.* 206; 1 *Hawk. P. C. c.* 76, § 5—8.

And it seems certain in all those cases, whether a private person be bound to repair a highway by inclosure or prescription, that the parish cannot take advantage of it on the general issue, but must plead it specially; that therefore, if to an indictment against the parish, for not repairing a highway, they plead not guilty, this shall be intended only that the ways are in repair, but does not go to the right of repairation. 1 *Mod.* 112; 3 *Keb.* 301; 1 *Vent.* 256.

If particular persons be made chargeable by statute to the repair of roads, and they become insolvent, the justices may cause the rest of the inhabitants to sustain their original liability in respect of such repair. 1 *Ld. R.* 725. So where the inhabitants of a township were exempted from the repair of new roads by an act of parliament, judgment passed against the rest of the parish, for they were bound at all events to repair their own roads. 2 *T. R.* 106. See also 3 *Camp.* 222; 2 *B. & A.* 179.

At common law it is said, that all the county ought to make good the reparations of a highway, where no particular persons are bound to do it, by reason the whole county have their ease and passage by the said way. *Co. Rep.* 13. By the ancient common law, villages are to repair their highways, and may be punished for their decay; and if any do injure or straighten the highway, he is punishable in the king's bench, or before justices of the peace, in the court-leet, &c. 27 *Ass.* 63; *Crompt. Jurisd.* 76.

III. It is clearly agreed to be a nuisance to dig a ditch, or make a hedge across the highway, or to erect a new gate, or to lay logs of timber in it, or generally to do any other act which will render it less commodious. *Kitchin.* 34; 1 *Hawk. P. C. c.* 76, § 48. Also it is a nuisance for an heir (and for which he may be indicted) to continue an incroachment or other nuisance to a highway begun by his ancestor, because such continuance thereof amounts in the judgment of law to a new nuisance. 1 *Hawk. P. C. c.* 76, § 61. Also it is agreed, that it is no excuse for him who lays logs in the highway, that he laid them only here and there, so that the people might have a passage through them by windings and turnings. 2 *Roll. Abr.* 137; 1 *Hawk. P. C. c.* 76, § 49.

It is a nuisance to suffer the highway to be incommoded by reason of the foulness, &c. of the adjoining ditches, or by boughs of trees hanging over it, &c. And it is said, that the owner of land next adjoining to the highway ought of common right to scour his ditches; but that the owner of land next adjoining to such land, is not bound by the common law so to do without a special prescription; also it is said, that the owner of trees hanging over a highway to the annoyance of travellers, is bound by the common law to lop them; and it is clear that any other person may lop them so far as to avoid the nuisance. 8 *Hen. 7.* 5, a; *Kitch.* 34; *Dalt.* c. 26; 1 *Hawk. P. C. c.* 76, § 52.

But it is no nuisance for an inhabitant of a town to unlade billets, &c. in the street before his house, by reason of the necessity of the case, unless he suffer them to continue there an unreasonable time. 2 *Roll. Abr.* 137, 265; 3 *Bac. Abr. Highways* (E).

But where the defendant, a timber-merchant, occupied a small timber-yard close to the street, and from the narrowness of the street, and the construction of his own premises, he had in several instances deposited long sticks of timber in the street, and had them sawed into shorter pieces there be-

fore they could be carried into his yard, it was held to be a nuisance. 3 *Campb.* 230. And so as to the repairing of a house, the public must submit to the inconvenience for the requisite period, but if this be unnecessarily prolonged, the party may be indicted for a nuisance. *Ibid.* And see 1 *Bos. & Pull.* 407, 408.

It has been held, that if a carrier carries unreasonable weight with an unusual number of horses, it is a nuisance to the highway at the common law. 3 *Com. Dig. Chemin* (A. 3.) And it seems now to be well established that every unauthorized obstruction of a highway, to the annoyance of the king's subjects, is an indictable offence. 3 *Campb.* 227. Thus, where a waggoner occupied one side of a public street in the city of Exeter, before his warehouses, in loading and unloading his waggons, for several hours at a time, both day and night, and had one waggon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying on the ground on the same side, ready for loading, he was held to be indictable for a public nuisance, although it appeared that sufficient space was left for two carriages to pass on the opposite side of the street. 6 *East.* 427. Also it is indictable for stage coaches to stand plying for passengers in the public streets, if they do more than take up and set down passengers, which must be done in a reasonable time, and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another. 3 *Campb.* 224. And it was intimated from the bench in the same case, that there could be no doubt but that if coaches, on the occasion of a *route*, should wait an unreasonable time in a private street, and so obstruct the transit of people passing through it in carriages, or on foot, the persons causing and permitting such coaches so to wait would be guilty of a nuisance.

Any one may justify pulling down, or otherwise destroying a common nuisance, as a new gate or house erected in a highway; and it hath been holden that there is no need, in pleading such justification, to show that as little damage was done as might be. 2 *Roll. Abr.* 144; *Cro. Car.* 184; 1 *Jon.* 221; 2 *Salk.* 458.

Though all nuisances are punishable by indictment with fine and imprisonment, it is said that one convicted of a nuisance to the highway, may be commanded by the judgment to remove it at his own costs, &c. 2 *Roll. Abr.* 84; 1 *Hawk. P. C. c.* 75, § 14. See 2 *Str.* 686.

A gate erected in a highway is a common nuisance, because it interrupts the people in that free and open passage which they before enjoyed and were lawfully entitled to; but where such a gate has continued time out of mind, it shall be intended that it was set up at first by consent, on a composition with the owner of the land on the laying out the road, in which case the people had never any right to a freer passage than what they still enjoy. 1 *Hawk. P. C. c.* 75, § 9. If one has a private way without a gate, and a gate is hung up, an action on the case lies, for the party hath not his way as he had before. *Litt. Rep.* 267.

There are also statutory provisions for the removal and punishment of nuisances.

IV. As to the general doctrine with respect to indictments, &c. upon this subject Mr. Serjeant *Hawkins* has laid down the following rules:—

1st. That it is safe in every such indictment to show both the place from which, and also the place to which, the way supposed to be out of repair doth lead; yet exceptions for want of such certainty have sometimes been disallowed. (See 4 *Burr.* 2091; *Lucas*, 383.) However it seems certain that there is no necessity to show that a highway leads to a market-town, because every highway leads from town to town. 1 *Hawk. P. C. c.* 76, § 86.

An indictment against the parish of B. for not repairing a road leading from A. to B., is exclusive of B., and therefore bad; and it is not aided by a subsequent allegation that a certain part of the same highway situate in B. is in decay, &c. *5 Term Rep.* 518. See *1 H. Black. Rep.* 351. that in pleading a public highway it is not necessary to state any termini. So in an indictment for a nuisance in a highway, it is not necessary to mention the termini. *Stra.* 44.

2dly. That it is necessary in every such indictment expressly to show in what place the nuisance complained of was done, for which cause an indictment for stopping a way at D., leading from D. to C., is not good; for it is impossible that a way leading from D. should be in D., and no other place is alleged. *1 Hawk. P. C. c.* 76. § 87.

So also in a presentment the highway must be alleged to lie in the parish, otherwise the parish is not bound to repair. *Comp.* 111; *Stra.* 181. But if there be two villis in a parish, it is not necessary, in an indictment for a nuisance, to show in which vill the nuisance lies. *Say.* 119.

3dly. That every such indictment ought also certainly to show to what part of the highway the nuisance did extend, as by showing how many feet in length, and how many feet in breadth it contained; or otherwise the defendant will neither know of the certainty of the charge against which he is to make his defence, neither will the court be able, from the record, to judge of the greatness of the offence, in order to assess a fine answerable thereunto; and upon this ground it hath been adjudged, that an indictment for stopping a certain part of the king's highway at K. is bad, for the uncertainty thereof. Also it hath been resolved, that the place wherein such a nuisance is alleged, is not sufficiently ascertained in such an indictment, by showing that it contained so many feet in length, and so many in breadth, by estimation. *1 Hawk. P. C. c.* 76. § 88.

An indictment for a nuisance in laying soil in a highway is not bad for want of the length and breadth of the nuisance being set out. *Say.* 98. Nor for a nuisance in digging two grips or ditches in a common footway. *Say.* 197. Nor for a nuisance that a certain highway and bridge are in a ruinous condition. *Say.* 301.

Upon exceptions taken to an indictment for suffering a highway to be very muddy, and so narrow, that the people could not pass without danger of their lives; first, that it was no offence for a highway to be dirty in winter; and secondly, that the parish had no power to hinder it, as there was a particular power vested by act of parliament in justices to do so; the indictment was held bad for want of saying that the road was out of repair; and one of the judges observed, that saying that the way was so narrow that the people could not pass, was repugnant to its being "the king's highway," for that if it had been so narrow the people could never have passed there time out of mind. *2 Ld. Raym.* 1169. And it is the same as to a hedge, an indictment does not lie for not widening it.

4thly. That every such indictment must show that the way wherein a nuisance is alleged, is a common highway; for which cause it hath been resolved, that an indictment for a nuisance to a horseway, without adding that it was a highway, is bad; and upon the same ground it seemeth also, that an indictment for a nuisance to a common footway to the church of D. for all the parishioners of D. is not good; yet it seems, that if those last words, viz. "for all the parishioners of D." had been omitted, such an indictment might be maintained. See *1 Hawk. P. C. c.* 76. § 89.

5thly. That it is not safe in an indictment against a common person for not repairing a highway, which he ought to have done in respect of the tenure of certain lands, barely to say that he was bound to repair it *ratione tenuræ terræ*, without adding *sue*. Also it is said, that in an indictment against a bishop, &c. for not repairing a highway, in respect to cer-

tain lands, it ought to be shown in what capacity he ought to repair it, because otherwise it cannot be known in what capacity the process is to be awarded against him. *1 Hawk. P. C. c.* 76. § 90.

If a man be charged to repair *ratione tenuræ*, he may throw it upon the parish by the general issue. *Stra.* 184. And it hath been held upon consideration, that *ratione tenuræ* is sufficient without *sue*. *Stra.* 187. *Hankins* positively states that the defendant ought not to plead *quod non debuit reparare*, without showing who ought. *1 Hawk. P. C. c.* 76. § 94, cites *1 Sid.* 140; *Carth.* 213; *11 Mod.* 273; *12 Mod.* 13.

Where a parish is charged with the reparation of a highway lying in *aliens parochia*, a consideration must be stated; and where the plea stated that another parish had repaired, and been used and accustomed to repair, and of right ought to have repaired, it was held bad for not showing the consideration. *5 M. & S.* 260.

6thly. That in every such indictment the fact alleged against the defendant must be expressed in such proper terms, that it may clearly appear to the court to have been a nuisance; and for this cause it hath been resolved, that a presentment for diverting a highway is not good, because a highway cannot be diverted, but must always continue in the same place where it was, howsoever it be obstructed, and a new way made in another place. See *1 Hawk. P. C. c.* 76. § 91.

It hath been resolved, that an indictment against a man for stopping a highway in his own land is good, without laying the offence done *vi et armis*. Also it is said, that a presentment that a highway in such a place is decayed by the default of the inhabitants of such a town, is good, without naming any person in certainty. But it hath been adjudged that an indictment against particular persons must specially charge them every one; for which cause it hath been resolved that an indictment against several for not repairing their streets, that they, *et eorum uirgine*, did not repair them, is not good. See *1 Hawk. P. C. c.* 76. § 92.

Upon an indictment for not repairing a highway, if the defendant produce a certificate before trial that the way is repaired, he shall be admitted to a fine; but after verdict the certificate is too late, for then he must have a *constat* to the sheriff, who ought to return that the way is repaired, because the verdict, which is a record, must be answered by a record. *Raym.* 216. And where the defendants, indicted for not repairing a common footway, confessed the indictment, and submitted to a fine; it was held that the matter was not ended by their being fined; but that writs of *distringas* shall be awarded *in infinitum*, till the Court of B. R. is certified that the way is repaired, as it was when it was at best; but the defendants are not bound to put it in better repair than it has been time out of mind. *1 Salk.* 358; *6 Mod.* 163. If a defendant hath made a highway as good as it is capable of being made, it was said, in an extraordinary case, this shall not discharge him on an information against him, though it may be a mitigation of his fine. *3 Salk.* 183. Also it is no excuse for the inhabitants of a parish indicted at common law, for not repairing the highways, that they have done the work required by statute; for the statutes are made in aid of the common law; and when the statute work is not sufficient, rates and assessments are to be made. *Dall. c.* 26.

It is said that if the right or title to repair such ways come in question, upon suggestion and affidavit made thereof, a *certiorari* may be had to remove the indictment into B. R.

A person may be indicted for not repairing a house standing upon a highway, which is ruinous, and like to fall down, to the danger of travellers, whatever be his tenure, which in such case is not material. *1 Salk.* 357.

If there be a common footway through a close by prescription, and the owner of the close ploughs up the way, and sows it, and lays thorns at the side of it, passengers may go

over another footway in the same close without being trespassers, *Yelv.* 142. And if a highway is not sufficient, any passenger may break down the inclosure of it, and go over the land, and justify it till a sufficient way is made. *9 Salk.* 182.

Erecting a gate across a highway, though not locked, but opening and shutting at pleasure, is esteemed a nuisance; for it is not so free and easy a passage as if there had been no gate; and the usual way of redressing nuisances of this kind is by indictment; but every person may remove the nuisance by cutting or throwing it down, if there be occasion so to do; and it hath been held, that though there are many gates across highways, they must be anciently set up, and it shall be intended by license from the king upon the writ of *ad quod damnum*. *Cro. Car.* 184. See *ante*, III.

As to the Defence under the General Issue, and the necessity for a Special Plea.—Where an indictment or presentment is against the inhabitants of a parish at large, they may upon the general issue show that the highway is in repair, or that it is not a highway, or that it does not lie within the parish; for all these are facts which the prosecutor must allege in his indictment, and prove on the plea of not guilty. *1 Stra.* 181; *2 Saund.* 158, n. (3). But it is settled that they cannot, upon the general issue, throw the burden of repairing on particular persons by prescription or otherwise, but must set forth their discharge on a general plea. *1 Mod.* 112; *1 Vent.* 256. This rule, however, was recently held not to apply to a case where the liability to repair was transferred from the inhabitants to other persons by a public act of parliament, to which all are supposed to be privy, and of which all are supposed to have notice. *3 Campb.* 222. Where a person is charged with the repairs of a highway or bridge, against common right, he may discharge himself upon not guilty to the indictment; and therefore, where a particular division of a parish is charged with the repair by prescription, or a particular person by reason of tenure or the like, which are obligations against the common law, they may thus throw the burden either on the parish, or even on an individual. But if they will, though unnecessarily, plead the special matter, it is not enough to say that they ought not to repair, but they must go further, and show who ought. *1 Sid.* 140; *Carth.* 213; *1 Stra.* 180; *9 Salk.* 183, pl. 3; *2 Saund.* 159, a. n. (10).

If judgment be given against a parish, whether after verdict upon not guilty, or by default, the judgment will be conclusive evidence of the liability of the parish to repair, unless fraud can be shown. *Peake's Rep.* 219. But the record of an acquittal is not evidence to show that the plaintiff is not liable. *Peake's Rep.* 219. Because the acquittal might have proceeded upon the want of proof that the road was out of repair. *Mann. Ind. N. P. R.* 128. Upon an acquittal of the inhabitants, a new trial is not allowed. *1 Wils.* 298, cited *2 Salk.* 646; *4 M. & S.* 337; *1 Starkie's Rep.* 516; *6 East.* 315. But see *1 Barn. & Ald.* 63.

V. 1. *As to Highways.*—A bill being at present before parliament for consolidating the statute law upon the subject, it has been thought advisable to omit the sketch of the various statutory enactments with respect to the repair, diversion, or stopping up of highways, contained in the former edition of this work. Should this bill pass into a law before the publication of the present edition, its provisions will be shortly noticed in the addenda at the end of the volume.

In Scotland, by the acts 1669, c. 16; 1670, c. 9; 1686, c. 8. justices of peace were empowered to regulate highways, bridges, and ferries; they might call out tenants, cotters, and servants, six days in the year to work on the highways, and they might assess the county, not exceeding 10s. for every 100l. of valued rent. By the last of these acts, the commissioners of supply were joined with the justices; and by *11 Geo. 3. c. 53.* two general meetings should be held annually

of the justices and commissioners on the business of the highways; but by the *1 & 2 Wm. 4. c. 43.* the above and various other acts were repealed, and the law with respect to turnpike roads in that country consolidated.

2. *As to Turnpike Roads.*—The turnpike roads of England were formerly placed under the management and direction of trustees, appointed by the respective acts of parliament occasionally passed for the making and repairing particular roads. But the powers of these acts being confined to separate and distinct objects, it was thought expedient to pass some general laws which should apply in common to all trustees and turnpike roads in general throughout the kingdom. *Leach's Hawk. P. C. i. c. 76, App.*

By the conversion of highways into turnpike roads, the liability of parishes to repair such roads is suspended, except by the performance of their statute-labour, and in lieu of the parish, a body of trustees or commissioners, who are clothed with a contracting power, are enabled to levy tolls upon all passengers, and are authorised to raise money upon loan.

By the common law we have seen, that whenever a highway was out of repair, the inhabitants of the parish was bound, by actual labour thereon, to reinstate it in good order. Under the highway acts a ministerial agent is appointed to superintend the management of highways; actual labour is permitted to be compounded for in money, and a power is given to raise funds by assessment for effecting these repairs or other improvements, to which the common law provision may prove inadequate; while by the turnpike acts an additional body are appointed, who are made as it were the proprietors of the road, but nevertheless upon trust for the public. They are empowered to bargain and sell, and to enter into stipulations to raise money by mortgage, and, which is the most important of their privileges, they are authorized to levy a tax, the receipts of which are to be applied to the repair and improvement of the roads placed under their management. *Wellbeloved on Highways*, 180.

The present turnpike acts are the *3 Geo. 4. c. 126.* (whereby all former general statutes on this subject were repealed,) the *4 Geo. 4. c. 10, 35, 95*; *5 Geo. 4. c. 69*; *7 & 8 Geo. 4. c. 24*; *9 Geo. 4. c. 77*; and which acts are by the *4 & 5 Wm. 4. c. 10.* continued until the 1st June, 1836, or until the end of the then session of parliament.

As these statutes are about to be superseded by one general act consolidating their provisions, no attempt will be here made to give even an outline of their enactments, which are very numerous and complicated, and will be found collected and arranged in *Burn's Justice*.

VI. A private way, or the right of going over another man's ground, is classed by Blackstone among incorporeal hereditaments. In such private ways, a particular man may have an interest and a right, though another be the owner of the soil. *2 Comm. c. 3.*

This may be claimed either by grant, prescription, custom, by express reservation, as necessarily incident to a grant of land, or by virtue of an inclosure act. *Selm. N. P.* 124.

A person having the right of a private way over the land of another, cannot, as has been already observed, when the way is become impassable by the overflowing of a river, justify going on the adjoining land, although such land as well as the land over which the way runs belong to the grantor of the way. *Doug.* 744; *M. & S.* 387. as the public are entitled to do where a highway be impassable.

1. *By Grant.* A way may be claimed by grant, as where it grants that B. should have a way through a particular close. *Com. Dig. Chimin, D. 3.*

So a covenant that another shall have and use a way amounts to a grant. *3 Lev.* 305.

When the owner of the land grants to another a liberty of passing over his grounds, to go to church, to market, or the like; in this case the gift or grant is particular; and confined

to the grantee alone; it dies with the person; and if the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person in his company. *Finch. L.* 41.

Where a lease of premises described therein as abutting on an intended way, thirty feet wide, not then set out, the soil of which was the property of the lessor, and the lessee granted an under-lease, describing the premises as abutting on an intended way, without specifying the breadth; it was held that the sub-lessee was entitled to a convenient way only. *2 B. & C.* 96.

If a man seised of Whiteacre and Blackacre uses a way through the latter to the former, and afterwards grants Whiteacre, with all ways, &c. such right of way passes to the grantee. *6 Mod.* 3.

Where certain houses with a piece of ground, part of an adjoining yard, were leased to a tenant, together with all ways with the said premises, or any part thereof, used or enjoyed before, and at the time of the lease granted; the whole of the yard was in the occupation of one person, who had always used and enjoyed a right of way to every part of that yard; it was held that the lessee was entitled to such right of way to the part of the yard demised to him. *5 B. & A.* 890; *S. C.* *1 D. & R.* 506.

Where the plaintiff claimed a right of way over the defendant's soil, and it appeared that in the defendant's lease, granting him all ways without exception or qualification, there was a covenant for contributing with other occupiers of the lessor's property, to the keeping up paths, &c. used in common by them, and it was proved that the plaintiff had always used the path in question, and that there was no other path to which the covenant could apply; it was held that it might be inferred that the defendant took the soil demised to him, subject to plaintiff's right of way. *8 Bing.* 356; *S. C.* *1 M. & Sc.* 510.

A way must not be claimed as appendant or appurtenant to a house, because it is only an easement, and no interest. *Yelo.* 159. But it may be quasi appendant thereto, and as such pass by grant thereof. *Cro. Jac.* 190.

If a close is conveyed, with all ways thereto belonging and appertaining, the easement will not pass, except in the case of a way of necessity, where such right of way would pass without any words of grant of ways. *Bulst.* 17. But a way not strictly appurtenant will not pass by those words in a conveyance, unless the parties appear to have intended to use them in a sense larger than their ordinary legal sense. *1 Cr. & M.* 339. The words "belonging" and "appertaining" are synonymous. *Id.* 448. Where an under-lease described the ground demised and the ways granted by the words "all ways thereunto appertaining," a road over the soil of the original lessor was held not to pass by those words, although it might by the words "heretofore used." *2 B. & C.* 96. Where a testator being seised in fee of the adjoining closes A. and B., over the former of which a way had immemorially been used to the latter, devised B. with the appurtenances; it was held that the devisee, under the word "appurtenances," could not claim a right of way over A. to B., as no right of way was thereby created, and the old one was extinguished by the unity of seisin in the deviser. *1 Bos. & Pull.* 371. An existing way will pass by the word "appurtenances." *Id.*

But according to the strict legal sense of the term "appurtenances," it will not pass an easement which has become extinct, (as by unity of possession,) and which has no legal existence, although enjoyed *de facto*. *2 N. & M.* 517.

A right of way or a right of passage for water (where it does not create an interest in the land) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as right of common, rents, advowsons, &c. It lies not in livery but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which it seems cannot,) otherwise than by deed. *5 B. & Cr.* 229.

Grants of rights of way are, however, presumed from long

enjoyment, where their commencement cannot be accounted for, unless a grant has been made. *5 B. & A.* 237. The uninterrupted enjoyment of a right of way for twenty years, and no evidence that it had been used by leave or favour, or under a mistake, was held sufficient to leave it to a jury to presume a grant, although the road in question had been extinguished about twenty-six years before, made by the award of commissioners of an inclosure act. *3 East.* 224. So where there had been an absolute extinguishment of a right of way for many years by unity of possession, but the way had been used for thirty years preceding an action for its obstruction, the jury were directed to presume a grant from the defendant. *Bull. N. P.* 74. cited *3 T. R.* 157.

Though an uninterrupted possession for twenty years and upwards be a bar to an action on the case, yet the rule must be taken with this qualification, that the possession was with the acquiescence of the person seised of an estate of inheritance. The mere knowledge of the tenant is not sufficient, otherwise he might collude to the prejudice of his landlord. But presumptions have sometimes been made against the owners of lands during their possession, and by the acquiescence of their tenants, in cases of rights of way and of common, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own. *11 East.* 372. In every case where the party claiming relies on his want of possession, the question whether he knew or not of the enjoyment, is to be determined by the circumstances of the case, and may very properly be left for the consideration of the jury. *1 Price.* 247; *2 Brod. & Bing.* 667.

The knowledge of the owner of the land, and his acquiescence may be presumed from circumstances. Thus where the lessees of a fishery had publicly landed their nets on the shore at A. for more than twenty years, and had at various times dressed and improved the landing-place; and both the fishery and landing-place originally belonged to one person, but no evidence was offered to show that he or those who under him owned the shore at A. knew of the landing nets by the lessees of the fishery; it was held, that it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery by some former owner of the shore at A. *2 Brod. & Bing.* 667; *S. C.* *5 Moore.* 527.

For the provisions of the recent prescription act, *2 & 3 Wm. 4. c. 71.* with respect to ways, see *Prescription*, III. and for an important decision upon the construction of this statute, see *Bright v. Walker*, *4 Tyr.* 502.

In this case it was held that user of more than twenty years without interruption by the plaintiff, who was assignee of a lease for lives under a bishop, of a way over ground held by an assignee of a similar lease, conferred no title under the above act as against the reversioner, the bishop, or even against his lessee or persons claiming under such lessee, during the continuance of the term. And see *1 C. M. & R.* 614.

A plea of twenty years of a right of way under the act is not defeated by proof of an agreed alteration of the line of way or by a temporary nonuser under and agreement between the parties. *1 M. & R.* 348.

2 By Prescription. A private way may also be claimed by prescription; as that a man is seised in fee of a certain messuage, and that he and all those whose estate he has in the same messuage, have from time immemorial had a way (describing it as the case may be) from A. to B.

A man may prescribe for a way from his house through a certain close, &c. to church, though he himself has lands next adjoining to his said house, through which of necessity he must first pass; for the general prescription shall be applied only to the lands of others. *Palm.* 387, 388; *2 Rol. Rep.* 397.

A way being only an easement, and not an interest, should not be laid as appendant or appurtenant. *Yelo.* 159. Where

a particular tenant relies on a presumptive right, he must, previous to the act above-mentioned, have set forth the seisin in fee of the owner, and then have traced his own title from the owner of the fee. 2 *Salk.* 562; *Com. Dig. Chimin*, (D. 2); see now *Prescription*, III.

Unity of possession of the land to which the way is claimed as appurtenant, with the land over which the way lies, extinguishes the way, for it is an answer to the prescription, and the way is against common right. 1 *Roll. Abr.* 935; 3 *T. R.* 157; 5 *East*, 295; 1 *Boss. & Pull.* 371; 5 *Taunt.* 311.

But where in trespass *quare clausum fregit*, defendant prescribed in a *que estate* for a right of way over the locus in quo, and it appeared that the defendant's land had, within fifty years, been part of a large common, and afterwards inclosed under the provision of an act of parliament, and sold to the defendant's ancestor; it was held, notwithstanding this evidence, the right claimed by the defendant's plea might exist; and the jury having found that in fact it did exist, the court refused to disturb the verdict. 9 *B. & C.* 938. If the lessor enjoy a presumptive right of way, among other easements, by virtue of the demised premises, such right will pass to the tenant for life or years. Before the recent act, the only distinction between a tenant for years and tenant for life, was, that the former could not preserve an easement in his own right; but he must have asserted the right during his life, as lord, or the owner of the freehold. *Styl.* 300; *Carth.* 432.

3. *By Custom.* A custom that every inhabitant of such a vill shall have a way over such land, either to church or market, is good; because it is only an easement, but not a profit. 6 *Rep.* 60. b.; *Co. Lit.* 110, b.; *Cro. Eliz.* 180. See 9 *H. Bl.* 396; and tit. *Prescription*.

4. *By Reservation.* A right of way may be claimed by express reservation; as where A. grants land to another, reserving to himself a way over such land, 1 *Roll. Abr.* 109, pl. 45; *Com. Dig. Chimin*, D. 2; and see 2 *B. & C.* 197; 3 *D. & R.* 411.

5. *Through Necessity.* As a right of way may be created by an express grant, so it may also arise by an implied grant, where the circumstances are such that the law will imply such grant. This right of way has been commonly termed a way of necessity, but it is in fact only a right of way by implied grant; for there seems to be no difference where a thing is granted by express words, and where it passes as incident to the grant by operation of law. 1 *Wms. Saund.* 323, note. See 4 *M. & S.* 387.

A purchaser of part of the lands of another, has a way of necessity over the vendor's other lands, if there be no convenient way adjoining; so if a man having four closes lying together, sells three, and reserves the middle close, to which he hath no way but through one of those sold, although he did not reserve any way, yet he should have it as reserved to him by the law. *Co. Lit.* 110. A way of necessity passes by a grant or lease of the land without being expressed; for the land cannot be used without a way. *Cro. Jac.* 189. So also a conveyance of land by a trustee, to which there is no access but over the trustee's land, passes a right of way. 8 *T. R.* 50. So if the owner of two closes, having no way to one of them but over the other, part with the latter without reserving a right of way, it will be reserved to him by operation of law. *Id.*

A way of necessity cannot be pleaded generally, without showing the manner in which the land over which the way is claimed is charged with it. 4 *M. & S.* 387. See 1 *Wms. Saund.* 323, n. 6. A way of necessity exists after a unity of possession, which would otherwise have extinguished the way and a subsequent severance. *Buckley v. Coles*, 5 *Taunt.* 311.

This right of way is limited by the necessity which created it, and when such necessity ceases, the right of way also ceases; therefore if at any subsequent period the party formerly entitled to such way can approach the place to which it led by passing over his own land, by as direct a course as

he would have done by using the old way, the latter will cease to exist. 2 *Bing.* 76.

Where there is a private road through a farm, the parson may use it for carrying away his tithe, though there is another public way equally convenient. 6 *East*, 103.

But a rector cannot claim a permanent right of way for the purpose of carrying away his tithe, unless by prescription or grant. And the owner or occupier of the soil, provided he claim it *bond fide* for the convenient management of the farm, has a right to vary and stop up a way by which tithe has been carried, although he thereby puts the tithe owner to great inconvenience by compelling him to use a more circuitous rout for that purpose. 2 *C. & M.* 266; 4 *Tyrr.* 1.

VII. Where a right of way has been once established by clear evidence of enjoyment, it can only be defeated by distinct evidence of interruption acquiesced in; an unsuccessful attempt on the part of the occupiers of the land, over which the way run, from time to time to interrupt such right, will not be sufficient to get rid of it, 3 *Bligh*, N. S. 444—447. By the 4th section of the 2 & 3 *Wm. 4.* c. 71. (See *Prescription*, III.) no act is to be deemed an interruption, unless the same shall have been acquiesced in for one year after the party interrupted shall have had notice thereof, and of the person making or authorizing the same to be made.

It seems that a release of a right of way previously established may be presumed from the declaration of a party that he has no such right, 3 *Bligh*, 241, 242; or from non-user for twenty years, 3 *B. & C.* 339. A prescriptive right of way to a public towing path on the banks of a navigable river, is not destroyed by that part of the river adjoining the towing-path having been converted by statute into a floating harbour, although such towing-path was thereby subject to be used at all times of the tide, whereas before it was only used at those times when the tide was sufficiently high for the purposes of navigation; and such prescription is not destroyed by a clause in the statute whereby the undertakers of the work were authorized to make a towing-path over land comprising the towing-path in question, on paying a compensation to the owner of the soil. 3 *B. & A.* 19.

By the general inclosure act, (41 *Geo. 3.* c. 102. § 10.) the commissioners are directed to set out private roads, and by § 11. all roads not so set out shall be extinguished.

VIII. If one grants a way, and afterwards digs trenches in it to my hindrance, I may fill them up again. But if a way which a man has, becomes not passable, or becomes very bad, by the owner of the land tearing it up with his carts, so that the same be filled with water, yet he who has the way cannot dig the ground to let out the water, for he has no interest in the soil. *Godb.* 52, 53. But in such case he may bring his action against the owner of the land for spoiling the way, or perhaps he may go out of the way, upon the land of the wrong doer, as near to the bad way as he can. But where a private way is spoiled by those who have a right to pass thereon, and not through the default of the owner of the land, it seems that they who have the use and benefit of the way ought to repair it, and not the owner of the soil, unless he is bound thereto by custom or special agreement. 2 *Burr.* 382.

Disturbance of ways is very similar in its nature to disturbance of common. See *Common*. It principally happening when a person, who hath a right to a way over another's grounds, by grant or prescription, is obstructed by inclosures, or other obstacles, or by ploughing across it; by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done. If this be a way annexed to his estate, and the obstruction is made by the tenant of the land, this brings it to another species of injury; for it is then a nuisance, for which an assize would formerly lie. See *Nuisance*. But if the right of way, thus obstructed by the

tenant, be only in gross, (that is, annexed to a man's person, and unconnected with any lands and tenements,) or if the obstruction of a way belonging to an house or land is made by a stranger, it is then in either case merely a disturbance: for the obstruction of a way in gross is no detriment to any lands or tenements, and therefore does not fall under the legal notion of a nuisance, which must be laid *ad nocumentum liberi tenementi*; and the obstruction of it by a stranger can never tend to put the right of way in dispute: the remedy therefore for these disturbances was never by assize or any real action, but is by the universal remedy, of action on the case to recover damages. 3 *Comm. c. 16*; *Hale on F. N. B. 183*; *Lutw. 111, 119*.

An action on the case lies for the disturbance of a right of way, created either by reservation, grant, or prescription, (*Com. Dig. Action on the Case for Disturbance, A. 2*; *Roll. Abr. 109*.) and such disturbances may be either by absolutely stopping up the way, or by ploughing up the land through which the way passes, (*2 Roll. Abr. 140*); or by damaging the way with carriages so that it is of no use. *Laughton v. Ward, 1 Lutw. 111*. But such action will not lie for the disturbance of a highway, unless the plaintiff has sustained some special damage. *Co. Litt. 56, a.*; *5 Rep. 73, a.*; *2 Bing. 263, 266*.

In a late case it was held that a reversioner cannot maintain an action on the case against a stranger for merely entering upon his land held by a tenant on lease; though the entry be made in exercise of an alleged right of way, such an act during the tenancy not being necessarily injurious to the reversioner, for in order to entitle a reversioner to maintain an action on the case against a stranger, he must allege in his count, and prove at the trial, an actual injury to his reversionary interest. *4 B. & Ad. 72*. See *1 M. & S. 234*; *2 M. & S. 5*.

In a declaration for a disturbance of a private way, it is necessary to state the *terminus à quo* and *ad quem*; and if it lead to a private close, to state some interest of the plaintiff therein. And it should also be shown whether the way be a cart way, horse way, or foot way. *Com. Dig. Action on the Case for Disturbance, (B. 1.)*; *8 East, 4*; *Noy, 86*; *S. C. Latch. 166*; see *1 C. & P. 579*. But in both, the termini of a private way claimed by prescription should be correctly stated; it is not necessary to take notice of all the intervening land. *3 B. & Ad. 229*; and see *1 H. Bl. 351*; *1 East, 331*.

In an action on the case for not repairing a private road leading through the defendant's close, it is sufficient to allege that the defendant as occupier of the close is bound to repair. *3 T. R. 766*.

For the recent regulations made by the rules of *H. T. 4 Wm. 4*, as to pleading rights of way, see *Trespass, V*.

WEALD or **WALD**. In the beginning of names of places, signifies a situation near a wood, from the Sax. *weald*, i. e. a wood. The woody parts of the counties of Kent and Sussex are called the *wealds*, though misprinted *wildes* in the *13 & 14 Car. 2. c. 6*.

WEALREAF, from the Sax. *weal*, strages, and *reaf*, spoliation. The robbing of a dead man in his grave. *Leg. Etheldred, cap. 21*.

WEAR. A great dam made across a river, accommodated for the taking of fish, or to convey a stream to a mill.

All wears for the taking of fish are to be put down, except on the sea-coasts, by *Magna Charta, c. 23*, and *25 Ed. 3. st. 4. c. 4*.

Commissions shall be granted to justices to keep the waters, survey wears and mills, and to inquire of and correct abuses; and where it is found by them that any new wears are made, or others altered, to the nuisance of the public, the sheriff, by *scire facias*, is to give the person making them notice of it; and if he do not amend the same in three months, he shall forfeit 100 marks, &c. *1 Hen. 4. c. 12*; *4 Hen. 4. c. 11*; *12 Edm. 4. c. 7*. See further *Rivers*.

WEAVERS. By the *2 & 3 P. & M. c. 11*, persons using the trade of a weaver should not keep a cuckoo or fulling-

mill, or use dyeing, &c.: or have above two looms in a house, in any corporation or market-town, on pain of forfeiting 20s. a week: and should serve an apprenticeship of seven years to a weaver or clothier, or should forfeit 20l. &c.; but this statute was repealed by the *49 Geo. 3. c. 109*. See *Manufacturers, Servants*.

WED, Sax.] A covenant or agreement; whence to wed, a wedded husband, wedded bond-slave. *Conell*.

WEDBEDRIP. The customary service which inferior tenants paid to their lord in cutting down their corn, or doing other harvest duties. From the Sax. *wed*, a covenant, and *biddan*, to pray or desire, and *ripan*, to reap or mow. As a covenant of the tenant to reap for the lord at the time of his bidding or commanding. *Paroch. Antiq. 401*; *Conell*.

WEEK, *septimana*.] Seven days of time; four of which weeks make a lunar month, &c. The week was said to be originally divided into seven days, according to the number of the seven planets. *Skene*.

WEIGH, *waga*.] A weigh of cheese or wool, containing two hundred and fifty-six pounds; in Essex, the weigh of cheese is three hundred pounds. A weigh of barley or malt is six quarters or forty-eight bushels. There is also a weigh of salt. See *9 Hen. 6. c. 8* (repealed.)

WEIGHTS, [*pondera*] AND **MEASURES**. Are used between buyers and sellers of goods and merchandize, for reducing the quantity and price to a certainty, that there may be the less room for deceit and imposition.

There are two sorts of weights in use with us, viz. troy weight and avoirdupois; troy weight contains twelve ounces to the pound and no more; avoirdupois contains sixteen ounces in the pound; in this weight twelve pounds over are allowed to every hundred, so as one hundred and twelve pounds make the hundred weight. *Dalt. 248*.

In the composition of troy weight, twenty pennyweights make an ounce, twenty-four grains a pennyweight, twenty mites a grain, twenty-four droits a mite, twenty perits a droit, and twenty-four blanks a perit. The troy weight is said to be 20s. sterling in the pound; and the avoirdupois weight 25s. sterling. *4 Shep. Abr. 194*.

Fleta mentions a weight called a *trone weight*, being the same with that we now call troy weight, and according to the same author, all our weights have their composition from the penny sterling, which ought to have weighed thirty-two wheat-corns of the middle sort; twenty of which pence made an ounce, and twelve such ounces a pound; but fifteen ounces made the merchants' pound. *Fleta, lib. 2, c. 12*.

As to what articles shall now be sold by troy weight, and what by avoirdupois weight, and for the other provisions of the recent statutes relating to weights and measures, see *Measure*.

WEIGHTS OF AUNCCEL. Mentioned in the (repealed) statute *14 Edw. 3. st. 1. c. 12*. See *Auncel Weight*.

WEND, *wendus*, i. e. *perambulatio*, from the Sax. *wendan*.] A certain quantity or circuit of ground. *Rental, Regal. Maner. de Wye, pag. 31*.

WERELADA, from the Sax. *were*, i. e. *pretium capitis hominis occisi, et ladian purgare*.] Where a man was slain, and the price at which he was valued not paid to his relations, but the party denied the fact, then he was to purge himself by the oaths of several persons, according to his degree and quality; and this was called *werelada*. *Leg. Hen. 1. c. 12*. See next title.

WERGILD, **WEREGILD**, *weregildus*.] The price of homicide or other enormous offences, paid partly to the king for the loss of a subject, partly to the lord whose vassal he was, and partly to the party injured, or the next of kin of the person slain. *LL. H. 1*. See *4 Comm. 188*.

In our Saxon laws, particularly those of King Athelstan, the several weregilds for homicide were established in progressive order, from the death of the ceorl or peasant, up to that of the king himself. And in the laws of King Henry I. we have an account of what other offences were then re-deemable by weregild, and what were not so. The weregild

of a ceorl was 266 *thrysmas*, that of the king 30,000, each *thrysmas* being equal to about 1s. of our present money. The weregild of a subject was paid entirely to the relations of the party slain; but that of the king was divided, one half being paid to the public, the other to the royal family. 4 *Comm. c. 23*, and *note*. See *Appeal of Death, Homicide*.

WEST-SAXON-LAGE. The law of the West Saxons. See *Merchenlage*.

WESTMINSTER, Westmonasterium, Sax. West-myn-ster, i. e. occidentale monasterium.] The ancient seat of our kings, and is now the well-known place where the high court of parliament and courts of judicature sit.

It had great privileges granted by Pope Nicholas, among others, *ut amplius in perpetuum regie constitutionis locus sit atque repositorium regalum insignium.* 4 *Inst. 255*.

By the 57 *Geo. 3. c. 19. § 29*, reciting that it is highly inexpedient that public meetings or assemblies should be held near the houses of parliament, or the courts of justice in Westminster Hall at certain times, it is enacted that no public meeting of more than fifty persons shall be convened or meet in any open street or place within the distance of one mile from Westminster Hall gate (except such parts of St. Paul's, Covent Garden, as are within such distance,) for the purpose or on pretext of preferring or considering of any petition, &c. to the houses of parliament for alteration of matters in church or state, on any day on which either house of parliament shall sit, nor on which the courts of justice shall sit in Westminster Hall; and any meeting to the contrary shall be deemed an unlawful assembly; but this not to extend to meetings for elections, or to persons attending business in parliament or the courts of justice.

See further, *Bishop, Fish, London, Police, &c.*

WHALE-FISHERY. Bounties were formerly granted by parliament to the ships engaged in the whale fishery. The first bounty allowed in 1732 was 20s. a ton to every ship of more than 200 tons burden, which was doubled in 1749. In 1777 it was reduced to 30s. but was restored to its former amount in 1781, which it preserved till 1787, when it was again diminished to 30s., and in 1792 further lessened to 25s., and in 1795 to 20s., at which sum it continued until 1824, when it was altogether withdrawn.

For the statutes regulating the whale-fishery, see *Fish*; and see further *McCulloch's Com. Diet.*

WHARF, wharfs.] A broad plain place, near some creek or haven, to lay goods and wares on, that are brought to or from the water. 12 *Car. 2. c. 1*.

There are two denominations of wharfs, viz. legal quays and sufferance wharfs. The former are certain wharfs in all seaports, at which all goods were required by the 1 *Eliz. c. 11*. (now repealed) to be landed and shipped, and they were set out for that purpose by commission from the Court of Exchequer, in the reign of Charles II. and subsequent sovereigns. Many others have been legalized by act of parliament. In some ports, as Chepstow, Gloucester, &c. certain wharfs are deemed legal quays by immemorial usage. For the lawful wharfs belonging to the port of London, see *Key*.

Sufferance wharfs are places where certain goods may be landed and shipped, such as hemp, flax, coal, and other bulky goods, by special sufferance granted by the crown for that purpose.

See *Harbours and Havens, Port, Ships*.

WHARFAGE, wharfugium.] Money paid for landing of goods at a wharf, or for shipping and taking goods into a boat or barge from thence. See 22 *Car. 2. c. 11*.

WHARFINGER. He that owns or keeps a wharf. See *Carrier*.

WHEELAGE, rotagium.] *Tributum quod rotarum nomine penditur; hoc est, pro plaustris et carris transeuntibus.* *Spelm.*

WHERLICOTES. The ancient British chariots that were used by persons of quality, before the invention of coaches. *Stowe's Surv. Lond. p. 70*.

WHINIARD. A sword, from the Sax. *winn, i. e. to get*, and *are*, honour; because honour is gained by the sword. A cant word used by *Butler* in *Hudibras*.

WHIPPING. A punishment inflicted for many of the smaller offences.

The punishment of whipping has been long recognized by the English law, the 22 *Hen. 8. c. 12*, directing all vagabonds taken begging to be whipped.

By the 1 *Geo. 4. c. 51*, this punishment is very properly abolished with respect to females, and imprisonment to hard labour or solitary confinement is substituted in its stead.

By the new Larceny Act, 7 & 8 *Geo. 4. c. 29*, and the Malicious Trespass Act, 7 & 8 *Geo. 4. c. 30*, wherever the punishment of whipping is left at the discretion of the court, three times is the very extent to which it is allowed to be inflicted; and it is never imposed but in addition to imprisonment.

Where a statute directs an offender, on conviction, to be committed to prison, there to remain and be corrected, this implies whipping; and, indeed, renders that punishment a necessary part of the judgment, leaving no alternative in the discretion of magistrates. 14 *East, 606*. But most of the new penal statutes which impose this punishment, now give the magistrate a discretionary power.

See further, *Judgment (Criminal)*.

WHITEHART-SILVER. A mullet on certain lands in or near the forest of Whitehart, paid early into the Exchequer, imposed by King Henry III. upon Thomas de la Linde, for killing a beautiful white hart, which that king before had spared in hunting. *Cambd. Brit. 150*.

WHITE-MEATS. Milk, butter, cheese, eggs, and any composition of them, which before the Reformation were forbid in Lent as well as flesh, till King Henry VIII. published a proclamation allowing the eating of white-meats in Lent. *Anno 1543*.

WHITE-RENT. A duty or rent payable by the tinnors in Devonshire to the Duke of Cornwall. See *Quit Rent*.

WHITE-RENTS. Payments or chief rents reserved in silver or white money, called white-rents or blanch-farms, *redditus albi*, in contradistinction to rents reserved in work, grain, &c. See *Alba Firma*.

WHITE-SPURS. A kind of esquires called by this name.

WHITSUNTIDE. The feast of Pentecost, being the fiftieth day after East r

It is so called, saith *Blount*, because those who were newly baptized came to the church, between Easter and Pentecost, in white garments. *Blount's Diet.*

WHITSUN-FARTHINGS. Mentioned in letters-patent of King Henry VIII. to the dean of Worcester. See *Pentecostals*.

WHITE STRAITS. A kind of coarse cloth in Devonshire, about a yard and half-a-quarter broad, raw; mentioned in the (repealed) 5 *Hen. 8. c. 2*.

WIC. A place on the sea-shore, on the bank of a river. 1 *Inst. 4*. It more properly signifies a town, village, or dwelling-place; and is often in the Saxon language made a termination to the name of the town, which had a complete name without it, as *Lunden-wic*, i. e. London town; so Ipswich is written in some old charters *Villo de Gippo wico*, which is the same thing, for *Gippe* is the name, and *Gipps wic* is *Gipps town*.

WICA. A country-house or farm. There are many such houses, now called the wick and the wike. *Cartular. Albat. Glaston. 29*.

WICHENCRIF, Sax. mitchcraft.] The word occurs in the laws of King Canute, c. 27.

WIDOW, vidua, relicta.] A married woman bereft of her husband, left all alone. *Litt.*

The widow of a freeman of London may use her husband's trade, so long as she continues a widow. *Chart. K. Cha. I. See Baran and Feme, Dower*.

WIDOW'S CHAMBER. In London, the widow of a freeman

is, by the custom of the city, entitled to her apparel, and the furniture of her bed-chamber, called the widow's chamber. See *Executor*, V. 9.

WIDOW OF THE KING, *vidua regis*.] Was she that after her husband's death, being the king's tenant *in capite*, could not, during the continuance of the feudal law of tenures, marry again without the king's consent. *Stamdf. Prærog. c. 4*. See *Tenures*.

WIDOW'S TERCE. The right which the wife hath after her husband's death to a third of all the rents he died infeft of during life. *Scotch Dict.* See *Dower*.

WIFE, *uxor*.] A woman married. See *Baron and Feme*. WIGREVE, from the Sax. *wig*, i. e. *sylea*, and *greve*, *præpositus*.] The overseer of a wood. *Spelm.*

WIGHT ISLAND, was anciently called *Guith*, by the Britons; whence it had many other names, as *Ictu*, *Wotha*, &c. *Law Lat. Dict.*

WILD FOWL. By the 25 Hen. 8. c. 11. and 9 Ann. c. 25. various provisions were made prohibiting the taking of wild ducks, teals, widgeons, or other water fowl, out of season, or the taking of their eggs; and by the 2 Jac. 1. c. 27. persons shooting at any mallard, duck, teal, or widgeon, might be imprisoned for three months, unless they paid the fine, or gave the security not to offend again therein-mentioned.

All of these acts, however, were repealed by the recent statute amending the Game Laws, which contains a clause whereby persons having in their possession the eggs of any wild duck, teal, or widgeon, are made subject to a penalty. See *Game*, I.

WILL, ESTATES AT. A species of estates not freehold. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor, and the tenant by force of this lease obtains possession. *Litt. § 68*.

Such tenant hath no certain indefeasible estate, nothing that can be assigned to him by any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connexions with the other, at his pleasure. 1 *Inst. 55*. Yet this must be understood with some restriction; for if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits. 1 *Inst. 56*. And this for the same reason upon which all the cases of emblements turn, viz. the point of uncertainty; since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it: and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land. 1 *Inst. 55*. See *Emblements*.

What act does or does not amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it now seems settled, that, (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer, which must either be made upon the land, or notice must be given to the lessee,) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, taking a distress for rent and impounding it thereon, or making a feoffment, or lease for years of the land, to commence immediately; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure; or, which is *instar omnium*, the death or outlawry of either lessor or lessee, puts an end to or determines the estate at will. 2 *Comm. c. 9*.

The law is however careful, that no sudden determination

of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of emblements before-mentioned: and, by a parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils. *Litt. § 69*. And if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year. *Salk. 414*; 1 *Sid. 389*. And, upon the same principle, courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved; in which case they will not suffer either party to determine the tenancy even at the end of the year without reasonable notice to the other, which is generally understood to be half a year. 2 *Comm. c. 9*.

This head of law is now of the less importance, because in pursuance of the leaning above-mentioned, it seems settled that what was formerly a tenancy at will by implication, shall now be considered a tenancy from year to year, determinable by half a year's notice expiring at the end of a current year. And it has been held even in construing the statute of frauds, where the words are that any lease, &c. for more than three years not in writing, shall operate only as a tenancy at will, that such a lease makes a tenancy from year to year. 8 *T. R. 3*. The term tenancy at will by implication is here used, because the general expressions that tenancies at will exist only notionally, and are, in fact, become tenancies from year to year, must be confined to those cases in which no determinate term being expressed, the law formerly implied a holding at will, and in which it would now, from an annual reservation of rent, or any other circumstances showing that the parties contemplated a holding for a year at least, imply a tenancy from year to year. A strict tenancy at will may be still created, though it seldom is so, by express agreement. See *Hargr. & Butler's Co. Litt. 55, a. n. 361. & 4 Taunt. 128*; *Coleridge's note to 2 Comm. c. 9*.

See also *Lease, Sufferance, &c.*

WILL OF THE SUMMONS. In Scotch law, that part of the letter of diligence, or process, which contains the order of the sovereign, beginning with these words, "Our will is," &c.

WILLS; OR LAST WILLS AND TESTAMENTS.

A preliminary observation is necessary; namely, that the system of wills, under the laws and decisions hereinafter mentioned, does not extend generally to Scotland; a will or testament being incapable of conveying landed property in that part of the kingdom, and having of late been greatly superseded in practice even as to personal property by deeds of general disposition.

The following summary as to the dispositions of lands in Scotland, which have superseded wills and testaments, is abstracted from *Bell's Scotch Law Dictionary*.

The transmission of land is, by the law of Scotland, regulated entirely on feudal principles. In all such transmissions there is a superior and a vassal. On the death of the vassal, the heir pointed out by the investiture, that is, by the title to the land, applies to the superior, and receives a renewal of the right; and it is a peculiarity in the law of Scotland, that a person on death-bed can do no deed by which the interest of the heir at law can be any way affected; and where a person has been ill at the time of any disposition made, it is only by going to kirk or market unsupported, or by surviving the execution of the deed of disposition for sixty days, that the objection of death-bed can be taken off.

It is on these grounds, therefore, that landed property must be conveyed in Scotland by deed, in the form of a dis-

position, by which the grantor gives, grants, and disposes in terms of present donation; and that the mere nomination of an heir in lands, or any similar form in the nature of a devise, as it is termed in the English law, is ineffectual to convey a right to lands under the law of Scotland. It may appear, perhaps, that by this form of deed the proprietor must instantly deprive himself of the property of his lands; and so he does in form; but by the use of two clauses, the one reserving his life interest, and the other a power to revoke or alter the deed, joined to the power of retaining it in his own possession or putting it into the custody of a friend, and still possessing the power of altering it, all danger from this form of conveyance is done away. One clause of the deed also specifies the consent of the party granting to the registration thereof, and appoints persons for that purpose. The deed must be executed in the presence of two witnesses named and described in the deed itself.

The reasons on which the form of a will or testament of personal property has in Scotland given way to that of a deed of disposition, depends on the construction of laws peculiar to that country. The present general adoption of the method by deed must obviously have arisen from the convenience of uniting the final disposition of a person's lands and moveables in the same instrument, by which a proprietor may convey his whole property to such persons as he prefers, and burthen them with the payment of such legacies as he thinks proper.

It may also be observed that, with respect to the wills of seamen and mariners, specific regulations are made by the 11 Geo. 4. and 1 Wm. 4. c. 20. to prevent impositions upon them, as to the disposal of their pay and prize money: but these do not supersede the general rules of law in case of wills of real estates. See *Navy*, II.

In 1833 the Real Property Commissioners made a report upon the subject of wills, in which, after giving a compendious account of the present state of the law, they concluded by appending to the report a variety of propositions, having for one of their principal objects the reduction of the law to a uniform standard, with respect to the execution and operation of wills of real and personal estate. A bill, founded upon this report has just passed through the House of Commons, and some of the most important alterations it has in contemplation will be noticed in the course of the present title.

The Real Property Commissioners, in their report, also propose to take away the jurisdiction of the Spiritual Courts, with respect to the probate of wills and the granting of the administrations, as well as with regard to legacies and other testamentary matters. They recommend a general office to be established in the metropolis, where wills shall be registered, instead of being proved in the ecclesiastical courts, as at present, and that the jurisdiction of determining upon the validity of wills of personalty, and the power of granting administrations, which are also to be registered, shall be transferred to the Court of Chancery.

Proceeding to state the general law of England, and which also extends to Ireland, on this subject, the subject may be considered under the following heads:—

I. Of the Form and Manner of making Wills and Codicils.

1. The Nature, and different Sorts of Wills.
2. Nuncupative Wills.
3. Codicils.
4. Of various and contradictory Wills, Codicils, and Legacies. And see title *Legacy*.
5. How Wills shall be executed by a Testator, and attested by Witnesses.

II. Who are capable or incapable of making Wills.

1. Generally; Aliens.

2. Infants; Idiots; Lunatics; Others disabled by temporary Incapacity: Deaf, Dumb, and Blind Persons.

3. Femes Covert.

4. Persons under Duress.

5. Criminals; Traitors; Felons; Outlaws; Excommunicates; &c.

III. What may be disposed of by Will.

1. Of the Statutes enabling Persons to devise.
2. What Estates and Things are devisable.
3. Of lapsed Devises.

IV. 1. Of the Republication of Wills.

2. Of the Revocation of Wills.

V. General Rules as to the Construction of Wills.

For further matter, connected with this subject, see *Descent, Estate, Executor, Executory Devise, Legacy, Remainder, Tail, or Fee-Tail, &c.*

I. 1. A WILL or testament is, "the legal declaration of a man's intentions of what he wills to be performed after his death;" a will or testament being of no force till after the death of the testator, or person making it. 1 *Inst.* 111.

A will and a testament, strictly speaking, are not words of the same meaning. A will is properly limited to land, and a testament only to personal estate; and the latter requires executors. Wills, by which lands are disposed of, are regulated by several statutes made for that purpose, and are a conveyance unknown to the old common law, which permitted a man only to dispose of his goods or personal property. So the word *devise* seems most properly applicable to the disposition of lands by will; and *bequest* or *legacy* to that of personal estate. But in a course of time the words have come to be applied indifferently to a disposition of lands or goods, which are frequently and continually distributed and devised, at the same time, by the same will. *Burn, Eccl. L. tit. Wills.*

Upon the notion that a devise of land by will is merely a species of conveyance, is founded the following distinction between such devises, and dispositions of personal estate: that a devise of a man's goods and personal property will operate upon all such personal estate as the maker of the will dies possessed of, at whatever distance of time he may die after making the will. But a devise of real estate will only operate on such estates as were his at the time of executing and publishing his will; so that freehold lands, purchased after making the will, cannot pass under any devise in that will, unless the will shall have been legally and formally republished subsequent to the purchase or contract. See *post*, IV. 1.

It is intended, however, to alter the law in this respect, so that any freehold or other property acquired by a testator subsequent to the execution of his will shall pass by it, and the will be considered, with reference to the property comprised in it, as speaking at the testator's death, unless a contrary intention appears. See *post*, V.

Wills and testaments are divided into two sorts; first, written; and secondly, verbal, or nuncupative.

The law also takes notice of a particular gift, in the nature of a will, made by any one in contemplation of immediate death, which is called *donatio causa mortis*, a gift in prospect of death. This is, where a man, being ill, and expecting to die, gives and delivers something to another, to be his in case the giver dies; but if he lives he is to have it again. In every such gift, there must be a delivery made by the giver himself, or some person by his order, in his last sickness, while he is yet alive; for the gift will not be good if the delivery is made after his death. The delivery, however, may be made either to the person himself, for whom the gift is intended, or to some other for his use, which will be equally

effectual, so as it is made in the life-time of the party giving. See further, *Donatio causâ mortis, Legacy*.

No stamp-duty whatever is imposed on wills; but the probate or letters of administration are charged with certain duties, in proportion to the value of the deceased's personal property. A will may therefore be written and executed by the testator on unstamped parchment or paper.

2. A NUNCUPATIVE WILL extends only to the personal property of the testator, and is his intention, declared in his last hours before a sufficient number of witnesses, and afterwards reduced to writing.

As these verbal wills (which were formerly more in use than at present, when the art of writing is become almost universal) are liable to great impositions, and may occasion many perjuries, the Statute of Frauds, 29 Car. 2. c. 3. (amongst other things) enacts—

First, That no written will shall be revoked or altered by a subsequent nuncupative one, except the same (the nuncupative will) be in the lifetime of the testator put in writing, and read over to him and approved; and unless the same be proved to have been so done by the oaths of three witnesses at the least, who, by the 4 & 5 Ann. c. 16. must be such as are admissible upon trials at common law. See *Evidence*, II. 1.

But where a man by will in writing devised the residue of his personal estate to his wife, and she dying, he afterwards, by a nuncupative codicil, bequeathed to another all that he had given to his wife; this was resolved to be good. For by the death of the wife the devise of the residue was totally void, and the codicil was no alteration of the former will, but a new will for the residue. 1 Eq. Ab. 408; *T. Raym.* 334.

Secondly, That no nuncupative will shall be good (where the estate thereby bequeathed shall exceed the value of 30*l.*) which is not proved by the oaths of three witnesses at the least, who were present at the making of it; nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his habitation or dwelling, or where he hath been resident for the space of ten days or more before the making of such will; except where such person was surprised or taken sick, being from his own house, and died before he returned.

Thirdly, That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any nuncupative will, except the said testimony, or the substance thereof, were committed to writing within six days after the making the said will.

Fourthly, That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court till fourteen days at least after the death of the testator; nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, and next of kindred to the deceased, that they may contest the same if they please. Soldiers and sailors in actual service may dispose of their moveables, wages, and personal estate, as they might before this act. See the statute.

The legislature has, by the above restrictions, provided against frauds in setting up nuncupative wills by so numerous a train of requisites, that the thing itself is fallen into disuse, and is hardly ever heard of, but in the only instance where favour ought to be shown to it, when a person is surprised by sudden and violent sickness.

The words by which the devise is made must be spoken with an intent to bequeath, not any loose, idle discourse in his illness; for the sick man must require the by-standers to bear witness of such his intention. The will must be made at home among his family or friends, unless by unavoidable accident, to prevent impositions from strangers; it must be

in his last sickness; for if he recovers, he may alter his disposition, and has time to make a written will. It must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses (but which is permitted to be remedied by their writing down within six days what they heard the testator say); nor yet too hastily, and without notice, lest the family of the testator should be put to inconvenience or surprise. 2 *Comm.* c. 30.

Nuncupative wills, for the reasons given by *Blackstone*, have of late years hardly ever been heard of, and by the bill now before parliament they are to be abolished.

3. A CODICIL is a supplement to a will, or an addition made by the person making the will, annexed to, and to be taken as part of the will itself, being for its explanation or alteration; to add something to, or take something from the former dispositions; or to make some alteration in the quantity of the legacies, or the regulations contained in the will. This codicil may also be either written or verbal, under the same restrictions as regard wills. 2 *Comm.* c. 32.

Whenever a codicil is added to a will or testament, and the testator declares that the will shall be in force, in such case, if the will happens to be void for want of the forms required by law in the execution, or otherwise, yet it shall be good as a codicil, and shall be observed by the administrator. And though executors cannot regularly be appointed in a codicil; yet they may be substituted in the room of others named in the will, and the codicil is still good. If codicils are regularly executed and witnessed, they may be proved as wills; and so if they are found written by the testator himself, they ought to be taken as part of the will, as to the personal estate, and proved in common form by witnesses to be the handwriting of the person making the codicil, and by giving an account when, where, and how the same was found. *Burn, Eccl. Law.*

4. If two wills are found, and it does not appear which was the former or latter, both are void; so if two inconsistent wills of the same date appear, neither of which can be proved to be last executed, unless such inconsistency can be explained by some subsequent act of the testator, both are void; but if two codicils are found, and it cannot be known which was first or last, and one and the same thing is given to one person in one codicil, and to another person in another codicil, the codicils are not void, but the persons therein named ought to divide the thing betwixt them. But if the dates appear to the wills or codicils, the latter will is always to prevail, and revoke the former; as also the latter codicil, as far only as it is contradictory to the former; but as far as the codicils are not contradictory they are allowed to be both in force. For though I make a last will and testament irrevocable, or unalterable, in the strongest words, yet I am at liberty to revoke or alter it, because my own act or words cannot alter the disposition of law, so as to make that irrevocable which in its own nature is revocable. If in the same will there are two clauses or devises totally repugnant and contradictory to each other, it has been held, that the latter clause or devise shall take effect, on the same principle as respects prior and subsequent wills. But it seems now, that where the same estate is given by a testator to two persons in different parts of his will, they shall be construed to take the estate as joint-tenants, or tenants in common, according to the limitation of the estates and interests devised. 3 *Atk.* 493; 1 *Inst.* 112 b, n.

It was determined by the House of Lords, upon the opinion of all the judges, that if a will be made, and afterwards another will, without cancelling the former, and either will is proved to be confirmed after the other will, the whole estate comprised in the will so last confirmed will go according to the limitations in that will. And that if two wills appear, and the limitations in both are consistent, and they have both been confirmed by various codicils, the wills and codicils may

all be taken together as one testamentary disposition, and such construction made as that the limitations in both wills shall take place to the disinherison of the heir at law. *Phipps v. Anglesey (Earl)*, *Parl. Cases*, tit. *Will*, ca. 2.

Where two legacies are given to the same person by the same will, or by will and codicil, the rule seems clear, that by the devise of the same sum to a person by a second clause in a will as had before been given him by a former clause in the same will, he shall only take one of the legacies, and not both. But where a legacy is given to a person by a codicil as well as by a will, whether the legacy given by the codicil be more or less than, or equal to, the legacy given by the will, the legatee shall take both; and if the executor contests the payment, it is incumbent on him to shew evidence of the testator's intention to the contrary.

Equal sums given by a will and codicil were held to be substitutional, and not accumulative, although the latter was only conditional. The question always is, whether from the whole of the instruments taken together an intention on the part of the testator to substitute the one legacy for the other can be collected. *Fraser v. Byng*, 1 *Russ. & M.* 90. See further, *Legacy*.

5. Several regulations have been made by the law in order to guard against any frauds in the disposition of real estate by will. As to such wills as dispose of goods and personal property only, if the will is written in the testator's own hand, though it has neither his name or seal to it, and though there are no witnesses to it, it is good, if sufficient proof can be obtained of the handwriting. And even if it is in another person's handwriting, though not signed by the testator, it will be good, if proof can be produced that it was made according to his instructions, and approved of by him. But as many mistakes and errors, not to say misfortunes, must often arise from so irregular a method of proceeding, it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed and sealed by the testator, and published in the presence of witnesses. 2 *Comm.* c. 32.

It is expressly provided by the English statute, 29 *Car. 2. c. 3.* (and by the Irish acts, 7 *Wm. 3. c. 12. § 3.*) that all devises of lands and tenements shall not only be in writing, but shall also be signed by the party so devising the same, or by some other person in his presence, and by his express direction; and shall be witnessed and subscribed, in the presence of the person devising, by three or four credible witnesses; or else the devise will be entirely void, and the land will descend to the heir-at-law.

In the construction of this statute it has been adjudged that the name of the person making the will, written with his own hand at the beginning of his will, as, "I, John Mills, do make this my last will and testament," is a sufficient signing, without any name at the bottom. But this seems doubtful, unless the whole will be written by the testator himself; and the safe and proper way is to sign the name, not only at the bottom or end of the will, but, as is usual and regular, at the bottom of each page or sheet of paper, if the will contain more than one; and the witnesses to the will, seeing the testator sign all the sheets, and put his seal (though this latter is not absolutely necessary in law), as well as his name, to the last sheet, must write their names under the attestation in the last sheet only.

Sealing of a will is not a sufficient signing. 1 *Wils.* 313.

Where a will, written on three sides of one sheet of paper, and attested by three witnesses, concluded by stating, "that the testator had signed his name to the two first sides thereof, and had put his hand and seal to the last side," and he put his name and seal to the last side only, the will was held to be duly executed. 5 *Moore*, 484; 2 *B. & B.* 650.

It has also been determined, that though the witnesses must all see the testator sign the will, or at least acknowledge the signing, yet they may do it at different times.

Jones v. Dale, 5 *Bac. Abr.* But they must all subscribe their names as witnesses in his presence, lest by any possibility they should make a mistake; and that a will is good, though none of the witnesses saw the testator actually sign it, if he owns it before them to be his handwriting. It is remarkable that the 29 *Car. 2. c. 3.* does not say the testator shall sign his will in the presence of the three witnesses, but requires these three things:—First, That the will should be in writing; Secondly, That it should be signed by the person making the same; and, Thirdly, That it should be subscribed by three witnesses in his presence. 3 *P. Wms.* 254. But it is not at all necessary that the witnesses should be acquainted with the contents of the will, provided they are able, when called on, to identify the writing; i. e. to say that the paper then showed them, is the same they saw the testator sign.

Though the statute has required that the witnesses to the will shall witness it in the testator's presence (in order to prevent obtruding another will in the place of the true one), yet it is enough that the testator might see the witnesses; it is not necessary that he should see them signing; for otherwise, if a man should but turn his back, or look off, it might make the will void. And in a case where the testator desired the witnesses to go into another room, seven yards distant, to witness the will, in which room there was a window broken, through which the testator might see them, it was by the court adjudged to be a witnessing in his presence. So where the testator's carriage was drawn opposite the windows of an attorney's office, in which the witnesses attested the will; this was clearly determined to be in the testator's presence. 1 *Bro. C. R.* 99.

Where there was a possibility of seeing the witnesses from the testator's room, but it was found that he was not in such a situation in the room as to see them, the attestation was declared invalid. 1 *M. & S.* 294.

Two witnesses to a will devising lands subscribed their names at the devisor's request, but did not see his signature, nor knew the nature of the instrument. A third witness (though he did not see the devisor's signature) was informed by him that the paper in question was his will. Above the names of the witnesses was written by the devisor, "In the presence of us as witnesses thereto." This attestation was held to be good, apparently on the ground of the immediate privity of the testator himself to the attestation, and thereby in fact acknowledging it to be his will. 6 *Bing.* 310.

If a will is executed at one time, and at another time afterwards the witnesses put their names to it, the testator being then insensible, this will not be a good will, as it cannot be said to be witnessed in his presence, if he is unconscious of what is passing. *Doug.* 241.

A will made beyond sea of lands in England, must be attested by three witnesses. 3 *P. Wms.* 293.

Before passing the act 55 *Geo. 3. c. 192.* a will devising copyhold land, witnessed by one or two witnesses, or even without any witnesses at all, was held sufficient to declare the uses of a surrender of such copyhold lands made to the use of a will. 2 *Atk.* 37; 2 *Bro. C. R.* 58. But an equitable estate of copyhold will pass by devise without surrender. 1 *Bro. C. R.* 481. A copyhold or customary estate, the freehold of which is in the lord, and not in the tenant, and which passes by surrender and admittance, was held to be neither within § 5. of the Statute of Frauds, 29 *Car. 2. c. 3.* so as to require to a devise thereof the signature of the party, or the attestation of witnesses; nor within § 7. of that act, as a declaration of trust requiring to be proved by a writing signed by the party, which applies only to cases where the legal and equitable estates are separated; or by a will in writing, which must be understood only of such a will of lands as the statute recognizes, viz. by a will attested by three witnesses. The Court of King's Bench held, that such estate might well pass by instructions for a will taken in writing by another in the presence and by the oral dictation

of the party, without any signature or attestation; and which was established as a will by the Ecclesiastical Court granting probate thereof; and which is a good will by the Statute of Wills (32 Hen. 8. c. 1; see *post*, III. 1.); the estate having been surrendered to the use of the last will of the party in writing. Such estates passing not by the will alone, but by the will and surrender taken together. 7 *East*, 299.

But query as to the effect of these determinations since the 55 Geo. 3. c. 192; and with reference to the terms of that act (see *Copyhold*,) it may not be irrelevant to observe that the power of devising copyholds was originally wholly dependent on special custom; and to such custom the 55 Geo. 3. expressly refers: but in 3 Bro. C. R. 286, it being alleged that according to the custom of a manor, copyhold lands holden thereof could not be surrendered to the use of the copyholder's will, and were not devisable by virtue of any custom subsisting in such manor, Lord Thurlow said it was totally impossible that a copyhold surrendered to the use of a will should not pass thereby; and therefore he must declare the custom, if there were such an one, bad. See now *post*, III. 2.

By the bill before mentioned it is proposed to enact that no will of any description (except wills of personal estate made by soldiers in actual service, or sailors at sea, under the present law, see *Navy*, II.) shall be valid unless it be in writing and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and the signature be made or acknowledged by the testator in the presence of two or more credible witnesses present at the same time, who shall subscribe their names to the will, in the presence of the testator, but no form of attestation shall be necessary.

It will be observed, that among other alterations meant to be introduced with respect to the execution of wills, that the name of a testator shall be signed at the foot of the will, and that the writing of his name at the commencement will not be sufficient. The witnesses also are to subscribe the will or acknowledge their signatures in each other's presence.

And with respect to appointments, the above bill provides (§ 17.) that no appointment made by will in exercise of any power shall be valid unless executed in manner thereinbefore required; but every appointment by will so executed shall be a valid execution of a power, notwithstanding such power imposed some additional form or solemnity.

It is also intended that a will executed in the above manner shall not require any other publication.

The witnesses to a will ought to be disinterested. In a case formerly determined by the Court of King's Bench, the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses; for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. 2 *Str.* 1253. This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom that depended on devises by will. For if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues (and these are the persons most likely to be present in the testator's last illness,) and if in such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the 25 Geo. 2. c. 6. (and the Irish act, 25 Geo. 2. c. 11.) which restored both the competency and the credit of such legatees, by declaring void all legacies (and in this are included devises of lands and other

interests) given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The Irish act imposes a penalty of three years imprisonment on persons paying or accepting the legacy.

In the 17 *Ves.* 508. a personal bequest to a subscribing witness to a will of personal estate was held void, although no attestation was necessary in such case.

But in the 3 *Russ.* 436. it was determined that the 25 Geo. 2. c. 6. does not extend to wills of personal estate, and that a legacy to a person who is attesting witness to such a will is not void; the statute relating only to such wills and codicils as by the Statute of Frauds are required to be attested by witnesses.

The same statutes likewise established the competency of creditors by directing the testimony of all such creditors to be admitted, but leaving their credit (like that of all other witnesses) to be considered on a view of all the circumstances by the court and jury before whom such will should be contested. And the testimony of three witnesses, who were creditors, has been since held to be sufficiently credible, though the land be charged with the payment of debts.

An executor of a testator, possessed of real and personal estate, clothed with a trust to pay debts, and to lay out money for the benefit of the testator's children, and with a power to sell freehold lands in fee, but taking no beneficial interest under the will, was held a good attesting witness. 6 *Taunt.* 220.

So the wife of an acting executor taking no beneficial interest under the will. 12 *East*, 250.

But where an estate in fee on the determination of a life estate was devised to the wife of one of the attesting witnesses, and the testator and devisee died before the life estate was determined; held that the husband of the devisee was not a good attesting witness. 5 *B. & A.* 589.

With respect to the credibility of witnesses, by the bill before parliament, gifts to them, whether they attest wills of real or personal estate, are declared void, and they are to be admitted to prove such wills notwithstanding.

By § 22. creditors attesting wills are to be admitted as witnesses to prove the execution thereof.

And by § 38. executors are also to be admitted as witnesses to prove the execution of wills or the validity thereof.

A will more than thirty years old proves itself, and this though the testator died within the time. 2 *M. & R.* 195; 8 *B. & C.* 22. where one of the attesting witnesses was living.

II. 1. REGULARLY every person has full power and liberty to make a will and testament who is not under some special prohibition by our law or by custom, which prohibitions are principally upon three accounts: 1st, for want of sufficient discretion in the person making the will; 2dly, for want of sufficient liberty and freewill; and 3dly, on account of their criminal conduct. 2 *Comm.* c. 32.

It may not be amiss, perhaps, first to mention a case which does not strictly come under either of these heads, unless on some occasions it might be supposed proper to be referred to the third: An alien, while living under the English government, may obtain money, goods, and personal property, and may make a will, and dispose of such property as he pleases, contrary to the ancient custom in France, where the king, at the death of an alien, was entitled to all he was worth in that kingdom, a custom repealed under the reign of the late unfortunate Louis XVI. A distinction is made in some of the law books between alien friends and alien enemies. But in the case of an alien, the subject of a state at war with England, if he lives here and trades, and is not guilty of any unfriendly act, he is permitted to dispose of his goods and money as freely as any subject, and this under the idea that he has the king's license for staying in the kingdom, and is therefore in some degree entitled to the protection and

privilege of a subject. But an alien (friend or enemy,) not being capable of acquiring any right in land for his own benefit, can never therefore have any real estate to dispose of. Yet it seems undisputed that an alien may be a devisee, even of lands, whatever the further effect of his taking such lands may be. *Powell on Devises.*

Some doubts have arisen, but it is believed have never yet been brought before the courts here, of the power of an alien, during a temporary residence here, to devise his property in the funds. It seems that such a devise is certainly good, unless the alien be positively restrained therefrom by the established laws of his own country, or by his own precontract. See further, *Alien.*

2. It is particularly provided by the 34 & 35 Hen. 8. c. 5. § 14. that no person under the age of twenty-one years shall make a will or testament of any manors, lands, tenements, or other hereditaments. See post, III.

It appears settled, however, that a male infant of the age of fourteen years and upwards, and a female of twelve years or upwards, are capable of making a will respecting only personal estate, but as the ecclesiastical court is the judge of every testator's capacity, and decides on disputes respecting the validity of wills relating to personal estates, the discretion of the person making the will may be disputed there, and his capacity of devising, let him be of what age he will. But no custom can be good to enable any persons to make a will under the respective ages of fourteen and twelve above-mentioned. *Burn's Eccl. L.* Though, by custom in particular places, infants may devise lands after that age, and before twenty-one. *Burn's Eccl. L.* See further, *Infant.*

By the bill before parliament it is proposed to fix seventeen years as the age at which persons, whether male or female, may make wills either of real or personal estate.

An idiot or natural fool, notwithstanding he may be of lawful age to make a will, cannot at any time make a will or testament, nor dispose either of his lands or goods; and on the same principle, persons who are grown childish, either through old age or any infirmity or distemper, are, during the continuance of such incapacity, disabled from making a will. 2 *Comm. c. 32.*

Lunatics, during the time of their madness, cannot make a will or testament, nor dispose of any thing thereby, and that for the most forcible of all reasons, their utter incapacity of knowing what they are doing; and it is a principle of law, that in making of wills, integrity, soundness, and perfectness of mind are absolutely requisite, the health of the body rarely not being regarded. Yet if such mad persons have had intervals of reason, then during the time of such intervals, if they are fully possessed of a sound and disposing memory and understanding, they may make their wills. *Burn's Eccl. L.* See *Idiots and Lunatics.*

Every person, however, is presumed to be of perfect mind and memory, unless the contrary is proved; and therefore if any one attempts to call in question or overthrow the will, on account of any supposed madness or want of memory in the testator, he must prove such impediment to have existed previous to the date of the will, but people of mean understanding and capacities, neither of the wise sort nor of the foolish, but intermediate betwixt both, even though they rather incline to the foolish sort, are not hindered from making their wills. The law will not scrutinize into the depth of a man's capacity, particularly after his death, if he was able to conduct himself reasonably in the common course of life; as it might be opening a wide door to support pretensions of fraud or imposition on the testator. *Burn's Eccl. L.* And if a person of a sound mind nicks his will, this shall not be revoked or affected by his subsequent infirmity. 4 *Co. 61.*

One overcome with drink is equally incapable of using his reason during his drunkenness as a madman; and therefore if he makes his will at that time, it is void. 2 *Comm. c. 32.*

Persons born blind, deaf, and dumb, are incapable of

making a will, as they want the common inlets of understanding, and are incapable of having any desire of bequeathing or obtaining any knowledge with respect to property, or the disposal of it, and are in as helpless and ignorant a situation as idiots themselves, and even those who are only deaf and dumb by nature, cannot make any will, unless it very manifestly appears, by strong and convincing proofs, that such persons understand what a will means and they have a desire to make a will; for if they are possessed of such understanding and desire, then they may, by signs and tokens, declare their intentions. *Burn's Eccl. L.*

A blind person may make a nuncupative will, by declaring his intentions before a sufficient number of witnesses, and he may also make a will in writing, provided the will be read to him before witnesses, and in their presence acknowledged by him for his last will; but if a writing should be delivered to a blind man, and he, not hearing the same read, acknowledged the same for his will, this would not be sufficient; for it might happen that if he had heard the same read he would not have acknowledged it for his will. The best way, therefore, in such a case is, that the will be read over to the testator, and approved by him in the presence of all the attesting witnesses; and although this is not necessary to the validity of such will (2 *New Rep. C. P. 214.*) yet a court of justice will demand satisfactory proof of some kind that the identical will was read over to him, though it was not in the presence of the witnesses; it is, therefore, good policy to let all the subscribing witnesses be present at the reading over such a will, as in case of any dispute which may be more likely in such extraordinary circumstances, they will be most capable of affording complete satisfaction to the minds of a judge and jury. *Burn's Eccl. L.*

The above precautions seem in like degree requisite in the case of a person who cannot read; for though the law in other cases may presume that the person who executes a will knows and approves the contents of it, yet that presumption will cease where through defect of education he cannot read, or is by sickness incapacitated to read the will at that time. *Burn's Eccl. L.*

3. A married woman is restrained and prevented from devising any land or real estate whatsoever (but by the custom of particular places she may devise her freehold estate,) being particularly excepted out of the 34 & 35 Hen. 8. c. 5. enabling other persons to dispose of their lands and tenements by will; and it is a general rule, that she cannot make any will, even of goods or personal estate, without the license or consent of her husband, because by the law, as soon as a man and woman are married, all the goods and personal estate, of what nature soever, which the wife had at the time of the marriage, or may acquire after, belong to the husband, by force of the marriage, which empowers him to make such part of them his own as are not absolutely vested in him immediately by the marriage; and therefore it would be an inconsistency in the law to give her a power of defeating that rule, by bequeathing those goods and chattels to another. 2 *Comm. c. 32.* See *Bacon and Fen.*

Although a married woman is, generally speaking, so entirely under the power of her husband, that she cannot make what in propriety of speech is called a will, yet she may, with the consent of her husband, make what is termed an appointment, and which, like a will, does not take effect till her death, and may be altered or revoked during her life; and the usual way in such cases is for the intended husband to enter into marriage articles, or a bond, before marriage, in a sufficient penalty, conditioned to permit his wife to make a will, and to dispose of money or legacies to a certain value, and to pay what she shall appoint, not exceeding such value; and in that case, if after the marriage, and during it, she makes any writing, purporting to be her will, and disposes of legacies to the value agreed on, though in strictness of law she cannot make a will without her husband's positive as-

sent to the specific will, but only something like a will, yet this shall be good as an appointment, and the husband is bound by his bond, agreement, or covenant, to allow the execution of it. 2 *Comm. c. 32*. And this will or appointment ought to be proved in the spiritual court. 1 *Burr. 431*; *Stone v. Forsyth, Doug. 707*.

To the above general rules there are also some few other exceptions.

The queen consort is exempted from these restrictions, and she may dispose of her goods and personal estate by will, without the consent of her lord. See *Queen*.

If a married woman is executrix to some other person, and in that right has goods and chattels, these do not become the property of the husband by marriage, because she has them not for her own use, but as representing the person of another, and therefore in this case she may, for the continuation of the executorship only, and for no other purpose, make an executor, and consequently a will, without the consent of her husband; but she cannot, either in her lifetime or by her will, dispose of the goods which she is thus possessed of in right of another, any otherwise than as by law she is required to do as executrix. See *Baron and Feme, V.*

If a married woman has any pin-money, or separate maintenance, she may dispose of any savings made by her out of the same by will, without the controul of her husband. *Pre. Ch. 44*.

Another remarkable exception is in favour of a married woman, whose husband is banished for his life by act of parliament; for she may make a will, and act in every thing as if she was unmarried, or as if the husband was dead. 2 *Vern. 104*. See further, *Baron and Feme, VI.*

Where personal property is given to a married woman for her sole and separate use, she may dispose of it by will without the assent of her husband. 3 *Bro. C. R. 8*.

Where lands are conveyed to trustees, a married woman may have the power of appointing the disposition of them after her death, which appointment must be executed like the will of a feme sole, and will be subject to the same rules of construction. 2 *Ves. 610*; 1 *Bro. C. R. 99*. And (though the contrary has been held) it has been determined by the House of Lords, that the appointment of a married woman is effectual against the heir at law; though it depends only upon an agreement of her husband before marriage without any conveyance of the estate to trustees. *Bro. P. C. vi. 156*.

By the measure before parliament (§ 14.), no will made by a feme covert shall be valid, except a will of real or personal estate to which she may be entitled for her separate use, or an appointment by will in pursuance of a power of appointment to be exercised by her, notwithstanding her coverture, or a will made with the consent of her husband of personal estate, or for appointing an executor to a will of which she shall be executrix.

If a woman makes a will and afterwards marries, and dies during the life of her husband, yet being at the time of her death incapable by law of devising, because her husband is then living, the will is void; for it is necessary, in order to make her will of force in law, that she had ability to make a will, not only at the time of making thereof, when the will received its being, but also at the time of her death, at which time only any will can receive its strength and confirmation. 4 *Rep. 60*; 2 *P. Wms. 624*. If a wife survives her husband, a will made during the marriage is not good, because she is, during such time, by law restrained from making any will; but if a will is made during the marriage, and she survives her husband, and approves and confirms the will after his death, in this case it will be good by reason of her new consent or new declaration of her will, for then it is, as it were, a new will. See *post, IV. 1*.

If a woman makes her will, and afterwards marries and survives her husband, and dies a widow, leaving such will made before her marriage; it has been held that the will was

revived, and in force. *Plowd. Comm. 343*. But later determinations seem to have settled, that though she was able in law to make a will, both at the time of the execution of it and at her death, yet such will shall not be good or valid in law without a republication, it having been once absolutely revoked and entirely made void by the marriage. See 2 *T. R. 695*.

For the intended measure with respect to the revocation of the will of a woman by marriage, see *post, IV. 2*.

4. A will will be set aside which is made by a person in consequence of any threats made use of to him, whereby he is induced, through fear of any injury, to make such a will as he would not otherwise have wished to do; and as to this, no certain rule can be laid down, but it is left to the discretion of the court to determine upon the particular circumstances of the case, whether or no such persons could be supposed to have a free will in the disposing of their estates; and the judge will, on such an occasion, not only consider the quality of the threats, but also the persons as well threatening as threatened; in the person threatening, his power, and disposition; and in the person threatened, the sex, age, courage, pusillanimity, and the like. But if, after making the will, when there is no cause of fear, the maker of it ratifies and confirms it, it will be good in law. *Burn. Eccl. L.*

If a man makes a will in his sickness, at the over-importunity of his wife, contrary to his own wishes and desires, and merely that he may be quiet, this is a will made by restraint, and shall not be good. *Sty. 427*.

The ecclesiastical court has jurisdiction of fraud or deception relating to a will of personal estate, and can examine the parties by allegation concerning such fraud and deceit; and if the will was falsely read to the testator, then it is not his will; but in the case of a real estate, a will cannot be set aside even by a court of equity for fraud or imposition, but must be tried at law; on the question, whether the testator did or did not in fact devise; the fraud or imposition in this case being a matter proper for a jury to inquire into. *Ker-ric v. Bransby; Parl. Ca.* See further, *Fraud*.

5. A traitor, lawfully convicted of high treason, by verdict, confession, outlawry, or otherwise, besides the loss of his life, shall forfeit to the king all his goods and chattels, and all such lands and freehold property as he shall have at the time of his committing such treason, or at any time after; and so consequently is unable to dispose of any thing by will; and traitors are not only deprived of the privilege of making any kind of last will, from the time of their being convicted and found guilty, but any will made before does, by reason of such conviction, become void, in respect both of goods and lands. But if any person convicted of treason obtain the king's pardon, he is thereby restored to his former estate, and may make his will as if he had not been convicted; or if he had made any before his conviction and condemnation, such will, by reason of the pardon, recovers its former force and effect. See *Attainder, Forfeiture, Treason*.

A felon, lawfully convicted, cannot make any will, or other disposition of any goods or lands, because the law has disposed thereof already; so that it cannot be in the power of the felon to devise them. But in this case also, a pardon restores him to his former estate and capacity of making a will. See *Attainder, Forfeiture*.

The will of a *felo de se* is void both as to the appointment of an executor, and also with respect to any legacy or bequest of goods, for they are forfeited by the very act and manner of his death, but any devise of land made by him is good, as that is not subjected to any forfeiture. See *Forfeiture, Homicide*.

An outlaw is not only out of the king's protection, and out of the aid of the law, but also all his goods and chattels are forfeited to the king, by means of the outlawry, although it should only be for debt, and even though the action in which he is outlawed is not just, nevertheless his goods and chattels

are forfeited by reason of his contempt in not appearing; and therefore he that is outlawed cannot make his will of his goods so forfeited. But a man outlawed for debt, or in any other personal action, may, in some cases, make executors; for he may have debts upon contract, which are not forfeited to the king, and those executors may have a writ of error to reverse his outlawry. *Burn, Eccl. L. See Outlawry.*

It was always the better opinion, that an excommunicated person might make a will; though some disputes had arisen as to the effect of what was called the greater and lesser excommunication; but these niceties are put an end to by 52 *Geo. 3. c. 127.* by which all disabilities resulting from excommunication are abolished. *See Excommunication.*

With respect, however, to the wills of traitors, felons, outlaws, &c. though they are void as far as concerns the king, or the lord who is entitled to the forfeiture of their lands or goods, yet the will is of force against the testator and his representatives, and all other persons whatsoever; so that if the king or the lord pardons the forfeiture, the will is suffered to take effect.

Formerly Roman Catholics were under several disabilities, both as to the purchasing lands, and taking them by descent or devise; but those are now done away, and persons of this persuasion are rendered capable of purchasing and devising lands, and having them by descent, purchase, and devise, on taking the oath prescribed to them by the act of the 18 *Geo. 3. c. 60.* but which oath seems now virtually repealed. *See Roman Catholics.*

III. 1. ANCIENTLY there were in different parts of the kingdom, and particularly in Wales, and in the province of York, and in London, several customs, the remains of the old common law, which prevented persons from disposing of more than the one-third part of their goods and personal property. And this restraint continued till very modern times, when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three acts of parliament have been provided; (one 4 & 5 *W. & M. c. 2.* explained by 2 & 3 *Ann. c. 5.* for the province of York; another, 7 & 8 *Wm. 3. c. 38.* for Wales; and a third, 11 *Geo. 1. c. 18. § 17.* for London;) whereby all persons within those districts, and liable to those customs, are enabled to dispose of all their money and other personal estate by will; and the claims of the widows, children, and other relations, to the contrary, under pretence of the custom, are totally barred. Thus is the old common law, restraining devises, and the customs in those places, which were the relics of it, entirely abolished throughout all the kingdom of England; and a man may give the whole of his chattels by will, as freely as he formerly could his third part; in disposing of which he was bound, by the custom of many places, to remember his lord and the church, by leaving them his two best chattels; and afterwards he was left at his own liberty to bequeath the remainder as he pleased. 2 *Comm. c. 32.* These customs, however, as far as they respect the distribution of an intestate's estate, still remain in force. *See Executor, V. 9.*

It seems sufficiently clear that, before the conquest, lands were devisable by will. *Wright of Tenures, 172.* But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord. *See Tenures.* And some have questioned whether this restraint was not founded upon truer principles of policy than the power of wantonly disinheriting the heir by will, and transferring the estate, through dotage or caprice, to utter strangers. *See 1 Comm. c. 23.*

However this be, we find that, by the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament, except only in Kent, and in some ancient boroughs, and a few particular ma-

nors, where their Saxon immunities by special indulgence subsisted. 2 *Inst. 7; Litt. § 167; 1 Inst. 111.* And though the feudal restraint on alienations by deed vanished very early, yet this on wills continued for some centuries after; from an apprehension of infirmity and imposition on the testator in *extremis*, which made such devices suspicious. Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descents is apparent to the neighbourhood; and which the simplicity of the common law always required in every transfer and new acquisition of property. 2 *Comm. c. 23.*

But when ecclesiastical ingenuity had invented the doctrine of uses, as a thing distinct from the land, uses began to be devised very frequently, and the devisee of the use could in chancery compel its execution. For it has been observed, that as the Popish clergy then generally sat in the Court of Chancery, they considered that men are most liberal when they can enjoy their possessions no longer; and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, could intercede for their happiness in another world. But, when the statute of uses had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable. *See Uses.* This might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, viz. 32 *Hen. 8. c. 1.* explained by 34 & 35 *Hen. 8. c. 5.* (and in Ireland by the Irish act 10 *Car. 1. st. 2. c. 2.*) which enacted that all persons being seised in fee-simple except feme coverts, infants, idiots, and persons of nonsane memory, might by will and testament in writing devise to any other person, except to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage; which now, through the alteration of tenures by the statute of Charles the Second, amounts to the whole of their landed property, except their copyhold tenements; and these latter pass, as we have seen, rather by surrender than by will; and in the latter case, rather as personal than real property. But see 55 *Geo. 3. c. 192; and post, III. 2.*

Corporations were excepted in these statutes, to prevent the extension of gifts in mortmain; but now, by construction of the 43 *Eliz. c. 4.* it is held, that a devise to a corporation for a charitable use is valid, as operating in the nature of an appointment, rather than of a bequest. *See Charitable Uses, Mortmain.*

But, by the bill before parliament, it is intended to be enacted (§ 15.) That no devise or other disposition by will of real estate to any body politic or corporate shall be valid, unless such body is empowered by act of parliament to acquire real estate by devise.

With regard to devises in general, experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed, and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance. For so loose was the construction of the 34 & 35 *Hen. 8. c. 1.* by the courts of law, that bare notes in the handwriting of another person were allowed to be good wills within the statute. To remedy which the statute of frauds and perjuries, 29 *Car. 2. c. 3.* already so fully stated, was passed. And to remedy the further inconveniences as to witnesses, the 25 *Geo. 2. c. 6.* (see *ante, I. 5.*) was found necessary.

One inconvenience more was at length found to attend this method of conveyance by devise; in that creditors by bond and other specialties, which affected the heir, provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the devisee of their debtor. To obviate which, the 3 & 4 *IV. & M. c. 14.* provi-

ded, that all wills and testaments, limitations, dispositions, and appointments, of real estates by tenants in fee-simple, or having power to dispose by will, shall (as against such creditors only) be deemed to be fraudulent and void. And that such creditors might maintain their actions of debt against the heir and devisee jointly. And such devisees should be liable and chargeable for a false plea in like manner, as heirs, for false pleas, or for not confessing lands descended. A devise for payment of any real or just debts, or for raising portions for younger children, according to an agreement before marriage, were exceptions in the statute, § 4. [The corresponding act in Ireland was 4 Ann. c. 5.]

The provision of these statutes being confined to an action of debt, an action of covenant did not lie thereon. 7 East, 127. And a suit in equity founded on the statute must have been against the heir and devisee jointly. 2 Atk 125. As to the manner of declaring, see *Clift's Ent.*; *Lill. Ent.*; 5 Wantw.; 2 Chitty. In a case within the statutes, the devisee must have shown by plea the particular lands devised. *Gott v. Atkins, Willes*, 521, 523.

In *Gott v. Atkins, Willes*, 521, it was held that no action could be maintained on the 3 & 4 W. & M. c. 14. against devisees in trust to sell and apply the money arising by such sale in payment of debts. In 1 Comp. Ch. Ca. 45, it was held, that a devise to pay simple contract creditors, in preference to specialty creditors, was good within the statute. It was previously held, (*Vernon v. Vaudry, Barn.* 304.) that a devise to pay debts, excepting a debt as a surety, was not valid; but this appears to have been contrary to the letter of the act, and all other authorities. In *Longard v. Derby*, (Ld.) 1 Bro. C. R. 311. the testator devised to trustees in trust to apply the yearly rents and profits in payment of his debts; upon application by bond creditors for a sale, it was insisted that the will was not authorised by the statute; for a bond creditor, without the devise, may compel a sale, and the devise tends to defeat his claim; but, by the chancellor, Lord Loughborough, both by the words and the construction of the statute, where there is a devise for the payment of any real and just debt or debts, the case is taken out of the statute, and stands as it would have done before making the statute; the creditor can come in only as the will directs. See to the like effect, *Bath (E.) v. Bradford (E.)*, 2 Ves. 577.

In *Hughes v. Dolben*, 2 Bro. C. R. 614. the testator had made a general charge of his debts upon his real estate, and devised a particular estate to trustees for that purpose, excepting the mansion-house. Lord Thurlow, C. said, that a devise for paying of debts, which was not effectual, did not take the case out of the statute; and that, if requisite, he should order the mansion to be sold. In *Bailey v. Ekme*, 7 Ves. 323, Lord Eldon, C. stated the uniform rule to be, that a provision by will, effectual in law or equity for payment of creditors, was not fraudulent within the statute: and see *Kidney v. Cousmaker*, 12 Ves. 154. Where an estate is charged with or devised generally for payment of debts, simple contract creditors are entitled equally with specialty creditors: and if the latter have exhausted the personal estate, they can have no benefit from the real estate until the simple contract creditors are paid *pari passu*. See further, *Heir*, III. 2, 4; *Executor*, V. 6.

The 3 & 4 Wm. & M. c. 14. was repealed by the 1 Wm. 4. c. 47, which provides a remedy for several cases in which there was no adequate relief under the above statute. See *Real Estate*.

In the arrangement of the funds in equity, as between the heir and the devisee, assets descended to the heir must be applied to pay debts, before lands specifically devised can be charged. 3 P. Wms. 367; 3 Atk. 556. As to the order of liability between different funds, see *Executor*, V. 6, and in addition to the cases there cited, see 8 Ves. 124; *ib.* 125.

2. More immediately as to what Things are devisable.—In

general it may be stated, that every thing in which a man has the absolute property may now be devised by his will; disputes at present arising mostly on the words of the will, and not on the capacity to bequeath. Thus rents, tithes, manors, franchises, and annuities, may be devised, by virtue of the words, lands, tenements, and hereditaments, in the statutes of wills. So may reversions, and vested remainders expectant after an estate tail, and trust estates by the *cestui que trust*. See *Powell on Devises*.

Estates *pur autre vie* are devisable by 29 Car. 2. c. 3. § 12. by a will attested by three witnesses; but not where there is no special occupant. But now see *post*. See also, *Life Estate, Occupant*.

If any one has money owing to him on mortgage, he may devise this money to be paid when it becomes due. *Burn, Eccl. L.* See 1 Inst. 208; and *tit. Mortgage*.

The right of presenting to the next avoidance, or the inheritance of an advowson of a benefice, may be devised; so also a donative may be devised. *Powell on Devises*. And a devise of the next turn, or presentation, carries the next turn of presenting absolutely to the devisee, and not merely the right of getting himself presented. 3 Black. Rep. 1240. And such devise may be made by an incumbent or parson of any church, to whom the inheritance of the advowson of that church belongs, though he is the incumbent or parson of the church when he dies; for though the will has no effect but by the death of the testator, yet it has a beginning in his lifetime; and the disposition and bequest will be good also, if he appoints by his will who shall be presented to the church by his executors, or that one executor shall present the other, or that his executors shall grant the advowson to any particular person. This case being distinguished and excepted from the general rule as to advowsons, which are by law forbidden to be disposed of while there is no incumbent, and the church is empty, in order to restrain the practice of simony. 3 Bulst. 38, 43; 1 Roll. Rep. 210; *Cra. Jac.* 371; 1 Atk. 619. See *Dy.* 456; and *tit. Simony*.

If a man has agreed to purchase an estate, and the buyer and seller enter into articles for the purchase, and the buyer dies, having by his will devised the land so agreed to be purchased, before any deed to convey the same is made to him; the land will in equity pass to the devisee; the seller only standing as trustee for him, and whom he should appoint till a regular conveyance be executed. 1 C. C. 39; 2 Vern. 679; 1 Atk. 578. And see 11 Vesey, 550; *Doug.* 718; and 2 Ves. & B. 332.

A lease for any number of years, determinable upon a life or lives, or a lease for 500 or 1000 years, or any other term absolute, may be given and disposed of by will, as personal estate. *Burn, Eccl. L.*

If one of two joint-tenants, during his lifetime, devise his share in the land, and die, this devise will not be good; and the person to whom the joint tenant has devised his share takes nothing, because the devise does not take effect till after the death of the joint-tenant, and then the survivor takes the whole land by a prior title, that is to say, the deed of purchase. *Burn, Eccl. L.* And although the joint-tenancy is severed before the testator's death, yet if the will be made before the severance, it will have no effect; unless there is a republication of the will after the partition. 3 Burr. 1497.

By stat. Merton, 20 Hen. 3. c. 2. widows may bequeath the crop of their ground, as well of their dowers as of their other lands and tenements; and by 28 Hen. 8. c. 11. if the incumbent of a living, before his death, has caused any of his glebe lands to be manured and sown at his own expense, with any corn or grain, he may by his will devise such corn, and all the profit of it, growing on the glebe land so manured and sown. So if a man is possessed of land for the term of his life only, and the land after his death descends to his heir, yet he may devise the corn growing on the land at the time of his death, away from the heir, to some other person;

although he has it not in his power to devise the land whereon it grows. *Burn, Eccl. L.* So where a man has lands in right of his wife, or is tenant by the curtesy of lands, and sows them with corn, he may devise the corn growing on the lands at his death: and if the husband, or tenant by the curtesy, lets the lands to another, who sows the ground, and afterwards the wife, or the tenant by curtesy, dies, the corn not being ripe; yet in this case the person to whom the lands were let is entitled to the corn, and may devise it, notwithstanding his estate and interest in the land is determined. See *Emblements*.

But trees, and other things fixed to the freehold, or heir looms, which by custom go to the heir with the house, are not devisable but by him who has the fee-simple. 4 Co. 64; 1 Inst. 185. See *Heir*.

An executor or administrator cannot devise those goods which he has as executor or administrator, and which belong to the person to whom he is executor or administrator; but the same must be applied in payment of that person's debts, and distributed in a due course of law; the executor or administrator having these goods only for such particular purposes, and not to their own absolute use. Nor can a husband devise any effects which his wife has as executrix, for the like reason. *Burn, Eccl. L.* See further, *Executor, Baron and Feme*.

Although the personal estate of the wife becomes the property of the husband immediately on marriage, as he is thereby enabled to make all debts due to her, and bonds for money given her before marriage, his own; yet unless he recovers such debts during the marriage, and renews the bonds, and takes them in his own name, he has not such an absolute interest in them as to be able to devise them by his will; but they will, after his death, again become the property of the wife. 1 Inst. 351. But if a woman's fortune, or any part of it, consisted in bonds given her before marriage, and the husband on the marriage makes a settlement on her in consideration of such fortune, notwithstanding the bonds are not renewed during the marriage, yet the husband will be entitled to them, being in this case considered as a purchaser for a valuable consideration; and he may devise them, or they shall go to his executor, even though the wife should survive him. *Talb. 108.* See *Baron and Feme*.

It has been already noticed, that one cannot, under the law as it stands at present, devise lands which he shall acquire after making his will; the will only operating on such lands as he is possessed of at the time of publishing it. And though a man does, by express words in his will, give to another all the lands which he shall have at the time of his death, yet this devise will be good only as to such lands as he had at the time of making the will; and any lands purchased afterwards will not pass by it, but go to the heir at law, unless the will is republished. See *post*, IV. 1.

But where a man is entitled to an estate in reversion, expectant on the determination of another person's life, who holds the lands for his life or in tail, he may by his will dispose of this; and if the tenant in tail or for life dies during the lifetime of the testator, such lands, which will then come to his possession, will pass without any republication of his will; the reversion at the time of making the devise being a certain present interest, though it was to take place in future. 10 Rep. 78, a; 4 M. & S. 366.

It is a general rule that a right of entry is not devisable, the authorities for which are fully stated in *Goodright v. Forrester*, 8 East, 552, in which it was held that the fine of tenant for life divested the estate of tenant in fee in remainder, and turned it to a right which was not devisable; and Lord Ellenborough, C. J. of K. B. observed, that whatever mischief or hardship might attend such a decision, could (if the judgment of the court was well founded) only be remedied by positive law; and that the propriety of applying such a remedy, by which the same rights of entry and action which belonged to the heir might be extended to the devisee, was a

question peculiarly for the consideration of the legislature. Upon the case being brought by writ of error before the exchequer chamber, it was decided on the ground of non-claim; that if the devise were of any effect, the devisee must enter within the same time within which the deviser if living, or his heir, must have entered: but the court declined giving any opinion upon the point decided in K. B., as to which however the observation of Mansfield, C. J. of C. P. deserves notice. See 1 Taunt. 578.

It is now in contemplation to enact by the bill before referred to (§ 3.) that every person may devise, or dispose of, by his will executed in manner thereafter required, all such real estate, and also all such personal estate as he shall be entitled to, either at law or in equity, except any real estate to which he shall be entitled for an estate tail or an estate in quasi entail, and any real or personal estate or share thereof to which he shall be entitled as joint-tenant, and which shall survive by his death to some other person.

And by § 4. every person may devise, or dispose of, by his will executed in manner thereafter required, any such real estate and personal estate, as thereinbefore are mentioned (except as aforesaid), to which he may be entitled at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

By § 5. the powers of disposition by will thereinbefore contained, shall extend to all contingent and executory and other future interests in any real estate or personal estate (except as aforesaid), whether the testator may or may not be ascertained as the person or one of the persons in whom the same may become vested, and whether he may be entitled thereto under the instrument by which the same was created, or under any disposition thereof by deed or will; and every person, to whom any such interest, or any part thereof, may be disposed of by will, shall be entitled to the same interest, or such part thereof as may be disposed of to him, and to the same actions, suits and remedies for the same, as the person originally entitled thereto, his heirs, executors, or administrators, would have been entitled to, if no disposition thereof had been made: provided, that no person shall be empowered by the act to dispose of any expectancy which he may have as heir or heir of the body inheritable to any real estate, or as next of kin under the statutes for the distribution of the estates of intestates of a person entitled to any personal estate who shall survive him, or under any deed which shall not be executed in his lifetime, or under the will of any person who shall survive him (except under any devise or bequest in the will of his ancestor, which, in pursuance of the provision hereinbefore contained, shall not lapse by the death of such person in the lifetime of such ancestor).

By § 6. the powers of disposition by will thereinbefore contained, shall extend to all such rights of entry for condition broken, and other rights of entry, as would (if the act had not been made) have become vested in the heir or customary heir, or executor or administrator of the testator.

By § 7. the powers of disposition by will thereinbefore contained, shall extend to all real estate of the nature of customary freehold, or tenant right, or customary, or copyhold, or of any other tenure, which in consequence of the want of a custom to devise, or to surrender to the use of a will or otherwise, could not have been disposed of by will if the act had not been made; and the will by which such disposition shall be made shall be enrolled in the court rolls, or manorial books of the lord of the manor or reputed manor, of which such real estate shall be held; and the same fine, heriot, dues, duties and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall have the same remedies for recovering and enforcing such fine, heriot, dues, duties and services, as he is entitled to for enforcing and recovering the same against the customary heir in case of a descent.

By § 8. the powers of disposition by will thereinbefore contained, shall extend to all real estate of the nature of customary freehold, or tenant right, or customary, or copyhold, which by the custom of the manor of which the same is holden, might be surrendered to the use of a will, notwithstanding that the testator shall not have surrendered the same to the use of his will.

By § 9. the powers of disposition by will thereinbefore contained, shall extend to all real estate of the nature of customary freehold, or tenant right, or customary, or copyhold, to which the testator, as devisee or otherwise, shall have been entitled to be admitted, notwithstanding that he shall not have been admitted thereto.

By § 10. the devisees of customary and copyhold estates, capable of being surrendered to the use of the will, are to pay, where there has been no such surrender, the like fees as would have been payable on such surrender; and also, where the testator was entitled to admittance, and was not admitted, and might, after admittance, have surrendered to the use of his will, the like fine and fees as would have been payable on such admittance and surrender.

By § 11. the powers of disposition by will thereinbefore contained, shall extend to an estate *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold or customary freehold, tenant right, customary, or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament.

By § 12. if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold, or customary freehold, tenant right, customary, or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall be distributed in the same manner as the personal estate of the testator or intestate.

3. By the above bill it is also proposed to alter the rules by which gifts in wills lapse by reason of the death of the person to whom they are made.

By § 38, 39. where any person to whom any real property shall be given by will for an estate tail, or an estate *in quasi* entail, shall die in the lifetime of the testator, leaving issue, who would be inheritable under such entail, and such issue shall be living at the death of the testator; and also where any person being a child, or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, or any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, who shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of the testator had happened before the deaths of such tenant in tail, or child or other issue, unless a contrary intention shall appear by the will. And see further, V.

IV. 1. THE REPUBLICATION OF WILLS has already been alluded to. The cases respecting such publication relate chiefly to the rule that a will as to real estate can only operate upon the land which the testator has at the time of the execution; and establish, first, that a republication of a will gives it the same effect as if originally made at the time of the republication. 1 *Ves.* 440; and, secondly, that a codicil confirming the will gives effect to the whole will, as if made at the time of publishing the codicil, whether the codicil be annexed to the will or not. *Comm. Rep.* 381; 3 *Bro. P. C.*

107; 1 *Ves.* jun. 486; 4 *Bro. C. C.* 2; 7 *Ves.* 98; 2 *M. & S.* 5. Unless the expressions of the will and codicil are of so qualified a nature as to require a different construction. 7 *T. R.* 482; 2 *Bos. & Pull.* 500; 7 *Ves.* 499; 10 *East*, 242.

And where a codicil applies solely to property previously devised by the will, it has not the effect of republishing the will, so as to carry after-acquired property. *R. & M.* 117.

The cancelling a second will revives the first, which was thereby revoked. 4 *Burr.* 2512; but if one part of a will, of which there are duplicates, be cancelled at the time of making the second, the other duplicate not being then in the testator's possession, the first is not revived by cancelling the second. *Comp.* 49. And see 13 *Ves.* 290.

Where the testator continues exactly of the same mind, as to the method of the disposal of his property, and circumstances only require that the will should bear date at any particular time, it will be sufficient for him to call in three proper witnesses, and before them declare the signature to be his handwriting, and use the same forms as in the original execution. And the three witnesses sign their names to such new will or republication, mentioning the date thereof.

A new publication of a will is in truth, as has been already said, making it a new will; so that after such publication it has the force and operation of a will just made at the time of such publication. Therefore, if a man by his will devises "all his lands;" and after making the will purchases other lands, and then new-publishes his will, this new publication has made it a new will, and consequently by the devise of all his lands the newly purchased lands shall pass; for there is no necessity to make any alteration in this case in the will, the words being sufficient, upon the new publication, to convey all the lands he had at the time of such publication. So if a man by his will devises all his lands to certain uses, and afterwards purchases copyhold lands, and surrenders them to the uses declared, or to be declared, (or to the uses declared only,) by his last will; this has the effect of a republication of his will, as to such after-purchased copyhold lands, and they shall pass thereby. *Comp.* 180. So, as before stated, if the testator, after making such a devise, purchases freehold lands, and then makes a codicil, duly executed to pass real estate, though no notice is taken of the after-purchased lands; yet if the codicil is annexed to or confirms the will, or (as it seems) has a reference to it, this amounts to a republication of the will, and the after-purchased lands will pass under the general devise. *Comp.* 158; *Com.* 383; *Acherley v. Vernon*, 3 *Bro. P. C.* 107. See *Powell on Devises*; and *Brady v. Cubitt*, *Doug.* 40; where it seems that such republication may be effected by any instrument (sufficiently executed) referring to the will.

This rule, as to the new publication of a will, should be understood with the following restriction, viz. that the words of the will at the time of the new publication are such as are proper to convey the lands, and also sufficiently to denote the person to whom they are devised; for if there is any change with respect to the person who is to take the lands by the will between the time of the first making the will and the new publication of it, in such case the new publication will not alter the intention of the will as originally made, nor change the import of the words made use of; so as to make the persons named in the will take in a different manner than was intended at the time of such original making the same. If therefore I devise land to A. and his heirs; and A. dies in my lifetime, yet a new publication after the death of A. will not make his heir take by the will; for though the original devise was to A. and his heirs, and from thence it appears to be my intention that his heirs should have the land; yet because the heirs were named in the will to take by descent, as heirs only, and not as the persons designed to take the land immediately, the devise to them was rendered void by the death of A. in my lifetime, and the new publication of the will could not make it good; the publication

making no alteration in the words of the will, and having no other effect than this, that if the words in the will are proper to convey and describe the person to take, and the land or thing to be taken, it makes that will, though of never so long a date, to be as perfectly new as if but then made. *Powell on Devises*.

There codicils, of different dates, were indorsed on the back of a will: the two first referred to lands mentioned in the will, made in disposition of lands purchased subsequent to the will, according to directions in the will, as to the deviser's lands in general, and appointed new executors; but these codicils were attested by only two witnesses each; the third codicil only appointed a new executor, in the room of one named in the second codicil; but this third codicil was attested by three witnesses. This was held to be a republication of the second codicil, and of the will; and the land acquired subsequently to the will passed according to the disposition made in the will, or to the deviser's land in general. *2 Bingham, 429*.

A delivery of a will by a widow to her executor, which was made before her marriage, was held a sufficient recognition or republication. *2 Hagg, 209*.

A testator devised to his wife certain estates, subject to particular bequests; and also all other his freehold, copyhold, and leasehold estates whatsoever, not before otherwise disposed of. By a codicil, in case his wife should die before him, he devised all his said estates to trustees, on entire trusts. His wife died before him: held that the codicil was not a republication of the will, so as to pass estates purchased between the date of the will and codicil. *3 Y. & J. 280*.

Such republication being duly made will supply a defect for want of capacity in the testator to make a will, as well as any inability for want of a subject matter whereon the will may attach. And, therefore, if one having, under age, made a will of land, duly executed according to the statute, which is void by reason of his infancy, re-execute it after he come of age, with the circumstances required by the statute, this will render such will valid. *1 Sid. 162; 1 Keb. 589*.

New publication of a will is always favoured in equity; and as regards personal or copyhold-estate, may be republished by parol; and with respect to personal estate, very slender evidence will serve; though it is not safe to trust to it. As if a man says, "My will in the hands of Robert shall stand;" this will amount to a good republication. See *3 Add. Eccl. Rep. 48*. But we have seen that, in the case of real estate, the republication must be as formal as the original execution.

In consequence of the contemplated alteration in the law already mentioned, of making a will as to freehold property speak at the time of the testator's death, republication will be no longer necessary to pass real estate acquired subsequently to the making of the will. See *post, V*.

The Real Property Commissioners think, as publication is to be declared unnecessary, the expression republication may be dropped.

2. REVOCATION OF A WILL may arise from various causes both in fact and law; and is either express or implied. Express, as if the testator absolutely cancels the will, by tearing off the seal and the signature; or if he destroys or burns the whole will, or expressly declares his mind that his will should be revoked. Revocations are implied where the state or condition of the person devising, or of the estate or thing devised, is altered after making the will. As the revocation of a will may frequently take place without the knowledge, or even against the consent, of an uninformed testator, it is necessary to state the principles of the law on this subject something at length.

By the statute of frauds, *29 Car. 2. c. 3*. no devise of land in writing shall be revocable, otherwise than by another will, or some other writing, to be executed in the presence of three

witnesses: or by burning, tearing, or cancelling the will containing such devise, by the person making the same, or in his presence, or by his consent.

A will, with a clause of revocation of a former will, being signed by the testator in the presence of three witnesses, but being not valid as a will on account of not being attested in the presence of the testator, is not a revocation of the former will, not being intended for such, as an independent act. See *Preced. Ch. 459; 1 P. Wms. 344; 3 Mod. 258; 1 Show. 89*.

In the case of lands, where the law does not imply a revocation, it must be in writing, operating as a will, and signed by the person making the will; or by some writing, by which the testator declares his intention to revoke the first will, and signed by three witnesses, pursuant to the statute of frauds.

A subsequent devise to another person, though he may be incapable of taking, is a revocation of a precedent devise to a person who was capable of taking; as it serves to show the intent of the testator to revoke the first devise, though the second cannot take effect. See *Spragge v. Stone*, cited *Doug. 35*. But one will cannot be revoked by another will, though it should contain a clause declaring all former wills to be revoked, unless the second is valid and effectual as a will. *2 P. Wms. 343*. Yet a will may be revoked by an instrument written merely for the purpose of revocation, if it is attested by three witnesses: and the testator must sign it in their presence, which, as already noticed, is not necessary in the execution of a will. *3 Comm. c. 23. in n*.

If there is a duplicate of a will made, and deposited in the hands of an executor, or other person; in such case, a cancelling of that part of the will which is in the possession of the testator is a sufficient revocation of both the parts, as well that in his own hands as the duplicate in the hands of the executor; they being both in fact but one will. *Doug. 40*. So, if a testator makes a second will, and duly executes the same, it shall, without any thing further, revoke and make void the former will and duplicate.

Where a latter will is the instrument by which a former is revoked, the revocation effected thereby is ambulatory until the death of the testator; for although, by making a second will, the testator intends to revoke the former, yet he may change his intention at any time before his death, (until which neither of his wills can have operation,) and then the latter, being a revocable instrument itself, and only affecting the former as far as it is itself efficient, being revoked, is as no will; the consequence of which is, that the first will never having been cancelled, but remaining entire, stands in like manner as if no other had been made. *4 Burr. 2512; Comp. 92*. If a will be made, and then a subsequent, expressly revoking the former, although the first will be left entire and the second will be afterwards cancelled, yet the better opinion seems to be that the former is not thereby set up again. See *Comp. 53*. So, if a testator having made a new will, actually cancel the former will by tearing off the name and seal, &c., and afterwards cancel the latter will, the former will is not revived thereby, although a counterpart thereof be found uncanceled and undestroyed; because the revocation is here an express, independent, substantive act; by which the former will becomes to all intents and purposes void, and incapable of taking effect, unless as a new will by force of a republication. See *Comp. 49; 13 Vesey, 290*.

An instrument void as a conveyance, does not revoke a prior will. Where, therefore, a wife having a power of appointment by will, duly executed that power, and afterwards joined with her husband in a deed purporting to be an appointment of the same lands, but which was a nullity as to the wife, it was held that the will made in pursuance of the power was not revoked. *1 Russ. 564*.

A codicil does not revoke or alter a will to a greater extent

than was intended. A testator by his will gave certain legacies *exclusively charged on real estate*. By a codicil reciting so much of the will as related to those legacies, he revoked that part of his will, and in lieu of the legacies therein given, gave smaller. Held, that the object of the codicil being merely to alter the *amount* of the legacies, it could not extend to charge the personal estate; but the codicil not being attested by three witnesses, did not alter the amount of legacies charged on the real estate. 4 *Russ.* 435.

A beginning to cancel, under the impression that a new will is complete, and desisting, on being informed of the contrary, is no revocation. 1 *Eq. Abr.* 409. Throwing the will into the fire with intent to destroy it is sufficient, though it fall off, and is preserved. 2 *Blackst. Rep.* 1043. The obliteration of a part is only a revocation as to that part. *Sutton v. Sutton, Comp.* 812.

A testator having quarrelled with one of the devisees named in his will, began to tear it in a fit of passion, with the intention of destroying it; and having torn it in four pieces he was prevented from proceeding further, partly through the efforts of a by-stander, and partly by the entreaties of the devisee: he afterwards became calm, and, having put by the several pieces, expressed his satisfaction that no material part of the writing had been injured, and that it was no worse. It was held to be properly left to a jury to say, whether the testator had *completely finished all* that he intended to do for the purpose of destroying the will; the jury having found that he had not, the court refused to disturb the verdict. 3 *B. & A.* 489.

A testator in Peru, supposing his will to be lost, by which he had appointed his wife to be executrix and universal legatee for life, made a nuncupative will there (not in conformity with the statute of frauds) with a general revocatory clause, appointing two executors and his wife universal legatee absolutely. The executors renounced, and the wife took probate in Peru of the nuncupative will. The former will was afterwards found, and probate thereof granted to the wife at her prayer. 1 *Hagg. Eccl. Rep.* 378.

Where a will was executed in duplicate, and one part remains in the custody of the testator, but the other is left abroad, where the testator resided at the time of making his will, if the testator destroys the part in his own custody, the legal consequence is that the part remaining abroad is revoked, unless it is clearly shown that the testator did not intend his act to have that operation. *Colvin v. Fraser, 2 Hagg.* 266. This was a case of immense property of a Mr. Farquhar. The facts were much contested, but the principle was held to be clear.

Striking out the name of a joint-tenant has the effect of leaving the entire estate in the other. *Aliter* as to tenants in common, who cannot thereby acquire an estate not originally given. 2 *Bos. & Pull.* 16, 109. See also 4 *East*, 419.

Without any express revocation, if a man who has made his will afterwards marries, and has a child or children, whether such child is born before or after his death, this is a presumptive or implied revocation of his former will which he made in his state of celibacy, as well as to his real as his personal estate; and the statute does not extend to this case, but he shall be said to die intestate; the law supposing that he must mean to provide in the first place for his family, and distributing his estate for their benefit accordingly. See 5 *T. R.* 49. This, however, being only a presumptive revocation, if it appears, by any expression or other means, to be the intent of the testator that his will should continue in force, the marriage will be no revocation of it. As in the case where a man devised an estate to a woman, whom he afterwards married, and when he died she was with child of a son, yet the will was determined to be good, and not revoked by the marriage. And such implied revocation may, in all cases, be rebutted by parol evidence. *Doug.* 40. And more particularly, 2 *East*, 530, and 7 *Ves.* 348.

In *Wright v. Netherwood*, in the Prerogative Court, 1793, where A. made a will leaving legacies, and appointing his wife residuary legatee, and she died leaving several children: A. married again, and had one child by his second wife; and afterwards he, his wife, and all his children, perished by shipwreck, it was determined that the will was not revoked; on the ground that implied revocations depend on the circumstances at the time of the testator's death, and that in this case at the time of his death he had no wife or children.

In *Doe d. White v. Burford*, where J. B. had married, and afterwards made his will, and devised to his niece; and then died, leaving his wife *enchant* with a daughter, which was unknown to him: the Court of King's Bench held that the will was not revoked by the birth of the daughter. 4 *M. & S.* 10.

That the presumptive or tacit revocation, by marriage and birth of a child without provision, can be rebutted by a parol evidence of intention is affirmed *per cur.* *Lord Raym.* 441; *Doug.* 31; *per Eyre, J.* 2 *H. Blackst.* 522; but negatived *per Lord Alvanley, 4 Ves. jun.* 848; *Lord Rosslyn, 5 Ves. jun.* 664. See 2 *Comm.* 503, n.

It is still a matter of doubt, but evidence of circumstances has been admitted, and has been made the foundation of several exceptions to the rule.

Thus marriage and issue have been held not to be a revocation of a will, when there were children of a first marriage, and a provision for the second wife and her issue. 2 *Hagg.* 561.

By the bill before parliament, § 24. every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when some person other than his or her heir, executor, or administrator, shall be entitled to the real or personal estate thereby appointed in default of such appointment.

By § 25. no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

By § 26. no will or codicil, or any part thereof, shall be wholly revoked, otherwise than by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence or by his direction, with the intention of revoking the same, or by marriage, except as aforesaid, or by another will or codicil executed in manner thereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereby required to be executed; and no will or codicil shall be revoked in part, otherwise than by a codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is thereby required to be executed, or by an obliteration, interlineation, or alteration, executed as thereinbefore is required.

By § 27. no obliteration, interlineation, or other alteration, made in any will after the execution thereof, shall be valid, or have any effect, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator be made and the names of the witnesses be written by them in the margin, or some other part of the will opposite or near to such alteration, or at the foot, or end, or opposite, or near, to a memorandum referring to the alteration, and written at the end, or on some other part, of the will.

By § 28. no will or codicil, which shall be revoked by burning, tearing, or otherwise destroying the same, shall be revived, otherwise than by the re-execution of a duplicate thereof; and no will or codicil, which shall be revoked by marriage, shall be revived, otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and no will or codicil, which shall be wholly revoked by another will or codicil, or writing executed as aforesaid, shall be revived, otherwise than by the re-execution thereof, or by

a codicil executed in manner hereinbefore required, and showing an intention to revive the same, or by the revocation of such subsequent will, codicil, or writing, by burning, tearing, or otherwise destroying, with the intention of revoking the same; and when any will or codicil shall be partly revoked, the part thereof so revoked shall not be revived, otherwise than by a codicil executed in manner thereinbefore required, and showing an intention to revive the same, or by the revocation of the codicil or writing, by which the same was revoked, by burning, tearing, or otherwise destroying, with the intention of revoking, the same, or by an obliteration, interlineation, or other alteration, executed in manner thereinbefore required; and when any will or codicil, which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

Where a man, possessed of stock or money in the funds, devises the exact quantity he is possessed of to any one or more persons by his will, this is a specific legacy; and if the testator afterwards, before his death, sells any part of the stock so devised, such sale shall operate as a revocation (or, as the law terms it, an ademption or taking away) of so much of the legacy as shall be sold: and the legatee or legatees shall be only entitled to so much stock as actually remains at the time of the testator's death; and if there is no stock at all remaining, the whole legacy is gone, and the legatees cannot come on the other part of the estate for a satisfaction. If the testator, however, after sale of part of the stock, purchases other stock, this shall restore the legatees to the amount of such purchase. See *Legacy*, I.

Revocations of a will may also take place by an actual or intended alteration in the estate of the testator. And here it is necessary to observe, that the principle which governs cases of such actual alteration is clearly distinguishable from that which governs cases of an intended alteration only: in the former cases, the revocation is a consequence of law, uninfluenced by, and independent of any intent in the testator to revoke or not; but, in the latter cases, the revocation is an inference from the fact, as furnishing a ground to conclude that such was the intent of the party. *Powell on Devises*.

The following general principles will explain the nature of such revocations, and the decisions of the courts thereon; and the instances quoted, though few, may suffice in a work of this nature.

There is no feature in our law more prominent than that of an uniform solicitude, on every occasion, to favour the heir, and prevent his disinheritance: this anxious attention to the interest of the lawful representative has introduced into the law respecting devises this fixed principle; namely, that as at the inception of his will a man must be seised of the estates he devises, so the law requires that such estate should remain in the same plight and unaltered, to the time of its consummation by his death; and that his original intention in respect thereto should continue, unremittingly, the same until the object of it takes effect, when the will is consummated thereby; and therefore not only any alteration or new modelling which makes it a different estate, but also any intent of the owner to alter or new-model the estate, will, in construction of law, render a disposition of it by will invalid. See *Powell on Devises*, tit. *Revocations*, and the cases there cited.

Any alteration whatever in a freehold estate will operate as a revocation; even although the act done be necessary to give effect to the disposition made by such devise. *3 P. Wms.* 163, 170. And the rule of law will be the same, although the act be expressly declared to be done with a view to give effect to the will, if, in its operation, the deviser be in as of a new purchase; for the rule being introduced with a view to preserve the inheritance in the heir-at-law, and not with a view

to carry into execution the intent of the deviser, the question is not, whether the deviser intended to revoke; but whether he intended to do that, the effect of which in law will be to alter the estate or interest which was in him, by passing it away, and taking it back through a new channel; for if that be his intention, whether he meant to revoke or not is immaterial; the alteration operating as a revocation in law, and not as a revocation by the party; and therefore taking effect without reference to the intent of the party, as to the stability or non-stability of the will. *Powell on Devises*. See *2 Atk.* 579; *1 Bos. & Pull.* 576.

A fine levied by a testator subsequent to his will, was held to operate as a revocation. *3 Moore*, 24; *3 Bro. P. C.* 361.

Where a testator, after having made his will, levied a fine to such uses as he should by deed or will appoint, and died without making any new will, the will made prior to the fine was revoked thereby. *2 New Rep.* 401.

Since courts of equity have considered articles for the sale of estates, or respecting the settlement of them, as of the nature of actual conveyances, from the time at which they are agreed to be carried into execution; even covenants, when the covenantee has a right to a specific performance, have been allowed in equity to operate as revocations of wills previously made. See *2 P. Wms.* 329, 624.

But, upon the principle that no actual alteration is made in the thing devised, the changing of trustees, where the estate originally devised is only the trust, will not amount to a revocation. *1 C. R.* 23; *2 C. R.* 109. Nor though the estate is absolutely conveyed to different parties from those who had it at the time of the devise; as in the case of an intended purchase being completed, or a mortgage paid off by the testator. *Doug.* 561; *Doug.* 719; *3 P. Wms.* 170; *1 Wils.* 311; and *11 Vesey*, 550. But see *2 Ves. & Beames*, 382, where a person, after devising land contracted for, took the conveyance, with limitation to bar dower by the interposition of a trustee; and it was ruled by the vice-chancellor that the will was revoked.

Under the head of intended alterations of his estate by the deviser may be arranged those cases, where the deviser, after making his will, attempts a disposition of his estate, and intends a complete conveyance, but fails therein, either for want of due formalities, in the instrument that he uses, or from an incapacity to take, in the person to whom he means to convey; in these cases of intended alteration, it may be shown that the deviser had no intent to alter the disposition he has made; and if that be made out in proof, no revocation will ensue from the circumstance of there having been such imperfect conveyance. *Powell on Devises*.

In all cases, where a person having lands in fee devises them, and then parts with or conveys them away, though he afterwards, nay immediately, takes a new estate in fee, this will be a revocation of his will. *1 Ro. Ab.* 616. pl. 15; *2 Atk.* 325; *Bro. P. C.*; *1 Eq. Ab.* 412. c. 12; and see *Powell on Devises*. As where a person having made his will, and thereby devised his real estate, afterwards, in contemplation of an intended marriage, conveys that estate to trustees for the use of himself and his heirs till the marriage should take effect, and after the marriage for other particular uses; but happens to die before any marriage had; this has been determined to be a revocation of his will as to the disposal of such estate. *Shaw. P. C.* 154; *4 Burr.* 1961. See *Powell on Devises*. But in the case of coparceners, as also in the case of tenants in common, having devised their several parts by will, any partition between them, (or even the levying a fine, in consequence of and to strengthen the same,) shall not revoke their will; if the conveyance is merely for the purpose of partition. *T. Raym.* 140, 240; *3 P. Wms.* 170; *1 Wils.* 309. But see *8 Ves.* 231; *10 Ves.* 246.

If a man, seised of lands in fee, devises the same by his will, and afterwards mortgages them in fee, to secure a sum of money, though in law the legal estate is conveyed to the

mortgagee, and such mortgage is therefore held to be a revocation of the devise in the will; yet in equity it is now settled that these mortgages shall only operate as a revocation *pro tanto*; (for so much as the land is mortgaged for;) by which means the devisee shall take the land under the will, subject to the mortgage. 1 *Vern.* 239; 2 *C. R.* 154; 1 *Salk.* 158; and see *Powell on Devises*. A conveyance by way of mortgage for years amounts, both in law and equity, only to a conditional revocation *pro tanto* of a devise in fee: but still the construction is different in law and in equity; for in law the mortgage is an absolute revocation *quoad* the term, though the reversion passes by the will notwithstanding; but in equity it is a revocation *pro tanto* only as well with respect to the term as to the reversion, and the reversion there draws to it the equity of redemption. *Powell on Devises*. But if one devise lands to A. in fee, and afterwards mortgage the same lands to A., this has been decreed to be an entire revocation, it being inconsistent with the devise. *Pre. Ch.* 514.

If a man possessed of a leasehold estate in land for a term of years, or for life or lives, by his will bequeaths the same to A., and after making his will takes a new lease of the same land for another term of years, or for other life or lives, so that the former lease is surrendered in fact or in law, this is a revocation of his will, or at least makes the same void as to this devise; for this is another lease, and not that which he had at the time of the making of the will. 1 *P. Wms.* 575; 2 *P. Wms.* 168; 3 *P. Wms.* 163.

But these revocations turn merely on the penning the will, viz. whether the words are sufficient to pass the subsequent renewed interest; and not on any inability in point of law, to give by will an after-taken lease: and therefore if such lease be disposed of by will, by a proper form of words, it will pass, notwithstanding any subsequent renewal. As if one give "all his estate, right, and interest, he shall have to come in such lease at the time of his death." So, such right of renewal will pass by general devise of the residue; or by a devise of the lease, together with the right of renewal: and the devise of the lease carries the right of renewal as well as the lease itself. *Salk.* 237; 1 *P. Wms.* 575; 1 *Atk.* 599; 3 *Atk.* 177, 199; and see *Powell on Devises*.

Perhaps there are few settled doctrines of law, to which it would be more desirable to apply the correction of legislative authority, than those by which a devise is rendered inoperative, in consequence of a subsequent conveyance of the estate, contrary to the admitted intention of the testator. The positions, that a devise is generally annulled at law by any conveyance of the estate made subsequent to the devise, although the testator, by the effect of the statute of uses, continues seised of the ancient estate, and even though the conveyance is inoperative for want of legal requisites; and that when there is a revocation at law, a court of equity will not controul the legal operation of the conveyance, except in certain deficient cases; are fully established as settled rules of property. The history of the law on this subject, and the grounds and principles upon which it is founded, have been already stated in part, and are most fully stated in 2 *Ves.* 417; 7 *Bro. P. C.* 505; 1 *B. & P.* 576; 7 *T. R.* 399; and *S. C.* in equity, 3 *Ves.* 682; 7 *Bro. P. C.* 503; and see 6 *Ves.* 199; 8 *Ves.* 106; 9 *Moore*, 286; 2 *Bingh.* 136; 3 *B. & A.* 462. The question for consideration as a matter of legislative interference is, whether it would be more conducive to utility, that the law should continue as it is, or that it should be reformed. The disappointment of the intention of the testator is undisputed in all the cases; and the benefit from permitting it to continue results from the contingent advantage derived to the heir in consequence of his ancestor's ignorance of a technical rule, the knowledge of which would be immediately followed by the necessary provisions for preventing such advantage from being obtained. The remedy suggested is by a law, enacting, that no devise of lands should be annulled or affected by any recovery, fine, or conveyance, except so

far as shall be necessary for the express object or purpose for which such conveyance shall be made: but that every such devise shall be valid and effectual at law, as to all such legal interest as, after such conveyance, shall remain in, or result to the devisor; and that where the legal estate shall be transferred from such devisor, the devise shall be deemed valid in equity as to all such beneficial right and interest as shall remain in the devisor. See *Evans's Collection of Statutes*, note on 32 *Hen.* 8. c. 1. pt. ii. cl. xi. nu. i.

The alteration suggested in the above remarks with respect to the law of revocation of wills by an alteration in the estate devised, is intended to be effected by the before-mentioned bill, which (by § 29.) enacts that no conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, shall prevent the operation of the will with respect to such real or personal estate, or such estate or interest therein as the testator shall have power to dispose of by will at the time of his death.

The effect of the contemplated changes under this head is thus summed up in the Report of the Real Property Commissioners:

"If the alterations we have proposed with respect to the revocation of wills be carried into effect, the laws relating to it, which at present are so complicated and incongruous, will be reduced to a few very simple rules applicable to wills of every description. There will be only four modes in which any will can be revoked: 1st, by another inconsistent will or writing, executed in the same manner as the original will; 2d, by cancellation, or any other act of the same nature; 3d, by the disposition of the property by the testator in his lifetime; and 4th, in the case of a woman, (and also of a man, see *ante*), by marriage. By the first and third of these modes the will may be revoked entirely or in part; by the second and last the revocation will be complete."

In all cases where a will is determined to be revoked, and no other will is made, a person is said to die intestate; at least as far as concerns the devises thus revoked. In all cases also of void devises, an intestacy shall take place as to those, unless there is a particular devise contained in the will of the residue of the testator's estate to some person; in which cases the legacies sink into and become part of such residue, and go to the residuary legatee.

V. THE most general and comprehensive rule, as to the construction of wills, is, That a devise be most favourably expounded, to pursue, if possible, the will of the devisor, who, for want of advice or learning, may have omitted the legal or proper phrases: and, therefore, many times, the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus a fee may be conveyed without words of inheritance; and an estate-tail without words of procreation. By a will also an estate may pass by mere implication, without any express words to direct its course. As where a man devises lands to his heir at law, after the death of his wife: here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication; for the intent of the testator is clearly to postpone the heir till after her death; and, if she does not take it, nobody else can. 1 *Vent.* 376. But it seems, that if it is given to a stranger, after the wife's death, the devise raises no implication in favour of the wife, for it may descend to the heir during the life of the wife. *Cro. Jac.* 75. So also where a devise is of Black-acre to A., and of White-acre to B. in tail, and if they both die without issue, then to C. in fee; here A. and B. have cross remainders by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C.'s remainder over shall be postponed till the issue of both shall fail. But where cross remainders are to be raised between more than two, the presumption is against them. See *Remainder*. And, in general, where any

implications are allowed, they must be such as are necessary, (or at least highly probable,) and not merely possible implications. And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation of uses, is construed in each with equal favour and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law. 2 *Comm. c. 23*.

The intention of the testator is said by Coke to be the pole-star to guide the judges in the exposition of wills; but though it is allowed to be thus considered, in order to explain the words of the will, yet such intention must be collected from the will itself, and not from any reports or evidence concerning it; the courts having been at all times careful of admitting verbal testimony in respect to a will: and little credit being due to any thing that may have fallen from a man himself, either before or after making his will; it often appearing that insinuations may be thrown out purposely to mislead those who were interested in the disposal of his property. Though a parol averment shall not be admitted to explain a will, so as to expound it contrary to the import of the words; yet, when the words will bear it, a parol averment may be admitted. As, for instance, to ascertain a person; but in no case to alter the estate. 1 *Freem. 292*; 5 *Rep. 68*, *Lord Chagney's case*.

It may be laid down generally that parol evidence is admissible to show extrinsic facts, remove latent ambiguities, correct mistaken descriptions, rebut constructive trusts, repel presumptions against double legacies and in some other instances. See *Powell on Devises by Jarman*, vol. 1, c. 12.

Other rules of construction are the following; all consistent with, and dependent upon, that which lays down the intent of the testator as the general guide for the expositions of doubtful circumstances. Where the words of a will have a plain sense, and no doubt is in any matter within or without the words, touching the matter of the devise, there the words of the will shall always be taken to be the intent of the deviser, and his intent to be what the words say. 2 *And. 17*. All the words of a will are to be carried to answer the intent of the deviser; but this is to be understood in cases where the intent of the party may be known by the words that are in the will. 2 *And. 10, 11, 134*. If there are inconsistent and contradictory words in a will, words may be rejected to make it sense. And words may be supplied to render a sentence complete and intelligible in aid of the apparent intent to be collected from the whole context. 6 *East, 486*. And even in a case where two estates were misdescribed by their contrary appellations, this was remedied by a construction according to the intent appearing on the face of the will. 8 *East, 149*.

A will must have a favourable interpretation, and as near to the mind and intent of the testator as may be, and yet so withal as his intent may stand with the rules of law, and not be repugnant thereunto; it being a rule or maxim of law, *quod ultima voluntas testatoris perimplenda est, secundum veram intentionem; sed legum servanda fides, suprema voluntas quod mandat fierique jubet parere necesse est*. In deeds the rule of construction is, that the intention must be directed by the words; but in wills the words must follow the intent of the deviser; and such a construction is to be made of them, as to make use of all the words, and not of part, and so as they may stand together, and have no contrariety in them. *Shep. Abr. part 10, voc. Testament; Bridg. 105*. See *Words*.

Such a sense shall be made of a devise, that it may be for the profit of the devisee, and not to his prejudice. General and doubtful words in a will shall not alter an express devise before, nor carry any thing contrary to the apparent intent. The clauses and sentences of a will shall be severally transposed to serve the meaning of it: and construction shall be made of the words to satisfy the intent, and they shall be put in such order as the intent may be fulfilled. No sense may

be framed upon the words of a will, wherein the testator's meaning cannot be found. *Shep. Abr. voc. Testament*.

One part of a will shall be expounded by another: as where a man leaves an estate to another and his heirs, and afterwards mentions to have given him an estate-tail, heirs shall be taken to mean heirs of the body, and the devisee shall take only an estate-tail. 2 *Freem. 267*. See further on this subject, *Burr. 912—924, 1110—1118*; 1 *Vesey, 142*.

Where there is no connection by grammatical construction, or direct words of reference, or by the declaration of some common purpose, between distinct devises in a will, the special terms of one devise cannot be drawn in aid of the construction of another, although similar in its general terms and import, and applicable to persons standing in the same degree of relationship to the testator; and there being no apparent reason, other than the different wording of the clauses, to presume that the testator had a different purpose in view. 9 *East, 267*.

In the case of devises to relations generally, it seems the established doctrine of the Court of Chancery to make the statute of distributions the rule and measure of such general devise, so that those who by the statute of distributions would have been entitled to the personal estate in case the testator had died intestate, shall upon such general devises be benefited. See 1 *Bro. C. R. 31*. And the rule will be the same though the word *poor* be prefixed to relations. *Ambler, 507, 595, 636*. But if the bequest be to the testator's descendants, these being capable of being ascertained, the necessity of resorting to the statute of distributions does not arise. 3 *Bro. C. R. 367*; *Amb. 397*. And where the court does resort to the statute, it does not consider itself bound to adopt the proportions prescribed by the statute, but distributes *per capita*, and in such shares as any particular expressions of the bequest may call for. 2 *Ch. Rep. 77, 179*; *Talb. 251*; *Bro. C. R. 31*.

Under a devise of freehold property "to the relations on any side," it was held that all should take who could be entitled to personal estate under the statute of distributions, as well in the maternal or the paternal line at the time of the testator's death; and where one who was in equal degree at the time of making the will died before the testator leaving a son, the son was held not entitled to a share as such relation. 1 *Taunt. 263*.

Devise of "the interest of all my land property, whether houses, bank stock, or cash, after discharging my debts, to my wife; and after her demise, to my brother W. for life, but not to cut, fall, or destroy any thing of the estate, and after his decease, into my sister C.'s family, to go in heirship for ever" the Court of King's Bench held, that the real estate passed in entirety to the eldest son and heir of C. in fee. 5 *M. & S. 126*.

A devise to the testator's wife of "all my property both personal and real for ever;" held to pass the fee in the real estate, and that the deviser's intent to use them in a more restricted sense was not shown by a subsequent clause in the will whereby he gave an additional annuity to a person (after the wife's death) to whom he had before given a smaller annuity. 11 *East, 518*.

A. devised to his daughters, J. and E., "their heirs, executors, and administrators, equally between them, all and every his messuages, lands, tenements, and hereditaments, both freehold and leasehold in England, to have and to hold to the said J. and E. their heirs, executors, and administrators equally." This devise was held to pass all his interest in the estates to his daughters in fee, to the exclusion of the testator's right heirs. 4 *D. & R. 246*.

A gift confined expressly to the donee's life, with a power of disposition superadded, confers a power only over the remainder, after the estate for life, but a gift to a person indefinitely, with a superadded power of disposition, passes the absolute interest; and this rule applies to personal estate

as well as real. Therefore where a testator bequeathed all his personal estate to his wife for life; and after her decease one moiety thereof was to be at her disposal either by will or otherwise, the other moiety being given to other persons, she had the moiety for her life with a mere power of appointment. 4 Russ. 263.

If a man devises land to another for ever, or in fee-simple, or to him and his assigns for ever, or to him and his; in all these cases the fee-simple passes by the will: for it is evident by the testator's intention, that the gift should continue beyond the life of the devisee. So if one devises lands to another, to give, sell, or do what he pleases with them, these words, by the intent of the giver, convey the fee-simple; as does also to one and his blood; because the blood runs through every branch of a family. A devise also to a man and his successors carries a fee; for by the word successors is intended heirs, the heir succeeding to the father. Burn, Eccl. Law. See Comp. 352.

A devise of all his estate, (or estates,) whatsoever, or all his effects real and personal, comprehends all that a man has, land, money, goods, or other property whatever: provided, in all cases, that the will is duly executed, and attested by three witnesses, so as to pass land. And a copyhold estate will fall under the same construction. See Comp. 299.

A devise of "all my freehold estate, consisting of thirty acres of land more or less, with the dwelling house and all erections on the said farm, situate at Sudbury, Harrow, in the county of Middlesex;" held, by the Court of Common Pleas, on a case from Chancery, to pass an estate in fee-simple, 1 B. & B. 72. And see 6 Taunt. 410; 7 Taunt. 35.

If lands are devised to trustees for any particular purposes, without using the word heirs; yet, by implication of law, the trustees must have an estate of inheritance sufficient to support such trust; for there is no difference between a devise to a man for ever, and to a man upon trusts which may last for ever. 1 Eq. Abr. 176.

Where one devises land to another, on condition that the devisee shall pay several sums of money in gross, and not saying out of the profits of the land; or shall release a debt due from the testator; the devisee, in this case, shall have a fee-simple in the land, though all the sums of money together, which he is to pay, do not amount to a year's rent of the land; for the devise shall be intended for his benefit: and if he was to have the land for his life only, he might die before he could receive the amount of the legacies out of the land, and consequently be a loser: and where there is a sum thus to be paid all at once and immediately, there the person to whom the land is devised shall have the whole of it, though the sum is not the value of the land, or near it; the quantity of the sum thus to be paid in gross not being material. But if a devise were to A., paying so much, or such sums of money, out of the profit of the lands, there A. would take but an estate for his life; for though he takes the land charged with payment of money, yet he is to pay no faster than he receives, and so he can be no loser. 1 Eq. Ab. 166, 167.

A. devised to his daughter, then under age, an estate in fee, and if she died under the age of twenty-one, unmarried, and without leaving lawful issue, then to his wife in fee: the daughter married and died under the age of twenty-one years without issue, but left her husband surviving her. Held that the devise over to the wife of the testator did not take effect, as by the will it was made to depend on the happening of the three events. 2 B. & A. 441. And see 12 East, 298.

A. devised his estate to trustees for the maintenance of six children; and immediately on the youngest attaining twenty-one then to his said six children and the survivor and survivors of them their heirs and assigns for ever as tenants in common. The term "survivor or survivors" was held to refer to the time of the testator's death and not to the coming of age of the eldest child, and therefore each had a fee-simple estate in reversion in one sixth part; which (on the death of any with-

out issue and intestate after the testator's death and before the coming of age of the youngest child) descended to the heir at law of the party dying. 2 Marsh. 24; 6 Taunt. 213. But see 1 Price, 264.

A. devised lands to his wife for life, and at her death to his son B. and his heirs for ever: but if B. should die unpossessed of the land, or without heirs, to his daughter C. and her heirs for ever. In this case the word heirs was held to be confined to heirs of the body, and that therefore B. took an estate tail with remainder in fee to C. 2 Marsh. 170; 6 Taunt. 485.

It would be endless to multiply individual cases, as to the construction of wills, where the words have been held to give an estate in fee, in tail, or for life. A devise of land to A. B., without any further words, gives him only an estate for life. The reason why the word estate has been held to pass a fee, is, that this word (and which has been extended to the plural, estates,) comprehends not only the land or property that a man has, but also the interest he has in it. The general rule of construction, that governs all uncertain cases, of which innumerable instances occur in the books, seem to be that "if there be no words of limitation added, nor words of perpetuity annexed to the devise, so as to show the intention of the testator to convey the inheritance to the devisee, he can only take an estate for life." Comp. 299. But "wherever there are words and expressions, either general or particular, or clauses in a will, which the court can lay hold of, to enlarge the estate of a devisee, they will do so, to effectuate the intention of the testator: but if the intention of the testator is doubtful, the rule of law must take place." Comp. 352.

The following clauses of the bill now before parliament will put an end to many of the questions, which have arisen upon the construction of wills:—

By § 30. every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

By § 31. unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

By § 32. a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

By § 33. a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a leasehold estate, if the testator had no real estate which could be described by it, shall be construed to include the leasehold estates of the testator, or his leasehold estates to which such description shall extend (as the case may be).

as well as real estates, unless a contrary intention shall appear by the will.

By § 34. where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

By § 35. in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or, "have no issue," or any other words, which may import a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless by reason of such person having a prior estate tail, or of a preceding gift being a limitation of an estate tail to such person or issue, or otherwise a contrary intention shall appear by the will: provided, that the act shall not extend to cases, where such words as aforesaid import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

By § 36. no trustee or executor shall be construed to take any chattel interest in any real estate (other than a next presentation to a church), under any devise to him as such trustee or executor of any such real estate, unless a definite term of years, absolute or determinable, shall thereby be given to him expressly or by implication.

By § 37. where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Notwithstanding that wills are generally favoured, yet where a person endeavours to make a settlement of his estate against the reason and policy of the common law, the judges are bound to reject it. And where a man by his will makes no other disposition of his land than the law itself would have done, had he not made any will, there such a will is useless, and will be invalid. As if one give land to his son and his heirs, or to A. and his heirs, and his son or A. is heir at law, this was formerly held a void devise, and the person to whom the land was given should not take the land under the will, but by descent, being the better title, as if no will had been made: for a descent strengthened a title, taking away the entry of such as might possibly have had right to the estate: while he who had an estate by devise was said by law to be in by purchase; a worse title than descent. But if one by will created an estate in his heir, different from what he would have taken by law, there the devise should be good, the quality of the estate being altered, and it being indeed not the same estate as would have descended to him. *Burn, Eccl. Law.*

The law with regard to devises to the heir is now altered, see *Descent*.

Those devises are also void and rejected where the words of the will are so general and uncertain that no meaning can be collected from them. And therefore, where a man by will gives "all to his mother," these general words will not pass lands to his mother; for since the heir at law has a plain and uncontroverted title, it would be severe and unreasonable to set him aside, unless the intention of the testator is evident from the will; for that would be to set up and prefer a dark,

and at best but a doubtful title, to a clear and certain one. *Burn, Eccl. Law.*

So a devise of real estate to the heir of an alien is void; because an alien, according to the policy of the English law, can have no heir, either to inherit or to take by purchase. See *ante*, II. 1. and tit. *Alien*.

A native of Scotland, domiciled in England (having no real property at his death), when on a visit to Scotland executed and deposited there a will, prepared in the Scotch form, and afterwards died in England. Held that the will was to be construed by the law of England. *2 Sm. 1.*

By the bill before parliament, (§ 40.) the heir shall not be a necessary party in suits in equity for the execution of a will, or for the administration of assets.

And by § 41. depositions shall not be taken in equity in suits for establishing wills, unless required by a party at the peril of costs.

By § 42. the act is not to extend to wills made before 1836, nor to the assets of persons who die before 1836.

And by § 43. the act is not to extend to Scotland.

As to stealing wills, see *Larceny*.

WIN, *Sax.*] In the beginning or ending of the names of places, signifies that some battle was fought, and victory gained there.

WINCHES. A kind of engine to draw barges against the stream of a river. *21 Jac. 1. c. 32.*

WINCHESTER MEASURE. The standard measure originally kept at Winchester. See further *Measure*.

WINDAS, or WINDLASS, corruptly Wanlass. A term for hunting of deer in forests to a stand, &c. See *Wanlass*.

WIND-MILL. A man may not erect a wind-mill within any forest, because it frightens deer, and draws company to the disquiet of the game. *W. Jones's Rep. 293.* See *Forest, Malicious Injuries*.

WINDOW-TAX. See *Taxes*.

WINE, *vinum*.] Very heavy duties were formerly imposed on foreign wines imported into this country, but these were reduced 50 per cent. in 1825. The duties thus reduced were 7s. 3d. per imperial gallon on French wines; 4s. 10d. on all other foreign wines, and 2s. 5d. on those of the Cape of Good Hope, which continued until the passing of the equalization act, (1 & 2 Wm. 4. c. 30.) whereby a duty of 5s. 6d. per gallon is imposed on all foreign wines, and of 2s. 9d. on those of the Cape.

Various regulations are made by the 3 & 4 Wm. 4. c. 52, 54, 57. with respect to the importing of foreign wines for home consumption, or warehousing them for re-exportation.

The retailers of wine are subject to certain license duties.

Home made wines (usually called sweets) are also under the regulation of excise, subject to certain internal duties.

By several ancient acts of parliament the prices of wine were to be set by the great officers of state. See 4 Edw. 3. c. 22; 28 Hen. 8. c. 14; 7 Edw. 6. c. 5.

The sale of corrupted or unwholesome wines is prohibited by a very ancient statute, 51 Hen. 3. st. 6. under severe penalties.

And by 12 & 13 Car. 2. c. 20. penalties from 40l. to 300l. are imposed on merchants and others adulterating, mixing, or brewing of wines.

WINE-LICENSES, or the rents payable to the crown by such persons as are licensed to sell wine by retail throughout England, heretofore, formed part of the royal revenue.

These were first settled in the crown by 12 Car. 2. c. 25. and, together with the hereditary excise, made up the equivalent in value for the loss sustained by the prerogative in the abolition of the military tenures, and the right of pre-emption and purveyance: but this revenue was abolished by 30 Geo. 2. c. 19. and an annual sum of upwards of 70000l. per ann. issuing out of the new stamp-duties imposed on wine-licenses was settled on the crown in its stead. See further, *King, V. 4. Taxes*.

WINTER-HEYNING. The season between the 11th day of November and the 23d day of April; which is excepted from the liberty of commoning in certain forests. See 23 Car. 2. c. 3. and *Forest*.

WIRE, of iron or gold or silver, is one of the articles, the importation duties on which are regulated by statutes; home-made wire is liable to an excise duty on the manufacture.

WIRE-DRAWERS. By 15 Geo. 2. c. 20. the silver wire to be drawn for silver thread, is to hold eleven ounces and fifteen penny-weights; and all silver to be gilt and used in the wire-drawers' trade shall hold eleven ounces and eight penny-weights of silver on the pound weight Troy; and four penny-weights and four grains of gold to be laid upon each pound of silver, on forfeiture of 5s. for every ounce make otherwise. And see 28 Geo. 3. c. 7. by which copper, brass, and metals, inferior to silver, are directed to be spun on thread, not on silk; which act also regulates making copper-wire, lace, spangles, &c. Wire-drawers are to take out annual licenses under the laws of excise.

WISTA. A measure of land among the Saxons; being the quantity of half a hide; the hide being 120 acres. *Mon. Ang.* i. 133.

WITAM. *Secundum witam jurare*, was for a person to purge himself by the oaths of so many witnesses as the offence required. *Leg. Inq.* cap. 63.

WITCHCRAFT. See *Conjuration*.

WITE. A Saxon word used for punishment; a pain, penalty, mulct, &c. So *witefree* is a term of privilege or immunity from fines and amercements. *Sax. Dict.* Hence come the words *Bloodwite*, *Lechermite*, &c.

WITENA (or WITTENA) GEMOT, Sax. *Conventus sapientium*.] A convention or assembly of great men, to advise and assist the king, answerable to our parliament, in the time of the Saxons; or rather an assembly of the whole nation. See *Diets*, *Squire's Anglo-Saxon Government*, 165, &c.; and *Parliament*.

WITENS. The chief of the Saxon Lords or Thanes, their nobles and wise men. *Sax. Dict.*

WITEKDEN. A taxation of the West Saxons, imposed by the public council of the kingdom. *Chart. Ethelwulf. Reg. Anno.* 855.

WITHERNAM, from the Sax. *Wieder, back, and naam captio*.] Where a distress is driven out of the country, and the sheriff upon a replevin cannot make deliverance to the party distrained; in this case the writ of withernam is directed to the sheriff, for the taking as many of his beasts or goods, who did thus unlawfully distrain, into his keeping, till the party make deliverance of the first distress, &c. It is therefore a taking or reprisal of other cattle or goods, in lieu of those that were formerly unjustly taken and eloigned, or otherwise withheld. *F. N. B.* 68, 69; 2 *Inst.* 140; *Stat. West.* 2. 13 Edw. 1. c. 2. See *Replevin*, I. V.

This writ is granted on the return of the sheriff upon the *alias* and *pluries* in replevin, that the cattle, &c. are eloigned, by reason whereof he cannot replevy them; and it appears by our books, that the sheriff may award withernam or replevin sued by plaintiff, or if it be found by inquest in the county, that the cattle were eloigned according to the bailiff's return, &c. Though upon the withernam awarded in county-court, if the bailiff doth return that the other party hath not any thing, there shall be an *alias* and *pluries*, and so infinite, and no other remedy there; but on a withernam returned in the King's Bench or Common Pleas, if the sheriff return that the party hath not any thing, &c. a *capias* shall issue against him, and exigent and outlawry. *New Nat. Br.* 168. In replevin, &c. the sheriff returns *averia elongata sunt* by the defendant; thereupon a writ of withernam is awarded; and if he return *nihil*, the plaintiff proceeds to outlawry by *alias* and *pluries capias* in withernam, and so to exigent.

There is some difference where the defendant appeareth

upon the return of the *pluries capias*, and when he stays longer, and appears on the return of the exigent and not before; for in the first case his cattle shall not be taken in withernam: but he must find pledges to make deliverance, or be committed; and in the last case shall not only find pledges for making deliverance, but shall be fined, and his cattle may be taken in withernam: in both cases the plaintiff may declare for the unjust taking, and yet detaining of his cattle, and so go to trial upon the right; and if it is found for him, then he shall recover the value of the cattle, with costs and damages, or may have the cattle again by a *retorno habendo* directed to the sheriff; but if it be found for the defendant, he shall keep the cattle, and have costs and damages for the unjust prosecution. 1 *Brownl.* 180.

A defendant in replevin may have a writ of withernam against the plaintiff; as if the defendant hath a return awarded for him, and he sueth a writ *de retorno habendo*, and the sheriff return upon the *pluries quod averia elongata sunt*, he shall have a *scire facias* against the pledges which the plaintiff put in to prosecute, &c.; and if they have nothing, then he shall have a *capias ad withernam* against the plaintiff. The cattle taken in withernam are to be *ad valentiam*, i. e. to the value of the cattle that were first taken and detained; for it is to be understood not only of the number of the cattle, but according to the worth and value; otherwise he that brings the replevin and withernam will be deprived of his satisfaction. Where cattle have been taken in withernam, they have been by a rule of court delivered back and restored to the owner, on his payment to the plaintiff of all his damages, costs, and expenses. 3 *Lill. Abr.* 690.

Cattle taken in withernam may be milked or worked reasonably; because they are delivered to the party as his own cattle, &c. *Contrd* of cattle distrained, 1 *Leon.* 302. See further, *Replevin*, V.

This word withernam also signifies reprisals taken at sea by letters of mark. See *Letters of Marque*.

WITHERSAKE. An apostate or perfidious renegade. 1 *Leg. Canut.* cap. 27.

WITHOUT DAY. See *Sine Die*.

WITNESS, testis.] One who gives evidence in a cause; an indifferent person to each party, sworn to speak the truth, the whole truth, and nothing but the truth. 2 *Lill. Abr.* 700. See *Evidence*; and particularly Division II. of that title.

As supplementary to what is there said the following abridgment of the law respecting parol or personal testimony may be found useful.—

I. Of compelling the Attendance of Witnesses; and Payment of their Expenses, &c.

II. The Causes which render Witnesses incompetent, and the Exceptions thereto; and how such Causes may be removed.

As to bills of exceptions, and demurrers to evidence, see those titles.

I. The process far compelling the attendance of witnesses in civil cases is a *subpoena ad testificandum*, commanding the witness to appear at the trial, and testify what he knows in the case, under the penalty of 100*l.*; to which the 5 *Eliz.* c. 9. § 2. adds a penalty of 10*l.* and recompence to the party grieved. This statute requires that on serving the process there shall be tendered to the witness, according to his circumstances and calling, such reasonable sum for his costs and charges as is necessary, having regard to the distance. No witness is therefore bound to appear in civil causes, unless his reasonable expenses of going, remaining, and returning, are tendered with the subpoena; nor is he bound to give evidence until these expenses are paid, or undertaken for, except when he resides within the bills of mortality. So in cases of witnesses brought from abroad. Compensation for loss of time

is not generally allowed, except to medical men and attornies; but there may be some cases in which it is justified. Four witnesses, and no more, may be included in one writ of subpoena, with each of whom a ticket or copy of the writ is to be left, the original being at the same time shewn to them. This should be served personally on the witness in reasonable time before the day of trial. A witness thus summoned, if neglecting to attend, is punishable either by attachment for contempt of the process of the court, or by special action on the case for damages at common law; or by an action on the stat. of *Eliz.* The first is the most usual, and generally the most effectual proceeding: the third is attended with some difficulties and niceties, which render it not useful in practice. When the witness neglects to attend at the trial, and it is intended to proceed against him, he is usually "called on his subpoena" by the crier in open court. Witnesses are privileged from arrest in going, tarrying, and returning, either at the trial, or before an arbitrator, under an order of reference at nisi prius, or before commissioners of bankrupt or courts martial. But in the latter cases they are compellable to attend, though their expenses are not tendered to them; but to which they are entitled after examination. Magistrates have not in general any authority to compel the attendance of witnesses for the purpose of summary trials before them, except in such cases in which special provision is made by act of parliament; and such power is by several acts given to commissioners for special purposes.

The means of compelling the attendance of witnesses in criminal cases are by subpoena, for the disobedience to which the party is liable to attachment; or by recognizance (taken by the justice, &c. before whom information is given) to appear at the trial: and, on refusal to come before the justice, or to enter into recognizance, they may be committed for contempt.

Witnesses for the accused are compellable to appear by the provisions of 7 *Wm. 3. c. 3. § 7*; 1 *Ann. st. 1. c. 9. § 3.* in treason and felony: and in cases of misdemeanour, by subpoena allowed from the earliest times. See *Treason and Trial.*

By 45 *Geo. 3. c. 92. § 3. 4.* persons may be compelled by subpoena to attend and give evidence in criminal prosecutions in any one part of the United Kingdom, on service of the subpoena on him in any other part, having his reasonable expenses of coming, attending, and returning, tendered to him. But in all other cases, witnesses in criminal proceedings are bound to appear unconditionally.

With respect to the subsequent allowance of the expenses to witnesses in criminal cases, see *Expenses.*

Where the witness is in custody, his testimony is obtained either in civil or criminal cases by means of a *habeas corpus ad testificandum*.

A subpoena has no effect where the witness is in custody, or on board ship, under command of an officer: in this case a writ of *habeas corpus ad testificandum* must be obtained. See *Habeas Corpus, I.*

Witnesses residing abroad, or about to depart the realm, may be examined on interrogatories *de bene esse* by consent of the parties: and when a cause of action or offence arises in India, provision is made for obtaining the evidence of witnesses there, by the 13 *Geo. 3. c. 63. §§ 40. 44.* and now by the 1 *Wm. 4. c. 22.* witnesses may be examined on interrogatories in all colonies abroad, and in all actions depending in the courts at Westminster, &c. where such witnesses are residing out of their jurisdiction. See *Deposition.*

If a witness have in his possession any deeds or writings required to be produced at the trial, a special clause is inserted in the subpoena, called a *duces tecum*, commanding him to bring such deeds, &c. with him. See *Subpoena.*

II. The competency of a witness is to be determined by the court; as his credibility is by the jury. The several grounds

of incompetency are, 1. Want of reason or understanding; 2. Defect of religious principle; 3. Infamy of character; 4. Interest in the matter in question.

1. Insane persons, idiots, and lunatics, are disqualified; but the former may be admitted to give testimony in their lucid intervals, if any. Persons born deaf and dumb are not therefore absolutely incompetent, if they have otherwise sufficient understanding, and can give evidence by signs, with the assistance of an interpreter. Children, not distinguishing good from evil, nor understanding the moral obligation of an oath, cannot be examined. The judges have often thought it necessary for the purposes of justice to defer the trial of an offender, directing that the child should be in the mean time properly instructed. No age therefore of an infant, capable of being taught, is of itself an objection to its competency as a witness. If a child cannot be sworn, any account given by it to others cannot be admitted: and it is in all cases desirable that some concurrent testimony of time, place, and circumstances, should be adduced to strengthen the evidence of an infant so admitted as a witness.

2. All witnesses, by the oath taken before they are examined, appeal to the Supreme Being for the truth of their testimony. It is therefore required that every person, to be admitted a witness, should believe in a God, and a future state of rewards and punishments; and that by taking the oath he imprecates the divine vengeance on himself, if his testimony should be false. Hence atheists and infidels, who profess not any religion which can bind their consciences to speak truth, are excluded from being witnesses: but this does not exclude Jews, nor Heathens who believe in a God, the avenger of falsehood. Persons excommunicated were heretofore disabled from giving testimony; but this disability is removed by the 53 *Geo. 3. c. 127.* See *Excommunication.* The ceremony may be adapted to the religious belief of the party: Jews are sworn on the Pentateuch; Mahometans on the Koran, &c. In civil cases the solemn affirmation of Quakers is admitted: and perhaps no good reason can be given why it should not be admitted also in criminal cases; as, in the case of a prosecution against a Quaker in certain cases, his affirmation is received in his own defence, even against criminal charges; but in any trial for a crime they are deprived of the testimony of those of their persuasion, which, after the admission of the testimony of Heathens, seems inconsistent.

3. The conviction of an infamous crime, followed by judgment, disqualifies a witness from giving evidence in a court of justice: but no suspicion, even though the party be an accomplice in the crime, is sufficient. See *Accessory.* The crimes, the conviction for which produces this disability, are treason, forgery, perjury, or subornation thereof, and all offences which involve the charge of falsehood, and the whole class of felonies.

Conviction and judgment in cases of barratry, præmunire, bribery of witnesses, or conspiracy, at the suit of the king, to accuse another of a capital offence, and for fraudulent gaining, under 9 *Ann. c. 14*; all these appear to disqualify a person as infamous. And outlawry for treason or felony has all the effect of conviction. It is to be remembered that it is the nature of the crime, and not of the punishment, which renders a person infamous.

So by the suffering of transportation, fine or whipping, in cases where by statute it is provided that these punishments shall operate as a pardon: and persons convicted of grand larceny are restored to their competency by suffering the punishment awarded by their judgment. But the most effectual mode of restoring the competency of a witness is by a pardon, either under the great seal, or by act of parliament, which, after conviction or attainder, whether it remits the punishment, or is after punishment suffered, (by the pillory, burning in the hand, &c.) clears the party from the legal disabilities of infamy, makes him a new creature, and gives him

a new capacity. See *tit. Pardon*. But from this case must be excepted a conviction for perjury, or subornation, under the 5 *Eliz. c. 9.* which expressly provides that the party shall never be allowed to give evidence in courts of justice, till the judgment be reversed. See *Perjury, II.*, and further, *Evidence, II., 1.*

4. It is a general rule that all witnesses interested in the event of a cause are to be excluded from giving evidence in favour of that party to which their interest inclines them: they are excluded from a supposed want of integrity, and not, as some have supposed, that they may be saved from the temptation to commit perjury: if that were the true principle, there would be some inconsistency in excluding witnesses who have an interest even to the smallest amount, at the same time that a child is allowed to give evidence for the parents; and a witness is not privileged from answering against his interest. The temptation to perjury may be much stronger in the two last cases than in the former; yet in the former the witness is permitted, and in the last is compelled, to give evidence: and it may be observed that the weight of the evidence of a child, in favour of a parent, carries with it a sort of feeling which is apt to induce juries to give it even more than its due weight.

The old cases on the incompetency of witnesses, on account of interest, were generally decided on very narrow grounds, without reference to the distinction now adopted between an interest in the question put to a witness, and an interest in the event of the suit; the general rule now established is, that a witness is not disqualified, unless actually interested in the event of the suit. In an action against the master for the negligence of his servant, the servant is not a competent witness to disprove his own negligence; for the verdict may be given in evidence in a subsequent action by the master against the servant, as to the *quantum* of damages, though not as to the fact of the injury: and so the servant is manifestly interested in the event of the suit against his master. Persons any way liable to the costs of the suit have an immediate interest in the event, and therefore are not competent witnesses. The defendant's bail are not competent to give evidence for their principal, being immediately answerable in case of a verdict for the plaintiff. In an action against a sheriff for a false return, his officer having given security to him, is not a competent witness for him to prove an endeavour to arrest. In an action by an insane plaintiff, his guardian, or *prochein amy*, are not competent witnesses, being liable to costs. Any certain, direct, and immediate interest, to result from the verdict, will disqualify a witness, although the verdict cannot be evidence for or against the witness. Before the 54 *Geo. 3. c. 170.* rated parishioners were incompetent witnesses on appeals against orders of removal. A bankrupt is not a competent witness to any fact which may tend to increase the fund of his estate; nor a creditor, as that will increase his dividend. In all cases where there is a direct interest in the event of the suit, this will make a witness incompetent, however small or inconsiderable the degree of interest may be.

See now the provisions of the 3 & 4 *Wm. 4. c. 42. § 26.* whereby witnesses interested solely on account of the verdict are declared admissible, *Evidence, II. 1.*

Where the witness has an interest inclining him to each of the parties, so as on the whole to make him indifferent, he is competent to give evidence for either party. The objection to a witness on account of interest is an objection on the *Voire Dire* (see that title); and excludes him from giving any kind of evidence for the party who calls him.

A party on record to the suit cannot be a witness to the trial for himself, or for a joint-trustee, or co-defendant, on account of the immediate and direct interest which he has in the result, either from having a certain benefit or loss, or from being liable to costs; and this, though he be merely a trustee for others: but those who are parties to a suit, as members

of a corporate body, and not individually liable to costs, have been held competent.

As a party to the suit is not suffered to be witness in support of his own interest, so he is never compelled in a court of law to give evidence for the opposite party. A defendant cannot regularly be a witness for co-defendants; but if no evidence has been produced against him, he is entitled to his discharge as soon as the opposite party has closed his case, and may then give evidence for the others. In equity, defendants, made parties to a suit without having interest, are allowed to be examined either for the plaintiff or their co-defendants.

As a party on record is not a competent witness, so neither is the husband or wife of such party competent to give evidence either for or against them: but in an action for criminal conversation, discourses between the wife and the defendant are evidence against him; and where the husband and wife were living in different families, the wife's letters were admitted to show the affection subsisting between them. This rule of evidence, adopted for promoting a perfect union of interests, and securing mutual confidence, is so strictly observed, that even after a dissolution of marriage for adultery, the evidence of the divorced wife has been refused as inadmissible; nor will a wife be admitted, though the husband consent.

Generally speaking, the husband and wife are not permitted to be witnesses against each other in any criminal proceeding. In a prosecution for bigamy the first husband or wife cannot be admitted to prove the first marriage: but the second husband or wife may prove the second marriage, after proof of the first, as they are not in fact lawful husband and wife. In suits or proceedings between third parties only, the result of some conflicting cases goes to the admission of a husband or wife to prove a first marriage, even after proof of a second; but that in such case the witness is not compellable to answer, and that in such cases the husband may be cited to contradict the wife, *à contra*. The reasoning, however, for the admission of such evidence seems founded on the fear of failure of justice between third parties; and on this ground it seems to be that where a wife has made contracts with the authority of her husband, she has been considered as his agent, and her representation admitted as evidence against him; and, on an order of bastardy, the wife has been admitted to prove her criminal conversation with the putative father: but these cases do not appear sufficiently supported either by authority, or incontrovertible principle. The wife of a bankrupt may be examined for disclosure of his effects. On an indictment for a forcible marriage, under the repealed statute 9 *Hen. 7. c. 2.* the wife was a competent witness; and, as it seems, even though she had consented to the marriage after the first forcible abduction. See *Marriage*.

In cases also of offences against the person of a lawful wife by her husband, she is a competent witness against him: as is every day's practice in exhibiting articles of the peace for ill usage; and other more atrocious cases might be instanced. See further *Baron and Feme*.

As the parties to a suit are excluded from being witnesses on account of their interest, statements or representations made by them against their interest, are admissible in evidence against them: and in many instances are the strongest evidence. Upon this principle the free admission of any party to a suit, or the matter in issue, and the voluntary confession of a prisoner under a criminal charge, are always received in evidence against the party.

In criminal prosecutions it is a general rule that the injured party may be a witness, although on the conviction of the prisoner he might be entitled to a reward (see *Rewards*); and this extends to cases of robbery, fraud and perjury. But formerly, in case of forgery, the party by whom an instrument purported to be made was not admitted to prove it forged, if he could be either liable to be sued upon the instrument (if

genuine), or be thereby deprived of a legal claim against another. This anomaly in the law of evidence is now removed by the 9 Geo. 4. c. 32. § 2; see *Forgery*, V.

There are certain exceptions to the general rule, that all persons who gain or lose directly by the event of a cause are incompetent witnesses. By the express provision or policy of many (perhaps too many) acts of parliament, informers, entitled to part of the penalties, are admitted as competent witnesses. On indictments for not repairing bridges, &c. the inhabitants of the county, &c. are made competent witnesses for the prosecution by the 1 Ann. st. 1. c. 18. § 13. Surveyors of the highways, and inhabitants of parishes, under the general highway acts; inhabitants of parishes, where the penalty is given to the use of the poor, 27 Geo. 3. c. 29; rated inhabitants of parishes or orders of removal, 54 Geo. 3. c. 170. § 9; agents for their principals to prove contracts, &c. and servants and agents to prove payment or receipt of money or delivery of goods, although their evidence tend to discharge themselves.

By § 64, 65. of the 7 & 8 Geo. 4. c. 29. (the general *Larceny Act*), and by § 29, 32 of the 7 & 8 Geo. 4. c. 30. (the *Malicious Injuries Act*), the evidence of the party aggrieved is declared admissible in evidence; but he forfeits all claim to the sum awarded for compensation, which is to be paid to the overseer of the parish, and by him to the county rate. As to Ireland, see 9 Geo. 4. c. 55. § 57, &c. and c. 56. § 36, &c.

The competency of interested witnesses may be restored in certain cases. Where the objection arises on the *voire dire*, it may be removed by the witness's answer. See *Voire Dire*. Whatever interest a witness may have had, if he is divested of it by release or payment, or any other means when he is ready to be sworn, there remains no objection to his competency on that ground: in case of forgery, the release of the holder of the security formerly made the party, whose name was forged, a competent witness to prove the forgery. The competency of a bankrupt is restored by his certificate, and his release to the assignees of his share in the surplus and dividends. The competency of the member of a corporation may be restored by his resignation or disfranchisement. In some cases a release is not necessary; as where the witness offers to surrender his interest, but is refused; or the party interested offers to release, and the witness refuses: so where a witness has acquired an interest for the mere purpose of disqualifying himself: or where the witness is answerable to one or other of the parties, and the event of the suit determines only to which.

One particular kind of incompetency remains yet to be considered, founded on the professional confidence which a client reposes in his counsel, attorney, or solicitor, and which courts of justice ever hold to be inviolable. Confidential communications between attorney and client are not to be revealed at any period of time, nor in an action between third parties, nor after the proceedings to which they referred are at an end: nor after the dismissal of the attorney. The privilege of not being examined as to such points, is the privilege of the client, and never ceases: but it is confined to such communications as are made with reference to professional confidence in the particular business. It is confined to counsel, solicitor, and attorney; and does not extend to medical persons. If the party interested waive the privilege, the witness may be examined of course.

WITTENA-GEMOT. See *Witena-Gemot*.

WOAD. A herb used for the dyeing of blue colour. The cultivation of it is considered as so exhausting the ground, or so profitable to the tenant, or both, that it is generally restrained by covenants in leases to pay a very advanced rent for the land so employed. See *Tithes*.

WOLD, Sax.] A down, or open champaign ground void of wood; as Stow in the Wolds, Cotswold, in Gloucestershire, &c.

WOLFESHEAD, or WOLFERHEFOD, Sax. *Caput*

Lupinum.] Was the condition of such as were outlawed in the time of the Saxons, who, if they could not be taken alive to be brought to justice, might be slain, and their heads brought to the king, for they were no more accounted of than a wolf's head, a beast so hurtful to man. *Leg. Edw. Confess.*; *Bract. lib. 3.* See *Outlaw*.

WONG, Sax.] A field. *Spelm.*

WOODS. Several regulations were made as to the felling woods, and preserving their future growth, by the 35 Hen. 8. c. 17; 13 Eliz. c. 5; but these statutes were repealed by 7 & 8 Geo. 4. c. 27.

By the 29 Geo. 2. c. 26. and 31 Geo. 2. c. 31. the owner of wastes, on which others have right of common, with the consent of the major part in number and value of the commoners, may inclose such wastes for the growth of timber. See *Common*, II. *Forests*.

For the laws against destroying and spoiling timber and other trees, see *Malicious Injuries*, VII.; *Timber*, *Trees*.

WOOD-CORN. A certain quantity of grain paid by the tenants of some manors to the lord for the liberty to pick up dead or broken wood. *Cartular. Burgi S. Petri MS.* 142.

WOOD-GELD. The cutting of wood within the forest, or rather the money paid for the same to the foresters; or it signifies to be free from payment of money for taking wood in a forest. *Crompt. Juris.* 157; *Co. Litt.* 233.

WOODMOTE. The old name of that court of the forest which is now called the Court of Attachments, which was wont to be held at the will of the chief officers of the forest, without any certain time, till after the statute of *Carta de Foresta*, by which it was appointed to be held every forty days, and thence was called 'The Forty-day Court.' *Manwood*, c. 22. p. 207. See further, tit. *Forest*.

WOOD-PLEA-COURT. A court held twice in the year in the forest of Clun, in Shropshire, for determining all matters of wood and agistments there.

WOODSTOCK. Wool and yarn may be sold in Woodstock on market and fair days. 18 Eliz. c. 21.

WOODWARDS. Officers of the forests, whose duty consists in looking after the wood, and vert and venison, and presenting offences relating to the same, &c. Woodwards may not walk with bow and shafts, but with forest bills. *Crompt. Juris.* 201; *Manwood*, part 1, 189. See *Forest*.

WOOL, being a staple commodity of the greatest value in this kingdom, the employment of our poor at home, and our most beneficial trade abroad, depending in a great measure upon it, divers laws were heretofore made to preserve the same entirely to ourselves, and to prevent its being transported to other nations.

By the early statutes the exportation of wool was prohibited, but the law was afterwards relaxed, and the exportation appears to have been allowed. However, in 1660, (see 12 Car. 2. *post*.) a total prohibition was again enforced, which continued till 1825.

An old statute of 27 Edw. 3. declared it felony to transport wool; but the felony was repealed by the 38 Edw. 3. c. 6; and see 11 Edw. 3. c. 1. The 8 Eliz. c. 3. prohibited the transportation of live sheep on severe penalties. By the 12 Car. 2. c. 32. any person exporting any wool, yarn, sheep, or fuller's earth, was to forfeit the same; and for every pound weight of goods, 3s. And the owners of the ship in which it was transported, being privy to the offence, were to forfeit all their interest of the said ship; also the master and mariners assisting, all their goods; and any persons might seize such wool, and should be entitled to one moiety, and the king to the other moiety of forfeitures, &c. The 13 & 14 Car. 2. c. 18. made the transportation of wool felony again; though, this being thought too severe, the 7 & 8 Wm. 3. c. 28. a second time repealed the felony, and ordained that exporting wool beyond sea should incur a forfeiture of the vessel, and treble value, and persons aiding and assisting suffer three years' imprisonment.

These and several subsequent acts as to the export and transport of wool, were all repealed by the 5 Geo. 4. c. 47, 6 Geo. 4. c. 105.

Down to 1802 the importation of foreign wool into Great Britain was quite free, but in that year a duty of 5s. 3d. a cwt. was imposed upon it, which in 1813 was raised to 6s. 8d., and was further increased to the enormous sum of 56s. in 1819. The impolicy of this high impost led to its repeal in 1828, and foreign wool now pays a duty of a ½d. a lb. where the wool is not worth 1s., and a penny where it is of that value.

Sheep are prohibited to be imported by the act for the general regulation of the Customs, 3 & 4 Wm. 4. c. 52.

By the 35 Geo. 3. c. 124, wool-combers, their wives and children, may freely exercise their trade, or any other they may know, in any town or place in the kingdom, without being free of any corporation, &c.; and shall not be removable from such places until they become actually chargeable.

Much contest having arisen as to the policy, in the present times, of several acts heretofore made for the regulation of the woollen manufactures, these acts were by the 43 Geo. 3. c. 136. (a temporary act continued by several subsequent acts) suspended, with a view to the framing of a new law on the subject. At length by the 49 Geo. 3. c. 109, several acts, and parts of acts, (nearly forty in number,) on this subject, from the 2d of Edw. 3. to 5 Geo. 3. are repealed; and persons having served apprenticeship to any branch of the woollen manufactures, and their wives and families, are allowed to set up and exercise that trade, or any other, in any part of Great Britain, notwithstanding the restrictions in the 5 Eliz. c. 4.

By 50 Geo. 3. c. 83, a few other latent acts on this subject were repealed, and offenders indemnified against the penalties thereof.

As to *Wool-winders*, see the 8 Hen. 8. c. 22; 23 Hen. 8. c. 17; which are not included in the list of acts repealed by 49 Geo. 3. c. 109, or 50 Geo. 3. c. 83.

By the 54 Geo. 3. c. 103, the acts 30 Car. 2. c. 3, 32 Car. 2. c. 1. for compelling the burying of corpses in woollen, were repealed.

By the 3 & 4 Wm. 4. c. 28, an act passed in the 13 Geo. 1. c. 23. for the better regulation of the woollen trade, was repealed.

See further, *Frames, Malicious Injuries, Manufacturers.*

WOOL-DRIVERS. Such as bought wool in the country of the sheep-owners, and carried it on horseback to the clothiers, or to market towns, to sell again. 2 & 3 P. & M. c. 13.

WOOLFERTHFOD, or WOOLVERHEFOD. See *Wolfshead*.

WOOL-STAPLE. See *Staple*.

WOOL-WINDERS. See *Wool*.

WORDS, which may be taken or interpreted by law in a general or common sense, ought not to receive a strained or unusual construction; ambiguous words are to be construed so as to make them stand with law and equity, and not to be wrested to do wrong. A Latin word in pleading, which signified divers things, was well used to express that thing intended to be expressed by it. Uncertain words in a declaration are made good in a plea in bar, where notice is taken of the meaning of them; and words which are in themselves uncertain, may be made certain by subsequent or following words. The different placing of the same words may cause them to have different sense and construction. A word which is written short, or abbreviated, is not good without a dash to distinguish it. Senseless words are void and idle, though they shall not hurt where the sense is good without them. Nor shall words in deeds that are needless impeach a clause certain and perfect without such words. 2 Lill. Abr. 711 to 714; Hob. 313.

The following general rules and maxims are stated by *Blackstone* as having been laid down by the courts of justice for the construction and exposition of the several species of common assurances or conveyances whereby a title to lands and tenements may be transferred and conveyed from one man to another. 2 Comm. c. 23.

1. That the construction be favourable, and as near the minds and apparent intents of the parties as the rules of law will admit. For the maxims of law are, that *verba intentioni debent inservire*, and *benigne interpretamur chartas propter simplicitatem laicorum*. And therefore the construction must also be reasonable, and agreeable to common understanding. *And. 60; 1 Bulst. 175; Hob. 304.*

2. That *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*; but that, where the intention is clear, too minute a stress be not laid on the strict and precise signification of words; *nam qui hæret in literâ, hæret in cortice*. 2 Saund. 157. Therefore, by a grant of a remainder, a reversion may well pass, and *à converso*. Hob. 27. And another maxim of law is, that *mala grammatica non vitiant chartam*; neither false English nor bad Latin will destroy a deed; which perhaps (says *Blackstone*) a classical critic may think to be no unnecessary caution. See 10 Rep. 133; 1 Inst. 225; 2 Show. 334.

3. That the construction be made upon the entire deed, and not merely upon disjointed parts of it. *Nam ex antecedentibus et consequentibus fit optima interpretatio*. 1 Bulst. 101. And therefore that every part of it be (if possible) made to take effect, and no word but what may operate in some shape or other. 1 P. Wms. 457. *Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat*. Plowd. 156.

4. That the deed be taken most strongly against him that is the agent or contractor, and in favour of the other party; *Verba fortius accipiuntur contra proferentem*. As if tenant in fee-simple grants to any one an estate for life, generally it shall be construed an estate for the life of the grantee. 1 Inst. 42. For the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words; and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must be taken between an indenture and a deed-poll; for the words of an indenture, executed by both parties, are to be considered as the words of them both; for though delivered as the words of one party, yet they are not his words only, because the other party hath given his consent to every one of them. But in a deed-poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him. 1 Inst. 134. And in general this rule, being a rule of some strictness and rigour, is the last to be resorted to, and is never to be relied upon but where all other rules of exposition fail. *Bac. Elem. c. 3.*

5. That if the words will bear two senses, one agreeable to, and the other against law, that sense be preferred which is most agreeable thereto. As if tenant in tail lets a lease to have and to hold during life generally, it shall be construed to be a lease for his own life only, for that stands with the law, and not for the life of the lessee, which is beyond his power to grant. 1 Inst. 42.

6. That in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received, and the latter rejected, contrary to the general rule as to the exposition of wills, yet in both cases we should rather attempt to reconcile them. *Hardr. 94; Cro. Eliz. 420; 1 Vern. 30.*

See further, *tits. Conveyance, Deeds, Statutes, Will, &c.*

As to words defamatory being actionable, libellous, or treasonable, see *Action, Libel, Slander, Treason*.

In order to avoid disputes about terms, it is now the prac-

tice in almost every modern act, and particularly in the statutes amending the laws of real property, to define the meaning of the words employed.

WORKHOUSES. By the 55 Geo. 3. c. 137. § 2. pawning or receiving goods belonging to workhouses, or articles provided for the use of the poor, may be summarily punished before a justice, on the oath of one witness, by a fine not exceeding 5*l.* or under 1*l.*

For the provisions of the recent Poor Law Amendment Act, with respect to Workhouses, see *Poor*, VII.

WORT, or WORTH, from Sax. *weorth*.] A curtilage, or country farm. *Mat. West.* 870.

WORTHIEST OF BLOOD. An expression of the lawyers, signifying the preference given in descents to sons before daughters. See *Descent*.

WORTHINE OF LAND. A certain quantity of ground so called in the manor of Kingsland in the county of Hereford; and in some places the tenants are called worthines. *Consuetud. Maner. de Hedenham in Com. Bucks.* 18 Edw. 3.

WRECK, Lat. *wreccum maris*, Fr. *wreck de mer*, sometimes writ *varech*, *wroche*, *werec*, et *scup werpe*, quasi *sea-up werp*, i. e. *ejectus maris*.] Such goods as after a shipwreck are cast upon the land by the sea, and not there, within some county; for they are not wrecks so long as they remain at sea in the jurisdiction of the admiralty. 2 *Inst.* 167. Where a ship perisheth on the sea, and no man escapes alive out of it, this is called wreck. And the goods in the ship being brought to land by the waves belong to the king by his prerogative, or to the lord of the manor. 5 *Rep.* 106.

By the common law all wrecks belonged to the crown, and therefore they are not chargeable with any customs, and for that goods coming into the kingdom by wreck are not imported by any body, but cast ashore by the wind and sea. But it was usual to seize wrecks to the king's use only when no owner could be found; and in that case the property being in no man, it of consequence belongs to the king, as lord of the narrow seas, &c. *Bract. lib.* 2, c. 5.

The profits arising from shipwrecks are classed by *Blackstone* among the articles of the king's ancient ordinary revenue. These are declared to be the king's property by the prerogative statutes, 17 Edw. 2. st. 2. c. 11. and were so long before at the common law.

It is worthy of observation how greatly the law of wrecks has been altered, and the rigour of it gradually softened in favour of the distressed proprietors. Wreck, by the ancient common law, was where any ship was lost at sea, and the goods or cargo were thrown upon the land; in which case these goods so wrecked were adjudged to belong to the king; for it was held that by the loss of the ship all property was gone out of the original owner. *Doct. & Stud. D.* 2. c. 51. But this was undoubtedly adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore it was first ordained by King Henry I. that if any person escaped alive out of the ship, it should be no wreck; and afterwards King Henry II. by his charter declared that if on the coasts of either England, Poitou, Oleron, or Gascony, any ship should be distressed, and either man or beast should escape, or be found therein alive, the goods should remain to the owners, if they claimed them within three months; but otherwise should be esteemed a wreck, and should belong to the king, or other lord of the franchise. This was again confirmed with improvements by King Richard I., who, in the second year of his reign, not only established these concessions, by ordaining that the owner, if he was shipwrecked and escaped, *omnes res suas liberas et quietas haberet*, but also that, if he perished, his children, or, in default of them, his brethren and sisters, should retain the property; and in default of brother or sister, then the goods should remain to the king. And the law, as laid down by *Bracton*, in the reign of Henry III., seems still to have improved in its equity. For then, if not only a dog (for instance) escaped,

by which the owner might be discovered, but if any certain mark were set on the goods, by which they might be known again, it was held to be no wreck. *Bract. lib.* 3. c. 3. And this is certainly most agreeable to reason; the rational claim of the king being only founded upon this, that the true owner cannot be ascertained. Afterwards, in the *stat. Westm.* 1. 3 Edw. 1. c. 4. the time of limitation of claims given by the charter of Henry II. is extended to a year and a day, according to the usage of Normandy; and it enacts, that if a man, a dog, or a cat, escape alive, the vessel shall not be adjudged a wreck. These animals are only put for examples; for it is now held, that not only if any live thing escape, but if proof can be made of the property of any of the goods or lading which came to shore, they shall not be forfeited as wreck. The statute further ordains, that the sheriff of the county shall be bound to keep the goods a year and a day; that if any man can prove a property in them, either in his own right or by right of representation, they shall be restored to him without delay; but if no such property be proved within that time, they then shall be the king's. 2 *Inst.* 168. If the goods are of a perishable nature, the sheriff may sell them, and the money shall be liable in their stead. *Plowd.* 166.

The year and day in the *stat. Westm.* 1. shall be accounted from the seizure; and if the owner of the goods die within the year, his executors or administrators may make proof. 2 *Inst.* 167; 5 *Rep.* 106. If a man have a grant of wreck, and goods are wrecked upon his lands, and another taketh them away before seizure, he may bring action of trespass, &c. For before they are seized there is no property gained to make it felony. 1 *Hawk. P. C.* c. 33. § 24. See now *post*.

If goods wrecked are seized by persons having no authority, the owner may have his action against them; or if the wrong-doers are unknown, he may have a commission to inquire, &c. 2 *Inst.* 166. Goods lost by tempest, or piracy, &c. and not by wreck, if they afterwards come to land, shall be restored to the owner. 27 Edw. 3. st. 2. c. 13. Where a ship is ready to sink, and all the men therein, for the preservation of their lives, quit the ship, and afterwards she perishes; if any of the men are saved and come to land, the goods are not lost. A ship on the sea was chased by an enemy; the men therein, for the security of their lives, forsook the ship, which was taken by the enemy, and spoiled of her goods and tackle, and then turned to sea; after this, by stress of weather she was cast on land, where it happened her men safely arrived; and it was resolved that this was no wreck. 2 *Inst.* 167.

This revenue of wrecks is frequently granted out to lords of manors, as a royal franchise; but if any one be thus entitled to wrecks in his own land, and the king's goods are wrecked thereon, the king may claim them at any time, even after the year and day. 2 *Inst.* 168.

In order to constitute a legal wreck, the goods must come to land. If they continue at sea, the law distinguishes them by the barbarous and uncouth appellations of *jetsam*, *flotsam*, and *lagsam*. *Jetsam* is where goods are cast into the sea, and there sink and remain under water. *Flotsam* is where they continue floating or swimming on the surface of the waves. *Ligan*, or *Lagan*, is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again. 5 *Rep.* 106. These are also the king's, if no owner appears to claim them; but if any owner appears, he is entitled to recover the possession. For even if they be cast overboard, without any mark or buoy, in order to lighten the ship, the owner is not by this act of necessity construed to have renounced his property; much less can things *ligan* be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These three are therefore accounted so far a distinct thing from the former, that by the king's grant to a man of wrecks, things *jetsam*, *flotsam*, and *ligan*, will not pass. 5 *Rep.* 108. See *Jetsam*, &c.

Wrecks, in their legal acceptance, are at present not very frequent; for if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not able to assert his property within the year and day limited by law. And in order to preserve this property entire for him, and, if possible, to prevent wrecks at all, our laws have made many very humane regulations. By the 27 *Edw. 3. c. 13.* if any ship be lost on the shore, and the goods come to land (which cannot, says the statute, be called wreck), they shall be presently delivered to the merchants, paying only a reasonable reward to those that saved and preserved them, which is called salvage. See *Insurance*, II. 6. Also by the common law, if any persons (other than the sheriff) take any goods so cast on shore, which are not legal wreck, the owners might have a commission to inquire and find them out, and compel them to make restitution. *F. N. B. 112.* And by the 12 *Ann. st. 2. c. 18.* confirmed by the 4 *Geo. 1. c. 12.* in order to assist the distress, and prevent the scandalous illegal practices on some of our sea-coasts, it is enacted, that all head officers and others of towns near the sea shall, upon application made to them, summon as many hands as are necessary, and send them to the relief of any ship in distress, on forfeiture of 100*l.*; and in case of assistance given, salvage shall be paid by the owners, to be assessed by three neighbouring justices.

And by the 7 & 8 *Geo. 4. c. 29. § 18. G. B. (9 Geo. 4. c. 56. § 18. I.)* plundering any part of any ship or vessel in distress, or wrecked, stranded, or cast on shore, or any goods or articles belonging to such ship, is felony, punishable with death: but if articles of small value stranded or cast on shore are stolen, without cruelty or violence, the offender may be punished as for simple larceny.

By § 19. persons in possession of shipwrecked goods not satisfactorily accounted for, they may be taken under a search-warrant and restored. By § 20. persons offering shipwrecked goods for sale may be stopped and seized.

By the 7 & 8 *Geo. 4. c. 30. § 11, G. B. (9 Geo. 4. c. 56. § 10. I.)* procuring or endeavouring to procure the wreck of a ship, by false lights; destroying a shipwrecked vessel or cargo, or any part thereof; or forcibly impeding men from saving their crews; are declared capital felony.

By the 9 *Geo. 4. c. 31.* assaulting or wounding any magistrate, or person lawfully authorized, on account of the lawful exercise of his duty in the preservation of any vessel in distress, or wrecked, &c. is punishable with transportation for seven years, &c.

By the 48 *Geo. 3. c. 130.* which extended only to the Cinque-Ports, and by the 49 *Geo. 3. c. 122.* which extended to all places other than the Cinque-Ports, and both of which were amended by 58 *Geo. 3. c. 87.* regulations were made for the preventing frauds and depredations on merchants, &c. by boatmen and others, and for remedying some defects as to the adjustment of salvage. With reference to wreck they were chiefly directed against the wilful injury to or embezzlement of cables, anchors, &c. by boatmen, pilots, hovelers, and others, and also to the regulations of the claims of lords of manors to wreck.

By the 1 & 2 *Wm. 4. c. 75.* the acts of the 49 *Geo. 3. c. 122.* & 58 *Geo. 3. c. 87.* which were only temporary, were amended, and their provisions made perpetual. Many of the clauses of this statute have already been noticed. See *Ships*.

By § 26. lords of the manor are not to lay claim to wrecks or goods found jetsam, flotsam, or ligan, until they have made a report in writing to the deputy vice-admiral of that part of the coast, or his agent; or if there be no such deputy, &c. within 50 miles, then to the Trinity House; and such deputy vice-admiral, on receiving the report, is within forty-eight hours to transmit it to the secretary of the Trinity House, under a penalty of 50*l.*

By § 27. perishable goods taken possession of by any lord

of the manor, or found flotsam, &c. may be sold with the consent of a justice, and the money deposited with such lord of the manor. An account of the sale is to be transmitted to the deputy vice-admiral, who is to forward it to the secretary of the Trinity House.

§ 28. The commissioners of the customs and excise are to permit goods saved from vessels wrecked to be forwarded to the ports of their original destination, but are to take security for the protection of the revenue in respect of such goods.

§ 29. The deputy vice-admiral, or his agent, or the owner or master of any ships wrecked or stranded, or the owner of goods, or any officer of the customs or excise, or any person employed in aid of the deputy vice-admiral, &c., may pass over private lands near the coast where vessels are wrecked, for the preservation of the wreck, &c. if there be no other fit road: Compensation is to be made to the occupiers of such lands; and if the parties cannot agree, the amount is to be settled by two justices.

§ 30. Refusing to let persons so employed pass over lands renders the party liable to a penalty of 100*l.* recoverable by an action of debt.

By the 1 & 2 *Geo. 4. c. 76.* the provisions of the 48 *Geo. 3. c. 130.* relative to wrecks, &c. within the jurisdiction of the Cinque Ports, were amended and made perpetual.

By the above two mentioned acts the provisions of the 12 *Ann. c. 18.* with respect to salvage on ships wrecked, &c. are amended. See *Insurance*, II. 6.

As by the ancient common law all property stranded belongs to the king or his grantees; and after a year and a day, without claim, it still belongs to him entirely: it is vested in him during that time for protection, until the owner can be found. It is therefore very properly, in the first instance, placed in the custody of the admiralty; the proctor of the admiralty interposes for its protection until a claim is made; but as soon as a lawful owner appears within the year and a day, the proctor withdraws his claim; the right of the crown is then gone, the ship and goods are restored, and the charges of the admiralty, and salvage, if any, are paid. See 1 *Hagg. R. 16—20*; 1 *Chitty's Gen. Pr. 103.*

The grantee of wreck has a special property in all goods stranded within his liberty, and may maintain trespass against a wrong-doer for taking them away, though such goods were part of the cargo of a ship from which some person escaped alive to land, and though the owners within a year and a day claimed and identified them, and though the taking was before any seizure on behalf of the grantee. 1 *B. & Ad. 831.*

And see further, as connected with this title, *Navy, Pilots, Seamen, Ships, Trinity House, &c.*

WRECK-FREE. Exemption from the forfeiture of shipwrecked goods and vessels, which King Edward I. by charter granted to the barons of the Cinque Ports. *Placit. temp. Edw. 1.*

WRIT,

BREVE, from Sax. *writan*, i. e. *scribere*.] In general is the king's precept, in writing under seal, issuing out of some court to the sheriff or other person, and commanding something to be done touching a suit or action, or giving commission to have it done. *Termes de la Ley*; 1 *Inst. 78.* Also a writ is said to be a formal letter of the king's, in parchment, sealed with a seal, directed to some judge, officer, or minister, &c. at the suit or plaint of a subject, requiring to have a thing done for the cause briefly expressed, which is to be discussed in the proper court, according to law. *Old Nat. Br. 4*; *Shcp. Abr. 245.*

Of writs there are divers kinds; in many respects some writs are grounded on rights of action, and some in nature of commissions; some mandatory and extrajudicial, and others remedial; some are patent or open; some close or sealed up; some writs issue at the suit of parties; some are of office; some ordinary; and others of privilege; some writs are di-

rected to the sheriffs, and in special cases to the party, &c. 1 *Inst.* 289; 2 *Inst.* 39; 7 *Rep.* 20.

The writs in civil actions are either *original* or *judicial*; original writs are issued out in the Court of Chancery for the summoning a defendant to appear, and are granted before the suit is begun, to begin the same; and judicial writs issue out of the court where the original is returned after the suit is begun. The originals bear date in the name of the king, but judicial writs bear *teste* in the name of the chief justice. See *Capias*, *Latitat*, *Original Process*, &c. A writ without a *teste* is not good, for the time may be material when it was taken out, and it is proved by the *teste*; and if it were out of the common law courts, it must formerly have been dated some day in term (not being Sunday); but in Chancery, writs might always be issued in vacation as well as term time, as that court is always open. *F. N. B.* 51, 147; 2 *Inst.* 40; *Latw.* 337. • See 13 *Car.* 2. c. 2.

Writs in actions are likewise *real*, concerning the possession of lands, called writs of entry or of right, touching the property, &c.; *personal*, relating to goods, chattels, and personal injuries; and *mixed*, for the recovery of the thing and damages. 2 *Inst.* 39. Writs may be *possessory*, of a man's own possession, or *ancestral*, of the seisin and possession of his ancestor.

All writs of entry and writs ancestral, and also all other real and mixed actions, with the exception of a writ of right of dower, or writ of dower *unde nihil habet, quare impedit*, and ejectment, are now abolished. See *Limitation of Actions*, 11. 1.

There are also certain writs of prevention or anticipation, and of restitution, &c. But the most common writs in daily use are in debt, detinue, trespass, action upon the case, account, and covenant, &c. which, with others, must be rightly directed, or they will be naught. *F. N. B.*; *Style* 42, 237. In all writs care is to be taken that they be laid and formed according to the cause or ground of them, and so pursued in the process thereof. Though the writ in some cases may be general, and the count or declaration special. *Hob.* 18, 84, 251.

By the 2 *Wm.* 4. c. 39. (Uniformity of Process Act,) there are now but three species of writs for commencing *personal* actions in any of the superior courts, viz. a writ of summons, where the process is not bailable; a writ of *capias*, where the defendant is held to bail; and a writ of detainer against prisoners in custody. See *Process*.

For an account of the present practice with regard to the writs allowed by the above statute, see 3 *Chitty's Gen. Pr.* 140.

WRIT OF ASSISTANCE. A writ issuing out of the Exchequer to authorize any person to take a constable, or other public officer, to seize goods or merchandize prohibited and uncustomed, &c.

By the 3 & 4 *Wm.* 4. c. 53. § 39. these writs are to continue in force during the whole of the reign in which they are granted, and for six months longer.

There is also a writ of this name issued out of the Chancery to give possession of land. 11 *Car.* 2. c. 1.

WRIT OF DELIVERY. In what cases grantable, 13 & 14 *Car.* 2. c. 11. § 30.

WRIT OF ENTRY. See *Entry*.

WRIT OF ERROR. See *Error*.

WRIT OF INQUIRY OF DAMAGES. A judicial writ that issues out to the sheriff upon a judgment by default, in action of the case, covenant, trespass, trover, &c. commanding him to summon a jury to inquire what damages the plaintiff hath sustained *occasione præmissorum*. See *Judgment*, I.; *Tidd*, 314.

Formerly the writ of inquiry must have been returnable on a general return, or day certain, according to the nature of the proceedings; if by original, on a general return; if by bill, on a day certain; and it must also have been returnable in term; but now by the 1 *Wm.* 4. c. 7. § 1. it may

be made returnable and be returned on any day certain in term or vacation.

1. *In what cases granted.*—A writ of inquiry of damages is a mere inquest of office, to inform the conscience of the court, who, if they please, may themselves assess the damages. And it is accordingly the practice, in actions upon promissory notes and bills of exchange, instead of executing a writ of inquiry, to apply to the court for a rule to show cause why it should not be referred to the master to see what is due for principal and interest, and why final judgment should not be signed for that sum, without executing a writ of inquiry; which rule is made absolute on an affidavit of service, unless good cause be shown to the contrary. *Tidd's Pract. K. B.* And the same course is pursued in an action on an award, *Tidd*, 571; in covenant for non-payment of a liquidated sum, 1 *Doug.* 316; 13 *Price*, 52; as for non-payment of money lent upon mortgage, 8 *T. R.* 326; or for non-payment of rent, 8 *T. R.* 410; or for the arrears of an annuity, 2 *Chit. R.* 32, or the like. This practice, however, is confined to actions where the *quantum* of damages depends on figures, which may be as well ascertained by the master as before a jury; and therefore where the defendant had suffered judgment by default in an action of *assumpsit*, on a foreign judgment, the court refused to make the rule absolute for a reference to the master, saying this was an attempt to carry the rule further than had yet been done, and as there was no instance of the kind, they would not make a precedent for it. 4 *T. R.* 493. The court has also refused to make the rule absolute, in an action upon a bill of exchange, for foreign money, the value of which is uncertain, and can only be ascertained by a jury. 5 *T. R.* 87. See *Cro. Eliz.* 536; *Cro. Jac.* 617.

Where the jury, upon the trial of an issue, omit to assess the damages, the omission may in some cases be supplied by a writ of inquiry; as to which, it seems that where the matter omitted to be inquired by the principal jury, is such as goes to the very point of the issue, and upon which, if it be found by the jury (now abolished,) an attaind would formerly have lain against them by the party, if they gave a false verdict; there such matter cannot be supplied by a writ of inquiry, because thereby the plaintiff might have lost his action of attaind, which would not lie upon an inquest of office. *Tidd's Prac.*

Thus, where in detinue the jury omitted to assess the value of the goods, the court refused to supply the omission by a writ of inquiry. And so where the jury who try the issue in replevin (see that title) omit to inquire of the rent in arrear and value of the cattle, pursuant to the 17 *Car.* 2. c. 7. no writ of inquiry can be afterwards awarded to supply the omission; for by the words of the statute these matters are to be inquired of by the same jury who try the issue. *Tidd's Prac.* and the authorities there cited.

In debt on a replevin bond, assigning for breach the not making a return of the goods distrained for rent, the plaintiff may, after signing judgment for not returning the demurrer-book, tax the costs and issue execution for them and the value of the goods distrained as indorsed on the replevin bond, without executing a writ of inquiry. 3 *M. & S.* 155.

But where the matter omitted to be inquired by the principal jury doth not go to the point in issue or necessary consequence thereof, but is merely collateral, as the four usual inquiries on a *quare impedit*; there such matter may be supplied by a writ of inquiry, without any damage to the party; because if the same had been inquired of by the principal jury, it would have been, as to those particulars, no more than an inquest of office, upon which an attaind would not lie. *Carth.* 362.

Thus, where the parties being at issue in *assumpsit*, a demurrer was joined upon the evidence, and the jury discharged, without assessing the damages, and afterwards judgment was given for the plaintiff, and a writ of inquiry of damages

awarded, the court held that though the same jury might have assessed the damages conditionally, yet it may be as well done by a writ of inquiry of damages when the demurrer is determined; and the most usual course is when there is a demurrer upon evidence, to discharge the jury without further inquiry. *Cro. Car.* 143.

So in trespass or replevin against overseers of the poor, acting *virtute officii*, if the plaintiff be nonsuit, or have a verdict against him, and the jury are discharged, without inquiring of the treble damages, pursuant to the 43 *Eliz. c. 2. § 19*, the defect may be supplied by a writ of inquiry, because such inquiry is no more than an inquest of office. In such case, as a ground for awarding a writ of inquiry, it is necessary to enter a suggestion upon the roll that the defendants were overseers of the poor, and that the action was brought against them for something done by virtue of their office. *Tidd's Prac.*

And lastly, where the jury, on a trial at nisi prius, or before the sheriff, under the 3 & 4 *Wm. 4. c. 42*, or at bar, act as an inquest, as where they are to assess contingent damages on a demurrer, or where they are to assess damages on a judgment by default as to some of the counts of the declaration (*Barnes*, 228,) the omission of the jury to assess the damages, may afterwards, upon application to the court, be supplied by a writ of inquiry; and the same in all other cases where an attain would not lie. 2 *Wils.* 367; *Hard.* 295.

2. *Before whom executed.*—The writ of inquiry may be executed, on due notice, before the sheriff or his deputy; or by leave of the court under special circumstances, before the chief justice or a judge of assize, as an assistant to the sheriff. And where the writ of inquiry is executed before the chief justice or a judge of assize, it is usual to move the court for the sheriff to return a good jury. But unless some matter of law is likely to arise in the course of the inquiry, the court will not give leave to have it executed before a judge, merely on account of the importance of the facts. *Tidd's Prac.*

3. *Notice of executing the inquiry.*—The notice of inquiry should be in writing; and if the defendant have appeared, and his attorney be known, it should be delivered to such attorney; but if the defendant have not appeared, or his attorney be unknown, the notice should be delivered to the defendant himself, or left at his last place of abode.

By the rule of *H. T. 2 Wm. 4. r. 57*, notice of trial and inquiry shall be given in town; but countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the court or a judge. See 3 *East*, 568.

If the venue be laid in London or Middlesex, and the defendant live within forty computed miles from London, there must be eight days' notice of inquiry, exclusive of the day it is given; which notice is also sufficient in country causes; for the 14 *Geo. 2. c. 17. § 4*, which requires ten days' notice of trial at the assizes, does not extend to notices of inquiry. But where the venue is laid in London or Middlesex, and the defendant lives above forty computed miles from London, there must be fourteen days' notice of inquiry. And Sunday is to be accounted a day in these notices, unless it be the day on which the notice is given. Short notice of inquiry is the same as short notice of trial; and where a term's notice of trial is required, there must, at the same distance of time, be the like notice of inquiry. *Tidd's Pract.* See *Trial*.

It is usual to give the notice on a separate piece of paper; but by the rule of *H. T. 2 Wm. 4. r. 59*, in all cases where the plaintiff, in pleading, concludes to the country, the plaintiff's attorney may give notice of trial at the time of delivering his replication or other subsequent pleading.

Where the inquiry is to be executed before the chief justice or a judge of assize, the notice should be given for the sittings or assizes generally; but otherwise the notice should

express the particular time and place of executing it. A writ of inquiry may be executed, in point of time, on the day it is returnable, but not on a Sunday; and where the notice was to execute it by ten o'clock, the court set it aside for uncertainty. The usual way is to give notice that the inquiry will be executed between two certain hours, as between ten and twelve o'clock in the forenoon, or between four and six in the afternoon, of a particular day, on or before the return of the writ. On a notice of inquiry so given, the party is not tied down to the precise time fixed by the notice; for the sheriff may have prior business, which may last beyond it. *Tidd's Prac.*

Notice of inquiry may be continued or countermanded in like manner as notice of trial. *Tidd's Pract.*

With regard to the place of executing an inquiry, it must be executed within the county where the action is laid, and the notice should be given accordingly.

But by the 3 & 4 *Wm. 4. c. 42. § 22*, the court or judge may in a local action order the inquiry to be executed in another county than that in which the venue is laid.

How executed.—In London or Middlesex the writ must be left at the sheriff's office the day before the time appointed for its execution. And if either party propose to attend by counsel, he should give notice thereof to his adversary, or he will not be allowed for it in costs. The execution of the writ may be adjourned by the sheriff after it is entered upon. And if the plaintiff do not proceed to execute the inquiry according to notice, or countermand in time, the defendant, on an affidavit of attendance and necessary expenses, shall have his costs, to be taxed by the master. *Tidd's Prac.*

All that the plaintiff has to prove, or the defendant is allowed to controvert, is the amount of the damages; 1 *B. & P.* 365; for letting judgment go by default is an admission of the cause of action; and therefore where the action is founded on a contract, the defendant cannot give in evidence, on a writ of inquiry, that it was fraudulent. So in an action on a promissory note or bill of exchange, the note or bill need not be proved, though it must be produced before the jury, in order to see whether any money appears to have been paid upon it. And where an action was brought on a policy of assurance on a foreign ship, wherein there was a stipulation that the policy should be deemed sufficient proof of interest, the plaintiff, on the writ of inquiry, was only bound to prove the defendant's subscription to the policy, without giving any evidence of interest. *Tidd's Prac.*

Formerly, on the return of the inquiry, the plaintiff must have given a rule for judgment with the clerk of the rules, which expired in four days; but now by the rule of *H. T. 2 Wm. 4. r. 57*, such rule for judgment is unnecessary, and without it judgment may be signed after the expiration of four days from the return of the inquiry; in the mean time the defendant may move to set aside the inquisition for want of due notice, or on account of an objection to the jury, or mode of returning them, as that some of the jury were debtors, taken out of prison for the purpose of attending, or that they were returned by the plaintiff's attorney; or for excessive damages.

The sheriff or other officer before whom the writ was executed may likewise, under the 1 *Wm. 4. c. 7. § 1*, certify under his hand, upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity of applying to the court to set aside the execution of the writ, or one of the judges shall think fit to order the judgment to be stayed until a day to be named in such order.

The plaintiff, in like manner, may move to set aside the inquisition when it is obvious the damages are too small, except in vindictive, hard, or trifling actions. On the expiration of the rule for judgment, the sheriff, being called upon for his return, will deliver it, with the inquisition, to the plaintiff's attorney, who gets the inquisition stamped, and taxes his costs thereon with the master. *Tidd's Prac.*

The want of a writ of inquiry is aided by the Statute of Jeofails. And where a writ of inquiry had been many years executed, and costs taxed upon it, but no final judgment entered up, there being occasion to prove the debt in Chancery, and the writ of inquiry being lost, a rule was made for a new writ of inquiry and inquisition, according to the sheriff's notes, and that the master should indorse the costs, which by the commitment-book appeared to have been taxed. *Tidd's Prac.* and the authorities there cited.

WRIT OF REBELLION. A writ out of Chancery or Exchequer, against a person in contempt, for not appearing in those courts, &c. See *Commission of Rebellion*.

WRIT OF RIGHT.

BREVE DE RECTO.] The great and final remedy for him that was injured by ouster, or privation of his freehold. See *Recto, Right*.

By the several possessory remedies formerly given by our law, (see *Entry, Assize*.) the right of possession might be restored to him that was unjustly deprived thereof. But the right of possession (though it carried with it a strong presumption) was not always conclusive evidence of the right of property, which might still have subsisted in another man: for as one man might have the possession, and another the right of possession, which was recovered by possessory actions; so one man might have had the right of possession, and thus not be liable to eviction by any possessory action, and another might have had the right of property, which could not be otherwise asserted than by the great and final remedy of a writ of right, or such correspondent writs as were in the nature of a writ of right. 3 *Comm. c. 10*. See *Title*.

This happened principally in four cases: 1. Upon discontinuance by the alienation of tenant in tail, whereby he, who had the right of possession, had transferred it to the alienee; and therefore his issue, or those in remainder or reversion, were not allowed to recover by virtue of that possession, which the tenant had so voluntarily transferred. 2, 3. In case of judgment given against either party, whether by his own default, or upon trial of the merits, in any possessory action: for such judgment, if obtained by him who had not the true ownership, was held to be a species of forfeiture; which however bound the right of possession, and suffered it not to be ever again disputed, unless the right of property were also proved. 4. In case the demandant, who claimed the right, was barred from these possessory actions by length of time and the statute of limitations. See *Limitation of Actions*. In these four cases the law applied the remedial instrument of either the writ of right itself, or such other writs as were said to be of the same nature.

1. And, first, upon an alienation by tenant in tail, whereby the estate-tail was discontinued, and the remainder or reversion is, by failure of the particular estate, displaced, and turned into a mere right, the remedy was by action of *formedon*, (*secundum formam doni*.) which was in the nature of a writ of right, and was the highest action that tenant in tail could have. See *Formedon*.

2. In the second case; if the owners of a particular estate, as for life, in dower, by the curtesy, or in fee-tail, were barred of the right of possession by a recovery had against them, through their default or non-appearance in a possessory action, they were absolutely without any remedy at the common law, as a writ of right did not lie for any but such as claim to be tenants of the fee-simple. Therefore the *Westm.* 2. 13 *Edw. 1. c. 4*. gave a new writ for such persons, after their lands have been so recovered against them by default, called a *quod ei deforceat*; which, though not strictly a writ of right, so far partook of the nature of one, as that it would restore the right to him who had been thus unwarily deforced by his own default. *F. N. B. 155*. But in case the recovery were not had by his own default, but upon defence in the

inferior possessory action, this still remained final with regard to these particular estates, as at the common law: and hence it was that a common recovery (on a writ of entry in the post) had, not by default of the tenant himself, but (after his defence made and voucher of a third person to warranty) by default of such vouchee, was, until recently, the usual bar to cut off an estate-tail. See *Recovery*.

3, 4. Thirdly, in case the right of possession were barred by a recovery upon the merits in a possessory action, or, lastly, by the statute of limitations, a claimant in fee-simple might have had a mere writ of right; which is in its nature the highest writ in the law, and was only of an estate in fee-simple, and not for him who had a less estate. *F. N. B. 1*. This writ lay concurrently with all other real actions, in which an estate of fee-simple might be recovered; and it also lay after them, being as it were an appeal to the mere right, when judgment had been had as to the possession in an inferior possessory action. *F. N. B. 155*. But though a writ of right might be brought where the demandant was entitled to the possession, yet it rarely was advisable to be brought in such cases; as a more expeditious and easy remedy is had, without meddling with the property, by proving the demandant's own, or his ancestor's possession, and their illegal ouster, in one of the possessory actions. But, in case the right of possession were lost by length of time, or by judgment against the true owner in one of these inferior suits, there was no other choice; this was then the only remedy that could be had; and it was of so forcible a nature, that it overcame all obstacles, and cleared all objections, that might have arisen to cloud and obscure the title. And, after issue once joined in a writ of right, the judgment was absolutely final; so that a recovery had in this action might be pleaded in bar of any other claim or demand. *F. N. B. 6*; 1 *Inst.* 158.

The pure, proper, or mere writ of right, lay only, we have seen, to recover lands in fee-simple, unjustly withheld from the true proprietor. But there were also some other writs which were said to be in the nature of a writ of right, because their process and proceedings did mostly (though not entirely) agree with the writ of right; but in some of them the fee-simple was not demanded; and in others not land, but some incorporeal hereditament. Nor was the mere writ of right alone, or always, applicable to every case of a claim of lands in fee-simple: for if the lord's tenant in fee-simple died without heir, whereby an escheat accrued, the lord should have had a writ of escheat, which was in the nature of a writ of right. *Booth, 135*; *F. N. B. 9*. And if one of two or more coparceners deforced the other, by usurping the sole possession, the party aggrieved should have had a writ of right, *de rationabili parte*; which might be grounded on the seisin of the ancestor at any time during his life; whereas in a *nuper obiit*, (which was a possessory remedy,) he must have been seised at the time of his death. *F. N. B. 9*.

The general writ of right ought to have been first brought in the court-baron of the lord of whom the lands were holden; and then it was open, or patent: but if he held no court, or had waived his right, *remisit curiam suam*, it might be brought in the king's courts by writ of *præcipe* originally; and then it was a writ of right close, being directed to the sheriff and not to the lord. *F. N. B. 2*; *Finch. L. 313*; *Booth, 91*. Also, when one of the king's immediate tenants in *capite* was deforced, his writ of right is called a writ of *præcipe in capite*; (the improper use of which, as well as of the former *præcipe*, *quod dominus et must. c. 11*, so as to oust the lord of his jurisdiction, was restrained by *Magna Carta, c. 24*.) and, being directed to the sheriff and originally returnable in the king's court, was also a writ of right close. *F. N. B. 7*.

There was likewise a little writ of right close, *secundum consuetudinem manerii*, which lay for the king's tenants in ancient demesne, and others of a similar nature, to try the right of their lands and tenements in the court of the lord exclusively.

But the writ of right patent itself might also at any time be removed into the county court by writ of *tolt*, and from thence into the king's courts by writ of *pone* or *recordari facias*, at the suggestion of either party that there was a delay or defect of justice. 3 *Comm. c.* 10.

In the progress of this action, the demandant must have alleged some seisin of the lands and tenements in himself, or else in some person under whom he claimed, and then derived the right from the person so seised to himself; to which the tenant might have answered by denying the demandant's right, and averring that he had more right to hold the lands than the demandant had to demand them: and, this right of the tenant being shown, it then put the demandant upon the proof of his title: in which, if he failed, or if the tenant had shown a better, the demandant and his heirs were perpetually barred of their claim; but if he could make it appear that his right was superior to the tenant's, he recovered the land against the tenant and his heirs for ever. But even this writ of right, however superior to any other, could not be sued out at any distance of time. For by the ancient law no seisin could be alleged by the demandant, but from the time of Henry I.; by the statute of *Merton*, 20 *Hen. 3. c.* 8. from the time of *Hen. 2*; by the statute of *Westm.* 1, 3 *Edw. 1. c.* 39. from the time of Richard I.; and at length by statute 32 *Hen. 8. c.* 2. seisin in a writ of right should be within sixty years. So that adverse possession of lands of fee-simple uninterruptedly for threescore years was a sufficient title against all the world, and could not be impeached by any dormant claim whatsoever. 3 *Comm. c.* 10.

With a view to shorten the time within which suits for the recovery of land may be brought, and for simplifying the remedies for trying the rights thereto, by the 3 & 4 *Wm. 4. c.* 27. § 36. writs of right, except the writ of right of dower, have been abolished as well as all other real and mixed actions, with the exception of the writ of dower *unde nihil habet, quare impedit*, and ejectment, and the latter will hereafter be the usual action in which the title to lands

may be contested. See *Limitation of Actions*, II. 1; and further, *Possession, Title*.

As to the trial of writs of right by the grand assize, see *Jury*; and as to the trial thereof by wager of battle, which latter mode of proceeding was abolished by the 59 *Geo. 3. c.* 46, see *Battel*.

WRIT OF RIGHT OF ADVOWSON. See *Advowson*, III.; *Quare Impedit*.

WRIT OF RIGHT OF DOWER. See *Dower*.

WRIT OF RIGHT OF WARD. See *Guardian*.

WRIT OF RIGHT SUR DISCLAIMER. See *Cessavit, Disclaimer*.

WRITER OF TALLIES, *scriptor talliarum*.] An officer in the Exchequer, being clerk to the auditor of the receipt, who wrote upon the tallies the whole letters of the teller's bills. *Cowell*. See *Exchequer*.

WRITER TO THE SIGNET. See *Signet*.

WRITING, *scriptum*.] A simple writing or declaration, not in the manner of a deed, made to a certain person, &c. shall be good in law. *Hob.* 312. See *Agreement*.

WRONG, *injuria*.] Any damage or injury contrary to right. *Co. Litt.* See *Tort*.

WRONGLANDS. Seem to be ill-grown trees that will never prove timber; such as wrong the ground they grow in. *Kitch.* 169.

WRONGOUS IMPRISONMENT. The Scotch term for false imprisonment. See the act, 1701, c. 6; and *tits. Imprisonment, Habeas Corpus*.

WUDEHETH, from the Sax. *wude*, i. e. *sylva*.] A felling of wood. *Leg. Hen. 1. c.* 37.

WYDRAUGHT. A water-passage, gutter, or watering-place; often mentioned in old leases of houses, in the covenants for repairs, &c.

WYKE, WYKA, — *Et totam Wykham cum hominibus, &c.* *Mon. Ang.* ii. See *Wic*, and *Wica*.

WYTE, *pœna multa* — *Saxones duo mulctarum genera statuere*, i. e. *Weram* and *Wytan*. See further, *Wite*.

X.

XEN

XANTUS, is used for sanctus. See *Spelm.*

XENIA, Dicuntur munuscula, quæ à provincialibus rectoribus provinciarum efferebantur: vox est in privilegiorum chartis non insueta; ubi quietus esse a Xeniiis immunes notat ab hujusmodi muneribus aliisque donis, regi vel reginæ præstandis, quando ipsi per prædia privilegiatorum transierint. *Chart. Dom. Sempplingham.*—Concedo ut omnia monasteria et ecclesia regni mei à publicis vectigalibus, operibus et oneribus absolvantur.—Nec munuscula præbeant regi vel principibus, nisi voluntaria. *Spelm. Gloss. Nulla autem persona, parva*

vel magna, ab hominibus et terra Radingensis monasterii exigat non equitationem sive expeditionem, non summagia, non vectigalia, non navigia, non opera, non tributa, non Zenia, &c. Monim. Scacc. Anno, 20 Edm. 8.

XENODOCHUM. Is interpreted an inn, allowed by public license for the entertainment of strangers and other guests: also an hospital. *Vocab. utriusque Juris.*

XEROPHAGIA. A kind of Christian fast; the eating of dry meat. *Litt. Dict.*

XER

Y.

YEAR.

YA AND NAY,—*Quod homines de Rippon sint credendi per suum Ya, et per suam Nay in omnibus querelis, &c. Charta Athelstan. Reg. Mon. Angl. i. 173.*

YARD. A measure, three feet in length; by which cloth, linen, &c. are measured: it was said to have been ordained by King Henry I., from the length of his own arm. *Baker's Chron. See Measure.*

YARD. An enclosed space of ground generally attached to a dwelling house, &c.

By the highway acts, yards and courts cannot be taken for the purpose of widening a highway.

It is illegal to keep a ferocious dog in a yard with the gate open, without giving full notice of the danger: and if that be omitted, the owner is liable to make compensation for any damage that may be sustained. 4 *Car. & P.* 297. See *Vagrant.*

YARDLAND, *virgata terra.*] A quantity of land, different according to the place or country; as at Wimbleton in Surrey it is fifteen acres, in other counties it is twenty, in some twenty-four, and in others thirty and forty acres. *Bract. lib. 2. c. 10.*

YAUGH. A yacht, or little bark; also a fly-boat, pinnae, &c. In Latin called *celox à celeritudine*, from its swiftness. *Litt. Dict.*

YEAR, *annus.*] The time wherein the sun goes round his compass through the twelve signs, viz. three-hundred and sixty-five days, and about six hours. A year is twelve months, as divided by Julius Cæsar.

The church formerly begun the year on the first day of January, called New-year's-day; but the civil account, not till March the 25th. It appears by ancient grants and charters, that our ancestors began the year at Christmas, which was observed here till the time of William I., commonly called the Conqueror; but afterwards for some time the year of our

YEAR.

Lord was seldom mentioned in grants, only the year of the reign of the king. *Mon. Ang. i. 62.*

At the Reformation the commencement of the year was fixed to the 25th of March, by the following rubric added to the calendar, immediately after the table of moveable feasts for forty years: "Note, that the Supputation of the year of our lord in the church of England beginneth the 25th day of March, the day supposed to be the first day on which the world was created, and the day when Christ was conceived of the Virgin Mary." [The 25th of March is distinguished as the feast of the Annunciation.] This continued till soon after the Restoration of Charles II., when it was thought proper to retain this order and drop the reason for it, and in this shape it was continued down to the parliamentary correction of the calendar after mentioned.

The civil government seems never to have used any other date than that of the king's reign, till after the time of Charles I., not even in common deeds. During the usurpation of Cromwell the years of our Lord seem to have been introduced, and continued after the Restoration of Charles II. for convenience without the interposition of legal authority.

Several deeds of early date have the year of the Lord inserted, not in the body of the deed, but in the middle of the initial letter.

The Scotch, from time immemorial, dated from March 25 as the first day of the year, until 27 November, 1599, when the following entry was made in the books of the privy council there, "On Monday proclamation made by the king's warrant, ordaining the first of January, in time coming, to be the beginning of the new year."

There being a difference in the computation of time in these kingdoms, and on some parts of the continent, of eleven days; and frequent uncertainties having arisen from the different times of commencing the year above-mentioned,

(which introduced the mode of dating 1743, for days between the first of January and twenty-fifth of March,) all these inconveniences were remedied by 24 Geo. 2. c. 23. which enacts, that the first day of January next following the last day of December, 1751, shall be the first day of the year, 1752. And that the first day of January next after the first day of January, 1752, shall be the first day of the year, 1753. And so on, the first day of January in every year shall be the first day of the year. And that after the first day of January, 1752, the several days of each month shall go on in the same order; and the feast of Easter, and other moveable feasts thereon depending, shall be ascertained according to the same method they then were, until the second day of September, 1752; and that the natural day next following the said second day of September shall be reckoned the fourteenth day of September, omitting, for that time only, the eleven intermediate days. And that the several natural days which shall succeed the said fourteenth day of September shall be reckoned in numerical order according to the order and succession of days now used in the present calendar. All writings, &c. after the first of January, 1752, to be dated according to the new style.

After 2d September, 1752, the terms of Hilary and Michaelmas, and all courts were to be held on the same nominal days and times they then were.

The several years 1800, 1900, 2100, 2200, 2300, and any other hundredth year, (except every four hundredth year of which the year 2000 shall be the first,) shall not be deemed Bissextile or Leap Years, but common years, to consist only of 365 days. The years 2000, 2400, 2800, and every other four hundredth year, from the year 2000 inclusive, and all other years, which are now esteemed Bissextile or Leap Years, shall for the future be esteemed Bissextile or Leap Years consisting of 366 days. A calendar, and certain tables and rules for the fixing the true time of the celebration of the feast of Easter, and the finding of the times of the full moons on which the same depends, are annexed to this act, which are to be prefixed to all future editions of the Common Prayer-Book. Courts of session and exchequer in Scotland, and markets, fairs, and marts, to be held upon the same natural days they should have been holden on, if this act had not been made. The natural days and times for the opening and inclosing of commons of pasture, were not altered by this act.

Where the opening or shutting of commons is regulated by any moveable feasts, they shall be computed according to the new calendar. 25 Geo. 2. c. 30. § 2.

The natural days and times of payment of rents, annuities, sums of money or interest, or of the delivery of goods, commencement or expiration of leases, &c. or of attaining the age of twenty-one years, &c. not altered by the 24 Geo. 2. c. 23.

The mode of computation, introduced into England by the above act, is called the new style, to distinguish it from the former called the old style, which still continues to prevail in many places; and the new style had been used by other nations long previous to its adoption by the English.

The Old Style now prevails in Muscovy, Denmark, Holstein, Hamburg, Utrecht, Guelders, East Friesland, Geneva, and in all the protestant principalities in Germany, and the cantons of Switzerland: in this style the date is now twelve days earlier than the new style, owing to the circumstances of the new style having omitted the intercalary day in the month of February in the year 1800.

The New Style is used in all the dominions subject to Great Britain; in America, in Amsterdam, Rotterdam, Leyden, Haerlem, Middleburg, Ghent, Brussels, Brabant, and in all the Netherlands, except the places before-mentioned: also in France, Spain, Portugal, Italy, Hungary, Poland, and in all the popish principalities of Germany and cantons of Switzerland. See *Month, Time*.

YEAR AND DAY, *annus et dies*.] A time that determines

a right, or works a prescription in many cases by law; as, in case of an estray, if the owner challenge it not within that time, it belongs to the lord. See *Estray*.

The owners of wreck must likewise claim within a year and a day, otherwise the king or his grantees become entitled to it. See *Wreck*.

A person wounded must die within a year and day, in order to make the offender guilty of murder, &c. 3 Inst. 53; 6 Rep. 107.

A year and a day was given to prosecute appeals of murder, (now abolished by 59 Geo. 3. c. 46.) and was also allowed for actions after entry, or claim, to avoid a fine, now likewise abolished. See *Claim, Entry, Fine*.

YEAR, DAY, AND WASTE, *annus, dies, et vastum*.] Formerly a part of the king's prerogative, whereby he had the profits of lands and tenements for a year and a day of those that were attainted of petit treason or felony, whosoever was lord of the manor whereto the lands or tenements belonged, and [or] the king might cause waste to be made on the tenements, by destroying the houses, ploughing up the meadows and pastures, rooting up the woods, &c. except the lord of the fee agreed with him for the redemption of such waste; afterwards restoring it to the lord of the fee. *Staud. Prærog.* 44. See further, *Attainder, Escheat, Forfeiture*, II. 1., *Tenures*.

"We will not hold the lands of them that be convict of felony but one year and one day, and then those lands shall be delivered to the lords of the fee." *Magna Charta*, 9 Hen. 3. c. 22. This chapter expresses that which belonged to the king, viz. the year and the day, and omits the waste, as not belonging to him; and this explained by our ancient books with an uniform consent. 2 Inst. 36. cites *Bracton*, lib. 3. fol. 129, and 137; and *Britton*, c. 5. fol. 14; and *Fleta*, l. 1. c. 28; and *Mirror*, c. 5. § 2. The *Mirror*, speaking of this chapter, saith, *Le point des terres aux felons tener per un an, est du susie, car per la ou le roy ne duist aver que le gast de droit, ou l'an in nosme de fine pur sauver le fief de l'estripment preignont les ministers le roy ambideux*. Upon all which it appears, that the king originally was to have no benefit in this case upon the attainder of felony, where the free land was holden of a subject, but only in detestation of the crime; *ut poena ad paucos, metus ad omnes perveniat*; to prostrate the houses, to extirpate the gardens, to eradicate his wood, and to plow up the meadows of the felon: for saving whereof, and *pro bono publico*, the lords, of whom the lands were holden, were contented to yield the lands to the king for a year and a day; and therefore not only the waste was justly omitted out of this chapter of *Magna Charta*, but thereby it was enacted, that after the year and day the land should be rendered to the lord of the fee, after which no waste could be done. 2 Inst. 37.

And where the treatise of *Prærogativa Regis*, made in 17 Edw. 2, says, *Et postquam Dominus Rex habuit annum, diem, et vastum, tunc reddatur tenementum illud capitali domino feodi illius, nisi prius faciat finem pro anno, die, et vasto*; this is so to be expounded, that forasmuch as it appears in the said old books, that the officers and ministers did demand both for the waste and for year and day, that came in lieu thereof, therefore this treatise named both, not that both were due, but that a reasonable fine might be paid for all that which the king might lawfully claim. But if this act of 17 Edw. 2. were against this branch of *Magna Charta*, then it was repealed by the act of 42 Edw. 2. c. 1; 2 Inst. 37; 2 Hawk. P. C. cap. 49. § 8.

Hereby (says Coke) it appears how necessary the reading ancient authors is for understanding of ancient statutes. And out of these old books you may observe, that when any thing is given to the king in lieu or satisfaction of any ancient right of his crown, when once he is in possession of the new recompence, and the same in charge, his officers and ministers will, many times, demand the old also, which may

turn to great prejudice, if it be not duly and discreetly prevented. 2 Inst. 37.

If there were lord, mesne, and tenant, and the mesne was attainted of felony, the lord paramount should have the mesnalty presently; for this prerogative belonging to the king extended only to the land, which might be wasted, in lieu whereof the year and day was granted. 2 Inst. 37. And this is to be understood when a tenant in fee simple was attainted; for when tenant in tail, or tenant for life, was attainted, there the king should have the profits of the lands during the life of tenant in tail, or of the tenant for life. 2 Inst. 37.

That be Convict.] Here convict, in a large sense, was taken for *attincti*: for the nature and true sense of both these words, see the first part of the *Institutes*; and likewise for this word felony there. 2 Inst. 37; and see *Attainder*.

Of Felony.] Must be understood of all manner of felonies punished by death, and not of petit larceny, (now abolished,) which notwithstanding was felony. 2 Inst. 38. If lord and tenant were, and the tenant was attainted of felony, and the king has *annum, diem et vastum*; yet if the lord entered without due process, and the writ sued to the escheator, the land should be re-seised, and he should answer for the mesne issues and profits. *Br. Re-Seiser*, pl. 36, cites *Edw. 2*; and *Fitz. Traverse*, 48.

Tenant by copy of court roll by the verge in ancient demesne committed felony, and was attainted of it, and *annum, diem, et vastum*, was awarded for the king; and the reason seems to be, inasmuch as frank-tenants in ancient demesne have no other evidence but copies of court-rolls; for otherwise it seems to be of a mere copyholder out of ancient demesne for other frank-tenement. *Br. Tenant per Copie*, &c. cites 3 *Edw. 3*. See *Copyhold*, *Forfeiture*.

A man was outlawed of felony, and aliened his land to J. N., on which *scire facias* issued against him, who came and would have traversed the felony: and the court doubted if he might traverse it, by reason that he is a stranger to the record; but *per Pigot*, by 7 *Edw. 4. c. 2*, he cannot traverse it in case of felony, being a stranger to the record; *contra* in case of trespass; on which it was prayed for the king, that year, day, and waste, be adjudged for the king immediately, and so it was immediately from that day till a year and a day next after: *quod nota*. *Quære*, if the king might take the year and the day at what time he pleased; it seems he could not. *Br. Corone*, pl. 204, cites 49 *Ass. 2*. See *Inquest of Office*.

The king should have the first year and day and waste of the land of him who was attainted of felony, which came after the attainder, and whosoever took the profits that year should answer the profits to the king; *per Fitzherbert*. But it seems that this is to be understood after office found, or that the inquest which attainted him found also what lands he had at the time of the felony committed, or after. And in the case above, of 49 *Ass. 2*, the outlawry of felony was 18 *Edw. 3*, and writ issued to the coroners to inquire of his goods, lands, and tenements, 48 *Edw. 3*; which returned that he had land, and aliened to J. N. after the outlawry; and upon this *scire facias* issued against J. N., who came and would have traversed the felony; and the year and day was awarded to the king with the waste. And so it seems that the king could not take it, unless after office, which was thirty years after, as there. But *quære*, if upon the office found, he who received the profits the first year after the felony should not be charged? It seems he should *per Fitzh.* above. *Quære* the experience thereof in *B. R.*? *Br. Corone*, pl. 207, cites *F. N. B. fol. 144*. See *Inquest of Office*.

This prerogative of the king is now abolished by the 54 *Geo. 3. c. 145*, which enacts that no future attainder for

felony, except in cases of high treason, or murder, shall extend to the dismembering of any heir, or to the prejudice of the right or title of any person, other than the right or title of the offender during his life.

YEAR-BOOKS. Reports, in a regular series, from the reign of King Edward II., inclusive, to the time of Henry VIII., which were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published annually; whence they are known under the denomination of the Year-Books. See *Law-Books*.

YEARS, Estates for. See *Lease*.

YEMAN, or YEOMAN, or YOMAN. A derivative of the Saxon, *geman*, i. e. *communis*.

These Camden in his *Britannia* placeth next in order to gentlemen, calling them *ingenuos*; whose opinion the statute affirms, anno 6 *Rich. 2. c. 4.* and 20 *Rich. 2. c. 2*. Sir Thomas Smith, in his *Republ. Anglorum*, l. 1. c. 23. calls him a yeoman, whom our law calls *legalem hominem*, which (says he) is in the English a freeborn man, that may dispense of his own freeland in yearly revenues to the sum of forty shillings sterling. *Verstegan*, in his *Restitution of decayed Intelligence*, c. 10, writes, that *gemen* among the ancient Teutonic, and *gemein* among the modern, signifies as much as *common*; and the letter *g* being turned into *y*, is written *yemen*, which also signifies a *commoner*. See *Procedure*.

Yeoman also signifies an officer of the king's house, in the middle place between the serjeant and the groom; as yeoman of the chandry, yeoman of the scullery, *stat. Antiq. 33 Hen. 8. c. 13*. Yeoman of the crown, *stat. Antiq. 3 Eliz. 4. 5*. The word youngmen is used for yeomen, in the 33 *Hen. 8. c. 10*. *Cowell*.

YEME. An ancient corruption of *Hieme*, *Winter*. *Cowell*.

YEOMEN OF THE KING'S GUARD. were first established by King Henry VIII. in 1485. See *Soldiers*.

YEOMANRY. See *Volunteers*.

YEONOMUS, œconomus; an advocate, patron, or defender. *Vit. Abbat. S. Abbatis*.

YEVEN, or YEOVEN. Given; dated. *Cowell*.

YEW. Said to be derived from the Greek *ἔνω*, to hurt, probably because, before the invention of guns, our ancestors made bows with this wood, with which they annoyed their enemies; and therefore they took care to plant the trees in the church-yards, where they might be often seen and preserved by the people. *Minsheu*.

YIELDING AND PAYING, reddendo and solvendo. Comes from the Saxon *geldan* and *gildan*; and in *Domesday*, *gildare* is frequently used for *solvere*, *reddere*, the Saxon *g* being often turned into *y*. See *Deed*.

YINGMAN. Mentioned in the laws of King Hen. 1. c. 15. *Spelman* thinks this may be a mistake for *Englishman*, or, as we now say, *Englishman*: but perhaps the yingmen were rather youngmen, printed for yeoman and yemen, in 33 *Hen. 8. c. 10*.

YOKELET, Sax. *joculet*.] A little farm, &c. in some parts of Kent, so called from its requiring but a yoke of oxen to till it. *Sax. Dict.*

YORK, Custom of. See *Executor*, V. 9.

YORK-BUILDINGS COMPANY. A corporation or company erected by statute for raising Thames water in York-Buildings, and dissolved by the 10 *Geo. 4. c. xxviii.* a private act.

YULE. In the north of England, the country people call the feast of the nativity of our Lord by the name of Yule, which is the proper Scotch word for Christmas; and the sports used at Christmas, here called Christmas Gambols, in Scotland they term Yule Games. The 1 *Geo. 1. c. 8.* was made for the repeal of an act, passed in the parliament of Scotland, intituled "An Act for discharging the Yule Vacance." See *Gale*.

Z.

Z E T

Z Y T

ZABOLUS, i. e. *Diabolus*, as used in many old writers, viz. Edgar, in *Leg. Monach. Hydens.* c. 4; *Orderic. Vitalis*, 460, &c.

ZALA, i. e. *incendium*; from whence we derive the English word *zeal*.

ZANT-KILLOW. A measure containing six English bushels.

ZATOVIN. Satin or fine silk. *Mon. Ang.* iii. 177.

ZEALOT, *Zelotes*.] Is for the most part taken in *pejorem sensum*; as when a separatist, or schismatic from the church of England, is termed a zealot or fanatic.

ZETA. A room kept warm like a stove; a withdrawing chamber with pipes conveyed along in the walls, to receive from below either the cool air in the summer, or the heat of fire, &c. in winter: it is called by our English historians a

dining-room, or parlour. *Osborn vita S. Elphegi apud Wharton; Mon.* ii. 127.

ZODIAC, *Zodiacus*.] An imaginary circle in the heavens, containing the twelve signs through which the sun passes every year. *Litt.*

ZUCHE, *zuchcus, stirps siccus et aridus*.] A withered or dry stock of a tree. See *Placit. Forest in Com. Nott. de Anno 8 Hen. 3.* where it seems a writ of *ad quod damnum* issued, on granting of suches or dead wood in a forest, &c. *Spelm.*

ZYGOSTATES, *liprimens*.] The clerk of the market, to see to weights. *Spelm.*

ZYTHUM. A drink made of corn, used by the old Gauls; so called from the seething or boiling it, whence cyder had its name. *Spelm.*

ADDENDA ET CORRIGENDA

IN THE SECOND VOLUME.

LEGACY. See *Executor*, in the Appendix to the first volume.

LONGITUDE. The statutes, offering rewards for the discovery of the longitude at sea, have been repealed. See *North West Passage*.

MILITIA. So much of the 43 *Geo. 3. c. 47.* as requires relief to be given to the wives and children of substitutes, hired men, or volunteers of militia, is repealed by the recent act for the amendment of the Poor Laws (4 & 5 *Wm. 4. c. 76. § 60.*)

OATHS. By an act passed in the present sessions of parliament (5 *Wm. 4. c. 8.*) for "the more effectual abolition of oaths and affirmations taken and made in various departments of the state, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra judicial oaths and affidavits," it is enacted, that in any case where, by acts made or to be made relating to the revenues of customs or excise, the post office, the office of stamps and taxes, the office of woods and forests, land revenues, works and buildings, the army pay office, the office of the treasurer of the navy or of the treasurer of the ordnance, his majesty's treasury, Chelsea Hospital, Greenwich Hospital, the board of trade, or any of the offices of his majesty's principal secretaries of state, the office for auditing the public accounts, or any office under the control, direction, or superintendence of the lords commissioners of his majesty's treasury, any oath, solemn affirmation, or affidavit might, but for the passing of the act, be required to be taken or made, the lords commissioners of his majesty's treasury or any three of them, by writing under their hands and seals, may substitute a declaration to the same effect as the oath, &c.; and the person who might under the acts imposing the same be required to take or make such oath, &c. shall, in presence of the commissioners, collector, other officer or person empowered to administer such oath, &c. make and subscribe such declaration, and every such commissioner, &c. is thereby empowered and required to administer the same accordingly.

By § 2. the substitution of such declaration is to be published in the Gazette; and after twenty-one days from the date thereof the provisions of the act are to apply. And (§ 3.) after the said twenty-one days, no oath is to be administered, in lieu of which a declaration has been directed.

By § 4. in cases of false declarations in matters relating to the customs, excise, stamps, and taxes, or post office, an additional penalty of 100*l.* shall be inflicted.

By § 5. the oath of allegiance is still to be required in all cases.

§ 6. Provided also, that nothing in the act shall extend to any oath, solemn affirmation, or affidavit, in any judicial proceeding in any court of justice, or in any proceeding by way of summary conviction before justices of the peace.

By § 7. the universities of Oxford and Cambridge, and other bodies corporate and politic, may substitute a declaration in lieu of an oath.

By § 8. the churchwarden's and sidesman's oaths are abolished, and declarations are to be made in lieu thereof.

§ 9. A declaration is to be substituted for an oath by persons acting in turnpike trusts.

§ 10. A declaration is substituted for the affidavit heretofore required on taking out a patent.

§ 11. A declaration is substituted for oaths and affidavits required by acts as to pawnbrokers. And the penalties as to such oaths, &c. are to apply to declarations.

By § 12. after reciting that "a practice wholly contrary to the policy of the law has been permitted to prevail, of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in any wise pending or at issue before the justice of the peace or other person by whom such oaths or affidavits have been administered or received;" And "doubts have arisen whether or not such proceeding is illegal;" it is enacted, that it shall not be lawful for any justice of the peace or other person to administer or to receive any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such justice, &c. hath not jurisdiction or cognizance by some statute: provided, that nothing therein contained shall extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences.

By § 13. the fees due on oaths are payable on declarations substituted in lieu thereof.

By § 14. persons making false declarations are declared guilty of a misdemeanor, and are punishable as for perjury.

PARCENERS. The writ of partition is abolished by the 3 & 4 *Wm. 4. c. 27. § 36.*

PARLIAMENT. A bill is now before the House of Commons for amending the clauses of the Reform Act, relative to the registration, &c. of the electors. Another bill has also been introduced to limit the time of taking the poll to one day. There is also a measure pending for the more effectual prevention of bribery.

PARTITIONE FACIENDA. See *ante*, *Parceners*.

PATENTS. A bill has been introduced into the House of Lords by Lord Brougham for the amendment of the law relating to patents.

POOR, IV. The statute of the 59 *Geo. 3. c. 12.* relative to the removal of poor persons born in Scotland, &c. is superseded by a recent statute, which will be found under tit. *Vagrants*.

PORTS. By the last act for the general regulation of the customs (3 & 4 *Wm. 4. c. 52. § 139.*) his majesty by his commission out of the Court of Exchequer, from time to time, may appoint any port, haven, or creek, in the United Kingdom, or in the Isle of Man, and set out the limits thereof, and appoint the proper places within the same to be legal quays for the lading and unlading of goods, and declare that any place set out by such authority shall no longer be a legal quay, and appoint any new place within any port to be a legal quay, for the lading and unlading of goods. Provided that all ports, &c. and the limits thereof, and all legal quays, appointed and existing at the commencement of the act under any law till then in force, shall continue to be such ports, &c. as if set out under the act.

ERRATA

IN THE SECOND VOLUME.

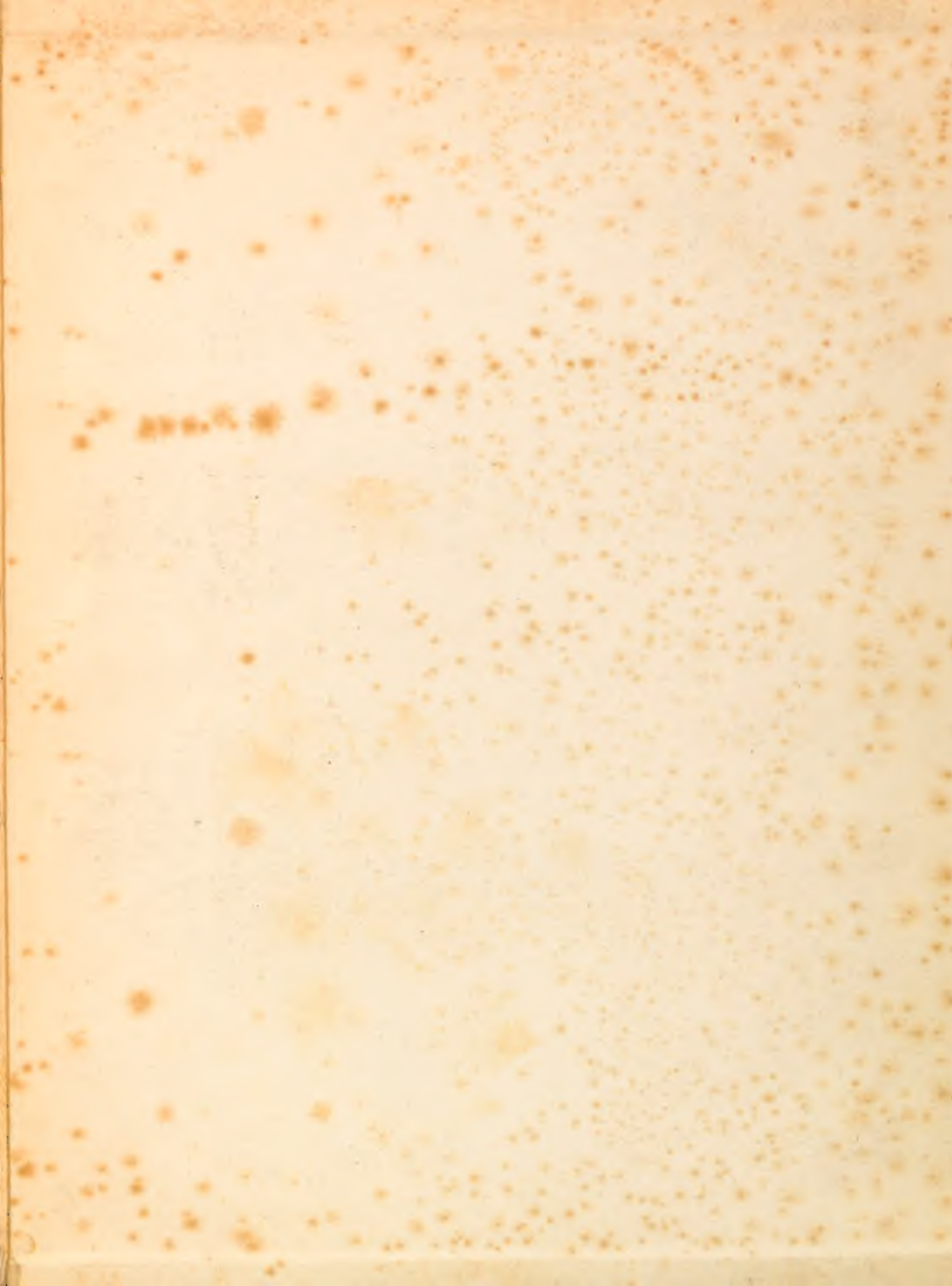
- MARRIAGE.—For the "3 & 4 Wm. 4. c. 112," read "c. 102."
NEWSPAPERS.—Instead of "500*l*." read "100*l*." as the penalty imposed by the 58 Geo. 3. c. 78.
NOT GUILTY IN CIVIL ACTIONS.—For "indictment" read "inducement."
POLICE.—For the "3 & 4 Wm. 4. c. 49," read "c. 19."
RAPE. 12th line from the bottom of the first page of the title, for "has" read "had."
REAL ESTATE.—8d line from the end, for "real" read "legal."
STAMP DUTIES.—Last line but one, for "board" read "boards."
TAIL, IV.—9th line from the bottom of the 2d page, for "verity" read "entry."
USURY.—Third paragraph, 6th line, for "on duin tamen" read "or duin tamen"

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